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March 22, 2002

**VIA HAND DELIVERY**

Mr. Geoffrey Griffis, Chairman
D.C. Board of Zoning Adjustment
Suite 210
441 4th Street, N.W.
Washington, D.C. 20001

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Re: BZA Appeal No. 16791, Brief on Precedent

Dear Chairperson Griffis:

In response to a request from the Board, on behalf of the Intervenor/Property Owner, Father Flanagan's Boys Home, attached is Intervenor's brief addressing to what extent the Board is required to follow its own previous decisions.

Please call either of the undersigned with any questions.

Sincerely,

Phil Feola

Martin P. Sullivan

cc: Michael McGill, Esq.

Attachment

BZA
Case No. 16791
Exhibit No. 65

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Board of Zoning Adjustment
District of Columbia
CASE NO.16791
EXHIBIT NO.65

**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**
**February 5 , 12, 19 and 26 2002**

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## THE BOARD OF ZONING ADJUSTMENT IS BOUND BY ITS PRIOR DECISIONS

On behalf of Father Flanagan's Boys Home ("**Girls & Boys Town**"), the Intervenor and Owner of the Property subject of this appeal, we respectfully request that the Board of Zoning Adjustment ("**BZA**") deny the appeal of Southeast Citizens for Smart Development ("**SCSD**") challenging the building permits ("**Permits**") issued by the Department of Consumer and Regulatory Affairs. The BZA should deny the appeal because SCSD has failed to carry the Appellant's burden to show, by a preponderance of evidence, that the Zoning Administrator erred in issuing the permits. This appeal should be denied for all of the legal and factual reasons previously addressed in the record by the Zoning Administrator and the Intervenor. Additionally, the doctrine of *stare decisis* also requires the BZA to deny this appeal.[1]

## FACTS

A. Sargent Road Property

Approximately two years prior to the issuance of the Permits at issue in this appeal, Girls & Boys Town submitted an application for a special exception to the BZA for its property at 4801 Sargent Road, N.E. to build four Youth Residential Care Homes each to house six children with two "parent" teachers, the same use as proposed in the present appeal. Girls & Boys Town sought permission, among additional requests, to construct these four detached youth residential care homes on a large single (12 acre) lot. The Board of Zoning Adjustment granted this

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[1] This brief only addresses the issue of whether the BZA is bound by its previous decisions and is offered in response to a specific request from the BZA.

application by BZA Order No. 16531 subject to certain conditions. In order to approve the application, the BZA was required to find that the proposed youth residential care homes were in harmony with the general purpose and intent of the Zoning Regulations and Maps. The BZA held that the proposed youth residential care homes were in harmony with the general purpose and intent of the Zoning Regulations and Maps, because "each individual home will accommodate six youths, which, if the property had been subdivided, could have been constructed and used... as youth residential care homes as a matter-of-right." (BZA Order 16531, Conclusions of Law and Opinion, page 13, emphasis added.) The BZA concurred, in the Order, with the Zoning Administrator's determination that "[i]f 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." (BZA Order No. 16531, page 2, emphasis added.)

B. Potomac Avenue Property

Girls & Boys Town purchased the Potomac Avenue property, legally subdivided it and filed the building permit applications, which are the subject of this appeal, to construct four youth residential care homes, functionally identical to the four homes at the Sargent Road site. The property has been subdivided into four separate record lots. Girls & Boys Town sought to build one youth residential care home on each of four lots. On September 6, 2001, the Department of Regulatory and Consumer Affairs issued building permits that would allow construction to begin. Relying on the permits and the BZA's holding in Order No. 16531 that the homes are permitted as a matter-of-right, Girls & Boys Town entered into construction contracts and began construction.

## DISCUSSION

### I. THE BZA MUST FOLLOW ITS PRIOR DECISIONS

The BZA must follow its own prior decisions so that parties, and the general public, have a clear and accurate understanding of the "rules" applicable to uses permitted under the Zoning Regulations. "[A]gencies, like courts, must and do favor a policy of *stare decisis* unless unusual circumstances intervene." *Springer v. District of Columbia Department of Employment Services*, 743 A.2d 1213, 1221 (D.C. 1999); *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 683 A.2d 470, 476 (D.C. 1996); *Reichley v. District of Columbia Department of Employment Services*, 531 A.2d 244, 247 (D.C. 1987). The rationale behind this policy is obvious. It allows a party to justifiably rely on an agency's prior interpretation. This concept "underlie[s] the very notion of an ordered society" and prevents "fundamental unfairness." *Reichley*, 531 A.2d at 253, 249. The only "unusual circumstance" that the District of Columbia Court of Appeals has held warrants the abandonment of *stare decisis* is the amendment of the underlying statute. *See Springer,* 743 A.2d at 1220.

In the present action, there has been no change in the underlying law nor is there any other "unusual circumstance" sufficient to justify the abandonment of the doctrine of *stare decisis*.. The BZA unequivocally determined that Girls & Boys Town would be able to construct a youth residential care home, that would house fewer than six youths, on a separate lot as a matter-of-right. The governing regulations have not changed. Accordingly, the BZA must follow its own prior interpretation of the Zoning Regulations, and uphold the issuance of the permits in the present action.

### II. IF THE BZA EFFECTUATES A NEW RULE OF LAW, IT SHOULD BE APPLIED PROSPECTIVELY ONLY

If the BZA does change its interpretation of § 201.1(n)(1), its new rule should not be applied retroactively to Girls & Boys Town as a matter of fundamental fairness. Courts

"frequently decline to enforce" an agency decision that "differs from a previously prevailing rule" because "fundamental unfairness would inevitably result if new regulations were applied to parties who had previously established their legal positions in reliance upon the former regulations." *Reichley*, 531 A.2d at 248, 250. (internal citations omitted).[2] In *Reichley*, the D.C. Court of Appeals held:

> Fairness ... may demand purely prospective application of an adjudicative rule when the conditions that ordinarily justify adjudication instead of rulemaking do not hold; for example, when a party to an adjudication announcing or applying a new rule reasonably relied ... on a different rule established by an earlier agency adjudication. In such a case, the relying party would be treated as unfairly by the application of a new adjudicative rule as by the retroactive imposition of a new rule adopted through the rulemaking mechanism.

*Id.* at 249-50 (citations omitted)(emphasis added).

In *Reichley*, the Court upheld the agency's new construction of the statute, but refused to apply it retroactively to the plaintiff. *Id.* at 246-47. The Court found that the agency had announced "an altogether different rule of law ... to govern the same issue." *Id.* at 247. The Court observed that the problem arises "in cases not of first but of second impression, where an agency alters an established rule defining permissible conduct which has been generally

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[2] Additionally, the BZA is estopped from changing its interpretation of Section 201.1(n). Courts have recognized that estoppel, even though judicially disfavored in zoning cases, is appropriate in some situations. *See Saah v. District of Columbia Board of Zoning Adjustment*, 433 A.2d 1114 (D.C. 1981); *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917 (1980) The BZA is estopped from changing its "rules". First, Girls & Boys Town moved forward with the purchase of the property and with the design and construction of these four houses incurring substantial costs in reliance upon the Zoning Administrator's and BZA's ruling for the Sargent Road Property. Second, Girls & Boys Town acted in good faith reliance upon the BZA's Order No. 16531, which very clearly stated the BZA's position that such development may proceed as a matter-of-right. Third, the reliance of Girls & Boys Town was justifiable and reasonable. There have been no relevant changes to the regulations or the interpretations thereof since the issuance of that order. Fourth, Girls & Boys Town relied upon numerous affirmative acts of the District government. Both the Zoning Administrator and the BZA affirmatively, and clearly, set forth their interpretation that a youth residential home for fewer that six persons may be constructed on a single lot as a matter-of-right in a prior case. Further, the District of Columbia Department of Consumer and Regulatory Affairs affirmatively issued building permits for the lots at issue. Finally, the equities weigh strongly in the favor of Girls & Boys Town, because Girls & Boys Town was a party in the prior case on which it relied.

recognized and relied on throughout the industry that it regulates." *Id.* at 249. The Court then established four factors to be applied in determining whether an agency's adjudication announcing a new rule of law should be applied retroactively or prospectively:"

1) whether the decision is a "clear break with the past" precedent or was foreshadowed by trends in the law;

2) the extent to which the party against whom the new decision is invoked reasonably relied upon the old rule, including the nature and degree of the burden a retroactive decision would impose on that party;

3) the importance of rewarding the real party in interest, if any, who initiated the agency's changed decision; and

4) whether administering both the new and the old rules for some period of time would pose a severe administrative burden or otherwise interfere with a significant statutory interest.

*Id.* at 251.

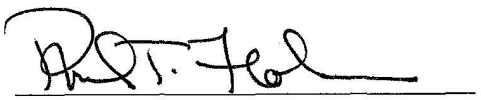
Applying the four factors to the present case, it is clear that the BZA should not apply any new interpretation retroactively against Girls & Boys Town. First, the determination that the proposed buildings could not be constructed as a matter-of-right would be a "clear break" from BZA Order 16531, which involved the same party and a functionally identical use. Girls & Boys Town had no notice that the BZA might change its interpretation, and it was not foreshadowed by trends in the law. Second, Girls & Boys Town reasonably relied upon the old interpretation in purchasing the Potomac Avenue property, entering into construction contracts and beginning construction. Further, the BZA's finding was neither ancillary nor merely advisory, it was a part of its Conclusions of Law and Opinion as it determined that the special exception met the requirements of Section 3104.1 of the Zoning Regulations. To support its finding that the application was in harmony with the general purpose and intent of the Zoning Regulations and Maps, the BZA held that each home could have been constructed as a youth residential care home as a matter-of-right if the property had been subdivided. Third, the real party in interest is

the SCSD, which has no financial or otherwise tangible stake in the Property, who would "reap the benefit" of any new interpretation issued by the BZA to the severe detriment of Girls & Boys Town. *See id.* at 253. Finally, the unfairness that will be engendered by a decision adverse to Girls & Boys Town is more poignant than any administrative inconvenience caused by applying any new interpretation prospectively. Indeed, "[t]he administrative burden must be severe ... to overcome a party's justifiable and detrimental reliance on an old rule the principles which underlie the very notion of an ordered society, in which authoritatively established rules of conduct may fairly be relied upon, must preclude its retroactive effect." *Id at 253.* Accordingly, under *Reichley*, even if the BZA decides to change its interpretation of this Zoning Regulation, the rule, it should not be applied retroactively to the Girls & Boys Town permits at hand.

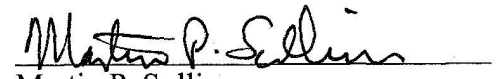
**CONCLUSION**

The BZA is required to follow *stare decisis* absent an "unusual" condition. The BZA may not arbitrarily change its own interpretation of a regulation. There is nothing in the record here that identifies any "unusual circumstances" that would justify the BZA in doing so. Further, any new interpretation of §201.1(n)(1) would be unfair to Girls & Boys Town because it reasonably relied upon the BZA Order No. 16531. Accordingly, the permits should be upheld.

Respectfully submitted,



Phil T. Feola



Martin P. Sullivan

March 22, 2002

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ShawPittman LLP

**CERTIFICATE OF SERVICE**

I hereby certify that on March 22, 2002, a copy of the foregoing letter and Brief was served by hand-delivery to:

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