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April 5, 2002

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

Re: Case No. 16791 Appeal; Father Flanagan's Boys Home

Dear Chairman Griffis:

Enclosed are one original and 12 copies of our response, on behalf of the Intervenor/Property Owner Father Flanagan's Boys Home, to the Appellant's March 23, 2000 brief.

Please call us with any questions or comments.

Sincerely,

Martin Sullivan

Document #: 1230473 v.1

BZA
Case No. 16791
Exhibit No. 69

Board of Zoning Adjustment
District of Columbia
CASE NO.16791
EXHIBIT NO.69

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

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Southeast Citizens for Smart Development, Appellant

Appeal No. 16791
Public Hearing: December 4, 2001, February 4, 12, 19 and 26 2002

ANC 6B

REPLY BRIEF OF INTERVENOR FATHER FLANAGAN'S BOYS HOME

On behalf of Father Flanagan's Boys Home ("**Girls and 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 and ANC 6B (collectively, "**Appellants**") challenging the building permits ("**Permits**") issued by the Department of Consumer and Regulatory Affairs.

The BZA should deny the appeal because the Appellants have failed to carry their burden to show, by a preponderance of evidence, that the Zoning Administrator erred in issuing the permits. In fact, Appellants failed to provide any evidence to support their position that the Permits should be overturned. 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 and because Appellants' allegations, taken individually and collectively, are not based on the District of Columbia Zoning Regulations, existing law, and/or past precedent of the BZA or Office of the Zoning Administrator. Even if Appellants' legal theories were correct, they have not proven the facts needed to apply these theories, indeed their alleged facts were actually disproven by credible testimony and evidence in the record.

In its Brief addressing the legal issues in this appeal filed in the record on March 22, 2002 ("**Appellants' Brief**"), Appellants again argue that:

(1) the Zoning Administrator erred by failing to apply the definition of "Community Based Residential Facility," to multiple buildings on several lots of record;

(2) the Zoning Administrator did not consider the four building permit applications as a single "facility" for purposes of determining whether the four homes exceeded the occupancy restrictions on matter-of-right CBRF development; and

(3) the Zoning Administrator erred in failing to consider the Ward 6 Element of the District of Columbia Comprehensive Plan in evaluating the permit applications.

All three legal arguments are unpersuasive, not based on existing law or precedent and cannot be sustained by the BZA.

ARGUMENT

I. APPELLANTS HAVE FAILED TO PROVE THAT THE ZONING ADMINISTRATOR ERRED

A. PREPONDERANCE OF EVIDENCE

The legal standard is clear. As the BZA itself has stated, Appellants bear the burden of proving by a "preponderance of evidence" that the Zoning Administrator erred (see Appeal of Fairview Heights Neighborhood Association, BZA Order No. 16604). Appellants have failed to meet this standard or provide any evidence that the Zoning Administrator erred in issuing the Permits or that he failed to follow the Regulations. In fact, Appellants' own expert witness, not once but twice, testified that the Zoning Administrator did not violate any Zoning Regulation in his decision to issue the building permits (Transcript, February 5, 2002, pp. 55 & 75).

Even a casual evaluation of the evidence in the record shows that the Zoning Administrator did not err in this matter. In fact, all of the evidence demonstrates just the opposite. The evidence in this record includes:

(a) the written evidence from the Zoning Administrator at the time the Permits were issued (Michael Johnson) who issued the Permits and wrote an explanatory letter to the Appellants as to why he did so, articulating in detail his interpretation of the Regulations.

(b) the testimony of the current Zoning Administrator indicating that the issuance of the Permits was correct as a matter-of-law.

(c) the expert testimonies of two previous Acting Zoning Administrators (Armando Lourenco and Gladys Hicks), affirming that Mr. Johnson followed the letter of the law and that his issuance of these permits was not only legal and permitted, but required as a matter-of-law.

(d) the testimony of Appellants' own expert, J. Kirkwood White indicating, not once, but twice, and very clearly both times, that in his opinion the Zoning Administrator did not violate the Zoning Regulations (see Transcript, February 5, 2002, pp. 55 & 75).

All the zoning experts, including the collective wisdom of past and present Zoning Administrators representing over thirty years of service in that office, agree that the Zoning Administrator followed the letter of the law and issued permits appropriately. Appellants provided no evidence to the contrary.

B. ZONING ADMINISTRATOR CORRECTLY APPLIED THE ZONING REGULATIONS

Section 201.1(n)(1) provides that a "youth residential care home," for not more than six persons, not including resident supervisors or staff and their families, is permitted as a matter-of-right in the R-1 Zone District. 11 DCMR §201.1(n)(1). Pursuant to §721.1, that use also is permitted as a matter-of-right in the C-2-B Zone District. The Regulations do not caveat this permission by requiring additional tests such as whether or not more than one home is in the same ownership; or whether or not they are physically next door to each other; or requiring an evaluation of how the home will be operated. It is undisputed that Girls and Boys Town wishes to construct four youth residential care homes for not more than six youths, not including resident supervisors. The only issue in dispute is whether the Zoning Administrator should have considered the four separate homes as a "single" home for twenty-four children. As set forth below, such an approach would violate the letter, and intent, of §201.1(n)(1) of the Zoning Regulations and does not correspond with the facts of record.

1. The Regulations Do Not Include Spacing Requirements or Require BZA Approval for These Permits.

Section 201.1(n)(1) does not include spacing restrictions and does not include a provision for BZA approval. The omission of spacing restrictions and BZA approval from Section 201.1(n)(1) was not an oversight on the part of the Zoning Commission. Indeed, the Zoning Commission was motivated to specifically eliminate such requirements as is set forth in Zoning Commission Order No. 725.[1] The Zoning Commission wished to put all people, including those

[1] Appellants cite, and rely on, extensively Zoning Commission Order No. 347 as the "principles that must guide zoning decisions relating to CBRFs" (Appellant's Brief, p.3). This reliance is completely misplaced, however, since the section of the Regulations at issue in this appeal (201.1(n)(1)) was created by Order No. 725 some eleven years later and completely supercedes Order No. 347 as it relates to these Permits.

who are likely to be handicapped, on equal footing. The Zoning Commission observed that the Zoning Regulations define "family" as "not more than six (6) persons who are not [related by blood, marriage, or adoption] including foster children, living together as a single housekeeping unit using certain rooms and housekeeping facilities in common... ." *See* Zoning Commission Order No. 725 at 3 (quoting 11 DCMR §199). The Commission then found that the Regulations, as they then-existed, were potentially unlawful in three ways, as they applied to facilities housing five to eight residents: (1) the regulations "allow only up to four residents as a matter-of-right"; (2) they "require Board of Zoning Adjustment (BZA) approval"; and (3) they "impose spacing requirements." *Id.* The Zoning Commission then expressly and intentionally removed the spacing requirements and provision for BZA approval for homes housing six individuals, not including supervisors or staff. Thus, the Zoning Commission decided to treat youth residential care homes (6 children or less) the same as one-family dwellings – they may be located adjacent to each other. It is clear that Appellants want the BZA to apply the Zoning Regulations, contrary to the Zoning Commission's intent in Order No. 725, so as to treat a youth residential care home (6 children or less) differently from a single family home. Appellants' counsel argued just that point saying that for a youth residential care home the Zoning Administrator should look across lot lines, but should not do so for a single family house (see Transcript, February 26, 2002, pp. 96-97).

Here, each building authorized by the Permits is a self-contained, independent one-family dwelling, which is located on a separate lot of record. Each independent home will house only up to six youths, not including supervisors or staff. Appellants have failed to present any evidence to the contrary. Accordingly, each home is permitted as a matter-of-right under the Zoning Regulations, without spacing requirements, and without BZA approval. To view the four

homes as a single "facility" would impose a spacing requirement that intentionally was omitted by the Zoning Commission.

2. The Proposed Buildings Are a Matter-of-Right

The homes that were approved by the Permits meet the requirements of §201.1(n)(1). There are two touchstones, and only two, that must be met for that section to apply. First, the proposed use must be a "youth residential care home". Second, there must be not more than six persons, not including resident supervisors or staff and their families, or not more than eight persons including resident supervisors or staff and their families. Girls and Boys Town has demonstrated, by the only credible evidence in the record, that each structure is an individual youth residential care home.

3. The Four Homes Are Not a Single "Facility", But Are Four Separate Facilities.

The crux of Appellants' argument, (see Transcripts, February 5, 2002, pp. 82,90,91; and December 4, 2001, p. 65), is that these four homes will be operated as a single unit. Appellants have provided no credible evidence to support this allegation, merely pure speculation.

To the contrary, the only credible evidence presented to the BZA on this matter was by the Site Director for Girls and Boys Town, Ms. Connie Washington. Her testimony completely discredits Appellants' allegations. As Ms. Washington testified, each of these homes will operate independently of each. They each will be a true "foster home", where the foster parents are in charge of the children's health and well-being, including their schooling, recreation, buying their groceries, preparing their meals, helping them with their school work, ensuring that they get to school, church and activities safely. Each home will have a separate license to

operate as a youth residential care home from the District of Columbia. The foster families will run these homes as single family youth residential care homes.

Ms. Washington also testified that there is no operational reason, or economies of scale, to having these homes next door to each other. As she testified, these four homes could easily operate in the various quadrants of the city and deliver the same programmatic results. (Transcript, February 19, 2002, pp. 371-2). Appellants attempt to make much of the fact that the utilities might be paid for by a common landlord or maintenance might be done out of a central budget, but this is not any different than a landlord owning four homes in different parts of the city, renting them to foster parents for their use and taking care of the maintenance responsibilities.

As Ms. Washington's unchallenged testimony indicates, these four homes are operated as four independent youth residential care homes, whose only common element is that they will be owned by a single entity.

Appellants argue that the word "facility" is "[s]omething that is built, constructed, installed, or established to perform some particular function or to serve." Appellants then argue at length that a "facility" may be comprised of more than one "building." Girls and Boys Town does not contest a facility may be comprised of multiple buildings, if for example the "facility" had two buildings, one a dormitory for residents and a second for a dining hall. That, however, is not the case here.

In the present case, however, each home is an independent, self-contained "facility." Each home is located on a separate lot and has a separate entrance. Each home, like all single-family homes, contains bedrooms, bathrooms, a kitchen, and a living area. Each home has its

own front door, parking space and back door. Each home performs its function independently of the other homes, and does not rely on the other homes in any fashion. Each home satisfies the definition of "facility" advanced by Appellant, because each home performs its "particular function" and "serve[s]" its purpose. The fact that each facility will be located next door to another that has the same type of use, or that they are owned by a common owner, does not change the fact that each home is an independent facility. In like manner, adjacent single-family homes may be owned by the same owner who rents them out. No one would argue that the two single family homes were one simply because the owner is the same. Moreover, the fact that the four homes will share amenities such as a basketball court and fence is not relevant. For example, a planned residential development may share a swimming pool, tennis court, park or a perimeter fence. This sharing does not make the planned development one "home" for zoning purposes. Appellants have failed to offer any evidence or testimony that proves that each one of these homes does not qualify as a youth residential care home for up to six children.

Thus, even if Appellants' novel legal theories had merit, they failed to provide any evidence to support them. In fact, notwithstanding Appellants' burden to prove their case, the speculation they relied on (through the testimony of Patricia Harden) was put to rest by the credible testimony of Ms. Washington.

C. ISSUANCE OF BUILDING PERMITS IS GOVERNED BY THE ZONING REGULATIONS

The operative requirements for the issuance of building permits for a Youth Residential Care Home (6 children or less) are contained in §201.1(n)(1) of the Zoning Regulations. As established above, Girls and Boys Town has met each of the requirements for each of the four homes. Each of the homes for which a Permit was issued is an individual youth residential care

home. Each home will house not more than six youths. Under the Zoning Regulations, each home is permitted as a matter-of-right in the C-2-B Zone District.

Appellants' novel construction of the word "lot" is inapposite. Appellants argue that the Zoning Administrator's interpretation of §3202.3, which pertains to "lots," is unsupportable because it "would be in direct conflict with the definition of 'facility' as used in the regulations governing CBRF's." (Appellants' Brief at 10). That section provides that a building permit shall not be issued for the proposed erection of a principal structure unless each structure will be on a separate "lot of record." 11 DCMR §3202.3. Appellants argue that because the definition of "facility" extracted from *Webster's Third New International Dictionary* may include more than one building, the Zoning Regulations must not be construed to require that each building of a facility must be located on a separate lot of record. Thus, Appellants propose to overturn the entire zoning process, fifty years of precedent, and the established procedures of the District of Columbia by requiring the Zoning Administrator to reconfigure the "lots" himself, in his own discretion. Appellants, however, have failed to point out even one regulation, precedent, or case that permits the Zoning Administrator to reconfigure lot lines for zoning purposes. Appellants argue that the Zoning Administrator is not "precluded" from considering more than one lot of record when determining whether a structure meets the requirements of §201.1(n)(1). Whether the Zoning Administrator is precluded from exercising such discretion is inapposite. The Zoning Administrator is limited to enforcing the Zoning Regulations as they are enacted. He has only so much power as has been delegated to him. See 11 DCMR § 3200.1.

Appellants assert that "well accepted principles of zoning" allow, indeed require, a zoning official to consider adjacent lots in common ownership as a single lot for purposes of granting zoning approvals[2]. To bolster its legal position, Appellant cites only one case, which is from the Appeals Court of Massachusetts, not even that state's highest court. See *Heald v. Zoning Board of Appeals of Greenfield*, 387 N.E.2d 170 (Mass. App. Ct. 1978). The issue in *Heald* was an interpretation of the zoning laws in that particular Massachusetts municipality and has absolutely no application in the District of Columbia[3]. *Heald's* progeny demonstrate that adjoining parcels held in common ownership will be considered one lot for zoning purposes against the will of the owner only when the lots are undersized and non-conforming. This precludes an owner from availing himself of a non-conforming exemption unless he uses his adjacent lot to reduce the non-conformity. *See, e.g., Preston v. Board of Appeals of Hull*, 744 N.E.2d 1126, 1128 (Mass. App. Ct. 2001); *Asack v. Board of Appeals of Westwood,* 716 N.E.2d 135, 137 (Mass. App. Ct. 1999); *Seltzer v. Board of Appeals of Orleans*, 510 N.E.2d 309, 309-10 (Mass. App. Ct. 1987) (listing cases); *see also* 83 Am. Jur. 2d *Zoning and Planning* §185 (1992) (common ownership of adjacent lots).

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2 In fact in its written submissions and at the public hearing on February 12, 2002, counsel for the Appellants promised the BZA that she had "ample" support for Appellants' position. She has subsequently provided no District of Columbia case law, BZA Orders, Zoning Administrator decisions or other such "ample" support for Appellants' position.

3 The Massachusetts case offered by the Appellants actually bolsters the Zoning Administrator's position, by showing that it is indeed a rare instance where separate lots in common ownership may be combined. In the Massachusetts case, the property owner itself petitioned to have the lots considered together, and the court determined that the specific zoning statute in question did allow such an anomaly. The Appellants completely misinterpret the Massachusetts case. The ruling of the Court is based on an actual zoning statute in Massachusetts. Regardless, the case does not stand for what the Appellant claims it does. This case holds that, in this particular scenario, the property owner was permitted to combine his adjacent lots, at his discretion, and the city permitting agency could not prohibit it. To say that this is support for a D.C. Zoning Administrator now being empowered to arbitrarily reconfigure lot lines is grossly inaccurate.

Appellants have failed to present any applicable precedent, evidence, or regulation that would permit or require the Zoning Administrator to issue building permits based upon a review of more than one lot of record. Thus, Appellants' interpretation must fail.

II. THE ZONING ADMINISTRATOR CANNOT IMPLEMENT THE COMPREHENSIVE PLAN

Appellants argue that the Zoning Administrator erred in failing to look to the Comprehensive Plan for guidance in approving the building permits. Appellants do not contend that the decision on the permits was inconsistent with the Comprehensive Plan[4]. Rather, Appellants contend that the Zoning Administrator should have used the Comprehensive Plan in determining whether the four homes are separate youth residential care homes or should be considered as a single youth residential care home.

As indicated in much greater detail in our Brief on the Applicability of the Comprehensive Plan, filed in the record on February 19, 2002, the Zoning Administrator has no power or authority to implement the Comprehensive Plan. 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). Further, the Plan must be interpreted under its own rules of interpretation. Section 112 of the Plan specifically states that provisions of the Plan are intended to be a "guide" to establish broad policies and goals and that they should be studied and executed in concert with others. It also says, in Section 112, that

the Plan itself establishes elements which intentionally overlap and are sometimes contradictory. But most importantly, the Comprehensive Plan is not self effectuating. It requires implementation by the variety of boards and agencies with whom responsibility rests for compliance.

The Zoning Administrator does not have the authority to incorporate the Comprehensive Plan in its decisions for issuing or not issuing building permits. The Courts have said so, and Appellants' own "Comprehensive Plan" witness (Brian Furness) admitted this when he stated the Comprehensive Plan does not "to the best of my knowledge, control it directly. That is done through the zoning and through the licensing and permitting process of the District Government." (Transcript, February 5, 2002, p. 143). And if that testimony is not sufficient for the Board, it can also rely on the Appellants' zoning expert, Mr. White, who agreed with Mr. Furness that the Zoning Regulations, not the Comprehensive Plan, directly control the subject lots (Transcript, February 5, 2002, p. 55).

Notwithstanding that the Zoning Regulations govern, it must be noted that many of the Plans goals are enhanced by these Permits. For example, the Plan encourages the creation of Youth Residential Care Homes to help house foster children; it also encourages compliance with the Fair Housing Act; and it encourages many of the goals that these homes will achieve for the District's children who have been abused or neglected . It also directs that the Land Use Element and the Land Use Map, not the ward plans nor any other element, take precedence when

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Footnote continued from previous page

[4] Indeed, that argument would fail under the law established in *Tenley and Cleveland Park Emergency Committee v. District of Columbia Board of Zoning Adjustment*, 550 A.2d 331, 341 (D.C. 1998).

evaluating these decisions. It is an absolute fact that the Land Use Element of the Plan, specifically the Map, is consistent with Girls and Boys Town's proposed uses.

Under *TACPEC*, the Zoning Administrator does not possess the discretion to review the consistency of matter-of-right zoning provisions with the Comprehensive Plan (*See TACPEC*, 550 A.2d at 340). In order for the Zoning Administrator to have authority to "look to" the Comprehensive Plan, as suggested by the Appellants, the Zoning Commission would have to promulgate a Regulation requiring such a "look". Until such Regulation is adopted the "Zoning Administrator is limited to enforcing the regulations" (Id, p. 341). The Court noted that residents, like Appellants, who perceive themselves to be aggrieved by such an alleged inconsistency between the Plan and the Regulations, may petition the Zoning Commission to address such matter. Here, the Zoning Administrator determined that each home was a youth residential care home for not more than six persons, not including resident supervisors or their staff. Pursuant to the Zoning Regualtions, under §201.1(n)(1), each home was entitled to a building permit. The Comprehensive Plan has no place in that determination.

III. THE BZA MUST ADHERE TO ITS PRIOR DECISION ABSENT UNUSUAL CIRCUMSTANCES

A. THE RULE OF *STARE DECISIS*

Administrative agencies must adhere to a policy of *stare decisis* that is, be bound to its previous decisions, unless unusual circumstances intervene. *See 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 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, s*ee Springer,* 743 A.2d at 1220, which has not occurred here.

B. *STARE DECISIS, RES JUDICATA,* AND *COLLATERAL ESTOPPEL*

Appellants contend that *stare decisis* does not apply here because this adjudication is between different parties and involves different properties. Appellants' assertion is erroneous and demonstrates that they do not comprehend the concept. Black's Law Dictionary defines *stare decisis* as, *inter alia,* the "Doctrine that, when [a] court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it in all further cases, where [the] facts are substantially the same; regardless of whether the parties and property are the same." Black's Law Dictionary 1406 (6th ed. 1990). The doctrine of *stare decisis* is about reliance and fairness. It is a policy developed by the courts of adhering to established precedent. Underlying the doctrine is the principle that factually similar cases should have similar outcomes. It ensures consistency. *See, e.g., Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591, 601, 68 S.Ct. 715, 721, 92 L.Ed. 898 (1948). Thus, *stare decisis* "underlie[s] the very notion of an ordered society" and prevents "fundamental unfairness." *Reichley,* 531 A.2d at 253, 249. It means that after a rule is established, the general public may rely on that rule and conform its behavior to it. An agency may overrule established precedent only by demonstrating through reasoned analysis that there are sufficient reasons for doing so. In this manner, the courts can be assured that the agency "is faithful and not indifferent to the rule of law." *See Springer,* 743 A.2d at 1221 (citing *Columbia Broadcasting System v. FCC,* 454 F.2d 1018, 1026 (D.C. 1971). Accordingly, the doctrine of *stare decisis* applies to parties

involved in different actions, and does not depend upon whether the parties to the current action are the same as the parties in the past action.

The doctrine of *stare decisis* is separate and distinct from the doctrines of *res judicata* and collateral estoppel. Those concepts, on the other hand, are based upon the principles of finality and conservation of judicial resources. The doctrines prevent the relitigation of the same case between the same parties. As the United States Supreme Court explained in *Commissioner of Internal Revenue v. Sunnen*,

> The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment
>
> But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters in issue or points controverted, upon which the determination of which the finding or verdict was rendered. ... In this sense *res judicata* is more accurately referred to as ... collateral estoppel.

Id. 333 U.S. at 597-97, 68 S.Ct. at 719 (internal quotations and citations omitted).

In accordance with the above principles, Girls and Boys Town agrees with the Appellants that "a person who is not a party is not bound by an [administrative] adjudication." (Appellants'

Brief at 11). However, when a non-party appears in its own administrative adjudication, the doctrine of *stare decisis* may apply to its case if the facts are similar.

Here, *res judicata* and collateral estoppel do no apply because the parties in this action are not the same as the parties in Application No. 16531. Further, the properties at issue are not the same. However, the doctrine of *stare decisis* does apply because the BZA established a precedent in its Decision and Order No. 16531. Boys Town relied on that precedent, and it would be arbitrary and unfair for the BZA to change the rule. Because Appellants have failed to demonstrate any "unusual circumstances," the BZA must adhere to its prior precedent.

C. BZA ORDER NO. 16531 IS BINDING PRECEDENT

Appellants contend that the holding in BZA's Decision and Order No. 16531 is not precedent because it was *obiter dictum*. Appellants' only argument is that the finding was a mere observation located in the section entitled "Preliminary Matters." Appellants' assertion is false. Indeed, the BZA made the question essential to the resolution of that case and its opinion on this issue is stated in the Order's "Conclusions of Law and Opinion". It is hardly dicta.

A complete reading of the Order demonstrates that the proposition is mentioned not once, but twice. First, the BZA observed that the Zoning Administrator had determined that "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 (BZA Order 16531, Preliminary Matters, page 2). Later, in the "Conclusions of Law and Opinion," 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 observed, in the Order, that the Zoning Administrator also had determined 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.). 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. Thus, the holding was essential to the BZA's reason for approving the special exception. That was precisely the issue of the case. The holding of the BZA in Application No. 16531 is binding precedent, which the BZA must follow.

Appellants also argue that BZA Order No. 16531 is not entitled to status as precedent because it is neither published nor made available to the public. This assertion is also false. BZA Orders are made public by the filing of them in the record.

BZA Order No. 16531 addressed the precise issue at hand and was made available to the public. Appellants have failed to advance any "unusual circumstances" that would warrant the abandonment of *stare decisis*. On that ground alone, the Permits must be upheld.

CONCLUSION

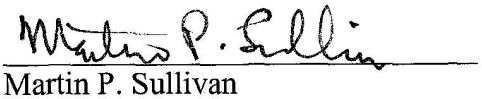
Despite Appellants' confusing and circular arguments, two things remain clear: (1) the Zoning Administrator followed the Zoning Regulations; and (2) Appellants disagree with the underlying policy behind §201.1(n)(1) of the Zoning Regulations. Because the Appellants do not like §201.1(n)(1), it urges the BZA to adopt an unsupportable interpretation of that section, which would effectively nullify express changes made by the Zoning Commission. The

Appellants then urge the BZA to adopt an unworkable standard whereby the Zoning Administrator would be unable to issue building permits based upon lots of record, but instead must divine whether lots in a certain area are somehow related. Further, the Appellants urge the BZA to require the Zoning Administrator to consider the Comprehensive Plan in issuing permits, a concept that has repeatedly been rejected by the District of Columbia Court of Appeals. Appellants also urge the BZA to write into the Zoning Regulations requirements that do not exist, i.e., that the Zoning Administrator should investigate the land uses on adjoining parcels, evaluate the operations plans of proposed uses and treat a property owner differently if it owns more than one contiguous lot. However, the BZA cannot write Zoning Regulations, that authority rests solely with the Zoning Commission. In essence, Appellants' arguments have no legal or factual basis. Accordingly, this appeal should be denied and the Permits upheld.

Respectfully submitted,



Phil T. Feola



Martin P. Sullivan

April 5, 2002

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2002, a copy of Boys Town Reply Brief was served by first class mail to:

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