BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

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IN THE MATTER OF	*	
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1308 – 1314 POTOMAC AVENUE, SE	*	BZA Appeal No. 16791
WASHINGTON, DC	*	
	*	
CITIZENS FOR SMART	*	
DEVELOPMENT, INC., APPELLANT	*	

POST-HEARING BRIEF OF
THE DISTRICT OF COLUMBIA ZONING ADMINISTRATOR

The District of Columbia Zoning Administrator, by and through undersigned counsel, adopts and incorporates herein the arguments made to the Board of Zoning Adjustment ("the Board") in support of its oral Motion to Dismiss this appeal made on February 12, 2002 and referenced in the Transcript (TR) of this proceeding at pages 204-208. In further support of this position, the Zoning Administrator submits the following argument.

The Board has jurisdiction to hear this appeal and to render a decision and order pursuant to D.C. Code, 2001 Ed. § 6-641.07(g) and 11 DCMR § 3200.2. Appellant Southeast Citizens for Smart Development, Inc. has the burden of proof pursuant to 11 DCMR § 3324.2. In order to reverse the Zoning Administrator's decision to issue the four building permits to Father Flanagan's Boys Home, Appellant must demonstrate by reliable, probative, and substantial evidence that the proposed construction was not permitted as a matter of right, pursuant to 11 DCMR § 201.1(n), in a district zoned C-2-B and, therefore, required a special exception.

The decision of the Board must be based exclusively on the evidence in the record, not on what Appellant's testifying expert intended to say or should have said. 11 DCMR § 3127.2. It is unequivocal that not once, but at least twice, Appellant's expert witness testified that the Zoning Administrator **did not violate any zoning regulation in his decision to issue the building**

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permits. The decision by this Board is limited to the evidence in the record of this proceeding, not the evidence that a party hoped to elicit from its witnesses. The Board is charged with rendering its decision based upon findings supported by and in accordance with reliable, probative, and substantial evidence in the administrative record, with conclusions flowing rationally from those findings. *Russell v. District of Columbia Bd. of Zoning Adjustment*, 402 A.2d 1231,1234 (D.C. 1979).

Appellant has suggested, through the testimony of its expert witness, that the error of the Zoning Administrator lies in the fact that he failed to "look at the other units that are planned for the site and to add up the number of people who will be served." (TR at 38-39). Appellant has suggested that notwithstanding the "practice of DCRA to reference record lot lines in connection with zoning," in this case the Zoning Administrator ignored the existing lot lines contrary to a Massachusetts ruling discussed below. (TR at 39). Appellant has relied inapprpriately on authority that does not apply in this jurisdiction.

According to appellant's expert witness, there is an entity known as a *lot* which, singly, as opposed to a *lot of record* "may be used to activate zoning on more than one parcel of land." (TR at 40). As an example of this *lot*, appellant's expert witness referenced a campus plan as the appropriate way to view this application for building permits because the zoning regulations governing Community Based Residential Facilities (CBRF) do not specifically provide for review based on lots of record.

This is simply not the case. The zoning regulations do not distinguish between the various types of proposed residential construction, but rather state that as a matter of general policy and procedure, the Zoning Administrator shall first establish that a proposed building is on a separate lot of record. Appellant's expert witness alluded to a "vexing problem of the

record lot versus the lot – the lots that are referred to in the regulation just defines 'lot'." (TR at 46). In fact, the regulations unequivocally state that the *lot of record* is an absolute requirement in the process of issuance of a building permit for a structure.

> [A] building permit **shall not be issued**... **unless** the land for the proposed erection has been divided so that each structure will be on **a separate lot of record.** ... Any combination of **commercial** occupancies shall be considered as one (1) structure. (11 DCMR § 3202.3)

The law cannot be any clearer. The subject permits are for residential, not commercial,[1] structures proposed to be erected. The Zoning Administrator is prohibited from issuing building permits unless they are for a single building on a single lot of record. The record in this case is clear on this point. Even the appellant's expert conceded that the zoning regulation applicable to this appeal states that that the building permit for each principal structure to be erected must be such that each structure is on a separate lot of record, and that the only way a permit could be issued in this case is on a per record lot basis. (TR at 54:16-19).

Appellant's expert witness conceded, first of all, that the campus plan regulations are inapplicable to the instant appeal. (TR at 47:25-48:4). The expert further conceded that he could not point to any situation in which the Zoning Administrator ruled beyond the confines of a record lot. (TR at 56:17-57:3). Thirdly, appellant's expert witness testified that the Zoning Administrator did not violate any District of Columbia law but that he **committed a mistake by following the zoning regulations by the book**, rather than looking at a bigger picture. (TR at 55:9-14, 75:9-18).

Appellant relies on a *Heald v. Zoning Bd. of Appeal of Greenfield*, 387 N.E.2d 170 (Mass. App. 1979), a Massachusetts case, in support of its argument that it is a well-established

[1] The Commercial structures as contemplated by this section refer to construction such as strip malls where there is a single structure subdivided into separate commercial occupancies.

principle of zoning law that where there are contiguous lots in common ownership, they should be considered, for zoning purposes, as a single lot. That case is limited to the zoning by-laws of Greenfield, Massachusetts and has no application in the District of Columbia. In *Heald*, there was a dispute over the interpretation of the word "lot." The court determined that the 1957 definition of "lot" which defined "lot" for conveyance purposes, *could* be treated as such for zoning purposes. The court further opined that

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

Heald at 289. The District of Columbia's zoning regulations define "lot" and more specifically define "record lot," the exact term used in the regulation in dispute before the Board. There is absolutely no dispute as to what is intended by the language in 11 DCMR § 3202.3.

However, even if the facts in the Massachusetts case were analogous to the instant appeal,

> [c]ase law from other jurisdictions, however, is unhelpful in this area of the law because "the extent to which zoning decisions must conform to independent comprehensive plans varies from state to state depending on the phraseology of the consistency legislation and the nature of the mandatory plan."

Tenley and Cleveland Park Emergency Committee v. BZA, 550 A.2d 331, 334 (D.C. 1988), *citing* 5 P. ROHAN, ZONING AND LAND USE CONTROLS § 37.03[2], at 37-50 (1988). Therefore, even if the *Heald*'s applicability were broader, it would not extend to the District of Columbia.

In its argument in opposition to the Zoning Administrator's oral Motion to Dismiss, appellant agreed that the property owner did exactly what was required by the zoning regulations – to build four separate principal structures on four separate lots of record. Appellant seems to

say that the zoning regulation in question here applies to the property owner's responsibility but does not have any bearing on the action to be taken by the Zoning Administrator in rendering a decision on building permits. This argument is nonsensical since the Zoning Administrator, through the authority delegated by the Mayor, is charged with enforcing these regulations. 11 DCMR § 3200.1.

Appellant has argued that rather than applying the plain meaning of the regulation, the Zoning Administrator must interpret the zoning regulations consistent with the goals and objectives of the Comprehensive Plan. The Zoning Administrator reiterates his argument that the Comprehensive Plan is irrelevant to the issue before the Board. It is well-established law in the District of Columbia that the Home Rule Act and the Comprehensive Plan do not impose a moratorium on matter of right development and that the Zoning Commission is the exclusive forum for addressing issues of inconsistency under the Comprehensive Plan. *Tenley* at 334.

The purpose of the Comprehensive Plan is to provide a statement of policy to guide future land-use decision-making. Recognizing that there may be inconsistencies between the elements of the Comprehensive Plan and the Zoning Regulations, the D. C. Court of Appeals held that the Comprehensive Plan is not self-executing and does not directly regulate the development of private property in the District of Columbia. *Id.* The Court affirmed the decision of the BZA that

> [t]he Zoning Commission for the District of Columbia has the statutory duty to insure that the Zoning Regulations are not inconsistent with the Comprehensive Plan. The Land Use Element of the Comprehensive Plan was enacted in March 1985, ten years after the installation of the elected Mayor and Council of the District of Columbia. Just as it was reasonable for the Executive and Legislative branches to take the time which they determined to be reasonably required to prepare and adopt the Comprehensive Plan, so also is it reasonable for the Zoning Commission to determine a reasonable schedule for the conduct

> of its business. The Board may not exercise oversight over the Commission in that respect. Further, the Zoning Commission is the only body which may amend the Zoning Regulations, including those provisions which govern matter-of-right developments. *Id.* at 333

The Court concluded that the Zoning Commission is the exclusive agency vested with responsibility for assuring that zoning regulations are not inconsistent with the Comprehensive Plan. *Id.* at 340.

Based upon lack of substantial evidence in the record of the proceedings to support the Appellant's position, the Zoning Administrator respectfully requests that the appeal of Southeast Citizens for Smart Development, Inc. be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Post-Hearing Brief of the District of Columbia Zoning Administrator were mailed postage prepaid this 22nd day of March, 2002 to Phil T. Feola and Martin P. Sullivan, Shaw Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128, Andrea C. Ferster, Esq., 1100 –17th Street, NW, 10th Floor, Washington, DC 20036, and Kenan P. Jarboe, ANC 6B, 921 Pennsylvania Avenue, SE, Suite 108, Washington, DC 20003.

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