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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

REPLY OF APPELLANT

Appellant Southeast Citizens for Smart Development, Inc. hereby replies to the argument advanced by the owner, Girls & Boys Town, that this Board is "bound" by an assertion contained in BZA Order 16531, relating to a facility at 4801 Sargent Road, N.E. In its brief, the Owner makes several arguments: first, it argues that this Board "must" follow its "prior interpretation of the Zoning Regulations." Owner's Brief, at 3. Second, the Owner argues that any new "rule of law" must be applied "prospectively only." Id. Third, the Owner even suggests that this Board is "estopped from changing its interpretation of Section 201.1(n)." Id. at 4 n.2. Each of these arguments is without merit.[1]

As noted in Appellant's opening brief, the reference in BZA Order 16531 on which the Owner purports to rely is *dictum* to that decision – language in an opinion which. is "unnecessary for the decision of the case." Albertie v. Louis & Alexander Corp, 646 A.2d 1001, 1005 (D.C. 1994). The application involved in BZA Order 16531 involved a single, not a subdivided lot, in an R-4 zone, and therefore the reference in this order upon which the Owner relies was framed as

[1] In response to the District's post-hearing brief, Appellant states only that Appellant's zoning expert, J. Kirkwood White did *not* testify (as the District repeatedly insists) that the Zoning Administrator's interpretation of the applicable regulation was correct. Ratther, Mr. White testified that while no regulation explicitly "compelled" the Zoning Administrator to view the Boy's Town campus as a single development, Transcript at 57-58 (Feb. 5, 2002), the Administrator had discretion to do so and should have done so under the facts of this case. *Id.* at 75-78.

BZA
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Exhibit No. 68

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EXHIBIT NO.68

hypothetical situation, speculating that: "*If* the subject property had been subdivided, . . .it *could* have been constructed and used . . . as youth residential care homes as a matter of right." BZA Order 16531, at 13 (emphasis added). Moreover, even the hypothetical situation referenced in BZA Order 16531 is distinguishable from the facts this case. This hypothetical situation appears to contemplate four "homes," whereas here, the Owners will operate a single facility, and there is nothing to suggest that the four "homes" referenced in the hypothetical would be owned, financed, and managed by a single entity, as in the present case, or even whether the hypothetical situation would have any applicability outside an R-4 Zone.

Here, of course, the precise issue is whether a *single* Community Based Residential Facility ("CBRF") on a subdivided lot can be located as a matter of right in a C-2-B zone where its occupancy exceeds the applicable matter-of-right limits for CBRF uses, where the four proposed "homes" are owned, financed and supervised by a single operator. Indeed, as was conceded by the owner's own zoning expert, who has spent a decade with the D.C. government enforcing the zoning code, the facts of this case involving four permit applications to build a four CBRFs, each with six or fewer residents, next door to each other, owned and operated by the same entity, is without precedent before the Zoning Administrator. Transcript, at 230-31 (Feb. 19, 2002).

The lack of clarity surrounding the hypothetical situation alluded to in BZA Order 16531 makes clear the danger of relying on such *dictum* as establishing a principle of law having precedent effect in other cases. This Board should not view as persuasive precedent to rely on such a vague hypothetical to resolve this case of first impression, thereby setting a clear

precedent, which would in fact set a clear precedent guiding future zoning decisions.[2] Thus, the Owner's suggestion that this *dictum* is entitled to precedential effect under the principle of *stare decisis* is simply wrong. Umana v. Swidler & Berlin, Chartered, 669 A.2d 717, 720 n. 9 (D.C. 1995) (*dictum* is not entitled to precedential effect in subsequent cases.). The settlement of the legal issue here by relying on *dictum* in another case prejudices ANCs, persons or community organizations who will be affected by this ruling, and yet who have not had notice that this important issue of first impression was been resolved or been given any opportunity for input.

Even if this statement were not *dictum,* however, the Owner is also wrong in asserting that the BZA "*must* follow its own prior decisions." Owner's Brief, at 3 (emphasis added). Rather, agencies are free to "depart from their own precedent but in doing so must 'supply a reasoned analysis' justifying the change." Springer v. D.C. Department of Employment Services, 743 A.2d 1213, 1221 (D.C. 1999) (quoting Greater Boston Television Corp. v. Federal Communications Comm'n., 444 F.2d 841, 852 (D.C. Cir. 1970) , cert. denied, 403 U.S. 923(1971). BZA Order 16531 provided absolutely no "reasoned analysis" in support of its hypothetical assertion that "*If* the subject property had been subdivided," the development would have been matter of right. Thus, the instant case provides an appropriate vehicle for this Board to interpret and clarify this vague and speculative assertion by providing a reasoned analysis resolving this unsettled issue of law.

Likewise, the Owner misstates and misapplies the principle governing when an agency's adjudication announcing a new "rule of law" may be applied so that it only has prospective effect

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[2] As previously noted, such a precedent would give CBRF operators (or other uses subject to occupancy limits) a blue print for developing large institutions throughout the city in excess of the applicable occupancy limits for matter-of-right uses without any BZA review.

(*i.e.*, not applicable to the parties whose efforts produced the change in administrative interpretation). Owner's Brief, at 3. First, of course, the principle concerning when changes in the "rule of law" can be given only prospective effect has no applicability here, since BZA Order 16531 established no "rule of law" that Appellants seek to reverse here. Rather, as noted above, the statement on which the Owner purports to rely is pure *dictum* in that decision. *Dicta* cannot, by definition, establish a rule of law. See Albertie v. Louis & Alexander Corp, 646 A.2d at 1005 ("dictum . . .[has] no effect as indicating the law of the District.").

In any event, once again, the owner misstates the applicable legal principle. There is no general rule requiring changes in regulatory interpretation adopted through adjudications to be made prospectively only. To the contrary, as the Court explained, "rules created during agency adjudication -- in contrast with regulations adopted through administrative rulemaking -- traditionally apply retroactively, at least to the immediate parties to the dispute." Reichley v. D.C. Department of Employment Services, 531 A.2d 244, 249 (D.C. 1987).[3] As the Court in Reichley

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[3] The Court provided the following reasoning in support of this view:

> In the first place, an agency's use of adjudication to announce a new rule usually means the law is unsettled; the decision usually does not change an established rule on which a party has reasonably relied. In the typical case, therefore, agency adjudication presents no issue of retroactivity in the sense that the agency confronts a settled rule in the way of its decision to adopt a different rule.
>
> Second, the practical benefits from allowing agencies to develop law, on occasion, through adjudication to some extent justify the retroactive rulemaking traditionally associated with adjudication. More specifically, certain areas of administrative regulation are better suited to case-by-case development than to more general prospective pronouncements; an agency legitimately may determine that it is preferable to develop detailed rules in a piecemeal fashion, waiting to decide issues until they arise in the varying circumstances of particular cases and thus tailoring its decisions to the narrow facts of individual disputes. . . . As a consequence, because the parties to agency adjudication are engaged in a real controversy, they ordinarily should be entitled to a decision that allocates

has held, "administrative agencies, and ultimately the courts, should apply four factors 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.

Reichley, 531 A.2d at 251. These factors, when applied to the facts of this case, strongly indicate that any "change" from the view expressed in BZA Order 16531 that this Board makes in this case should be made applicable to this case, which is the vehicle for clarifying this unsettled issue of law.

First, a decision requiring BZA review of the CBRF proposed in this case would not involve a "clear break" from the past. As noted above, this is a case of first impression, and the assertion in BZA Order 16531, at most, foreshadowed a future hypothetical situation not yet before the Board, and arguably one that is factually distinguishable from the present situation. As the Court noted in Reichler, "'every case of first impression has a retroactive effect in the sense

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> the benefits and burdens of the new rule among the parties themselves, as in a court of law; adjudications normally are not intended to result in advisory opinions.

Id.

that a definitive interpretation is eventually given to an earlier enactment.'" Id. at 249 (citation omitted).

Second, the Owner could not have reasonably or justifiably relied on this vague allusion to a hypothetical situation in BZA Order 16531. The assertion by the Owner's counsel, for the first time, in a post-hearing brief, that the Owner "moved forward with the purchase of the property . . in reliance on the . . . BZA's ruling for the Sargent Road property" (Owner's Brief, at 4 n. 2) is patently false , for the simple reason that the plans for the Capitol Hill facility were well underway by the time this order was issued. As the Owner's own press release and community update material state, the Owner had purchased the Capitol Hill property in March 2000, several months before the issuance of BZA Order 16531 on October 3, 2000. See Boy's Town "Community Update" materials.

Further, the Owner submitted no proof at the extensive hearings before this Board that it took any actions in reliance on this language in BZA Order 16531. Specifically, there is no evidence in the record that the Owner in any way modified the design of the project, its programs, or its plans in any way as a result of this decision, or incurred any costs whatsoever in reliance on BZA Order 16531. Should this Board agree with Appellant, the Owner will not be required to re-design or reconstruct its buildings Rather, the Owner will simply be required to refrain from exceeding the matter of right occupancy limits on CBRF uses within these buildings until this Board approves a special exception. Thus, this situation is very different from that in Reichley, in which the Court found that retrospective application of a new rule prohibiting claimants from recovering unemployment compensation benefits in D.C., which had higher compensation rate, where claimants also file in other jurisdictions, would detrimentally affect claimants who relied on

an old rule that did not bar such recovery. See Reichler, 531 A.2d at 252.[4]

By contrast, it would be grossly unfair to the Appellant, Southeast Citizens For Smart Development, Inc., the real party in interest here, who initiated and diligently prosecuted this appeal and brought this issue of unsettled law to the attention of this Board, not to apply any newly adjudicated rule to the facts of this case. Appellant is not an "institutional litigant" with numerous cases before the BZA; to the contrary, Appellant has no institutional interest in the adjudicated interpretation of the BZA's rules beyond the facts of this particular case. Thus, if this Board takes a position in this case that either repudiates or distinguishes the *dictum* in BZA Order 16531, applying such a rule prospectively only would work a grave injustice on Appellant by depriving it of any benefit from the change in regulatory interpretation whose achievement would exist solely as a result of Appellant's efforts. The facts of this case are therefore very different from those involved in the Reichler case, where the Court pointed out that WMATA was an "institutional litigant" with numerous cases before the Director of Employment Services, and thus, even if retroactive applicability is denied, WMATA would still "reap the benefit of the new rule of law in succeeding cases." Reichler, 531 A.2d at 252.

For the same reason, the Owner cannot justifiably claim that principles of estoppel bar the Board from "changing" its interpretation of its regulations here. As the Owner conceded, estoppel is judicially disfavored in zoning cases because of the important public interest in the

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[4] Also, as the Owner concedes, the statement on which it places such reliance would, at most, constitute an "interpretation" of a BZA regulation rather than a legislative-type rule. As the Reichler decision explains, "the issue of justifiable reliance on an agency adjudication not yet tested by judicial review turns primarily on the degree of deference a reviewing court owes to the agency's statutory." Id. at 246. As the Court further pointed out, "the least deferential standard of review has been applicable to so-called interpretative rule." Id. at 247.

enforcement and integrity of Zoning Regulations. See Interdonato v. District of Columbia Board of Zoning Adjustment,429 A.2d 1000 (D.C. 1981). The elements that must be shown in order to raise an estoppel against enforcement of a zoning regulation are: (1) that a party, acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, (4) the equities strongly favor the party seeking to invoke the doctrine; and (5) reliance by the party must be justified. Saah v. D.C. Board of Zoning Adjustment, 433 A.2d 1114, 1116 (D.C. 1981). None of the elements of estoppel are present here.

First, as noted above, there is no evidence whatsoever that the Owner incurred any costs, much less the "substantial costs" alleged (such as the $8.2 million purchase of the property) in reliance on BZA Order 16531. To the contrary, as noted above, the property was purchased *before* BZA Order 16531 was even issued, and a decision requiring BZA review of the facility would not involve any re-design or re-construction of the buildings, as would have resulted had the requested variance been denied in Saah.

Moreover, as also stated above, any reliance in this case by the Owner on assertions contained in BZA Order 16531 was not justifiable, since that assertion was *dictum* to the decision in BZA Order 16531, and on its face the assertion purports to address a hypothetical factual context not present here (*i.e.*, four separate youth residential "homes" versus the single facility proposed here), involving a different zone (*i.e*, R-4 versus C-2-B), and even cites a different regulation (*i.e*, 11 DCMR § 300.3 versus 11 DCMR § 201.1(n)).

Further, the Owner's professed detrimental reliance on *dictum* in BZA Order 16531is simply not credible given facts of the case. From the time that the purchase of the Capitol Hill site

was first made public, neighbors have voiced consistent and reasoned legal objections to this large scale project on this site.[5] The Owner's response was not to engage in a dialogue with community members but instead, to file a multi-million dollar damage suit against various public officials as well as individual community members, to get the permits issued. That lawsuit is still pending. Despite all this notice of potential problems with approval of its development, Owner voluntarily continued to pursue construction activities although the Appellants filed this zoning appeal less than 10 days after construction permits issued and well in advance of the commencement of actual construction. The Owner is thus proceeding with construction at its own risk, with ample notice that its right to use this site as proposed was being challenged this Board. Owner cannot now complain about alleged reliance on BZA Order 16531 and the expenditure of funds, whether for the site or construction activities, when it did so at its own risk and with full knowledge of the opposition and the unsettled nature of the legal principles on which its development is based. Indeed, to reward the Owner with a prospective ruling having no applicability to this case will simply encourage similar attempts by developers to extort permits from public officials and intimidate community activists such as Wilbert Hill by naming them as defendants in lawsuits claiming millions of dollars in damages, and then claim that it relied upon BZA *dictum*, or decisions that were not even issued at the time a controversial development project was initiated.[6]

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[5] For example, Appellant notified the DC government early on that the proposed CBRF was too large to be granted matter-of-right status, which it sought a decision on long before construction permits were issued or construction began. See Prehearing Submission, Exhibit 2.

[6] The Owner's practice of naming government officials in damage suits as a means of "expediting" permit approval should not escape this Board's attention, since a veiled threat to file such a suit was leveled at this Board by the Owner's counsel in his closing statement in this proceeding, despite repeated admonitions from this Board to refrain from all such references to

Finally, the equities do not strongly favor the Owner on this issue, since its application would detrimentally affect the legitimate appeal raised by Southeast Citizens for Smart Development, Inc., which represents the interests of many of the persons who own or reside in property adjoining the site of the proposed Boy's Town CBRF.. See Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 925 n.15 (D.C. 1980) ("It is not clear that estoppel will bar a case brought by a neighboring landowner; arguably, that defense may be asserted only against the municipality which rendered the decision on which a party relied."). Applying any decision in this case prospectively only would also undermine the comments of Appellant Advisory Neighborhood Commission 6B, whose views must be accorded "great weight" by this Board. D.C. Code § 1-309.10(d)(3). Rather, 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 outweighs any reliance that Boys Town may have placed on statements in this Board's Sargent Road, N.E. decision.

Respectfully submitted,



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April 5, 2002

"Fair Housing Act" litigation. Transcript, at 102 (Feb. 26, 2002). It is imperative that this Board send a strong signal that intimidation tactics and threats designed to silence legitimate community opposition and end run lawful appeals will not countenanced.

CERTIFICATE OF SERVICE

I hereby certify that, on April 5, 2002, a copy of the foregoing Reply Brief was served by mail on:

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