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

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Hearing dates: December 4, 2001
February 5, 2002
February 19, 2002
February 26, 2002

Decision date: May 7, 2002

APPELLANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. SUMMARY OF EVIDENCE

1. This appeal was filed on September 12, 2001, by the Southeast Citizens for Smart Development, Inc., and Advisory Neighborhood Commission ("ANC") 6B, pursuant to 11 DCMR § 3100.2 and 3200.2 challenging the determination of Michael D. Johnson, Zoning Administrator, made on August 30, 2001, that the four building permit applications filed by Father Flanagan's Boy's Home to construct buildings at 1308, 1310, 1312, and 1314 Potomac Avenue, S.E. (Square 1045, Lots 137, 136, 138, & 134), each housing six children as part of a Community Based Residential Facility, could be issued as a matter of right in the C-2-B zone.

2. On December 7, 2000, Father Flanagan's Boy's Home ("Boy's Home") filed four applications for building permits to construct four Youth Residential Care Homes, each housing six youths and two adults, at 1308, 1310, 1312, and 1314 Potomac Avenue, S.E. (Square 1045, Lots 137, 136, 138, & 134). Except for the lot numbers and lot area, the applications were virtually identical. The applications were reviewed by various permitting officials as a unit, with each official providing plan approval for each of the applications on the same day. According to the application, zoning approval for each of the four applications was issued on July 5, 2001. Appellant's Pre-hearing Submission, Exhibit 2.

3. According to project information submitted by Boy's Home to permitting officials, Boy's Home stated that "There are multiple structures planned for the Pennsylvania Avenue Campus of Girls and Boys Town." The four Youth Residential Care Homes were described as "Phase 1" of the development, consisting of four "identical" homes, whose "rear yards open[] onto the rest of the campus." Pre-hearing Submission, Exhibit 8. The houses

BZA
Case No. 16791
Exhibit No. 70

Board of Zoning Adjustment
District of Columbia
CASE NO.16791
EXHIBIT NO.70

have separate entrances for the adult caretakers, with the "front door" allowing for egress and ingress from the street from the caretakers' section of the house, and a "campus entrance" in the rear of each living unit, which will be used by the children. Tr. at 339, 344 (Feb. 19, 2002). Site plans show perimeter fencing around the entire campus, with a single gated entrance for vehicles. Tr. at 344-6 (Feb. 19, 2002). Phase 2 of the development will consist of a Short Stay facility for 16 children, an administration building, and a recreation area. Pre-hearing Submission, Exhibit 8.

4. Boys Home prepared and publicly distributed various Community Updates, which describe 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).

5. Mr. J. Kirkwood White, who was qualified as an expert witness in the area of zoning, testified that the Zoning Administrator made a "mistake not to look at the other units that are planned for the site and to add up the number of people to be serviced," and that the four applicable record lots on which the buildings were to be constructed should be considered a single "lot" for zoning purposes. Tr. 38-40 (Feb. 5, 2002). Mr. White also testified that the view that the Zoning Administrator should look at the total occupancy of buildings being constructed on four adjacent lots of record relates solely to CBRF's, in light of the zoning regulations specific policy to encourage "Smaller facilities, approximating the size and characteristics of families, . . to lessen impact, increase compatibility and provide for true alternatives to institutional settings." Tr. at 57 (Feb. 5, 2002); Zoning Commission Order 347 347, at 4 (July 9, 1981).

6. Ms. Patricia Harden, who was qualified as an expert in social work, testified concerning the operational characteristics of a single group home versus a series of small, independent group homes that coincidentally happen to be located side-by-side. Tr. at 93 (Feb. 5, 2002). Ms. Hardin testified that a group home where residents reside in separate structures or living units could nonetheless be part of single group home, where the facility has the appearance of a campus or a compound, sometimes fenced, often fenced, with common areas for recreation, meetings, classrooms, offices, etcetera, with all or most activities centrally managed." The facility "is administratively centralized," and "[s]taff for all the living units is centrally hired, trained and supervised and generally on the same payroll." Id. at 93-94. Ms. Hardin also testified that "operating a group home for more than six children is less desirable from a therapeutic standpoint, even where small, clustered living units are utilized because it is operated on a scale that is not sufficiently personalized and surrounds already troubled children with too many negative influences and not enough positive role models. Id. at 96. Ms. Hardin testified that in her opinion, the only reason for locating these four homes side-by-side is to achieve some sort of "economy of scale, economy of services, not for the therapeutic needs of the children" Id. at 97.

7. Mr. Brian Furness testified that the Ward 6 Comprehensive Plan contained a

statement of specific policy "to prevent further concentration of community-based residential facilities, CBRFs, in Ward 6 neighborhoods and require future development of CBRFs to be in accordance with the District-wide CBRF plan." Tr. at 122 (Feb. 5, 2002).

8. Mr.Rob Nevitt, President of the Capitol Hill Restoration Society, testified that 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). According to *Webster's*, a facility is "Something that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular need." Webster's Third New International Dictionary (G & C Merriam & Company 1971). See Tr. at 148 (Feb. 5, 2002).

9. Mr. Kenan Jarboe, Chairman of Advisory Neighborhood Commission ("ANC") 6B, testified that ANC 6B, at a properly noticed meeting held on November 13, 2001, unanimously voted that "the decision of the Zoning Administrator in this matter was in error and must be reversed in order to avoid setting a dangerous precedent" which would allow developers to circumvent the special exception process. Tr. at 166-67 (Feb. 5, 2002). The ANC testified that the four contiguous buildings at issue were a single "unit," which "have always been presented to the community as a whole, not as four separate entities" Id.

10. Mr. Toye Bello, Zoning Administrator stated that his role in reviewing this project 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. Tr., at 193, 215 (Feb. 12, 2002). As a result, Mr. Bello testified that it was irrelevant to his determination that "the four buildings were part of a larger project," and he therefore made no inquiries into the relationship between the four building permit applications. Id. at 196, 207. Mr. Bello also 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.

11. According to Mr. Bello, the reason that he was obligated to look at the Boys Town project as being four separate facilities was that, in his view, a "Community Based Residential Facility," by definition, can consist of no more than one building, id. at 237-239, and that Section 3202.3 of the Zoning Regulations requires that no more than one principal building be located on a single lot of record. Id, at 222-23.

12. The Zoning Administrator testified that he did not consider the D.C. Comprehensive Plan in his review of the permit applications, based on his opinion that it would be a "fruitless exercise" given his conclusion that the zoning regulations compelled matter of right treatment of the individual buildings comprising the Boys Town CBRF. Tr. at 201, 223-24 (Feb. 12, 2002).

13. Mr. Armando Lourenco was qualified as a zoning expert, and testified on behalf of Boys' Home. Mr. Lourenco stated that, in his opinion, the Zoning Administrator was correct in viewing the four buildings as separate CBRFs because each building would have fewer that seven youths, and could therefore be located in each building as a matter of right under 11 DCMR § 201.1(n)(1). Tr. at 219-224 (Feb. 19, 2002). Both Mr. Lourenco and Ms. Gladys Hicks, another zoning expert for Boys Home, testified that the focus of the Zoning Administrator's review was on the building proposed for a specific record lot and not on "what's next door or across the street." Id. at 284.

14. Mr. Lourenco stated 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." Tr., at 252, 254, 259, 262-63 (Feb. 19, 2002)

15. In support for his view that the Zoning Administrator had no obligation to consider whether the four buildings were a single "facility" regardless of their location on separate record lots, Mr. Lourenco argued that, in his experience, zoning review of uses such as grocery stores, single family homes, and apartment houses, focused solely on the development occurring within a single record lot. See Tr. at (Feb. 19, 2002) (apartment building); Id. at 238, 269 (supermarket or grocery shop); Id. at 263 (single family dwelling).

16. Mr. Lourenco also stated that 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. Tr. at 230-31 (Feb. 19, 2002).

17. Ms. Connie Washington, site director for Girls and Boys Town of Washington, testified about the day-to-day operations of the proposed development at issue. Ms. Washington testified that each of the four living units will be owned, operated and supervised by Boys Town, will have shared staff such as social workers and administrative staff, and have shared recreation space and joint recreational activities. Tr. at 306-13, 325. (Feb. 19, 2002).

II. FINDINGS OF FACT

18. Based on the unrebutted evidence that each of the four living units that are the subject of this appeal will be enclosed within a single fenced campus, and will be owned, financed, and operated by Boys Home, and have shared staff such as social workers and administrative staff, all on Boys Home's payroll, and will perform a common function as a youth residential care home, the preponderance of evidence demonstrates that the four subject buildings are part of a single Youth Residential Care Home, whose total occupancy will be 24 children, not including supervisors and staff.

19. This CBRF will be located within 500 feet of a pre-existing Community-Based Residential Facility (CBRF) for eight developmentally challenged persons, operated by D.C.

Health Care at 901 14th Street, S.E. See Appellant's Pre-Hearing Submission, Exhibit 1.

III. CONCLUSIONS OF LAW

20. Under § 3202.1 of the Zoning Regulations, a building permit shall not be issued for the proposed erection, construction, conversion, or alteration of any structure unless that structure complies with the provisions of the Zoning Regulations.

21. Under 11 DCMR § 3100.2 the Board of Zoning Adjustment shall hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, in the administration or enforcement of this title.

22. The Board of Zoning Adjustment has the power, in conformity with the Zoning Code, to "reverse or affirm, wholly or partly; or may modify the order, requirement, decision, determination, or refusal appealed from; or may make any order that may be necessary to carry out its decision or authorization; and to that end shall have all the powers of the officer or body from whom the appeal is taken." D.C. Code § 5-641.07(g)(4); 11 DCMR § 3101.5.

23. The Zoning Regulations define Youth Residential Care Home" ("YRCH") 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). A Community Based Residential Facility ("CBRF") 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).

24. The word "facility" is not defined in the Zoning Regulations. See 11 DCMR § 199.1. This word must have the meaning given in *Webster's Unabridged Dictionary*. Id. § 199.2(g). Based on the unrebutted testimony provided by the Appellant, the definition of "facility," as that word is used in the definition of YRCH and CBRF, is as follows: "Something that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular need." See Webster's Third New International Dictionary (G & C Merriam & Company 1971).

25. A facility, including a CBRF or YRCH, can be comprised of multiple buildings or structures that serve a particular function, including buildings that are located on separate but contiguous recorded lots. See 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).

26. It is a generally accepted principle of zoning 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) The Zoning Regulations implicitly endorse this concept by recognizing 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.

27. The 1981 Zoning Commission order adopting the following principles that must guide zoning decisions relating to CBRFs::

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)

28. In 1992, the Zoning Commission adopted Zoning Commission Order 725, which amended the Zoning Regulations applicable to CBRFs. These amended regulations increased the matter-of-right occupancy of a CBRF from four to six, in order to comport with the zoning definition of "family." See 11 DCMR § 201.1(n)(1). However, nothing in Zoning Commission Order 725 repealed the guiding principles set forth in Zoning Commission Order 347.

29. Viewing each of the separate buildings comprising the Boys Town Pennsylvania Avenue campus as a separate CBRF rather than as part of a single facility would be inconsistent with the guiding principles set forth in Zoning Commission Order 347, which seek to encourage "[s]maller facilities, approximating the size and characteristics of families." Because the four living units will be clustered together, and enclosed within a single fenced campus, the Pennsylvania Avenue Campus will more closely resemble an institution rather than a family. Further, if the permits are upheld here, the Boys' Home development will provide an architectural blueprint for developing large CBRF facilities in excess of matter-of-

right occupancy limits without BZA approval.

30. Nothing in Zoning Commission Order 725 suggests that the Commission, by increasing the matter of right occupancy limit from four to six persons, intended to encourage CBRF operators to evade special exception review by the architectural device of spreading out the occupancy of a large facility into separate living units housing only six residents built on subdivided lots.

31. The Zoning Administrator erred in failing to consider whether the four living units proposed for construction on Square 1045, Lots 134, 136, 137, 138, were part of a single Community-Based Residential Facility, even though the four living units were being constructed on separate subdivided lots of record.

32. This Board is not bound by any assertions contained in BZA Order 16531, concerning a different CBRF at 4801 Sargent Road, N.E., which language suggested as a hypothetical matter that four CBRFs, each housing six or fewer children, located on separate subdivided lots homes could be located as a matter of right. This assertion is *obiter dictum* to that case, which does not have the force and effect of law. Because the parties and facts of this case are different from the parties and facts involved in BZA Order 16531, the doctrines of issue or claim preclusion or estoppel have no applicability here.

33. Section 3202.3 of the Zoning regulations provide that

> Except as provided in § 2516 . . . ., a building permit shall not be issued for the proposed erection, construction , or conversion of any principal structure, or for any addition to any principal structure, unless the land for the proposed erection, construction, or conversion has been divided so that each structure will be on a separate lot of record.

34. Section 2516 of the Zoning Regulations provides that two or more principal buildings or structures may be erected on a single subdivided lot under certain conditions, if approved by the Board of Zoning Adjustment.

35. Nothing in Section 3202.3 of the Zoning Regulations explicitly states or provides that where a single "facility" consists of multiple buildings located on separate lots of record, the Zoning Administrator must consider each building to be a separate "facility," without regard to the functional relationship between the buildings. Plainly, a single facility can include more than one principal building.

36. While Sections 2516 and 3202.3 precludes the Zoning Administrator from approving an application where more than one principal building is proposed for a single subdivided lot, nothing in these provisions requires the Zoning Administrator to approve a CBRF or YRCH as being matter-of-right simply because it comports with section 3202.3.

Instead, even if the buildings were located on separate record lots, the developer would be entitled to matter-of-right approval only if the total occupancy was within the matter-of-right limits for CBRF uses in that zone.

37. The occupancy limits applicable to CBRFs in the C-2 district are set forth in Section 721. 5 and Section 732.1 of the amended Zoning Regulations. Section 721.5 of the Zoning Regulations 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.

38. Section 732.1(a) of the zoning regulations provides that:

> Community-based residential facilities in the following subcategories shall be permitted in a C-2 district if approved by the Board of Zoning Adjustment in accordance with the conditions specified in § 3108 of Chapter 31 of this title:
>
> (a) Youth Residential Care Home or community residency facility for sixteen (16) to twenty-five (25) persons, not including resident supervisors or staff and their families, subject to the standards and requirements of § 358.

39. The D.C. Comprehensive Plan, as amended, specifically 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).

40. The Ward 6 Comprehensive Plan states the following specific policy: "to prevent further concentration of community-based residential facilities, CBRFs, in Ward 6 neighborhoods and require future development of CBRFs to be in accordance with the District-wide CBRF plan." 10 DCMR § 1731.1(d).

41. The Advisory Neighborhood Commission (ANC) Act states that in the case of

actions where ANCs are entitled to notice:

> (A) The issues and concerns raised in the recommendations of the [ANC] shall be given *great weight* during the deliberations by the government agency and those issues shall be discussed in the written rationale for the government action. Great weight requires acknowledgment of the Commission as to the source of the recommendations and explicit reference to each of the Commission's issues and concerns.
>
> (B) In all cases the government entity is required to articulate its decision in writing. The written rationale of the decision shall articulate with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances. In so doing, the government entity must articulate specific findings and conclusions with respect to each issue and concern raised by the Commission. Further, the government entity is required to support its position on the record.

D.C. Code § 1-309.10(d)(3)

42. Where a single YRCH or CBRF is comprised of multiple buildings on several adjoining record lots, the Zoning Administrator must apply the applicable occupancy, spacing, or use restrictions to the facility as a whole, in order to give effect to the zoning principles governing CBRF uses as well as the Comprehensive Plan.

43. The preponderance of evidence demonstrates that the four subject buildings are part of a single Youth Residential Care Home, owned and operated by Boys' Home, whose total occupancy will be 24 children, not including supervisors and staff, which, pursuant to Section 732.1 of the Zoning Regulations, may only be located in the C-2 zone if approved by this Board in accordance with the conditions specified in § 3104.1

44. The Zoning Administrator abused his discretion by considering the four building permit applications by Boys Home to be separate matter-of-right facilities, without inquiring into the relationship between the four buildings, and without reference to the policies stated in the D.C. Comprehensive Plans or in Zoning Commission Order 347.

45. In light of the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the subject appeal is granted, and the building permit is revoked, because the four buildings are part of a single Community-Based Residential Facility having a total occupancy of 24 children, which exceeds the occupancy permitted in a the C-2 zone as a matter-of-right, and therefore may be permitted only by special exception.

VOTE: (Zoning Commission representative, James Hannahan, National Capital Planning Commission representative, David Levy, Geoffrey Griffis, xJr. Anne M. Renshaw, Curtis Etherly, Jr.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
Jerrily Kress, Director
Office of Zoning

Respectfully submitted,



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April 26, 2002

CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2002, a copy of the foregoing Appellant's Proposed Findings of Fact and Conclusions of Law was served by mail on:

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