BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Southeast Citizens for Smart Development, Appellant

Appeal No. 16791
Public Hearing: December 4, 2001, February 4 and February 12, 2002

ANC 6B

APPLICABILITY OF COMPREHENSIVE PLAN TO APPEAL OF A DECISION OF THE ZONING ADMINISTRATOR

On behalf of Father Flanagan's Boys and Girls Home, the Intervenor and Property Owner subject to appeal, we respectfully object to the introduction of evidence by Appellant related to the Comprehensive Plan for the reasons stated below. Appellant claims that the Zoning Administrator is bound by §112.6 of the Comprehensive Plan, and that the Ward 6 Element of the Plan takes precedence over the more general elements. Appellant's proposed interpretation of the Plan (and the Zoning Administrator's role in evaluating building permits) is erroneous as a matter of law, and should be rejected by the BZA.

I. The Comprehensive Plan Has Virtually No Role in a Decision by the Zoning Administrator

A. General Applicability

The Court of Appeals for the District of Columbia has established that "the Zoning Commission is the exclusive agency vested with the responsibility for assuring that the Zoning Regulations are not inconsistent with the Comprehensive Plan." *Tenley and Cleveland Park Emergency Committee v. District of Columbia Board of Zoning Adjustment*, 550 A.2d 331, 341 (D.C. 1998); *see also French v District of Columbia Board of Zoning Adjustment*, 658 A.2d 1023, 1034 (D.C. 1995). Thus, the Zoning

BZA
Case No. 16791
Exhibit No. 55
Board of Zoning Adjustment
District of Columbia
CASE NO.16791
EXHIBIT NO.55

Administrator has no power or authority to implement the Comprehensive Plan. *Tenley and Cleveland Park Emergency Committee,* 550 A.2d at 341 n.22 (discussing the limited role of the BZA); *French,* 658 A.2d at 1034 (discussing the limited role of the BZA). "The Zoning Administrator is limited to enforcing and certifying occupancy regulations." *Tenley and Cleveland Park Emergency Committee,* 550 A.2d at 341 n.22. Thus, residents may not appeal a decision of the Zoning Administrator on the basis that it is inconsistent with the Comprehensive Plan.

Community residents who contend they are aggrieved by an inconsistency between the Zoning Regulations and the Comprehensive Plan are not left without a remedy. Under the D.C. Code "[a]ny interested person may petition the Mayor or an independent agency requesting the promulgation, amendment, or repeal of any rule." D.C. Code §2-205(b) (1981); *see also Tenley and Cleveland Park Emergency Committee v. District of Columbia Board of Zoning Adjustment*, 550 A.2d at 340. Thus, Southeast Citizens for Smart Development ("SCSD") could have initiated before the Zoning Commission a petition to consider whether the existing Zoning Regulations were inconsistent with the Comprehensive Plan. The petition could have been submitted as soon as §201.1(n)(1) became effective. *Id.* Under the law, the Zoning Commission is the only forum capable of granting the relief SCSD seeks. *Id.* at 341.

The Court of Appeals for the District of Columbia addressed this issue in an almost identical case – *Tenley and Cleveland Park Emergency Committee* ("*TACPEC*").

In that case the Zoning Administrator issued a building permit for a proposed office building that was permitted as a matter of right under the Zoning Regulations. Neighborhood residents argued that the permit was improperly issued because the building would be in violation of the Comprehensive Plan. *Id.* at 333. The Court framed the issue in a manner that is similar to the argument here:

> In its own words, TACPEC claims that "[t]he heart of [its] case is that since the Comprehensive Plan controls land use actions in the District and the challenged permits violate the Plan, those permits are illegal, regardless of whether the permitted activity would comply with the zoning regulations."

Id. at 335 (citation omitted). However, the Court held: "Consideration of the District of Columbia Self-Government Act and the Comprehensive Plan demonstrate that the Comprehensive Plan is not self-executing and does not directly regulate the development of private property in the District of Columbia." *Id.* After exhaustively examining the relationship between the Home Rule Act and the Comprehensive Plan, the Court held, "the Zoning Commission is the exclusive agency vested with the power to enact zoning regulations for the District of Columbia." *Id.* at 336.

> While the [Comprehensive Plan Act and the Land Use Act] acknowledge that existing zoning regulations may be inconsistent in some instances with the policies outlined in the Comprehensive Plan, the Acts explicitly recognize that an examination of existing zoning regulations for conformance with the Comprehensive Plan is necessarily a time-consuming process to be carried out by the Zoning Commission assisted by the Office of Planning in a reviewing program to be developed after enactment of the

> Comprehensive Plan by the D.C. Council. In short, the Comprehensive Plan is not self-executing . . . .

Id. at 337. Accordingly, the Court determined that the Zoning Regulations have full force and effect until the Zoning Commission amends them. *Id.* at 336. The Court went on to establish the role of the District elements in the promulgation and amendments of the Zoning Regulations. It determined that the Comprehensive Plan, through the District elements, provides *policies* that act as a *guide* to future public decisions. *Id.* at 338. The elements do not "impose specific implementation techniques." *Id.* The court held:

> the language and the legislative histories of the Comprehensive Plan Act and the Land Use Act clearly reflect the intent of the D.C. Council that the process of conforming existing zoning regulations and maps to the Comprehensive Plan would occur after the Plan became effective and that matter-of-right real estate development in the District would continue while this process was underway.

Id. at 340. The Court further held that TACPEC should have initiated before the Zoning Commission a petition to consider whether the existing zoning regulations were inconsistent with the Comprehensive Plan. Because it had failed to do so, TACPEC had not exhausted its administrative remedies. *Id.* at 341.

The instant case is in all respects similar to *TACPEC.* Here, the Zoning Administrator issued a building permit for a proposed use that is permitted by the Zoning Regulations as a matter-of-right. Here, as in *TACPEC*, an association of community residents argues that the building and its use would be in violation of the Comprehensive

Plan. Here, as in *TACPEC*, the association appealed the Zoning Administrator's action to the BZA. The facts are similar and the arguments are the same. Under the law of the District of Columbia, as interpreted by its highest court, the arguments of SCSD cannot be sustained.

The BZA and the Zoning Administrator need not be concerned that the concerns of community residents have fallen on deaf ears. Before issuing Zoning Commission Order No. 725, which implemented the provisions of §201.1(n)(1), the Commission held a public hearing and solicited comments from interested parties. It heard arguments from ANCs that the proposed amendment would permit institutional uses that are not compatible with R-1 through R-2 zoning districts. (Z. C. Order No. 725, 5-6 (Nov. 26, 1992).) Even so, the Zoning Commission was required to take into account other considerations. A Stipulated Agreement between the United States and the District of Columbia reveals that the District of Columbia was subject to a lawsuit on the grounds that its zoning rules and practices discriminated on the basis of handicap in violation of the federal Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-19. (Stipulated Agreement Between the United States and the District of Columbia, at 1.) The allegations of the United States specifically listed as suspect practices the requirements that disabled persons obtain a special exception, the 500 foot rule, and an inadequately low cap on the number of disabled persons allowed in multi-family housing. (*Id.* at 2.) Further, the United States asserted that classifications may not be based on disability. (*Id.* at 1.) Pursuant to the hearing and information submitted, the

Zoning Commission considered and balanced all of the issues related to the proposed amendment and determined

> [the Zoning Commission's] 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.

(Z.C. Order No. 725 at 7.) Further, the Zoning Commission referred the proposed amendment to the National Capital Planning Commission, which also determined that §201.1(n)(1) was not inconsistent with the Comprehensive Plan. (*Id.*)

B. Interpreting the Plan – Section 112

Appellant also misreads how the Plan is to be interpreted. During the February 5, 2002 hearing, Chairperson Griffis expressed concern about the effect of §112.6 of the Comprehensive Plan on the propriety of the Zoning Administrator's decision. (Transcript of Hearing before the Board of Zoning Adjustment at 136 (Feb. 5, 2002)). That section purports to require that the Zoning Administrator evaluate permits in a manner consistent with the Comprehensive Plan. It provides:

> The zoning impact of the District elements of the Plan is not limited to areas where amendments to the Zoning Regulations are required to eliminate inconsistencies between the Plan and zoning:
>
> ...
>
> (c) In issuing or processing any building or construction permit, or any Certificate of

> Occupancy, the Zoning Administrator, the Board of Zoning Adjustment, and the Zoning Commission, shall evaluate the proposal in conjunction with the applicable sections of the Comprehensive Plan and the Comprehensive Plan Maps.

10 DCMR §112.6.

However, this section should be read in context with the entirety of Section 112, which, as a whole, provides a framework for interpreting the Plan. Section 112.3 very clearly states that the District elements of the Plan are "a guide intended to establish broad policies and goals while affording flexibility for future implementation and are not binding policy directives." 10 DCMR §112.3 (emphasis added). It further establishes that the elements of the Plan intentionally overlap. Thus, they "should be studied and executed in concert with each other and should be interpreted broadly." 10 DCMR §112.1(a). When one examines §112.6 in context, it becomes clear that §112.6 is not a legal mandate. It is a guiding framework that states broad policy objectives.

The Zoning Administrator's decision to issue the permit is in harmony with Section 112. For example, § 112.2 provides that "the interpretation of the District elements of the Plan should also be guided by the major themes set forth in §101.1…", which take precedent over the Ward 6 elements. 10 DCMR §112.2. The Boys Town projects are consistent with those themes because they are consistent with the Zoning Maps and the Land Use element of the Plan. Further, §112.1(c) establishes that the "Land Use element integrates the policies and objectives of all other District elements"

and "should be given greater weight than the other elements." 10 DCMR §112.1(c). The projects at issue here are consistent with the Land Use element, which has priority over §1731.1(d) of the Ward 6 element.

C. The Zoning Regulations Govern

It is undisputed that the Zoning Administrator is required to follow the Zoning Regulations. The regulations establish that the Zoning Administrator is charged with enforcing the Zoning Regulations. 11 DCMR §3200.1; *see also TACPEC*, 550 A.2d at 341 n. 22 ("The Zoning Administrator is limited to enforcing and certifying occupancy regulations."). Mr. Brian Furness, a witness testifying for SCSD, admitted that the approval of a CBRF is not directly regulated by the Comprehensive Plan. He testified:

> It [the Comprehensive Plan] does not, to the best of my knowledge, control it [CBRF development] directly. That's done through the zoning and through the licensing and permitting processes of the District government. The comprehensive plan should provide a framework in which those are considered.

(Transcript of Hearing before the Board of Zoning Adjustment at 143 (Feb. 5, 2002).)

Neither SCSD nor the Comprehensive Plan gives any indication of how the Zoning Administrator would take the Plan into account in issuing building permits while still adhering to the regulations. Most marked is SCSD's failure to explain how a particular building permit application addresses such concerns as those raised by Mr. Furness, including a "Special Treatment Area" or "dispersal of CBRFs.". The Zoning Regulations provide that the Administrator may not issue a permit for a building "unless

that structure complies with the provisions of *this title*." 11 DCMR § 3202.1 (emphasis added). If the Zoning Administrator had denied the Boys Town's application, the Administrator would have directly contradicted §201.1(n)(1). He does not have that discretion.

Case law establishes that even the BZA does not possess the discretion to ignore specific regulations in favor of broader policy objectives. For example, in approving applications for special exceptions, the applicant has the burden of showing that the proposal complies with the regulations, but once the showing has been made the Board ordinarily must grant the exception. *French*, 658 A.2d at 1033 (citing *First Baptist Church v. District of Columbia Board of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981)). In *Gladden v. District of Columbia Board of Zoning Adjustment*, 659 A.2d 249 (D.C. 1995), the BZA had granted an application for a special exception for establishment of a youth rehabilitation home in Ward 5. The home could not be established as a matter of right because it was designed to house 10 youths. The ANC objected to the application, arguing that "the area is already 'saturated' with group homes, including five in the surrounding five-block area and twenty-one altogether in Ward 5C." *Id.* at 252. The BZA granted the exception, concluding "while there may be a number of other facilities located in Ward 5, the Board is bound by the Zoning [R]egulations which allow facilities to be approved if they are not within 500 feet of each other or within the same square." *Id.*

Like the BZA in *Gladden*, the Administrator is bound by the zoning regulations. Because the proposed homes at issue in this action are intended to house only 6 youths, the use is permitted as a matter of right under §201.1(n)(1). Furthermore, there are no spacing requirements in §201.1(n)(1). As §201.1(o) demonstrates, spacing requirements, where applicable, are expressly included in the Zoning Regulations. Most significantly, if the Zoning Administrator were allowed to override explicit regulations because the Administrator considers them inconsistent with the Comprehensive Plan, the "careful balancing" of the issues and interests involved expressed by the Zoning Commission in Z.C. Order No. 725 would have been in vain.

II. The Project is Consistent with the Plan

Notwithstanding, Appellant argues that the building permits before the BZA are inconsistent with the Comprehensive Plan. Appellant's argument is unsupportable. As established above, the Land Use element is predominant in evaluating the Plan. Here, the D.C. Generalized Land Use Map designates the subject properties for moderate density residential development, or row houses and garden apartments. The four detached homes are safely compatible with this land use designation. The Maps specifically call out in the density category – the houses are compatible with the most restrictive Land Use Map category and the most restrictive zoning (R-1). Accordingly, the four youth residential care homes satisfy several elements of the Comprehensive Plan while not being in conflict with any of its provisions.

Of particular note, a major policy of the Housing Element of the Plan is that "[t]he District government recognizes the need to increase the supply of child care facilities in each residential area and should intensify District government efforts to identify and address issues applicable to child care." 10 DCMR §300.7. In support of this policy, District agencies are directed to "[w]ork to achieve an adequate supply of child care facilities by allowing the establishment of new or the expansion of existing child care facilities in residential and mixed use areas;" 10 DCMR §306.2(q). Additionally, the Ward 6 element of the Plan declares that "CBRF's are an important element of the human services delivery system. They provide housing for a number of individuals and families in need of various types of public assistance." 10 DCMR §1728.5.

Other Comprehensive Plan elements encourage the care of handicapped children as well as neglected children. The majority of Boys Town's children qualify as handicapped under the Fair Housing Act and are therefore entitled to its protections. Section 1000.1 of the Human Services Element of the Comprehensive Plan states that "[t]he availability of health and social services is critical to the District community," [including the] (subsection (d)) "[c]are of . . .the handicapped, children (ages 0-13), [and] youth (ages 14-21)."

SCSD invokes §1731.1(d) of the Ward 6 Plan and quotes:

> Prevent further concentration of community-based residential facilities ("CBRF's") in Ward 6 neighborhoods

> and require future development of the CBRF's to be in accordance with the District-wide CBRF plan."

The SCSD conveniently omits the remainder of the quoted sentence. The entire quote reads as follows:

> Prevent further concentration of community-based residential facilities ("CBRF's") in Ward 6 neighborhoods and require future development of the CBRF's to be in accordance with the District-wide CBRF plan, except that efforts to prevent further concentration of community-based residential facilities shall not violate the Fair Housing Amendments Act..."

§1731.1(b)(emphasis added).

Citing that provision, SCSD argues that the Zoning Administrator should have denied Boys Town's application in order to prevent further concentration of community based residential facilities in Ward 6.[1] However, if the Zoning Administrator had denied the application, the Administrator would have run afoul of the second part of the provision providing that the efforts to prevent further concentration of community based residential facilities shall not violate the Fair Housing Act. As mentioned in Boys Town's pre-hearing submission, the majority of the children served by Boys Town qualify as handicapped under the Fair Housing Act.

---

[1] Other Ward plans contain similar provisions. See §1527.1(d)(1)(Ward 4), §1827.1(b)(Ward 7).

If there had not been community opposition and discrimination against persons with disabilities, the Fair Housing Act would not be necessary. The arguments of SCSD are precisely the types of arguments that go to the heart of the Fair Housing Act. The section of the Zoning Regulations (201.1(n)(1)), under which Boys Town received its approvals for the Building Permits, was specifically enacted to aid the District's compliance with that Act, and to prevent a lawsuit by the United States. Therefore, § 1731.1(d) is of no consequence in this appeal – the children of Boys Town are handicapped, and 11 DCMR §201.1(n)(1) was enacted to comply with the Fair Housing Act. Therefore, the Zoning Administrator's approval of Boys Town's permit is expressly *consistent* with the Comprehensive Plan.

III. Conclusion

The Zoning Administrator is charged with implementing the Zoning Regulations – not the Comprehensive Plan. Even if the Zoning Administrator were required to address the Plan, he would have found that the four separate Boys Town homes were consistent with it. Accordingly, the Zoning Administrator's decision should be affirmed.

Respectfully submitted,

Phil T. Feola

Martin P. Sullivan

February 12, 2002

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2002, a copy of the Applicability of Comprehensive Plan was served by hand-delivery to:

Andrea Ferster, Esquire
1100 17th Street, N.W.
Washington, D.C. 20036

Toye Bello
Acting Zoning Administrator
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Washington, D.C. 20002

Marie Brown, Esquire
Office of the Corporation Counsel
441 Fourth Street, N.W.
Room 600 South
Washington, D.C. 20001

Kenan Jarboe
Chair, ANC 6B
921 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

Martin P. Sullivan, Esq.
Shaw Pittman, LLP
2300 N Street, N.W.
Washington, D.C. 20037

Document #: 1190039 v.5