BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Appeal of Zoning Administrator's Decision Allowing the Location of Father Flanagan's Boys Town Phase I, a Residential Group Home at premises 1308, 1310, 1312 and 1314 Potomac Ave., S.E. (Square 1045, Lots 134, 136, 137, 138).	) BZA No. 16791

BRIEF OF APPELLANT SOUTHEAST CITIZENS FOR SMART DEVELOPMENT, INC.

This brief is submitted to address the legal issues raised by this appeal, including legal issues identified by this Board, as follows:

(1) whether the Zoning Administrator erred by failing to correctly apply the definition of "Community Based Residential Facility," which definition contemplates that such a "facility" may include multiple buildings on several lots of record;

(2) whether the Zoning Administrator had the authority to consider the four building permits that are the subject of this appeal as a single "facility" for purposes of determining whether the Boy's Town Capitol Hill Campus exceeded the occupancy restrictions on matter of right CBRF development, notwithstanding the zoning regulations governing Building Permits (11 DCMR § 3202.3) or language in the BZA's decision in Application # 16531 granting a special exception for Boy's Town's CBRF at 4801 Sargent Road, N.E.

(3) whether the Zoning Administrator erred in failing to consider the Ward 6 Plan of the D.C. Comprehensive Plan in determining that the Boys Town CBRF consitutes a matter-of-right development.

BZA
Case No. 16791
Exhibit No. 64

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Board of Zoning Adjustment
District of Columbia
CASE NO.16791
EXHIBIT NO.64

I. The Zoning Administrator Failed to Correctly Apply the Definition of "Community Based Residential Facility" Which Definition Contemplates that "Facilities" May Include Multiple Buildings Serving A Single Use Located On Several Record Lots.

The Zoning Administrator testified that his role involved one of simply applying the zoning regulations in a "mechanical" or "clerical" fashion, and that he possesses no discretion to view the building permits as part of a single facility where they involved multiple structures on separate record lots, because no regulation specifically authorized him to do so. Transcript, at 193, 215 (Feb. 12, 2002). As a result, the Zoning Administrator testified that it was irrelevant to his determination that "the four buildings were part of a larger project," and he therefore ignored the relationship between the four building permit applications, apparent on the face of the applications themselves. Id, at 196, 207. The Zoning Administrator testified that the only circumstance under which he would look "cumulatively" at the occupancy levels in separate buildings are when these buildings are on a single lot of record. Id, at 226.

As support for this conclusion, the Zoning Administrator explained that a "Community Based Residential Facility," by definition, can consist of no more than one building, and Section 3202.3 of the Zoning Regulations requires that no more than one principle building be located on a single lot of record. Id, at 237, 239. This reasoning, however, is directly at odds with the definition of "Community Based Residential Facility" ("CBRF") and "Youth Residential Care Home" ("YRCH"), both of which are defined as a "facility," and thus contemplate the possibility that a single CBRF may consist of more than one building. Moreover, nothing in the plain language of Section 3202.3 of the Zoning Regulations or the BZA's Decision in Application # 16531 prohibits the Zoning Administrator or this Board from considering whether four buildings on separate record lots are nonetheless part of a single "facility" for purpose of the spacing and

occupancy restrictions governing matter-of-right CBRF development in the C-2-B zone.

A. The Definition of CBRF in the Zoning Regulations Requires the Zoning Administrator To Consider All Buildings Comprising Such A Facility Without Regard To Whether Such Buildings Are Located On Separate Record Lots.

The Zoning Administrator's refusal to consider whether the four buildings proposed by Boys Town were part of a single "facility" is inconsistent with the zoning regulations pertaining to CBRFs. Nothing in the definition of Youth Residential Care Home (the specific subcategory of CBRF applicable here) states or suggests that such a use consists of a single "building" or "structure." Instead, the Zoning Regulations define Youth Residential Care Home" as "a *facility* providing safe, hygienic, sheltered living arrangements for one (1) of more individuals less than eighteen (18) years of age, not related by blood, adoption, or marriage to the operator of the *facility*, who are ambulatory and able to perform the activities of daily living with minimal assistance." Id. § 199.1 (emphasis added). Likewise, a "Community Based Residential Facility" is defined as "a residential *facility* for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living." Id. (emphasis added).

It is also clear from the 1981 Zoning Commission order adopting the principles that must guide zoning decisions relating to CBRFs that the focus of zoning review of CBRFs is on "facilities" and not buildings or structures, as follows:

1. The *facilities* should be dispersed as equally as possible around the entire District of Columbia.

2. No single area should contain a disproportionate share of such *facilities*, so as to be adversely impacted by the concentration of such facilities.

3. Smaller *facilities*, approximating the size and characteristics of families, should be encouraged, to lessen impact, increase compatibility and provide for true alternatives to institutional settings.

4. The size and density of such *facilities* should be generally consistent with the size and density permitted in the various zone districts contained in the Regulations.

Zoning Commission Order 347, at 4 (July 9, 1981) (emphasis added). These principles were not altered or changed by the 1992 amendments to specific CBRF occupancy and spacing requirements. See Zoning Commission Order 725 (Nov. 16, 1992).

Likewise, the regulations specifying the spacing and occupancy restrictions application to CBRFs do not in any way require the Zoning Administrator to focus exclusively on individual buildings or record lots rather than facilities. Section 732.1(a) of the zoning regulations provides that a Youth Residential Care Home for 16 to 25 persons, not including resident supervisors or staff and their families, must be approved as a special exception by the BZA. 11 DCMR § 732.1(a). Section 721.5 provides that

> A youth residential care home . . . for seven (7) to fifteen (15) persons, not including resident supervisors or staff and their families, shall be permitted in a C-2 district as a matter of right; 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 there shall be no property containing an existing community-based residential facility for seven (7) or more persons within a radius of five hundred feet (500 ft.) from any portion of the subject property.

Id. § 721.5. Rather, these regulations provide that the specified spacing and occupancy restrictions apply to "facilities."

The word "facility" is not specifically defined by the Zoning Regulations; therefore, it must have the meaning given in *Webster's Unabridged Dictionary*. Id. § 199.2(g). See Concerned Citizens of Brentwood v. Board of Zoning Adjustment, 634 A.2d 1234, 1243 (BZA appropriately relied on *Webster's* dictionary to define terms otherwise undefined by its regulations). According to *Webster's*, a facility is "Something that is built, constructed, installed, or established to perform

some particular function or to serve." Webster's Third New International Dictionary (G & C Merriam & Company 1971). See Transcript, at 148 (Feb. 5, 2002). Thus, the use of the word "facility" (rather than "building," "unit" or other word denoting a single structure) in the regulatory definitions of "Community Based Residential Facility" and "Youth Residential Care Home" and in the regulations establishing occupancy and spacing restrictions plainly signifies that such facilities can be comprised of more than one building that serve or perform a particular function.[1] Even Boys Town's own zoning expert conceded that a "facility" can consist of more than one building, and that it is possible that "a single facility could occupy two different buildings, or in fact, two different lots." Transcript, at 252, 254, 259, 262-63 (Feb. 19, 2002).

Despite the plain language of these regulations, Zoning Administrator testified that the use of the word "facility" in "community based residential *facility*" in fact means "building," and that a Community Based Residential Facility cannot, by definition, consist of more than one building. Transcript, at 237-239 (Feb. 12, 2002). Thus, the Zoning Administrator testimony that he was compelled by the zoning regulations to disregard evidence that the four proposed buildings were part of a single "facility" is based on a clearly erroneous definition of "facility."

Significantly, the only "precedent" cited by the Zoning Administrator or the owner's zoning expert for focusing zoning review exclusively on the building on a particular record lot

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[1] A number of courts have acknowledged that the *Webster's* dictionary definition of "facility" plainly includes all buildings "assembled for a purpose; the common purpose unite the pieces." In re Continental Airlines, 138 B.R. 430, 436 (Bkrpt. D. Del), rev'd on other grounds, 149 B.R. 76 (D. Del. 1993) (finding that *Webster's* defines "facility" as "something (as a hospital, machinery, plumbing) that is built, constructed, installed or established to perform some particular function or to serve a particular purpose," and that, applying this definition of "facility," a "facility" must include all buildings used by an airline at a particular airport) (quoting *Webster's Third New Int'l Dictionary*, unabridged, pp. 812-13). See also United States v. Atlas Minerals and Chemicals, Inc., 1995 U.S. Dist. LEXIS 13097, *74 (E.D. Pa. August 22, 1995) ("The Lyon Station facility is a 225 acre, *multiple building* facility with the following operations: . . .")

rather than a facility as a whole was uses such as grocery stores, single family homes, and apartment houses. See Transcript, at (Feb. 19, 2002) (apartment building); Id. at 238, 269 (supermarket or grocery shop); Id. at 263 (single family dwelling); Transcript, at 227-28 (Feb. 12, 2002) (flats and apartment buildings). However, these uses are not defined as consisting of "facilities" but as "buildings" or "parts of buildings." See 11 DCMR. § 199.1. ("Apartment house - any *building* or part of a *building* . . ."; "Dwelling - a *building* designed or used for human habilitation . . ." ; "Flat - a two family dwelling"). Accordingly, it is irrelevant that zoning review of apartment houses and flats focuses on individual buildings without regard to common ownership or management of buildings on adjoining lots, since the zoning restrictions applicable to these uses do not apply to "facilities."

Thus, a ruling requiring the Zoning Administrator to consider the occupancy in all component buildings, even those on adjacent lots, in determining whether a CBRF is entitled to matter-of-right permitting, will not establish a precedent requiring such reviews in the case of apartment buildings, grocery stores, or other uses defined as "buildings." By contrast, as noted above, CBRFs and Youth Residential Care Homes are defined as a "facility" and *not* as a "building," and the definition of "facility" plainly contemplates the possibility that a "facility" can consist of more than one building.

Indeed, a ruling by this Board permitting the Zoning Administrator to ignore the definition of "facility" and consider only the occupancy in each of the facility's buildings will set an adverse precedent with respect to the balance between CBRFs and other residential uses sought by the zoning regulations. The zoning regulations governing CBRFs were developed "to balance then needs and desires of . . . the occupants of the facilities who use the services, the operators of the

facilities who provide the services and the residents of surrounding neighborhoods who may be affected by the [CBRF] services." Zoning Commission Order 347, at 4 (July 9, 1981). In the C-2-B zone, the Zoning Regulations balance these needs by allowing only small Youth Residential Care Homes (those with six or fewer persons) to locate as a matter-of-right, and by requiring larger facilities to satisfy certain dispersal and occupancy requirements as a condition of matter-of-right development. 11 DCMR §§ 721.5, 732.1(a). Allowing a 24-person CBRF to locate, and then incrementally expand on a building-by-building basis on successive adjoining lots as a matter-of-right will undermine this very carefully crafted balance by allowing CBRF operators unlimited ability to develop and operate CBRFs in or near residential neighborhoods that are larger than the regulations permit, without the protections to nearby residents afforded by BZA review.

Thus, both the letter and spirit of the Zoning Regulations require that the occupancy and spacing restrictions governing matter-of-right CBRF location in the C-2-B zone be imposed on a "facility" not a building or structure. To implement these regulatory objectives, the Zoning Administrator may not focus exclusively on the occupancy of any individual building within that facility, and ignore the building's functional relationship to commonly-owned buildings on adjoining lots. Rather, the focus of the Zoning Administrator's review must be on whether there is a functional relationship between the proposed buildings such that they are part of a single "facility," and if they are, whether the "facility" as a whole exceeds the applicable occupancy limits on matter-of-right use.

B. Section 3202.3 of the Zoning Regulations Does Not Prohibit the Zoning Administrator From Applying the Applicable Spacing and Occupancy Restrictions to all Buildings That Comprise The Facility, Including Buildings Located On Adjoining Record Lots.

The Zoning Administrator testified that the only zoning regulation that prohibited him from considering several buildings to be a part of a single facility if they were to be built on separate lots of record was Section 3202.3 of the Zoning Regulations. Transcript, at 222-23 (Feb. 12, 2002). However, this assumption is flatly contrary to the dictionary definition of the word "facility," adopted by the zoning regulations, which, as noted above, plainly contemplates that a "facility" can consist of more than one building.

Nothing in the plain language of Section 3202.3 either expressly or implicitly repeals this definition of "facility," or the language in the applicable zoning regulations that expressly applies occupancy or spacing restrictions to "community based residential *facilities*." The plain language of Section 3202.3 of the Zoning Regulations simply states, as matter of building permit control, that only one principal building will be permitted on a single record lot.

As the Zoning Administrator conceded, a property owner who submits separate building permit applications for several buildings, each of which is located on a separate record lot, is not necessarily entitled to matter-of-right approval. Transcript, at 218 (Feb. 12, 2002). Rather, other provisions of the zoning regulations establishing the use restrictions within a given zone are controlling. Id. It is the specific restrictions applicable to a specified use that constrain the discretion of the Zoning Administrator in determining whether a proposed use is entitled to matter-of-right approval. In this case, the applicable use restrictions for CBRFs govern "facilities" not "buildings" and do not the state any exception for a single "facility" that is comprised of multiple buildings located on adjoining record lots.

Indeed, the irony of the Zoning Administrator's reliance on Section 3202.3 is that it creates a direct conflict with the regulatory definition of CBRF. Under the Zoning

Administrator's view, any CBRF that consists of multiple buildings on subdivided lots must be treated as separate "facilities." As a result, he is forced to define "facility" as being limited to "building" – a definition that is flatly contrary to the definition adopted by this Board (through reference to the Webster's Dictionary definition and by virtue of the express omission of word "building" in the regulatory definition of CBRF). It is a well established principle of statutory and regulatory construction that express provisions control over general provisions. "Facility" is expressly defined in the zoning regulations, and may include more than one building. By contrast, section 3202.2 simply requires each proposed principal building to be on a separate recorded lot; it does not expressly bar the zoning administrator from considering whether the buildings are part of a single CBRF. Hence, Section 3202.3 cannot be given a meaning that negates the definition of "facility."

Thus, the building permit requirements of 3202.3 cannot be applied in a manner that effectively repeals the definition of "facility" employed by the zoning regulations applicable to CBRFs. Instead, where a "facility" consists of more than one building, the Zoning Administrator is required to apply any applicable occupancy or spacing restrictions to the whole "facility," even where the buildings comprising this facility are located on adjoining lots of record.

C. The Zoning Regulations And Established Principles of Zoning Law Define a "Lot" as Including Adjoining Lots in Common Ownership Where Reliance on Record Lots Would Circumvent Zoning Restrictions.

While the concept of the "lot" is a critical reference for the Zoning Administrator, the zoning regulations clearly do not confine all zoning review to "record lots." Rather, the zoning regulations specifically distinguish between "lots" and "lots of record," and recognize that: "A lot may or may not be the land so recorded on the records of the Surveyor of the District of

Columbia." 11 DCMR § 199.1. Thus, the "lot" that provides the reference for the Zoning Administrator's review need not be limited to the "lot of record."

Here, the zoning regulations do not define CBRFs or state the applicable restrictions in terms of "record lots." As a result, the Zoning Administrator has the authority to review a CBRF that may be located on several "record lots" as being on a single "lot" for purposes of the applicable spacing and occupancy restrictions on matter-of-right development.

This authority is supported by well accepted principles of zoning, acknowledging the authority and even the obligation of zoning officials to consider adjacent lots in common ownership as a single "lot" for purposes of granting zoning approvals. As one Massachusetts decision explained:

> In the absence of specific zoning code provisions defining a 'lot' in terms of sources of title or assessors' plans, the Supreme Judicial Court has consistently held that *adjoining parcels* may and, indeed in certain instances, *must* be considered one lot for zoning purposes.

Heald v. Zoning Bd. Of Appeals of Greenfield, 380 N.E.2d 170 (Mass. App. 1978) (emphasis added). See also 2 Anderson, American Law of Zoning, § 9.63 (Lawyer's Coop. 1986) (common ownership of adjacent lots).

In sum, the Zoning Administrator's interpretation of Section 3202.3 is not supported by the plain language of the regulations, and would be in direct conflict with the definition of "facility" as used in the regulations governing CBRFs. Moreover, allowing a limited focus on the occupancy level of individual buildings proposed rather than the facility as a whole would allow developers to use subdivided lots as a way to evade the zoning regulations requirement of BZA review of certain large CBRFS, by piecemealing the facility so that its component buildings,

considered separately, fall under the threshold standards for BZA review. As the Court in the Heald case pointed out, "It would be a peculiarly restrictive zoning code which tied owners to descriptions of record." 380 N.E.2d at 173. Commonly owned adjacent lots must be considered as a whole under appropriate circumstances, such as this one, in order to prevent developers from circumventing the occupancy and spacing restrictions applicable to CBRFs and other facilities.

D. Nothing in this Board's Decision in Application 16531 Creates Binding or Controlling Precedent in this Case.

This Board requested that the parties address whether this Board has the authority to "disavow" a sentence in the BZA Decision and Order in Application 16531, granting special exception approval to the Boys Town's CBRF at 4801 Sargent Road, N.E. That sentence asserts as follows: "If the subject property had been subdivided so that each home was on a separate lot, each of the four homes could have been used as a youth residential care home as a matter of right. See 11 DCMR § 300.3." See Owner's Response to Appellant's Pre-hearing Submission, Exhibit J.

This sentence creates no binding or controlling legal precedent in this proceeding. Specifically, this sentence in the Sargent Road decision does not constitute "law of the case" that precludes this Board from reaching a contrary result in this proceeding, which involves a different project and a different administrative proceeding. Further, no principles of administrative *res judicata* or issue preclusion apply here, since neither Southeast Citizens for Smart Development, Inc. nor ANC 6B were parties to the Sargent Road proceeding. It is well established that "a person who is not a party is not bound by an [administrative] adjudication." Davis, K., Administrative Law Treatise, 2d Ed., § 21:7 (Davis Pub. Co. 1983). Thus, this Board is not

compelled by any principles of administrative *res judicata* to issue a decision in this case that applies any conclusion made or reached in Application 16531.

Nor is this Board required to view this isolated (and gratuitous) sentence in the Sargent Road decision as precedent that must be either followed, distinguished, or even acknowledged. The view expressed – that four buildings on four separate lots would be entitled to matter of right approval – was simply *obiter dictum* to that decision. *Obiter dicta* is defined as "Statements and comments in an opinion concerning some rule of law or legal proposition not necessary involved nor essential to the determination of the case in hand." Black's Law Dictionary, Rev. 4th Ed. (West 1968). See Albertie v. Louis & Alexander Corp, 646 A.2d 1001, 1005 (D.C. 1994) (dictum is "Language in an opinion which... . .[is] entirely unnecessary for the decision of the case..."") The question of whether the spacing and occupancy restrictions applicable CBRF's should be applied to each building on a separate record lot rather than the CBRF as a whole (*i.e.*, the issue directly raised by this appeal) was not before this Board in the Sargent Road case, since all buildings comprising the Sargent Road CBRF were on a single lot of record. Clearly, this assertion was not essential or even necessary to the BZA's decision in that case.

The status of this assertion as *dictum* is also evidenced by the context in which the assertion is made. D.C. Court of Appeals has held that, "by definition, *dictum* is not necessary to the resolution of a case, . . .there is simply insufficient basis to believe that it was considered with appropriate care and attention to warrant precedential effect." Umana v. Swidler & Berlin, Chartered, 669 A.2d 717, 720 n. 9 (D.C. 1995). Here, the above-cited assertion in BZA Decision and Order in Application 16531 is not stated as either a finding of fact nor a conclusion of law, but is simply noted, as a "Preliminary Matter." This issue was not identified as a matter of dispute

in that case nor even addressed by the parties (including Boys Town) in their post-hearing submissions or proposed findings of fact and conclusions of law. See Exhibit 4 to Appellant's Pre-hearing Submission (Boy's Town's post-hearing brief and proposed findings of fact and conclusions of law). There is no indication that this Board was even aware that it was deciding a disputed question of law likely to have precedential effect in the disposition of subsequent cases. Accordingly, any reliance in this case by Boys Town on the assertion in the Sargent Road decision that four CBRF buildings were entitled to matter of right treatment simply because they were on separate record lots was not justifiable. Rather, as *obiter dicta,* this assertion simply lacks precedential value. Albertie v. Louis & Alexander Corp, 646 A.2d at 1005 ("dictum . . .[has] no effect as indicating the law of the District.").

Even assuming, solely for the sake of argument, that the assertion in the Sargent Road case were not *obiter dictum* but instead could somehow be considered an adjudicated conclusion of law in that proceeding, this Board would still be free to disavow this finding in this proceeding. As noted above, the Sargent Road case involved a separate project in a different location altogether, and Appellants were not involved in that proceeding. The zoning regulations contain no articulated policy that adjudicative decisions by the BZA constitute a body of decisional law entitled to precedential or *stare decisis* effect, nor would it be appropriate to do so. Decisions of this Board are not published in the D.C. Register, the D.C. Code, or in the Daily Washington Law Report, or in any private or public compendium of zoning decisional law. As a result, a decision made in a particular adjudication cannot create well settled law with precedential effect in the same manner as a published body of adjudicated law. See, e.g., In re Pearson, 628 A.2d 9, 98 n. 8 (D.C. 1993) (unpublished decision cannot be invoked by Board of Professional Responsibility as

controlling precedent).

In any event, this Board should certainly not accord this "precedent" undue weight to this assertion because, for all the reasons stated above, this assertion is wrong. Rather, the Zoning Administrator (and this Board) is required to determine whether the Boys Town Pennsylvania Avenue Campus is a single "facility," taking into account the fact that a "facility" is defined by its function or use, not the number of buildings or lots in which the use takes place. The importance of correctly interpreting the zoning regulations and avoiding the creation of adverse precedent that would undermine the enforcement of zoning principles applicable to CBRFs therefore outweighs any reliance that Boys Town may have placed on statements to the contrary in this Board's Sargent Road, N.E. decision.

II. The Boy's Town Capitol Hill Campus Constitutes a Single CBRF.

There is ample evidence in the record that would allow the Zoning Administrator (and this Board) to conclude that the four buildings are part of a single CBRF for 24 children. The site plans submitted by the owner show that facility will consist of four residential units enclosed within a self-contained, fenced compound, accessed by a single driveway. See Transcript, at 345-46 (Feb. 19., 2002); Exhibit 8 to Appellant's Pre-hearing Submission. Likewise, the description of the facility by the owner's architect, submitted as part of the Environmental Impact Screening process, described the project as consisting of "the Pennsylvania Avenue Campus of Girls and Boys Town." Id. Boys Town's own Community Update material submitted to this Board describes the Capitol Hill facility in the singular, for example, as "*The residence*," which provides longer term care for "twenty-four children." See Boys Town of Washington, Capitol Hill Residence: Community Update (June 12, 2000). Moreover, each of the four units will be owned,

managed, financed, and supervised by Boys Town; will have shared staff, such as social workers and administrative staff; have shared recreation space; and will perform a common function as a youth residential care home. Transcript, at 306-13, 325. (Feb. 19, 2002). These homes are therefore part of a single "facility."

Indeed, the Zoning Administrator specifically pointed out, in determining that the Boy's Town Sargent Road facility, which also consisted of four residential units for only six children each, nonetheless required a special exception as a facility for 24 children: "The applicant will own the entire property and will set program requirements on an overall basis (as it does for all its similar programs around the United States)." See Memo to Sherri Williams, Secretary to the BZA, from Michael Johnson, Zoning Administrator (April 10, 2000) (attached as part of Exhibit 4 to Appellant's Pre-hearing Submission).[2] The only difference in this case is the fact that here, the four buildings will be located on separate record lots. As noted above, this distinction is not legally relevant to the question of whether the buildings nonetheless comprise a single "facility." Accordingly, the four buildings are part of a single CBRF. Since the occupancy of the four buildings exceed that permitted in the C-2-B zone as a matter-of-right, the facility requires special exception approval by this Board.

III. The Zoning Administrator Erred in Failing to Consider the Comprehensive Plan.

The Zoning Administrator testified that he did not consider the D.C. Comprehensive Plan, based on his view that it would be a "fruitless exercise" given his conclusion that the zoning

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[2] As the Sargent Road case demonstrates, the Zoning Administrator plainly has the authority inquire into the ownership and "management" of a facility to determine whether several buildings comprise a single facility. See also Transcript, at 253 (Feb. 19, 2002). The Zoning Administrator also plainly has the authority to request additional information of an Applicant in order to make a determination of whether the buildings are part of a single "facility." See 12 DCMR 107.15(6).

regulations compelled matter of right treatment of the individual buildings comprising the Boys Town CBRF. Transcript, at 201, 223-24 (Feb. 12, 2002). However, as discussed above, the Zoning Administrator is required to apply the occupancy and spacing restrictions specified by the zoning regulations to the "Community Based Residential Facility" as a whole, and not simply its separate buildings, regardless of whether the buildings are located on separate record lots.

The question of whether each of the four buildings are separate CBRFs or are part of a single "facility"is not simply a "clerical" or "mechanical" inquiry; instead, it requires a discretionary review and determination by the Zoning Administrator. In exercising this discretion, the law is crystal-clear that the Zoning Administrator must look to the Comprehensive Plan for guidance, as required by statute. The D.C. Comprehensive Plan, as amended, provides that

> 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(d) (emphasis added). Even the District of Columbia, in its submission to this Board regarding the necessity for a Report from the Office of Planning, conceded, "it is *unequivocal* that the Comprehensive Plan may be used by the Zoning Administrator as a *guide* in rendering decisions about zoning in the District of Columbia." See Statement of the District of Columbia Zoning Administrator in Opposition to the Introduction of A Report of the Office of Planning, at 3 (Feb. 22, 2002) (emphasis added).

Boys Town misses the point when it relies on cases standing for the proposition that "Zoning Commission is the exclusive agency vested with the responsibility for assuring that the Zoning Regulations are not inconsistent with the Comprehensive Plan." Tenley & Cleveland Park

Emergency Committee v. D.C. Board of Zoning Adjustment, 550 A.2d 331, 341 (D.C. 1988), cert. denied, 489 U.S. 1082 (1989); French v. D.C. Board of Zoning Adjustment, 658 A.2d 1023, 1034 (D.C. 1995). These cases stand only for the proposition that, where existing zoning is in conflict with the Comprehensive Plan's land use objectives for that area, only the Zoning Commission has the authority to reconcile that inconsistency by amending the Zoning regulations and/or map.

However, as noted above, this case does not involve any conflict between the zoning regulations and the Comprehensive Plan. To the contrary, the Comprehensive Plan seeks to encourage the location of small CBRFs that are dispersed throughout the community, and the zoning regulations implement this objective by requiring special exception approval of CBRFs having more than 16 persons (or more than eight, where located within 500 foot of an existing CBRF). Rather, the question here is whether the Zoning Administrator must determine whether the four buildings are four separate CBRFs or whether they should be considered as part of a single community-based residential facility. In making this discretionary determination, the Zoning Administrator "*shall* evaluate the proposal in conjunction with the applicable sections of the Comprehensive Plan and the Comprehensive Plan Maps." 10 DCMR § 112.6(d) (emphasis added). There are numerous decisions issued subsequent to Tenley and Cleveland Park Emergency Committee in which the D.C. Court of Appeals has specifically held that "District agencies may 'look to the . . . . elements [of the Comprehensive Plan] for general policy guidance . . ." Gondelman v. D.C. Department of Consumer & Regulatory Affairs, 2002 WL 58560 (D.C., Jan .17, 2002); National Cathedral Neighborhood Ass'n v. D.C. Board of Zoning Adjustment 753 A.2d 984, 987 (D.C. 2000) (citing Section 112 of the Comprehensive Plan as

authority that the BZA is "required" to look to the D.C. Comprehensive Plan for "general policy guidance."

An examination of the applicable provisions of the D.C. Comprehensive Plan show that all policies and objectives relating to CBRFs focus on "facilities," not "buildings." For example, the Land Use Element of the Comprehensive Plan specifically states that:

> Matter-of-right development of community-based residential facilities ("CBRFs") shall be limited to *facilities* that:
>
> * * *
>
> (C) Do not locate on the same block or within 500 feet of another community based residential facility ("CBRF").

10 DCMR § 1101-4.1(v) (emphasis added). Likewise, the Ward 6 Plan, Human Services objective, states the following action relating to CBRFs: "Prevent further concentration of community-based residential facilities ("CBRF's") in Ward 6 neighborhoods and require future development of the CBRFs to be in accordance with the District-wide CBRF plan." 10 DCMR § 1731.1(d).

As noted above, Section 721.5 of the Zoning Regulations precludes matter-of-right approval for youth residential care home for more than seven persons where it is within 500 feet of a CBRF for more than seven persons. 11 DCMR § 721.5. Here, of course, the "facility" as a whole is located within 500 feet of an existing CBRF for eight developmentally challenged persons, operated by D.C. Health Care at 901 14th Street, S.E.. See Exhibit 1. In construing this Zoning Regulation, the Zoning Administrator must be guided by the above-quoted language in the Comprehensive Plan, and specifically the guidance mandating that the focus of the Zoning Administrator's review of CBRFs in determining status as "matter-of-right." This guidance, as well as the applicable zoning regulations, provides that "matter-of-right development of

community-based residential facilities ("CBRFs") *shall* be limited to *facilities* . . ." 10 DCMR § 1101-4.1(v) (emphasis added). Because the four residential units proposed by Boys Town are part of a single "facility," and because the total occupancy exceeds the number permitted in the C-2-B zone as a matter of right, special exception review by the BZA is required.

Respectfully submitted,

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March 22, 2002

CERTIFICATE OF SERVICE

I hereby certify that, on March 22, 2002, a copy of the foregoing Brief was served by mail on:

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