BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Southeast Citizens for Smart Development, Appellant
ANC 6B

Appeal No. 16791
Public Hearing: December 4, 2001

RESPONSE OF FATHER FLANAGAN'S BOYS HOME, OWNER

I.
Introduction

On September 10, 2001, Southeast Citizens for Smart Development ("**Appellant**") filed an appeal of the issuance of four building permits on four separate record lots - Board of Zoning Adjustment ("**BZA**") Case No. 16791 ("**Appeal**"). This Statement is Father Flanagan's Boys Home's ("**Boys Town**" or "**Owner**") response to the Appeal and Appellant's pre-hearing submission.

The Board must deny the Appeal. The laws and regulations of the District of Columbia do not support appellant's assertion of Zoning Administrator error. Each record lot's proposed use as a youth residential care home for up to six children, based on the clear language and the intent of § 201.1(n)(1) of the Zoning Regulations, is permitted as a matter of right, without spacing restrictions. The only issue before the Board is: did the Zoning Administrator err in determining that each of the subject homes is permitted as a matter of right in the C-2-B zone district? For the Board to uphold the Appeal would, in effect, constitute a re-writing of § 201.1(n)(1) of the Zoning Regulations – a section which was recently enacted by the District of Columbia Zoning Commission ("**Zoning Commission**") to bring the District closer to full compliance with the federal Fair Housing Amendments Act (42 U.S.C. 3601 et seq.) ("Fair Housing Act") and to

BZA
Case No. 16791
Exhibit No. 32

Board of Zoning Adjustment
District of Columbia
CASE NO.16791
EXHIBIT NO.32A1

protect childcare providers from the very type of discrimination that the Owner now faces.

II.
History of the Project

On February 10, 2000, Boys Town purchased, in two separate transactions, Lots 127, 128, 817, 818, 828, 836, 837, 840 and 841 in Square 1045, consisting of a land area of approximately 2.1 acres. Boys Town purchased these properties, located in the C-2-B Zone District, with the intention of constructing and operating youth residential care homes, as permitted by right under the D.C. Zoning Regulations. On March 5, 2001, the D.C. Office of the Surveyor recorded a subdivision plat which, as per Boys Town's application, subdivided the nine subject lots into six lots, Nos. 132 – 137 (see copy of Subdivision Plat attached as Exhibit A).

In December, 2000, Boys Town filed building permit applications to construct youth residential care homes, each housing up to six children and two adults, on lots 134, 135, 136 and 137 in Square 1045. The proposed homes which are the subject of the Building Permits are permitted as a matter of right, without spacing restrictions, under § 201.1(n)(1) of the Zoning Regulations. On September 6, 2001, the D.C. Department of Regulatory and Consumer Affairs ("**DCRA**") responded to these applications by issuing the following building permits (collectively, "**Building Permits**"): (1) Permit No. B438336, for 1314 Potomac Avenue, S.E., Lot 134; (2) Permit No. B438337, for 1312 Potomac Avenue, S.E., Lot 135; (3) Permit No. B438338, for 1310 Potomac Avenue,

S.E., Lot 136; and (4) Permit No. B438335, for 1308 Potomac Avenue, S.E., Lot 137. Each permit is for a "two story & cellar – residence w/ driveway" to be occupied by up to six children and two adults.

On September 10, 2001, four days after DCRA issued the Building Permits, Appellant filed the Appeal.

III.
BZA Jurisdiction

Pursuant to 11 DCMR 3100.2, the Board shall hear and decide appeals where it is alleged that there is error in any decision made by an administrative officer in the administration or enforcement of the Zoning Regulations. Pursuant to 11 DCMR 3199.1, the definition of "Party" in appeals cases before the Board automatically includes ". . .(3) [t]he owner, lessee, operator or contract purchaser of the property involved in the administrative decision, if he or she is not the appellant;. . ." Boys Town is the owner of the record lots underlying the Building Permits, and therefore submits this Statement as a Party to this proceeding.

IV.
Summary of Appellant's Argument

The Appeal challenges the Zoning Administrator's determination that each of the four homes is permitted as a matter of right, without spacing restrictions. Specifically, Appellant claims that the Zoning Administrator is *required* to view the four separate

building permits "in the aggregate" as one combined building permit, because the lots are in common ownership.

The Appellant phrases the issue in three different paragraphs, but presents just one issue. In its first argument, the Appellant claims that the Zoning Administrator has sanctioned an "artificial division into four separate projects." Appellant then lists one reason (written in 10 different ways) why it believes that the four homes should be considered as one. Appellant's contention is that the four lots should be "viewed in the aggregate" because of their common ownership. The second and third arguments merely provide other zoning regulations that the Owner would allegedly also be violating if the Zoning Administrator were forced to apply the Appellant's novel "view in the aggregate" theory.

V.
Owner's Response

Even though the Appellant bears the burden of proving by a "preponderance of the evidence" (BZA Order No. 16604) that the Zoning Administrator was at fault for failing to employ Appellant's "view in the aggregate" theory, Appellant has not provided any statutory or regulatory authority to support its position. This is because there is no such authority; Appellant will also not be able to present a single example of a D.C. Zoning Administrator arbitrarily combining separate building permits and separate record lots to

determine applicable zoning rights and restrictions.[1] From the materials filed to date, it is obvious that Appellant can not carry its burden of proof. Nevertheless, Owner offers the following rebuttal.

A. Zoning Restrictions Run With the Land

A major principle of land use law is that zoning restrictions "run with the land," i.e. zoning restrictions are concerned with a unit of real estate and its use, and not the ownership condition of such real estate, or the ownership or qualities of adjacent lots. This principle is followed in the District of Columbia. See National Black Child Development Institute, Inc. v. District of Columbia Board of Zoning Adjustment, 483 A.2d 687 (D.C. 1984) (attached as Exhibit B) ("**National Black Child**"). But even more, it is also a guiding principle of land use law in general. In Vlahos Realty Company, Inc. v. Little Boar's Head District, 146 A.2d 257 ("**Vlahos**") (attached as Exhibit C), a case which the D.C. Court of Appeals cited as an authority in National Black Child, the Court ruled that "[z]oning restrictions are designed to regulate the land itself and its use and not the person who owns or operates the premises by whom such use is to be exercised" (Vlahos at 260). In another case cited in National Black Child (Matter of Dexter v. Town Bd. of Town of Gates, 36 N.Y.2d 102) ("**Dexter**") (attached as Exhibit D), the Court ruled that, "[z]oning deals with land use and not with the person who owns or occupies it.

[1] It could be said that every issuance of a building permit since 1958 is precedent in support of the Zoning Administrator's position, each being issued for a single record lot, or theoretical lot, without reference to ownership.

Conditions and safeguards imposed must be reasonable and relate only to the real estate involved without regard to the person who owns or occupies it." (Dexter at 102.)

As these cases explain, ownership of property is irrelevant for zoning purposes – and zoning restrictions pertain to a specific, individual unit of property, which in the District is the 'record lot'. The Zoning Administrator has followed this principle; indeed, he had no other option. Each of the Building Permits was submitted and reviewed as individual building permits for individual houses on individual lots, legally subdivided. This was not simply a preference of the Zoning Administrator, but it is the only way in which building permits and their attendant zoning analysis is possible. When a home developer files a building permit, he is subject to the zoning on that particular lot, and is not subject to a review based on adjacent building permits. Because the Zoning Administrator has acted accordingly, there is no authority or any reasonable interpretation that would allow the Board to uphold the Appeal.[2]

B. Matter of Right Under 11 DCMR 201.1(n)(1)

In the C-2-B Zone District, a youth residential care home for six children is permitted as a matter of right, without spacing restrictions, under § 201.1(n)(1) (via § 721.1 for C-2-B) of the Zoning Regulations. A youth residential care home for handicapped children is permitted as a matter of right, without spacing restrictions or

[2] In BZA Order No. 16531, for Boys Town's Sargent Road site, the Board flatly stated that: "if the property had been subdivided [as it is in this appeal case], [the homes] could have
Footnote continued on next page

population caps, under § 201.1(o).[3] The homes which are the subject of the Appeal fit into both of these categories, and are therefore permitted as a matter of right, without spacing restrictions.

The Zoning Commission, in its Order No. 725 ("**Order No. 725**"), adopted § 201.1(n)(1) of the Zoning Regulations (effective January 23, 1993). Section 201.1(n)(1) reads (included in the list of matter of right uses):

> (n) Certain Community-Based Residential Facilities, as limited by the following:
>
> (1) Youth residential care home, community residence facility, or health care facility for not more than six (6) persons, not including resident supervisors or staff and their families; or for not more than eight (8) persons, including resident supervisors or staff and their families and providing that the number of persons being cared for shall not exceed six (6).

In adopting § 201.1(n)(1), the Zoning Commission increased the number of children permitted in a matter of right facility to six persons, from the previously

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Footnote continued from previous page

been constructed and used under 11 DCMR § 300.3 as youth residential care homes as a matter of right.p. 13 (Order No. 16531 attached as Exhibit J).

[3] The majority of the children served by Boys Town qualify as handicapped under the Fair Housing Act. As such, the homes which are the subject of the Building Permits are permitted as a matter of right, without reference to spacing restrictions or controls on the population size of the number of children permitted. While this avenue was available to the Owner, the decision of the Zoning Administrator appears to be based primarily on § 201.1(n)(1), rather than the following paragraph (o) covering the handicapped. As such, we believe the Board can easily dispose of the Appeal under § 201.1(n)(1), without the need to address § 201.1(o). However, a denial of zoning approval for the subject permits, in whatever form, would violate not only § 201.1(n)(1), but also § 201.1(p) and the Fair Housing Act.

permitted four persons. The limit was increased to (6) six because six is the maximum number of unrelated individuals permitted to live as a family in a non-CBRF household. The Commission, in an attempt to make the D.C. Zoning Regulations more compliant with the Fair Housing Act, ruled that youth residential care homes of six children or less must be treated in the same manner as would be other single family households. The Commission made this extremely clear when it stated that:

> It is this aspect, placing greater restrictions on CBRFs which may house handicapped persons than are placed upon unrelated adults occupying a dwelling, which could be subject to challenge under the provisions of the Fair Housing Amendments Act if there is no legitimate government interest served by this difference in treatment. (Order No. 725, p. 4.)

We recommend that the Board review Order No. 725 (attached as Exhibit E) to understand exactly what is permitted - and intended to be permitted - under § 201.1(n)(1). The Commission, in the Order, makes it clear that the revised regulations will not allow disparate treatment between CBRFs and other residential structures housing families. This leaves a simple analysis to determine the only issue in the Appeal. If a private developer may legally subdivide the subject property into four adjacent lots and construct single family structures for sale to the general public, then the Owner must be permitted to construct and operate youth residential care homes of up to six persons. To not permit such a result goes directly against the intent and the plain language of § 201.1(n)(1).

It is indisputable that the Zoning Administrator did what was required under the Zoning Regulations when he evaluated each of the Building Permits and granted zoning

approval for each, as permitted as a matter of right, without reference to any CBRF spacing restrictions.

Appellant claims that Owner has "architecturally contrived" its plans and applications to skirt the zoning regulations. This statement alone admits that the Appellant believes that the Owner does in fact comply with the regulations. Boys Town freely admits that it has prepared the subdivision and permit applications so as to comply with the laws and regulations applicable thereto. Presumably, all successful developers, of all sizes, design their projects so as to comply with zoning and subdivision regulations.

Owner could not have both "skirted the regulations" *and* be in violation of them, as the Appellant also claims. Since the Owner has designed the subdivision and permit applications in order to comply with the Zoning Regulations, and Appellant is still not satisfied with the result, Appellant in reality desires an amendment to the Zoning Regulations and is not properly before this Board.

Based on Order No. 725, the Zoning Commission's clear intent was that the District of Columbia not discriminate against youth residential care homes for six children by treating them differently than other non-CBRF residential structures and uses. To uphold the Appeal, the Board would have to ignore not only the clear language of the Zoning Regulations, but also the spirit and intent behind the language. Such a decision would also be in direct conflict with the Fair Housing Act, the law which the Zoning Commission cited as the impetus for establishing the new § 201.1(n)(1).

C. Upholding the Appeal Creates Unlawful Spacing Restrictions

The Appellant, in the Appeal and in its pre-hearing statement, repeatedly invokes § 721.5, the "500 foot rule" and the "same square rule." These particular spacing restrictions simply do not apply - no matter how many different ways the Appellant attempts to state it. The "500 foot rule," along with the "same square rule," and the "1,000 foot rule" are spacing restrictions that the Zoning Regulations provide for certain community based residential facilities housing more than six residents. No spacing restrictions apply to youth residential care homes with six children or less, *other than the zoning restrictions that apply to non-CBRF residences*. Therefore, no CBRF spacing restrictions apply to the subject homes. The Zoning Administrator was well aware that he had no authority to arbitrarily create such spacing restrictions.

The Appellant insisted that the Zoning Administrator manufacture a completely new zoning practice for these separate, legally subdivided record lots and separate building permit applications. Effectively, Appellant asked the Zoning Administrator to craft an arbitrary spacing restriction for the subject homes. There is no authority for such an action, and the Zoning Administrator therefore acted in accordance with the Zoning Regulations. If the Board upholds the Appeal, it would effectively re-write the Zoning Regulations as they relate to youth residential care homes and spacing restrictions. As the Board is well aware, only the Zoning Commission has the authority to amend the Zoning Regulations (D.C. Code § 5-424(e)).

It is not even clear what type of decision Appellant expects the Board to make. Should the Board permit the construction of only one home, thereby invoking the same square rule, which clearly does not apply to homes with six children or less? Should the

Board overturn all four Building Permits, thereby flatly denying a permitted - and protected – use? Should the Board consider the homes to be 'separate' if they are 500 feet apart, but 'one' if they are less than 500 feet apart, thereby nullifying §§ 201.1(n)(1) and (o), as well as the 500 foot rule? Should the Board provide for an arbitrary distance between the four homes, thereby unlawfully legislating an uncodified spacing restriction? Should the Board rule that Boys Town must divest itself of three of the four homes, each to a separate owner, which should satisfy the Appellant according to the language of the Appeal, even though it would be of no legal significance for zoning purposes? Finally, if the four permits were for single family homes not meant to be used as youth residential care homes, would the Zoning Administrator consider those four homes to be one large rooming house or boarding house? Could the Board create such a fiction? No it cannot, and therefore it cannot do so here.

For further clarification that spacing restrictions do not apply to youth residential care homes for up to six children, the Board should note § 201.1(p) of the Zoning Regulations. § 201.1(p) designates as a matter of right use a:

> (p) Youth residential care home, community residence facility, or health care facility for seven (7) to eight (8) persons, not including resident supervisors or staff and their families; Provided, that there shall be no property containing an existing community-based residential facility for seven (7) or more persons in the same square, and that there shall be no property containing an existing community-based residential facility for seven (7) or more persons within a radius of one thousand feet (1,000 ft.) from any portion of the subject property;

When one compares this section with § 201.1(n)(1), the intention of the Zoning Commission becomes even more obvious. Spacing restrictions are provided for one type of facility (of seven or eight persons) in subsection (p), while just above, in subsection (n)(1), spacing restrictions are rejected for a different type of facility (of six persons or less). The Zoning Commission clearly intended, and clearly recorded such intention in the Zoning Regulations, to permit youth residential care homes of up to six children as a matter of right, in the same manner as is permitted any non-CBRF household.

In the event that this Board determines, contrary to the plain language of the zoning ordinance and regulations, that the so-called 500 foot rule should be applied, Owner hereby requests a waiver of same pursuant to the reasonable accommodation provisions of the law of the District of Columbia and the Fair Housing Act (it was not necessary to seek such an accommodation previously, as the permits in question are matter of right). The great majority of the children to be served by Boys Town qualify as handicapped under the relevant law. If the 500 foot rule could be applied in this case, an accommodation in the form of a waiver would be necessary in order to provide this housing.

We must note as well that under the terms of the consent order entered into between the District of Columbia and the United States Department of Justice (Exhibit G attached), in fact the 500 foot rule should have been deleted from the C-2-B Zone District; the failure to have done so constitutes a violation of that consent order, and any attempt to apply that rule in this case would likewise be in plain violation of that consent order.

D. Appellant's Pre-Hearing Statement

Appellant divided its pre-hearing statement into two or three sections, or arguments. Appellant began its first argument (section I.) by *assuming* that § 721.5 applied and then proceeded with its interpretation of this section. Interestingly, § 721.5 could not possibly apply under either the Zoning Administrator's established position or under the Appellant's "view in the aggregate" theory. Section 721.5 applies only to facilities of seven to fifteen children. Both sides agree that the number of proposed residents is *not* between seven and fifteen. Appellant has not focused on the fact that the Zoning Administrator's ruling is this: § 721.5 does not apply and § 201.1(n)(1) does in determining the matter of right use. The question in this Appeal is not how to interpret § 721.5, but whether or not it applies. Still, the Appellant's pre-hearing statement devotes considerable space to arguing its own interpretation of § 721.5, rather than offering even the slightest legal authority as to why § 721.5 should apply in this case. This is the only issue in the Appeal.[4]

In section II. of its statement, Appellant again has missed the mark by offering several arguments which, while they may be politically expedient in a Special Exception

[4] Please note also that the Appellant has made several false statements. On page 2 of its statement, the Appellant writes: "Even assuming that the subject facility could be properly viewed as four separate CBRFs each with fewer than 15 persons, this CBRF is located within 500 feet from an (sic) pre-existing CBRF for more than seven persons, and is therefore not permitted as a matter of right in the C-2 zone." This is false. If the subject facilities are properly viewed as four separate CBRFs of six residents each, then the 500 foot rule simply does not apply. The Appellant makes a similar false statement on page 3, stating that the existence of a nearby facility precludes "the four group homes as matter of right development." It is absolutely clear that homes of up to six residents are not subject to any of the spacing restrictions noted by the Appellant.

case, are not remotely relevant to the Appeal. While the Appeal begs the question of whether the subject homes should be subject to Special Exception approval, the Appellant has tried to tempt the Board into actually prosecuting this case as if it already were a Special Exception case. This entire section of the Appellant's pre-hearing statement is irrelevant to the issue at hand; including but not limited to those sections related to the Comprehensive Plan, the number of CBRFs in Ward 6, Boys Town's financial situation, the price of neighboring properties, the Sargent Road site and Boys Town's relationship with D.C. Child and Family Services. Accordingly, the Board should disregard all of this section, and may be pleased to know that the Owner has attached a motion to strike this portion of Appellant's statement, including the large majority of the exhibits attached thereto.

VI.
Conclusion

The Appellant has one goal: to keep youth residential care homes for neglected, abused and handicapped children out of their neighborhood, by any means possible, including by the use of creative appeal arguments, a three-volume pre-hearing filing, and direct lies about the behavior of Boys Town's residents. These activities, devoid of any integrity, are intended to harass an organization which stands ready to provide desperately needed child care in the District of Columbia. This is the exact situation, all too common, for which the Fair Housing Act and §§ 201.1(n)(1) and (o) were adopted. Appellant hopes that the volume of filings, petitions and other activities will obfuscate

the narrow issue before the Board. The Zoning Administrator has acted in accordance with the Zoning Regulations in issuing its zoning approval for each of the four Building Permits. For this reason, the Appeal must be denied and the decision of the Zoning Administrator must be upheld.

Respectfully submitted,

Phil T. Feola by MPS 11/26/01
Phil T. Feola

Martin P. Sullivan 11/26/01
Martin P. Sullivan

List of Exhibits

Exhibit A: Subdivision Plat.

Exhibit B: National Black Child Development Institute, Inc. v. District of Columbia Board of Zoning Adjustment, 483 A.2d 687 (D.C. 1984).

Exhibit C: Vlahos Realty Company, Inc. v. Little Boar's Head District, 146 A.2d 257 (N.H. 1958).

Exhibit D: Matter of Dexter v. Town Bd. of Town of Gates, 36 N.Y.2d 102 (N.Y. 1975).

Exhibit E: Zoning Commission Order No.725.

Exhibit F: Stipulated Agreement Between The United States and the District of Columbia, September, 1997.

Exhibit G: Witness List for December 4th BZA Hearing

Exhibit H: Resume of Armando Lourenco, Zoning Expert.

Exhibit I: Report on BZA Appeal No. 16791, issued by Armando Lourenco, former Acting D.C. Zoning Administrator and former Administrator of the D.C. Building and Land Regulation Administration.

Exhibit J: BZA Order No. 16531.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2001, I served a copy of the foregoing Statement of the Owner, with attachments, via hand delivery to:

Ellen Opper-Weiner
c/o Andrea Ferster
Rails to Trails Conservancy
1100 17th Street, N.W.
Washington, D.C. 20036

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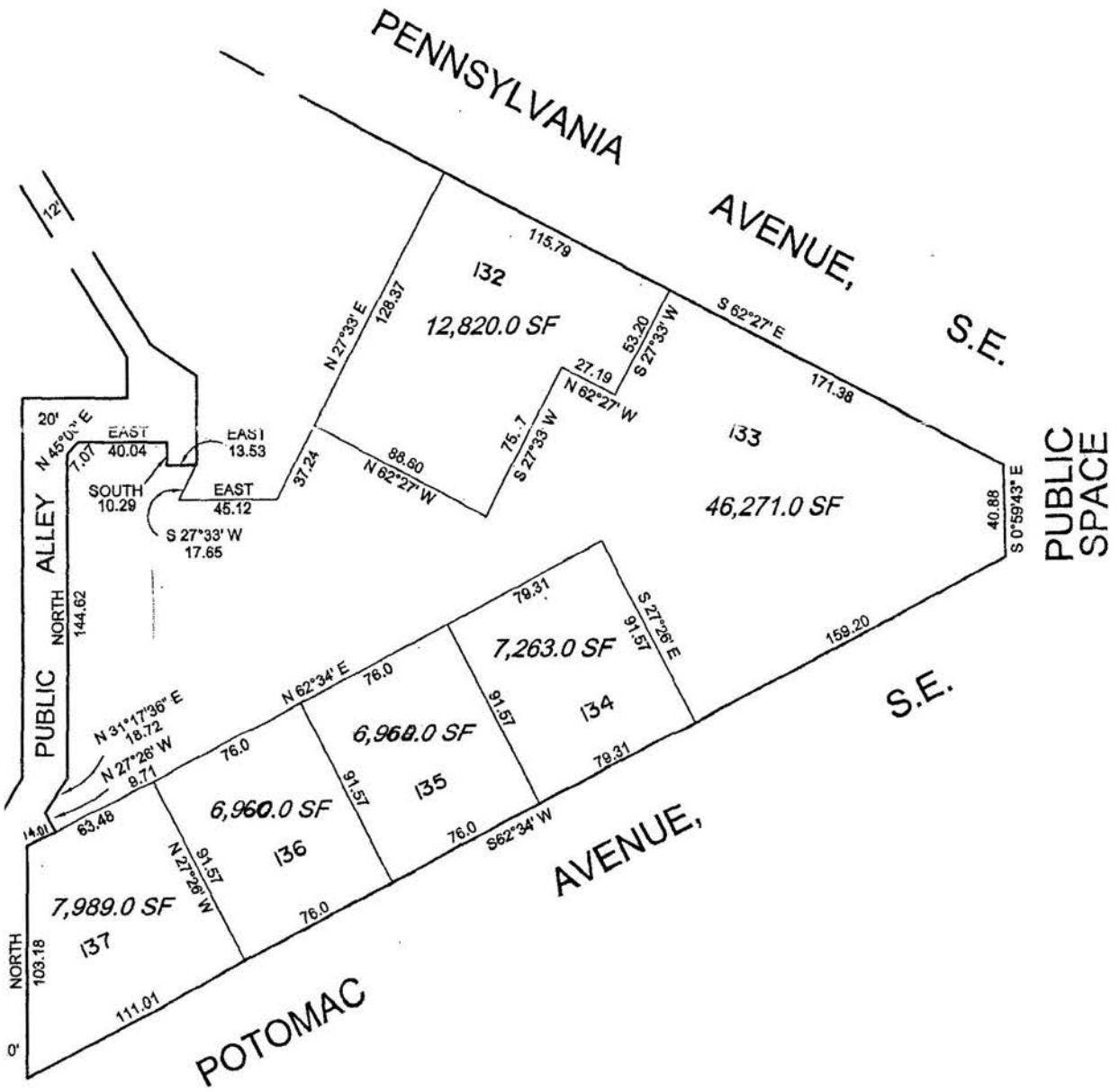
Martin P. Sullivan 11/28/01

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Document #: 1189140 v.1

A

SUBDIVISION
SQUARE 1045





District of Columbia Court of Appeals.

NATIONAL BLACK CHILD DEVELOPMENT INSTITUTE, INC., Petitioner,
v.
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent.

No. 83-1434.

Argued Oct. 2, 1984.
Decided Nov. 8, 1984.

Property owner appealed action of the board of zoning adjustment in granting a use variance imposing three restrictive conditions. The Court of Appeals, Nebeker, J., held that: (1) board of zoning adjustment did not exceed its authority in granting variance; (2) imposing personal conditions upon grant of variance was unlawful per se; and (3) condition limiting property owner to 12 employees regulated use of property, and was therefore not unlawful per se; however, it was unsupported by evidence in record, and instead was based only on a finding that property owner had 12 employees at time it applied for its variance.

Remanded.

West Headnotes

[1] Zoning and Planning 
414k536 Most Cited Cases

Burden is on applicant to meet all three criteria for issuance of use variance, namely, unique physical aspect or other extraordinary or exceptional situation or condition of a specific piece of property, undue hardship, and no harm to the public or zone plan, and hardship element must not be result of actions undertaken by landowner in knowing violation of zoning regulations.

[2] Zoning and Planning 
414k508 Most Cited Cases

Use variance was properly issued to nonprofit corporation so that its property could be used as office space, in view of board of zoning adjustment's findings that there existed other extraordinary or exceptional situation and undue hardship.

[3] Zoning and Planning
414k501 Most Cited Cases

Imposition of personal conditions upon grant of use variance was unlawful per se.

[4] Zoning and Planning
414k501 Most Cited Cases

Personal conditions upon issuance of variance impermissibly regulate business conduct of owner, rather than use of his property, and are unlawful per se.

[5] Zoning and Planning 
414k726 Most Cited Cases

On remand, should board of zoning adjustment decide to impose generic conditions upon issuance of use variance, it must hear evidence from property owner regarding impact upon it of those conditions and must weigh that evidence in making its determination.

[6] Zoning and Planning 
414k501 Most Cited Cases

[6] Zoning and Planning
414k539 Most Cited Cases

Condition upon issuance of use variance limiting property owner to 12 employees regulated use of property, and was therefore not unlawful per se; however, it was unsupported by evidence in record, and instead was based only on a finding that property owner had 12 employees at time it applied for its variance.

[7] Zoning and Planning 
414k537.1 Most Cited Cases
(Formerly 414k537)

If board of zoning adjustment imposes condition upon issuance of use variance limiting number of employees at site, it must base its findings on reliable, probative, and substantial evidence in the record as a whole.

***688** Louis R. Moffa, Jr., Washington, D.C., for petitioner.

Charles L. Reischel, Deputy Corp. Counsel,

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Washington, D.C., with whom John H. Suda, Principal Deputy Corp. Counsel, and Charlotte Brookins-Pruitt, Asst. Corp. Counsel, Washington, D.C., were on brief, for respondent.

Before PRYOR, Chief Judge, NEBEKER, Associate Judge, and PAIR, Associate Judge, Retired.

NEBEKER, Associate Judge:

Petitioner National Black Child Development Institute, Inc. (NBCDI) appeals the action of the Board of Zoning Adjustment (BZA) in granting a use variance imposing three restrictive conditions. Petitioner, a nonprofit corporation, [FN1] sought a variance to permit its property, located in an R-5-D residential zone, to be used as office space. After holding a public hearing on the NBCDI's application, the BZA voted on March 2, 1983, to grant a use variance, but imposed the following restrictive conditions:

> FN1. NBCDI is incorporated under the laws of California. It has its national headquarters in the District of Columbia, where it is authorized to operate under a Certificate of Authority granted by the Office of the Recorder of Deeds. NBCDI is tax exempt under § 501(c)(3) of the Internal Revenue Code of 1954, as amended; it is not a private foundation within the meaning of § 509(a) of the Code.

(1) The use of the subject premises shall be limited to the National Black Child Development Institute, Inc.
***689** (2) The number of employees shall not exceed a maximum of twelve.
(3) At such time as the applicant may offer the property for sale, it shall be advertised and sold for use only for the purpose permitted in the zone district applicable to the property.

By motion the NBCDI sought reconsideration or rehearing by the BZA, contending that the conditions imposed were illegal and unsupported by evidence in the record.

On December 1, 1983, the BZA issued a final order denying the NBCDI's motion. Appeal to this court followed. [FN2] We specify the scope of the relief in this case by leaving intact the grant of the variance. *See* D.C.Code § 1- 1510 (1981). We hold, however, that because no valid public policy is served by confining a variance to an individual entity, any personal condition imposed by the BZA to restrict a use variance is unlawful *per se*. We remand the case to the BZA for rehearing (1) to determine whether it has authority to impose generic restrictions on petitioner's use variance; (2) to hear testimony from petitioner regarding the impact on it of any such conditions; and (3) to set forth in the record any evidence supporting such conditions.

> FN2. D.C.Code § 11-722 (1981) confers jurisdiction upon this court to review final actions of the BZA.

In 1976, the NBCDI purchased its property at 1463 Rhode Island Avenue, N.W. The area was then, as now, zoned for residential use. The site is a fairly level trapezoid-shaped lot of approximately 1,850 square feet. It is improved with a brick townhouse having three stories and a basement. The NBCDI purchased the property to obtain office space in the District of Columbia. It had initially conditioned its purchase of the property on the seller's obtaining a variance to permit use as office space. The seller's attorney, however, pointed out that under zoning regulations as they then existed, the NBCDI qualified as a social service center; so long as it was operating under a grant from either the District of Columbia or federal government, it could obtain a certificate of occupancy immediately, as of right, without a hearing.

Having such a grant, the NBCDI purchased the property and made improvements. It applied for, and received, two successive temporary certificates of occupancy, their dates coinciding with those of grants the NBCDI held. In 1978, after its most recent certificate had expired, [FN3] but before the Zoning Administrator's Office had acted upon its application for a new certificate, emergency amendments to the zoning regulations went into effect. The emergency amendments eliminated the provision that had permitted social service centers under District or federal contract to operate offices as of right in an R-5-D district. [FN4]

> FN3. The certificate of occupancy was issued on April 4, 1978, but bore an expiration date of July 31, 1977. Since NBCDI had no valid certificate at the time the amendments went into effect, it could not qualify as a non-conforming user.

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FN4. The newer regulations permitted only "community based residential facilities" to operate as of right in R-5-D districts. NBCDI used its property only for offices and meeting facilities, and had no residents. (Record at 7, 110).

The present application for a variance was filed on September 24, 1982, and granted with the restrictive conditions listed above. While acknowledging the authority of the BZA to grant a variance, the NBCDI argues that conditions (1) and (3) are unlawful because they regulate the property owner personally, and that condition (2) is not based upon substantial evidence in the record. We agree.

I

Authority of the BZA to Grant the Variance

[1] The NBCDI sought its variance under § 8207.11 of the District of Columbia ***690** Zoning Regulations. [FN5] Section 8207.11 authorizes the BZA to grant a use variance based on three criteria: (1) unique physical aspect or "other extraordinary or exceptional situation or condition of a specific piece of property," (2) undue hardship, and (3) no harm to the public or the zone plan. *Monaco v. District of Columbia Board of Zoning Adjustment,* 407 A.2d 1091, 1096 (D.C.1979). The burden is on the applicant to meet all three criteria, *id.* at 1101, and the hardship element must not be the result of actions undertaken by the landowner in knowing violation of zoning regulations. *Clerics of St. Viator, Inc. v. District of Columbia Board of Zoning Adjustment,* 320 A.2d 291, 294 (D.C.1974) (drop in number of young men entering the priesthood, making maintenance of large seminary a hardship, not "self-imposed"); *see also and compare Clouser v. David,* 114 U.S.App.D.C. 12,13, 309 F.2d 233, 234 (1962), *cert. denied,* 372 U.S. 929, 83 S.Ct. 874, 9 L.Ed.2d 733 (1963) (hardship was self-imposed where nonconforming use was created in direct, knowing violation of the zoning provisions; and the cost of creating it could not then serve as reason for the variance).

FN5. Section 8207.11, adopted pursuant to D.C.Code § 5- 424(g)(3) (1981), provides:

Where, by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under this Act would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, [BZA may] authorize, upon an appeal relating to such property, a variance for such strict application so as to relieve such difficulties or hardship, provided such relief can be granted without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map.

Initially, this court read the first two criteria to require that the hardship justifying a use variance must arise from the nature of the land itself. *Palmer v. Board of Zoning Adjustment,* 287 A.2d 535, 539, 542 (D.C.1972). Subsequent decisions, however, modified *Palmer,* permitting the BZA to weigh more fully the equities in an individual case. *DeAzcarate v. District of Columbia Board of Zoning Adjustment,* 388 A.2d 1233, 1237 (D.C.1978); *Clerics of St. Viator, Inc., supra,* 320 A.2d at 294 (factors extraneous to land may be considered in determining existence of hardship). [FN6] Finally, in *Monaco,* we permitted the BZA to apply a more flexible standard for determining hardship when a "public service," or nonprofit entity, is the applicant. *Monaco, supra,* 407 A.2d at 1099.

FN6. The focus in these cases was on the "other extraordinary or exceptional situation" language of § 8207.11.

[2] In applying the *Monaco* three-part test to grant a variance to the NBCDI, the BZA did not exceed its authority. The Board found that there existed (1) "other extraordinary or exceptional situation" and (2) undue hardship. *See Monaco, supra,* 407 A.2d at 1096. The BZA found that the NBCDI's work benefited black children and families within the District, that the Institute had received temporary certificates of occupancy under regulations that had been altered by the 1978 amendments to preclude the NBCDI's qualifying for future certificates under them, and that the great expense of operating offices at another site would cause serious detriment to the Institute. [FN7] It held that the NBCDI's situation is unique, that its work does promote the public welfare, and that denial of the variance would cause undue hardship.

FN7. NBCDI pays $11,400 annually on its first trust on its property. The Institute has approximately 3,000 square feet of office space.

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> NBCDI would require the same amount of space in another building. Annual rental costs would range from $54,000 (at $18.00 per square foot) to $72,000 (at $24.00 per square foot). (Record at 200.)

However, to insure that its grant of the variance met the third part of the *Monaco* test, no harm to the public or zone plan, the BZA imposed the three restrictive conditions at issue here. In determining whether imposition of such conditions lies within ***691** the BZA's authority, we confront a new question of law within this jurisdiction.

II
Authority of the BZA to Impose Conditions Upon Grant of Variance

In imposing restrictive conditions, the Board draws upon its general mandate to insure that a proposed variance would have no detrimental effect on the neighborhood or zone plan. [FN8] *See, e.g., Monaco, supra,* 407 A.2d at 1101. We do not hold that the Board may never impose conditions in granting a variance. The record as it stands is inadequate to permit a determination regarding conditions in general. We hold only that the conditions imposed by the BZA in this instance are unlawful. On remand of the case, the BZA should more fully set forth the source of its authority to impose conditions and the specific findings supporting any such conditions.

> FN8. The BZA attempts to distinguish the circumstances here from those in *Monaco.* In *Monaco,* the Republican National Committee (RNC) had received assurances from zoning authorities that their townhouse properties on Capitol Hill could be used as offices. The RNC had acted in reliance on those assurances and was, eventually, granted its variance under the three-part test, which this court held could be applied with greater flexibility to nonprofit, service entities. *Monaco, supra,* 407 A.2d at 1099, 1101.
>
> Here, the BZA urges, applicant never received any guarantees from zoning authorities that a permanent certificate of occupancy would be granted. Furthermore, the NBCDI proceeded inappropriately, in the BZA's view, by failing to appeal the December 7, 1982, denial of their application for a permanent certificate of occupancy by the Office of Planning and Development (OPD). OPD had denied the application on the grounds that the NBCDI did not qualify as a social service center under the amended regulations. (Record at 201.) The distinctions the BZA draws are not dispositive. As the BZA points out in its findings, the use the NBCDI made of its property has not changed in scope or character since 1976 when it purchased the property and received a temporary certificate of occupancy under the current zoning regulations.
>
> The 1978 changes in zoning, however, permitted only residential facilities to qualify as social service centers. The NBCDI could reasonably conclude that appeal of OPD's denial was futile because the NBCDI's property was not a residential facility. The NBCDI acted, not in reliance on assurances of zoning authorities, but on the regulations as they existed at the time it initially purchased and renovated its property to meet its needs and the District's health and safety standards. The situation is, therefore, not materially different from that in *Monaco* in that the circumstances suggest good faith, reasonable efforts to comply. *Compare Clouser v. David, supra.*

A. *Conditions Personal to the NBCDI*

[3][4][5] The first and third conditions imposed by the BZA, however, limit the use variance to the NBCDI and provide for termination of the variance upon transfer of title. The BZA argues that the limitations are necessary to preserve the integrity of the zoning plan. Authorities generally disfavor personal conditions; rather, conditions, like the variance itself, must run with the land. *Dexter v. Town Board of Town of Gates,* 36 N.Y.2d 102, 104, 365 N.Y.S.2d 506, 508, 324 N.E.2d 870, 871 (1975); *Vlahos Realty Co. v. Little Boar's Head District,* 146 A.2d 257, 260 (N.H.1958); *see also* 3 R.M. ANDERSON, AMERICAN LAW OF ZONING 2D § 18.69 (1977); 6 P.J. ROHAN, ZONING AND LAND USE CONTROL § 43.03[2] (1984). We adopt this position. Personal conditions impermissibly regulate the business conduct of the owner, rather than the use of his property, and are unlawful *per se.* [FN9] We reserve judgment, however, regarding generic conditions, such as might limit the variance granted here and its transfer to "the NBCDI or any similarly situated nonprofit organization." The conditions would thus be structured to run ***692** with the land, requiring any future occupant to show that it fits within the genre. On remand, should the BZA decide to impose such generic conditions, it must hear evidence from the NBCDI regarding the impact upon it of those conditions and must weigh that evidence in making its determination. *See Monaco, supra,* 407 A.2d at 1101; *accord Allentuck v. District of Columbia Minimum Wage and Industrial*

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Safety Board, 261 A.2d 826, 832-33 (D.C.1969) (record must reveal sufficient basic findings and a reasoned application of these findings to agency policy and the law).

FN9. In its brief and at oral argument, the NBCDI pointed out that the restrictive conditions imposed by the BZA would cause it to lose its variance if it were, for example, to reincorporate, even while retaining a substantially identical purpose and mode of operation. Furthermore, its property is its most important source of internal funding. Its ability to use its property to raise operating funds via loans is severely curtailed by the first and third conditions. The BZA did not permit the NBCDI to present evidence regarding impact of the conditions. It denied rehearing after imposing these conditions and the conditions were not addressed in the earlier proceedings.

B. *Conditions Limiting Number of Employees*

[6][7] The second condition limits the NBCDI to twelve employees. This condition does regulate use of the property, and is therefore not unlawful *per se.* It is, however, unsupported by evidence in the record, and instead is based only on a finding that the NBCDI had twelve employees at the time it applied for its variance. (Record at 196.) The BZA heard no evidence from the NBCDI regarding its present or future needs for staff, nor did it relate the conditions to specific findings regarding traffic, parking, or availability of public transportation. If the BZA imposes a condition limiting the number of employees at the site, it must base its findings on reliable, probative, and substantial evidence in the record as a whole. *Monaco, supra,* 407 A.2d at 1101; *Allentuck, supra,* 261 A.2d at 833.

The case is remanded for proceedings in accordance with this opinion.

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Supreme Court of New Hampshire.

VLAHOS REALTY COMPANY, Inc.
v.
LITTLE BOAR'S HEAD DISTRICT et al.

Argued Oct. 7, 1958.
Decided Nov. 28, 1958.

Petition for declaratory judgment. The court, Morris, J., transferred without ruling reserved case. The Supreme Court, Kenison, C. J., held, inter alia, that where variance from zoning ordinance was not only conditional but conditions included requirement of an annual permit, which was also revocable and nontransferable because limited to specific owner or lessee who was operating the premises for that particular year, such condition was beyond statutory power of board of adjustment and invalid since zoning conditions and restrictions are designed to regulate the land itself and its use and not the person who owns or operates the premises by whom such use is to be exercised.

Case remanded.

West Headnotes

[1] Zoning and Planning 
414k501 Most Cited Cases
(Formerly 268k621.23)

The zoning statute which contains no express provision permitting conditions to be attached to a variance, but which gives the board of adjustment power to "make such order, or decision, as ought to be made" is inclusive enough to authorize the power to attach reasonable conditions to granting variances. RSA 31:72, subd. 4.

[2] Zoning and Planning 
414k501 Most Cited Cases
(Formerly 268k621.23)

Conditions may be attached to grant of a variance where it is necessary to do so in order to observe the spirit of the zoning ordinance. RSA 31:72, subd. 4.

[3] Zoning and Planning 
414k21 Most Cited Cases
(Formerly 268k625)

Zoning restrictions are constitutional, subject to qualification that they cannot be unreasonable or arbitrary.

[4] Zoning and Planning 
414k501 Most Cited Cases
(Formerly 268k621.23)

Where variance from zoning ordinance was not only conditional but conditions included requirement of an annual permit, which was also revocable and nontransferable because limited to specific owner or lessee who was operating the premises for that particular year, such condition was beyond statutory power of board of adjustment and invalid, since zoning conditions and restrictions are designed to regulate the land itself and its use and not the person who owns or operates the premises by whom such use is to be exercised. RSA 31:72, subd. 4, 31:88.

[5] Zoning and Planning 
414k501 Most Cited Cases
(Formerly 268k621.23)

A condition of variance to zoning ordinance limiting retail sales principally to those articles that were sold previously under pre-existing nonconforming use was proper even though additional articles could be sold without danger to public health, welfare or safety, since such limitation on nonconforming uses is one method of preventing variances from nibbling away at the main objectives of zoning which looks to the future. RSA 31:72, subd. 4, 31:88.

[6] Zoning and Planning 
414k501 Most Cited Cases
(Formerly 268k621.23)

Conditions of variance to zoning ordinance requiring that premises be kept neat and clean, that receptacles be provided for refuse and papers and that adequate toilet facilities be provided were reasonable restrictions. RSA 31:72, subd. 4, 31:88.

[7] Zoning and Planning 
414k501 Most Cited Cases
(Formerly 268k621.23)

A condition to variance from zoning ordinance restricting lights and signs to conform substantially with previous nonconforming uses was proper. RSA 31:72, subd. 4, 31:88.

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[8] Zoning and Planning
414k501 Most Cited Cases
(Formerly 268k621.23)

A condition of variance to zoning ordinance permitting ice cream stand regulating closing hours at 11 P.M. was valid. RSA 31:72, subd. 4, 31:88.

[9] Zoning and Planning
414k501 Most Cited Cases
(Formerly 268k621.23)

A condition to variance from zoning ordinance permitting ice cream stand in beach area which required a fence or railing in rear of the premises was reasonable. RSA 31:72, subd. 4, 31:88.

[10] Zoning and Planning
414k501 Most Cited Cases
(Formerly 268k621.23)

A condition to variance from zoning ordinance prohibiting radios or loud speakers in connection with operation of ice cream stand, disturbing abutting owners, was valid. RSA 31:72, subd. 4, 31:88.

[11] Declaratory Judgment
118Ak129 Most Cited Cases

Declaratory judgment to test legality of zoning restriction allegedly in excess of jurisdictional authority of zoning power was proper procedure notwithstanding plaintiff could stand by and await prosecution or injunctive proceedings by municipality, which was not exclusive method of settling the controversy. RSA 491:22.

[12] Declaratory Judgment
118Ak342 Most Cited Cases

In action for declaratory judgment to set aside a decision of zoning board of adjustment imposing conditions upon variance from zoning ordinance, plaintiff had burden of establishing that the board's decision was unreasonable or unlawful, and all findings of the board on questions of fact were deemed prima facie lawful and reasonable. RSA 491:22.

[13] Zoning and Planning
414k546 Most Cited Cases
(Formerly 268k621.13)

Plaintiff which operated its premises under a variance was not estopped to question it.

Zoning and Planning
414k501 Most Cited Cases

In view of narrowness of street adjacent to premises for which exception permitting its use as motor vehicle service station was granted, and in view of unsuitability of such outside operations in an area adjacent to a residential zone, it was not unreasonable to condition grant of exception by requiring that there be no entrance on such street and that vehicles be repaired and stored inside building. N.J.S.A. 40:55-39(b).

****258 *460** Petition, for a declaratory judgment. RSA 491:22. The Court (Morris, J.) transferred without ruling the following reserved case.

'Petition for Declaratory Judgment by Vlahos Realty Company, ***461** Inc. against Little Boar's Head District and William P. Fowler, Zoning Inspector of said District. On motion duly filed, Katharine F. Billings and Walter L. Barker, interested neighboring property owners, were allowed to intervene and to file an answer.

'The petition is for construction of the action by the Board of Adjustment of Little Boar's Head District regarding variances granted under the Zoning Ordinance of said District to predecessors in title of the petitioners relative to the operation of a certain ice cream stand at the Little Boar's Head Bathing Beach at North Hampton, New Hampshire, and as to the extent to which such variances are valid in whole or in part.

'All questions of law presented by the pleadings, as supplemented by the Agreed Statement of Facts and the Exhibits, are transferred without ruling.

****259** 'If the court determines the variance or variances as granted to be valid in all or any respects, the issue of fact whether the Zoning Inspector should renew the annual permit is reserved for further hearing in the Superior Court.'

Boynton, Waldron & Dill, Wyman P. Boynton, Portsmouth, for plaintiff.

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William P. Fowler, North Hampton and Edward R. Hale and Neil L. Lynch, Boston, Mass., for defendants.

Upton, Sanders & Upton, Richard F. Upton, Concord, for intervenors.

KENISON, Chief Justice.

In this declaratory judgment proceeding (RSA 491:22) the plaintiff seeks to ascertain the validity of a conditional variance applicable to its premises which is subject to a one-year nontransferable permit issuable to it or its lessee and renewable if the owner or lessee complies with all the conditions of the permit. The validity of such conditional variance, coupled with an annual permit, is a matter of first impression in this jurisdiction. Cf. Mater v. City of Dover, 97 N.H. 13, 16, 79 A.2d 844. A good nutshell introduction to this problem without, however, any accompanying solution, is found in Horack and Van Nolan, 'Land Use Controls,' (1955) p. 184: 'The most controversial condition limits the variance to a specific person. Although courts usually strike down such a limitation on the ground that it is unreasonable and discriminatory and the grant of a special privilege, in the actual administration of a zoning ordinance there is much justification for this restriction because of ***462** a board's confidence in the good reputation, capacity, and reliability of particular persons. On the other hand, isn't the argument valid that zoning ordinances apply to land and not to individuals?'

Since 1955 the plaintiff owned and its lessees have operated premises for the sale of ice cream, dairy products and other items specified in annual permits issued pursuant to a conditional variance granted by the board of adjustment of defendant District in 1947. The 1947 variance which was granted to one Sawyer, a predecessor in title of the plaintiff, was subject to the issuance of a permit by the zoning inspector limited to one year and 'renewable annually if complied with by the appellant [Sawyer].' Among the several conditions listed in the permit was No. 9 which reads as follows: 'Said permit shall be non- transferable, shall not be applicable to any lessee, and may be revoked or modified at any time for non-compliance with the conditions thereof, or if the stand in question shall be so operated as to cause injury or offense to the neighborhood.' Since 1947 the various owners of the premises or their lessees have been issued an annual permit subject to substantially the same conditions including No. 9. The present proceeding was brought in September 1957, when the defendant zoning inspector advised the plaintiff's lessee that he had violated certain provisions in the permit and indicated that he would not renew the permit.

A chronological summary of the events leading up to the present litigation is necessary for an understanding of the problem. At the time the defendant adopted its zoning ordinance in 1937, pursuant to special legislation (Laws 1937, c. 265), the plaintiff's predecessor in title, one Sawyer, was operating an ice cream stand located in the residential zoning district as a pre-existing nonconforming use under the provisions of the zoning ordinance. This commercial enterprise continued through the year 1941 but was discontinued during the years 1942 through 1945 because of World War II. In 1946, the plaintiff's predecessor in title Sawyer obtained a conditional variance, subject to the issuance of a conditional permit by the zoning inspector. In 1947, a further conditional variance and conditional permit were issued to Sawyer and the premises were operated by him or his tenants through 1952. In 1952, Sawyer appealed from the ruling of the zoning inspector refusing ****260** him permission to sell coffee and sandwiches at his ice cream stand, which was denied. No appeals were taken from the rulings of the board of adjustment.

***463** In 1953, Sawyer conveyed the premises to the plaintiff's predecessor in title who in turn conveyed to the plaintiff in 1955. From 1953 to 1957 the premises were operated by the owners or their lessees subject to the terms of the conditional variance granted in 1947 and the nine conditions attached to the individual annual conditional permits issued by the zoning inspector.

[1][2] While the zoning statute contains no express provision permitting conditions to be attached to a variance, the board of adjustment is given broad powers 'and may make such order, or decision, as ought to be made.' RSA 31:72, subd. IV. This statutory language is inclusive enough to authorize the power to attach reasonable conditions to the granting of variances as was intimated but not decided in Mater v. City of Dover, 97 N.H. 13, 16, 79 A.2d 844. A large number of cases sustain the

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right to attach conditions to the grant of a variance where it is necessary to do so in order to observe the spirit of the zoning ordinance. Annotation 168 A.L.R. 13, 60; Rhyne, Municipal Law 881 (1957); Reps. Legal and Administrative Aspects of Conditional Zoning Variances and Exceptions, 2 Syracuse L.Rev. 54 (1950). Some authorities maintain that it is 'common practice' to grant conditional variances which 'should usually be upheld unless the conditions are beyond the authority of the board, are outside the Law or unless they are plainly unreasonable.' 2 Metzenbaum, The Law of Zoning, p. 957 (1955).

[3][4] It is generally recognized that zoning restrictions are constitutional subject to the qualification that they cannot be unreasonable or arbitrary. 8 McQuillin, Municipal Corporations, § 25.05; 1 Yokley, Zoning Law and Practice (2d ed. 1953) § 26. In the present case the variance was not only conditional, which it had a right to be, but the conditions included the requirement of an annual permit, which was also revocable and nontransferable because limited to the specific owner or lessee who was operating the premises for that particular year (condition 9). While this condition might make zoning enforcement easier and has administrative merit, it has been pointed out that it would place the emphasis on the regulation of the person rather than the land, and tend to make it an *ad hominem* privilege rather than a decision regulating the use of property. Although the decisions are not numerous, it has been held that such a restriction is invalid because zoning conditions and restrictions are designed to regulate the land itself and its use and not the person who owns or operates the premises by whom such use is to be exercised. Olevson v. Zoning Bd. of Review, 71 R.I. ***464** 303, 44 A.2d 720; Green, The Power of the Zoning Board of Adjustment to Grant Variations from the Zoning Ordinance, 29 N.C.L.Rev. 245, 276-278 (1951). Our statute gives municipalities adequate powers and remedies for violation of the zoning ordinances and restrictions (RSA 31:88) but there is no indication either in this section or in any other part of the statute that they were to include the authority to issue a yearly permit to a specific person which would place the burden on the owner of the property or his lessee to convince the board of adjustment that the conditions of the variance or the permit had been complied with during the year. Cf. Kelley v. Board, 126 Conn. 648, 13 A.2d 675. See Hannigan v. Murdock, Sup., 47 N.Y.S.2d 855, 858; V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment, 8 N.J. 386, 86 A.2d 127. We conclude that condition 9 was beyond the statutory power of the board of adjustment and invalid, and that the device of an annual non-transferable permit good only for a specific person and subject to revocation is not sanctioned by the zoning statutes of ****261** this state as the price of granting a variance.

[5][6] In order not to cast a cloud of infirmity on conditional variances, which attach to the land and not to the person (Mastrati v. Strauss, 75 R.I. 417, 67 A.2d 29), reference is made to the other conditions applicable to the premises. Condition 1 limited the retail sales principally to those articles that were sold previously under the pre-existing nonconforming use by the plaintiff's predecessor in title. This was proper even though additional articles could be sold without danger to public health, welfare or safety. Such limitation on nonconforming uses is one method of preventing variances from nibbling away at the main objectives of zoning which looks to the future. Selligman v. Western & Southern Life Ins. Co., 277 Ky. 551, 126 S.W.2d 419; Zweifel Mfg. Corp. v. City of Peoria, 11 Ill.2d 489, 144 N.E.2d 593. Conditions 2 and 3 required that the premises be kept neat and clean and that receptacles be provided for refuse and papers. These were reasonable restrictions as was condition 4 which called for adequate toilet facilities on the premises.

[7][8][9][10] Condition 5 restricted the lights and signs to conform substantially with the previous nonconforming uses and was unobjectionable. St. Patrick's Church Corp. v. Daniels, 113 Conn. 132, 154 A. 343. Condition 6 regulating the closing hours at 11 p. m. was presumptively valid for the same reason. Condition 7 requiring a fence or railing in the rear of the premises was reasonable. Morris v. Zoning Board of Pawtucket, 52 R.I. 26, 155 A. 654; St. Patrick's Church Corp. v. Daniels, supra. ***465** Condition 8 prohibiting radios or loud speakers disturbing to abutting owners was likewise presumptively valid.

[11][12] The use of a declaratory judgment to test the legality of a zoning restriction allegedly in excess of the jurisdictional authority of the zoning power is not without precedent in this state.

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Faulkner v. Keene, 85 N.H. 147, 155 A. 195; Brady v. City of Keene, 90 N.H. 99, 4 A.2d 658. While the plaintiff could stand by and await prosecution or injunctive proceedings by the municipality, this is not an exclusive method of settling the controversy. Annotation 174 A.L.R. 853, 854; Zoning in New England, 36 B.U.L.Rev. 354, 489 (1956). The law does not always say to 'the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool is to eat it.' Borchard, The Constitutionality of Declaratory Judgments, 31 Col.L.Rev. 561, 589. In this declaratory judgment proceeding, as would be the situation in an appeal (RSA 31:78), the party seeking to set aside a decision of the zoning board of adjustment has the burden of establishing that the board's decision is unreasonable or unlawful; and all findings of the board on questions of fact are deemed prima facie lawful and reasonable. Jadda v. Manchester, 100 N.H. 150, 121 A.2d 803; Gelinas v. City of Portsmouth, 97 N.H. 248, 85 A.2d 896.

[13] It is urged that the plaintiff has operated its premises under a variance and therefore is now estopped to question it. A similar contention in a recent analogous case was rejected in Publico v. Building Inspector of Quincy, Mass., 142 N.E.2d 767, 769.

In conclusion we hold that the variance granted by the board of adjustment is valid except as to condition 9 and the requirement of an annual renewal of the permit which were beyond the statutory power of the board.

Remanded.

All concurred.

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[redacted]

Appellants,

v.

Town Board of the Town of Gates, Respondent.

Court of Appeals of New York

Argued January 9, 1975;

decided February 18, 1975.

HEADNOTES

Municipal corporation--zoning--town board, in rezoning land from residential to commercial classification to permit development as retail shopping center, was without power to impose condition that application for construction of supermarket should inure to benefit only of corporation which petitioned for rezoning.

(1) A corporation, as contract-vendee, petitioned the town board to rezone approximately 12 acres of land from a residential to a commercial classification to permit development of the site as a retail shopping center. The town board determined to rezone the property but provided "[t]hat said application for the construction of a retail supermarket by [the corporation], and related commercial structures, shall inure to the benefit of [the corporation] only, and for that specific purpose only." Zoning deals with land use and not with the person who owns or occupies it. Conditions and safeguards imposed must be reasonable and relate only to the real estate involved without regard to the person who owns or occupies it. The resolution of the town board is personal to the corporation itself and is improper and unauthorized by law.

Matter of Dexter v. Town Bd. of Town of Gates, 43 A D 2d 899, reversed. ***103**

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered January 17, 1974, which, upon an appeal from an order of the Supreme Court (Jacob Ark, J.), entered in Monroe County in a proceeding pursuant to CPLR article 78 to annul the rezoning of certain property by the Town Board of the Town of Gates, denying a motion by petitioners for an order stating that the town board had failed to show, as directed by a prior order of the Appellate Division, entered October 26, 1972, (40 A D 2d 754), that it had acted in accordance with a comprehensive plan in rezoning the property, denying a motion by the town board to dismiss the petition, and directing a hearing on the issues, (1) reversed said order insofar as it denied the town board's motion and directed a hearing, and (2) dismissed the petition. Petitioners also brought up for review the October 26, 1972 order of the Appellate Division, in which it had reversed a judgment of the Supreme Court (Emmett J. Schnepp, J.; opn. 68 Misc 2d 293), entered in Monroe County, annulling the rezoning, and remitted the matter to the town board for further proceedings to demonstrate that it had acted in accordance with a comprehensive plan.

POINTS OF COUNSEL

Neil Bubel for appellants. I. Petitioners did sustain the burden of proof in lower court. (*Shepard v. Village of Skaneateles,* 300 N. Y. 115; *Rodgers v. Village of Tarrytown,* 302 N. Y. 115.) II. No New York case has defined the term "comprehensive plan". (*Udell v. Haas,* 21 NY2d 463; *Albright v. Town of Manlius,* 34 A D 2d 419.) III. The burden is on the town board and they have failed to sustain the burden.

Richard S. Mayberry and *Vincent Assini* for respondent. I. The town board had authority to attach conditions to the granting of an application for rezoning. (*Albright v. Town of Manlius,* 28 NY2d 108; *Church v. Town of Islip,* 8 NY2d 254.) II. The conditions attached by the town board exhibited competent and legitimate town planning. (*Mazzara v. Town of Pittsford,* 34 A D 2d 90; *Walus v. Millington,* 49 Misc 2d 104, *sub nom. Walus v. Gordon Realty Corp.,* 31 A D 2d 777.) III. The December, 1972 town board resolution further explains and supports the July, 1971 rezoning. ***104**

OPINION OF THE COURT

Jasen, J.

Wegman Enterprises, Inc., as contract-vendee,

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petitioned the respondent Town Board of the Town of Gates to rezone approximately 12 acres of land from an R- 8A residential classification to a B-1 commercial classification. The purpose of the rezoning was to permit development of the site as a retail shopping center for a Wegmans Food Market and other stores. After a hearing, the town board resolved to rezone the property, but imposed a series of conditions upon its rezoning. The most pertinent of the conditions, [FN1] which had given rise to this appeal, is the condition which provides "[t]hat said application for the construction of a retail supermarket by Wegman Enterprises, Inc., and related commercial structures, shall inure to the benefit of Wegman Enterprises, Inc., only, and for that specific purpose only."

> FN1 The remaining conditions provided that development occur within two years, that the Town Planning Board before granting final approval of the site plan take cognizance of the suggestions of the Monroe County Planning Commission, that certain buffers be provided, that expensive signal lights be installed, that architecture be of a colonial type and style, that the entire building perimeter be brick, no deliveries to be made after certain hours, that trash and garbage be handled by mechanical compactor and not be stored in the open, that extensive screening and landscaping be performed, that a particular type of nonglare lighting be provided, and finally, that no gasoline dispensing service station be installed.

Petitioners sought to invalidate the change in zoning as being arbitrary and capricious and not in accord with the comprehensive town plan adopted in 1963. When the matter first reached the Appellate Division (40 A D 2d 754), the court remitted it "to the Town Board for further proceedings to demonstrate that it acted in accordance with a comprehensive plan." Upon remand, the town board reaffirmed the new zoning classification, setting forth the reasons for the rezoning -- that the population of the town had increased, the area surrounding the parcel was already commercially developed, and that a shopping complex would further the general welfare of the community. Once again the petitioners challenged the town board's action, but the Appellate Division (43 A D 2d 899, 900) dismissed the petition, finding "that the action of the Town Board in adopting the zoning change was not arbitrary or capricious and was in accordance with the general comprehensive planning of the town".

***105**

While it is a fundamental principle of zoning that a zoning board is charged with the regulation of land use and not with the person who owns or occupies it (see *Matter of Weinrib v. Weisler,* 27 N Y 2d 592, affg. 33 A D 2d 923; 1 Rathkopf, Law of Zoning and Planning, p. 1- 24), we recognize that customarily, as is here illustrated, when a change of zone, a variance or a special permit is sought, there is a specific project sponsored by a particular developer which is the subject of the application. As a practical matter, the application is usually predicated on a particular type structure, often accompanied by architectural renderings, for a particular use by a specific intended user. In the usual case, the application and accompanying graphic material come to constitute a series of representations frequently bolstered at the hearing by additional promises or assurances made to meet objections there raised. Throughout, attention focuses on the reputation of the applicant and his relationship to the community and the particular intended use. And all too often the administrative or legislative determination seems to turn on the identity of the applicant or intended user, rather than upon neutral planning and zoning principles.

The error in this approach, however, is lack of adherence to the fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it. (See *Matter of Weinrib v. Weisler, supra*; *Vlahos Realty Co. v. Little Boar's Head Dist.,* 101 N. H. 460, 463; *Mayor v. Poe,* 224 Md. 428, 433; 1 Rathkopf, Law of Zoning and Planning, p. 1-24.) While it is proper for a zoning board to impose appropriate conditions and safeguards in conjunction with a change of zone or a grant of a variance or special permit (cf. *Church v. Town of Islip,* 8 NY2d 254), such conditions and safeguards must be reasonable and relate only to the real estate involved without regard to the person who owns or occupies it.

We believe that the resolution of the town board which provides that the rezoning of the land in question "shall inure to the benefit of Wegman Enterprises, Inc., only", is plainly personal to Wegmans itself and does not relate to the use of the property and the zoning thereof. In response to a question posed by a member of the town board during the hearing upon the application, the town

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attorney stated that the rezoning "cannot be used by any other individual or Corporation" and ***106** that the site would revert back to its previous restricted classification if for any reason Wegmans should not proceed with the development.

A subsequent resolution [FN2] by the town board, passed upon remand from the Appellate Division on the first appeal to that court, and intended to clarify the basis for the rezoning, cannot cure this patent deficiency which is prima facie evidence of spot zoning in its most maleficent aspect. (*Rodgers v. Village of Tarrytown,* 302 N. Y. 115, 124; see *Baylis v. City of Baltimore,* 219 Md. 164, 166, 167; cf. *Hubbard v. Raynor,* N. Y. L. J., Jan. 13, 1959, p. 15, col. 3.)

> FN2 The subsequent resolution, which did not revoke the personal grant of rezoning to Wegman, provides in pertinent part: "If the applicant should choose not to develop the parcel as proposed and approved by the Town Board it was and is the intention of this Board that any other developer would be acceptable provided that development plans and standards as proposed by the applicant would be of the same caliber as were approved by this Board."

We hold, therefore, that the condition imposed by the town board -- that the change of zone "shall inure to the benefit of Wegman Enterprises, Inc., only" -- is improper and unauthorized by law.

Accordingly, the order of the Appellate Division should be reversed, with costs, the petition granted and the matter remitted to the Supreme Court, Monroe County, with instructions to remand to the Town Board of the Town of Gates for reconsideration of the application.

Chief Judge Breitel and Judges Gabrielli, Jones, Wachtler, Fuchsberg and Cooke concur.

Order reversed, with costs, petition granted and matter remitted to Supreme Court, Monroe County, for further proceedings in accordance with the opinion herein.

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N.Y. 1975.

DEXTER v TOWN BD., TOWN OF GATES

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Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION ORDER NO. 725
Case No. 90-15
(Text Amendment - Fair Housing Amendments Act)
November 16, 1992

Pursuant to notice, a public hearing was held by the Zoning Commission for the District of Columbia on Monday, June 24, 1991. At that hearing session, the Zoning Commission considered a proposal of the District of Columbia Office of Planning (OP) to amend the text of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning, pursuant to 11 DCMR 102. The public hearing was conducted in accordance with the provisions of 11 DCMR 3021.

By memorandum dated August 29, 1990, OP submitted a proposal that provided for the implementation of the provisions of the Fair Housing Amendments Act of 1988 related to community-based residential facilities (CBRFs).

Prior to mid-1981, four types of supervised residential establishments were regulated: Personal Care Homes, Philanthropic or Eleemosynary Institutions, Convalescent or Nursing Homes, and Halfway Houses or Social Service Centers. With the exception of Convalescent or Nursing Homes and Halfway Houses or Social Service Centers under Federal or District operation, supervised residential establishments were permitted only as special exceptions in the lower-density residential zones.

Several court decisions (most notably Dixon v. Weinberger, Evans v. Washington and Burgos v. Washington) and new Federal legislation in the mid-to-late 1970s demonstrated a need for a comprehensive network of community-based residential facilities for persons in need of supervision and/or assistance. Public hearings on new zoning regulations designed to accommodate and implement the land use aspects of providing CBRFs were held on November 27, 1978, and May 21 and 24, 1979.

By Z.C. Order No. 347 dated July 9, 1981, the Zoning Commission established the present system of regulating CBRFs. That system, in part, permits not more than four (4) persons to be cared for as a matter-of-right in CBRFs of minimal neighborhood impact (also known as Class A CBRFs).

The present system includes seven (7) categories of CBRFs, which were cooperatively developed by the Office of Planning, the Department of Human Services and other public and private entities.

These seven categories of CBRFs include Youth Residential Care Home; Community Residence Facility; Health Care Facility; Emergency Shelter; Youth Rehabilitation Home; Adult Rehabilitation Home; and Substance Abusers Home.

The present regulations permit more community residence facilities than previously permitted to locate as a matter-of-right in residential zones (for a limited number of residents) and, in some cases, with a "Spacing Requirement". Youth Rehabilitation Homes, Adult Rehabilitation Homes and Substance Abusers Homes are permitted only as special exceptions, regardless of the number of residents housed or zone district in which located.

In conjunction with the requirements of Z.C. Order No. 347, the Departments of Human Services, Corrections, and Consumer and Regulatory Affairs developed licensing requirements for community-based residential facilities which parallel the new use classifications in the Zoning Regulations. These licensing requirements are contained in Title III of the D.C. Code.

In 1979, the Department of Human Services created a Central Referral Bureau which approves all placements in CBRFs. In 1984, the Office of Community-Based Residential Facilities was established to coordinate and monitor CBRFs throughout the District of Columbia.

Since September 1989, the Office of Corporation Counsel, the Department of Consumer and Regulatory Affairs, the Department of Human Services, the City Administrator, the Office of Community-Based Residential Facilities, the Office of Policy and Planning, and the Office of Planning had been assessing the need for modification to the Zoning Regulations as well as other aspects of the Community-Based Residential Facilities system as a result of the Fair Housing Amendments Act.

In late 1989, the Zoning Commission heard a presentation sponsored by the Mental Health Law Project on the land use and zoning implications of the recently enacted Federal law, the Fair Housing Amendments Act of 1988. By memorandum dated May 14, 1990, OP provided the Commission with related information and material about the impact of the Fair Housing Amendments Act. In its report, OP suggested that the Commission sponsor a forum to hear from District agencies involved in the analysis of the impacts of the Fair Housing Amendments Act on CBRFs. This forum was held on July 19, 1990 with the participation of several District agencies involved with community-based residential facilities.

As a result of the Fair Housing Amendments Act's explicit inclusion of handicapped persons as a protected class, the District of Columbia reviewed its laws and regulations to determine the effect of the Act and to ascertain where modifications were required. The CBRF Taskforce was convened to assess provisions of existing regulations in the housing and land use regulations areas which could be subject to legal challenge.

While the CBRF provisions of the Zoning Regulations do not explicitly treat handicapped individuals differently from others, the effect of the application of the regulations may inadvertently deny handicapped individuals in a group residential setting equal rights when compared to non-handicapped individuals.

This occurs directly as a result of the definition of "family" in 11 DCMR 199, which reads:

> "Family - one (1) or more persons related by blood, marriage, or adoption, or not more than six (6) persons who are not so related including foster children, living together as a single housekeeping unit using certain rooms and housekeeping facilities in common; Provided that the term family include a religious community having not more than fifteen (15) members."

Because the CBRF provisions of the Zoning Regulations allow only up to four residents as a matter-of-right for certain categories of facilities and also require Board of Zoning Adjustment (BZA) approval and impose spacing requirements on certain categories of facilities with five to eight residents, these provisions could be found to discriminate against handicapped individuals under the provisions of the Fair Housing Amendments Act.

By definition, up to six unrelated persons constitute a family for zoning purposes. One-family dwellings, therefore, may be occupied by a group of six unrelated individuals without the need for a certificate of occupancy of a single-family dwelling by a family related by blood or marriage. (Section 3203.1 of the Zoning Regulations requires a Certificate of Occupancy for use of any structure or land for use as other than a one-family dwelling.

The Office of Corporation Counsel, by memorandum dated May 19, 1990, noted that up to six unrelated adults can live anywhere in an R-1 District but only four unrelated handicapped adults who need to live in a community-based residential facility may live in an R-1 District without restriction. CBRF's for five to eight persons are permitted as a matter-of-right so long as there is not another CBRF housing five or more persons in the same square or within 1,000 feet. The Corporation Counsel memorandum states:

> "This concentration requirement imposes more restrictive treatment for CBRF's housing five or six individuals who are likely to be handicapped."

It is this aspect, placing greater restrictions on CBRFs which may house handicapped persons than are placed upon unrelated adults occupying a dwelling, which could be subject to challenge under the provisions of the Fair Housing Amendments Act if there is no legitimate government interest served by this difference in treatment. The Corporation Counsel's memorandum also notes that rooming and boarding houses, fraternity and sorority houses and dormitories are permitted as a matter-of-right in the R-4 District while the limitations on CBRFs are relaxed only lightly".

The notice of public hearing, which reflected the OP recommendations dated August 29, 1990, proposed to increase the maximum number of residents allowed in "Class A" facilities from the current four to eight, with no spacing requirement. This in effect, eliminated the "5 to 8" residents category in the R-1, R-3, R-4 and C-1 zones for "Class A" facilities (Youth Residential Care Homes, Community Health Care Facility, Community Residence Facility) which are now permitted as special exceptions and have spacing requirements.

As a result of these changes (which are more in line with the definition of up to six unrelated individuals as a family), the notice of public hearing proposed that a maximum number of two staff persons be added as a matter-of-right, in the up to eight residents category for "Class A" facilities.

"Class A" facilities in the R-5, SP, W, CR and C-2 zones would be modified to permit "9 to 15" residents as special exceptions with spacing requirements.

The treatment of all "Class B" and "Class C" facilities remained the same as would parking requirements which required one space for up to eight residents, two spaces for 9 and 15 residents and "as determined by the BZA" for more than 15 persons in all districts except in the C-3, C-4, and C-5 zones.

The District of Columbia Office of Planning, by memorandum dated June 10, 1991 and by testimony presented at the public hearing supported the proposal as contained in the notice of public hearing. OP stated the following:

> "It is as a result of the District's attempt to respond positively to the Fair Housing Amendments Act that the proposed regulations have been developed. This Act leads the District government to conclude that our current CBRF zoning regulations are vulnerable to

challenge since Class A facilities are those which are most likely to house people who come under the protection of the Fair Housing Amendments Act; the handicapped. The Office of Planning recognizes the magnitude of the proposed changes but also recognizes that the District cannot ignore its own responsibilities regarding its citizens who are in need of assistance. OP, therefore, recommends that the Commission adopt the proposed regulations as advertised with the proviso that the public hearing process is a process which can be used to gather additional information which may, in turn, provide alternative solutions to this issue."

The District of Columbia Department of Human Services, by statement dated June 4, 1991 and by testimony presented at the public hearing, supported the proposal to permit eight residents as a matter-of-right in CBRFs in low density residential zone districts.

The District of Columbia Department of Housing and Community Development, by letter dated June 10, 1991, supported the proposed amendments to the Zoning Regulations.

The District of Columbia Department of Public Works, by memorandum dated June 6, 1991, had no objections to the proposal because there were no major transportation impacts associated therewith.

The District of Columbia Metropolitan Police Department, by letter dated June 4, 1991, indicated that it had no reason to suggest any restrictions of the rights of the disabled to have full and free access as all others do.

The District of Columbia Office of Community-Based Residential Facilities, by statement dated June 20, 1991 and by testimony at the public hearing, supported the proposal.

The District of Columbia Department of Consumer and Regulatory Affairs, by memorandum dated July 2, 1991, concluded that reference to applicable municipal regulations should be included in the proposal, and noted that existing operators of CBRFs with four residents will have to comply with licensure, construction and fire regulations, if they increase the numbers of their residents to eight.

Advisory Neighborhood Commission (ANC) 3F, by letter dated June 6, 1991, opposed the proposal because institutional uses are not compatible with R-1 through R-2 zone districts, the increase of residents will change the density and character of such zone districts, and the current limit on CBRF residents is a reasonable restriction and not inconsistent with the Fair Housing Amendments Act.

ANC-3C, by resolution dated July 3, 1991, opposed the increase to eight residents, but supported an increase to six residents and the elimination of spacing requirements for Class A CBRFs of five or six residents.

ANC-3D, by letter dated July 12, 1991, opposed the proposal because the increase will change the character of "family neighborhoods" and will create an institution-type facility that would not assimilate well into the neighborhoods. ANC-3D supported an increase to six residents.

ANC-6B, by resolution dated July 18, 1991 and by letter dated August 2, 1991, opposed an increase to eight residents and supported an increase to six residents. ANC-6B believed that better treatment could be provided to residents of a smaller CBRF.

The Commission heard testimony from several persons and received many letters in support of the proposal. Issues that were raised included, but were not limited to, the following:

1. The proposal does not go far enough and should provide an increase for Class B and Class C CBRFs;

2. The proposal is a move in the right direction for people in need of receiving decent housing and treatment; and

3. The proposal complies with the Fair Housing Amendments Act.

The Commission also heard testimony from several persons and received many letters in opposition to the proposal. Issues that were raised and not previously mentioned include, but were not limited to, the following:

1. The proposal goes too far by permitting CBRFs to house more residents that could be housed by other unrelated people who complied with the zoning definition of "family";

2. The existing spacing requirements are discriminatory and contrary to the Fair Housing Amendments Act; and

3. The existing Zoning Regulations are not discriminatory because CBRFs are institutions and not "free market" housing.

The Commission concurs with the various ANCs, city agencies, and others that believe the Zoning Regulations may be discriminatory by restricting the number of Class A CBRF residents to a level that would not be restricted if the building was not a CBRF.

The Commission also believes that the space requirements in the current regulations and the classification of CBRFs, based on neighborhood impact, are appropriate and are not inconsistent with "reasonable restrictions" that are contemplated in the Fair Housing Amendments Act.

The Commission believes that increasing the matter-of-right CBRF residents to eight may be discriminatory, because others who are not related by blood, marriage or adoption; and who want to lawfully establish a family household would be limited to six persons, pursuant to the zoning definition of family.

The Commission further believes that after considering and balancing all of the issues related to the proposal, its decision is not inconsistent with the intent of the Fair Housing Amendments Act, is in the best interest of the District of Columbia, is consistent with the intent and purpose of the Zoning Regulations and Zoning Act, and is not inconsistent with the Comprehensive Plan for the National Capital.

A notice of proposed rulemaking was published in the District of Columbia Register on September 11, 1992 (39 DCR 6864). As a result of the publication of that notice, comments were received from the Dixon Implementation Monitoring Committee (DIMC) dated October 2, 1992.

The proposed action of the Zoning Commission to amend the Zoning Regulations was referred to the National Capital Planning Commission (NCPC), under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. NCPC, by report dated October 1, 1992, found that the proposed amendments would not adversely affect the Federal Establishment or other Federal interests nor be inconsistent with the Comprehensive Plan for the National Capital.

On November 16, 1992 at its regular monthly meeting, the Zoning Commission considered the DIMC comments, which proposed lifting density restrictions on emergency shelters and substance abuser homes, and amending the special exception procedures. The Commission determined that the issues by DIMC would have to be addressed by the CBRF Task Force or in a process that would require further hearings by the Zoning Commission.

The Zoning Commission has accorded ANCs 3C, 3D, 3F and 6B the "great weight" consideration to which they are entitled.

In consideration of the reasons set forth herein, the Zoning Commission of the District of Columbia hereby orders **APPROVAL** of amendments to the Zoning Regulations. The specific amendments are as follows:

1. **Amend paragraphs 201.1(n), 601.2(a), and 901.1(f) of the Zoning Regulations to permit as a matter-of-right not more than six (6) persons, excluding supervisors or staff and their families, to reside in certain types of community-based residential facilities (CBRF) by creating new subparagraphs 201.1(n)(1) 601.2(a)(1) and 901.1(f)(1) to read as follows:**

201.1(n)(1) 601.2(a)(1) 901.1(f)(1)	Youth residential care home, community residence facility, or health care facility for not more than six (6) persons, not including resident supervisors or staff and their families; or for not more than eight (8) persons, including resident supervisors or staff and their families and providing that the number of persons being cared for shall not exceed six (6).

2. **Retain the matter-of-right provisions of the Zoning Regulations for the number of emergency shelter residents, but create new subparagraphs 201.1(n)(2), 601.2(a)(2), and 901.1(f)(2) to read as follows:**

201.1(n)(2) 601.2(a)(2) 901.1(f)(2)	Emergency shelter for not more than four (4) persons, not including resident supervisors or staff and their families.

3. **Amend the following subsections and paragraphs of the Zoning Regulations to include the phrase "resident supervisors or staff and their families", instead of the existing phrase "resident supervisors and their family(ies)":**

201.1(n)	304.8	513.1(b)	711.1(c)
201.1(o)	305.1	513.1(c)	711.1(d)
218.1	305.8	513.1(d)	721.5
218.7	306.1	601.2(a)	732.1(a)
219.1	335.1	601.2(b)	732.1(b)
219.7	350.4(f)	616.1(a)	732.1(c)
220.1	357.1	616.1(b)	732.1(d)
220.7	358.1	616.1(c)	901.1(f)
221.1	358.8	616.1(d)	901.1(g)
300.3(d)	359.1	701.2	913.1(a)
303.1	359.3	701.3	913.1(b)
303.8	360.1	711.1(a)	913.1(c)
304.1	513.1(a)	711.1(b)	913.1(d)

4. Amend the following subsections and paragraphs of the Zoning Regulations to change all references to the number of residents from "five (5)" to "seven (7)":

201.1(o)	303.2	306.2	358.3
218.2	303.3	306.3	601.2
219.2	304.2	335.2	701.2
220.2	304.3	335.3	701.3
221.2	305.2	350.4(f)	721.5
300.3(d)	305.3	358.2	901.1(g)

Vote of the Zoning Commission at the regular meeting on November 18, 1991: 4-0 (Tersh Boasberg, Lloyd D. Smith, William L. Ensign and Maybelle Taylor Bennett, to approve as amended - John G. Parsons, not voting not having participated in the case).

This order was adopted by the Zoning Commission at its regular meeting on November 16, 1992 by a vote of 4-0 (Maybelle Taylor Bennett, William L. Ensign and Tersh Boasberg, to adopt, and Lloyd D. Smith, to adopt by absentee vote - John G. Parsons, not voting, not having participated in the case).

In accordance with 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register; that is, on JAN 22 1993

TERSH BOASBERG
Chairman
Zoning Commission

MADELIENE H. ROBINSON
Acting Director
Office of Zoning

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F

(R) Lois Williams
Reed Colfax

STIPULATED AGREEMENT BETWEEN
THE UNITED STATES AND THE DISTRICT OF COLUMBIA

The United States and the District of Columbia enter into this Stipulated Agreement in order to resolve a proposed lawsuit by the United States. The United States has notified the District of Columbia that it is prepared to file a lawsuit alleging that the District of Columbia, through its zoning rules and practices, has discriminated on the basis of handicap in violation of the federal Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988 ("the Fair Housing Act"), 42 U.S.C. §§ 3601-19. The proposed lawsuit would allege that the District of Columbia's zoning rules and practices significantly restrict and, in some instances, preclude housing for disabled persons in violation of the prohibitions against discrimination because of handicap contained in the Fair Housing Act.[1]

More specifically, the United States is prepared to allege, and the District of Columbia does not dispute, that the District of Columbia's zoning regulations and practices that are applicable to housing in areas zoned for multi-family housing include classifications based on disability which on their face and as applied violate the Fair Housing Act. These zoning regulations and practices place restrictions upon housing for persons with disabilities when such housing is considered a

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[1]For purposes of this Stipulated Agreement, the terms "handicap" and "disability," and any derivation of these terms, shall have the same meaning as the term "handicap" in the Fair Housing Act. 42 U.S.C. 3602(h).

"Community Based Residential Facility" ("CBRF"), even though no such restrictions are placed on housing for an equal number of non-disabled persons. The zoning regulations and restrictions applicable to housing for persons with disabilities but not to housing for non-disabled persons include: (1) a requirement that a special exception be obtained from the Board of Zoning Adjustment, (2) restrictions that prohibit housing for persons with handicaps from being located within five hundred feet or within the same square of other similar housing, and (3) an absolute cap on the number of persons allowed in certain housing for persons with handicaps.

In addition, the United States is prepared to allege, and the District of Columbia does not dispute, that the District of Columbia has, until recently, failed to provide a mechanism by which providers of housing for persons with disabilities may obtain an exemption from the District of Columbia zoning restrictions under the reasonable accommodation mandate of the Fair Housing Act. 42 U.S.C. § 3604(f)(3). While the District of Columbia has taken steps to rectify this situation by initiating the establishment of an appropriate mechanism, the mechanism does not contain criteria by which the responsible city official shall assess requests, nor are there time frames set within which a decision must be rendered.

To resolve the concerns of the United States, the District of Columbia has proposed to revise its zoning regulations so that housing for persons with disabilities in areas designated for

multi-family housing will be treated for zoning purposes in the same manner as housing for non-disabled persons. In addition, the District of Columbia has proposed to create a mechanism to ensure that eligible persons may request and obtain, if appropriate, a reasonable accommodation. Specifically, the District of Columbia shall propose to the Zoning Commission regulations to establish guidelines, criteria, and time frames for the processing of reasonable accommodation requests to supplement and amend the procedure set forth in the notice regarding reasonable accommodation requests published in the District of Columbia Register on February 9, 1996. The United States agrees that the amended provisions of the District of Columbia's zoning code, when enacted, cure the deficiencies that led the United States to prepare its lawsuit.

In entering into this Stipulated Agreement, the United States and the District of Columbia agree that the federal Fair Housing Act carries out a policy of the highest priority and that the United States and the District of Columbia believe it is in their mutual interest to work cooperatively to ensure that the District of Columbia acts in compliance with both the spirit and the letter of the Fair Housing Act. The District of Columbia, upon becoming informed of the United States' allegations concerning violations of the Fair Housing Act, has engaged in good faith negotiations to resolve the dispute. The District of Columbia has proposed a series of actions which, when implemented, will address the alleged violations of the Fair

Housing Act raised by the United States. The District of Columbia is intent upon implementing these actions without the need for a court order or contested litigation.

NOW, THEREFORE, upon consent and agreement of the parties to this Stipulated Agreement, it is hereby AGREED as follows:

I. Amendment of Zoning Regulations

A. The District of Columbia will remove the restrictions placed upon housing for people with disabilities in multi-family zones so that such housing is treated in the same manner as housing for people without disabilities: as a matter of right use. To accomplish that end, the District of Columbia will, no later than thirty (30) days after the date on which the District of Columbia executes this agreement, advise the District of Columbia Zoning Commission to initiate proposed rulemaking to amend the District of Columbia's zoning regulations contained at 11 DCMR § 330.5. This section of the District of Columbia's zoning regulations lists the uses that "shall be permitted as a matter of right in an R-4 district." 11 DCMR § 330.5. To this list of "as of right uses," the proposed amendment adds CBRFs which are intended and operated as housing for persons with handicaps. Because, under the District of Columbia's zoning regulations, uses that are permitted as of right in a R-4 zone are permitted as a matter of right in R-5 and all other less restrictive zones, this proposed amendment will allow CBRFs which are intended and operated as housing for persons with handicaps to be permitted as a matter of right in R-5 and all other less

restrictive zones as well as R-4 zones. The proposed amendment, which describes those CBRFs which will be permitted as of right in R-4 and less restrictive zones, is as follows:

> The following uses shall be permitted as a matter of right in an R-4 district: ...
>
> (i) Community-Based Residential Facility; Provided that, notwithstanding any provision in this title to the contrary, the Zoning Administrator has determined that such community-based residential facility, which otherwise complies with the zoning requirements of this title that are of general and uniform applicability to all matter of right uses in an R-4 district, is intended and operated as housing for persons with handicaps as that term is defined under § 3602(h), 42 U.S.C. § 3602(h).

Within the thirty (30) day period, the District of Columbia will take all actions necessary to allow the District of Columbia Zoning Commission to initiate rulemaking.

B. The District of Columbia will create a mechanism to ensure that eligible persons under the Fair Housing Act may request and, if appropriate, obtain a reasonable accommodation. To accomplish that end, the District of Columbia will, no later than thirty (30) days after the date on which the District of Columbia executes this agreement, advise the District of Columbia Zoning Commission regarding the proposed reasonable accommodation mechanism attached to this Stipulated Agreement as Attachment 1. Within this thirty (30) day period, the District of Columbia shall take all actions necessary to allow the District of Columbia Zoning Commission to initiate rulemaking.

C. The District of Columbia will regularly keep the United States informed of each step in the process of the amendment of the District of Columbia's zoning regulations set forth in §§ IA

and IB and, upon written request, will promptly provide the United States with documents pertaining to that process.

II. Interim Actions

A. The District of Columbia anticipates that it will take the Zoning Commission approximately 450 days to consider the proposed amendments referenced above, including the time necessary for application, notice, hearing and approval procedures. The District of Columbia will make all good faith efforts to enable the Zoning Commission to enact these proposed amendments within that period.

B. The District of Columbia shall take the following actions to ensure that eligible persons are not adversely affected by the length of time the Zoning Commission will require to enact the proposed amendments:

(1) Permit, as a reasonable accommodation under the Fair Housing Act, housing for persons with handicaps in R-4 and all less restrictive zones under the terms and criteria in the proposed amendment set forth in § IA until whichever of the following events occurs first: (a) the Zoning Commission enacts the proposed amendment referenced in § IA, (b) the Zoning Commission enacts an amendment which the United States, after notification from the District of Columbia pursuant to § VA, determines does not satisfy the terms of this Stipulated Agreement, or (c) the District of Columbia informs the United States in writing that the Zoning Commission has failed to enact

any legislation related to the proposed amendment and will not do so within a reasonable period of time; and

(2) Within thirty (30) days of the date of execution of this Stipulated Agreement, publish the reasonable accommodation mechanism set forth in Attachment 1 as administrative regulations that shall be followed from that time until the Zoning Commission enacts the proposed amendment as set forth in § IB above.

III. Reporting

Within six (6) months of the date of execution of this agreement and each six (6) months thereafter until the termination of this Stipulated Agreement as set forth in § V, the District of Columbia will submit to counsel for the United States a written report regarding requests for reasonable accommodation which will include the number of such requests in the previous six (6) month period; the number of requests that were granted, denied, or in which other action was taken; and a written explanation concerning those requests that were not granted. This responsibility will continue for a period of two (2) years after the date that the United States approves the District of Columbia's amendment to its zoning regulations pursuant to § V below.

IV. Record-Keeping

A. During the term of this Stipulated Agreement, the District of Columbia will retain all documents pertaining to zoning regulations regarding housing for persons with disabilities located in areas zoned for multi-family housing and

all documents pertaining to requests for reasonable accommodations. Such documents include those related to any application to construct, develop, or rehabilitate housing for use by people with handicaps in an area zoned for multi-family housing and any enforcement actions taken against housing occupied or intended to be occupied by persons with disabilities.

B. Upon reasonable notice to counsel for the District of Columbia, representatives of the United States will be permitted to inspect and copy all pertinent records of the District of Columbia at any and all reasonable times; provided, however, that the United States will endeavor to minimize any inconvenience to the District of Columbia from inspection of such records.

V. Termination

A. At such time as the District of Columbia believes it has satisfactorily enacted the proposed zoning amendments identified in §§ IA and IB, it will within ten (10) days submit a written report to counsel for the United States, including, but not limited to, documentation reflecting all action undertaken by the Zoning Commission. The United States will then have sixty (60) working days in which to inform the District of Columbia in writing whether the United States agrees that the District of Columbia has satisfactorily amended its zoning regulations. At such time that the United States submits its written agreement to the District of Columbia, this Stipulated Agreement will continue for two (2) years during which time the District of Columbia will submit reports required in § III. Upon receipt of the last

report due under § III of this agreement, this agreement will be terminated.

B. In the event the Zoning Commission approves the proposed amendments referenced in §§ IA and IB without changes and in no more than 450 days from the date of execution of this Stipulated Agreement, the United States will agree that the District of Columbia has satisfactorily amended its zoning ordinances and will not file its complaint in federal court.

C. In the event that the District of Columbia does not comply with the terms of this Stipulated Agreement, including, but not limited to those set forth in § II, or in the event that the Zoning Commission does not enact the proposed amendments referenced in §§ IA and IB in the form contemplated therein within 450 days of the date of execution of this Stipulated Agreement, the United States reserves its right to file its complaint in federal court seeking all relief and remedies that are available under the Fair Housing Act. In the event that the United States files its complaint in federal court, the District of Columbia will treat such a complaint as if it had been filed on December 27, 1994, and will be deemed to have waived any defense that it might be entitled to because the complaint was filed after that date, such as any defense based upon a statute of limitations, estoppel, or laches. The United States will inform the District of Columbia in writing prior to filing its complaint in federal court.

VI. Scope and Limitations of This Agreement

This Stipulated Agreement does not concern or address the legality of matters other than whether the provisions of the District of Columbia's zoning rules, regulations, and procedures at issue in the United States' proposed lawsuit comply with the Fair Housing Act. More specifically, it does not address or concern the District of Columbia's licensing rules and regulations related to dwellings for persons with disabilities, including the District of Columbia's use of the CBRF category in that context. This agreement shall not be construed as an endorsement by the United States of the CBRF classification or the District of Columbia's licensing or other laws that apply to or affect persons with disabilities. This Stipulated Agreement is not intended to mandate that housing for persons with disabilities be designated as a CBRF and recognizes that housing for persons with disabilities may be designated in other zoning categories, such as a rooming or boarding house. The designation of housing for persons with handicaps as a CBRF for zoning purposes under the provisions set forth in §§ IA and IIB(1) above shall have no bearing on how such housing is classified by the District of Columbia for licensing or other purposes. This Stipulated Agreement does not limit or affect the rights of third parties.

VII. Commitment to Work Together in Good Faith

Notwithstanding any other provision in this agreement, the parties will endeavor to work in good faith to resolve any issues that arise concerning this agreement.

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