BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

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

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Appeal # 16791, of Southeast Citizens for Smart Development, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of Michael D. Johnson, Zoning Administrator, allowing the location of Father Flanagan's Boys Town Phase I, a residential group home, in a C-2-B District at premises 1308, 1310, 1312, and 1314 Potomac Avenue, Southeast, Square 1045, Lots 134, 135, 136, and 137.

Hearing Dates: December 4, 2001, and February 5, 12, 19, and 26, 2002.

DISTRICT OF COLUMBIA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND OPINION

PROCEDURAL HISTORY

On or about December 12, 2000, Father Flanagan's Boys Home, Inc. (hereinafter "Owner") submitted applications ("Applications") for building permits to construct four Community-Based Residential Facilities ("CBRFs"), each on a separate lot of record in the Capitol Hill neighborhood. In or around June 2001, Appellant Southeast Citizens for Smart Development, Inc. (hereinafter "Appellant") wrote to the Department of Consumer and Regulatory Affairs (hereinafter "DCRA") with concerns about the Owner's proposed project.

Appellant's position is that the four proposed structures for which building permits were issued should have been treated, for zoning purposes, as a *single* CBRF

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housing up to 24 residents. A CBRF of that size would require a special exception and would be subject to the radius requirement of 11 DCMR § 721.5. That regulation provides that a CBRF shall be permitted as a matter of right if there is (1) no existing CBRF that accommodates seven or more persons within the same square and (2) no property containing an existing CBRF within 500 feet of the subject property. In reviewing the applications for building permits, the Zoning Administrator determined that the 500-foot radius requirement was inapplicable to the four proposed CBRFs, which were permitted as a matter of right pursuant to 11 DCMR § 201.1(n).

The issue on appeal to the Board is whether the Zoning Administrator erred in determining that each of the four proposed buildings is permitted as a matter of right in the C-2-B zone district.

A hearing was commenced on December 4, 2001, and concluded on February 26, 2002. The parties were required to submit proposed findings of fact and conclusions of law by April 26, 2002.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The subject properties are four (4) separate lots located on Capitol Hill, just south of Pennsylvania Avenue, S.E. These lots are located in a C-2-B zoned district. Their legal descriptions are Lots 134, 135, 136, and 137 in Square 1045. (Applications for Construction Permits dated December 12, 2000 ("Applications"), Appellant's Statement filed in support of this appeal on or about November 20, 2001 at 1).

2. Permit No. B438335 permits new construction at 1308 Potomac Avenue, S.E., Lot 137 in Square 1045. (Board's File).

3. Permit No. B438336 permits new construction at 1314 Potomac Avenue, S.E., Lot 134 in Square 1045. (Board's File).

4. Permit No. B438337 permits new construction at 1312 Potomac Avenue, S.E., Lot 135 in Square 1045. (Board's File).

5. Permit No. B438338 permits new construction at 1310 Potomac Avenue, S.E., Lot 136 in Square 1045. (Board's File).

6. The drawings submitted to the DCRA with the four separate Applications depicted four separate (CBRF) buildings on four separate lots of record. Each of these buildings was to house up to six youths and two resident staff members. These drawings were used by the Zoning Administrator to determine compliance with the District's Zoning Regulations, including radius requirements. (Transcript ("Tr.") 2/12/02 at 221:7-223:2, 225:6-8, 227:24-228:4).

7. In reviewing the Applications, the Zoning Administrator was able to ascertain the relationship between the four proposed buildings without requesting additional information. (Tr. 2/12/02 at 238:3-20).

8. The proposed project to which the Applications pertained did not involve an institution of higher learning and, therefore, it would have been improper for the Owner to request a campus plan permit for the proposed project. (Tr. 2/5/02 at 47:8-19, Tr. 2/12/02 at 230:5-13).

9. Olutoye Bello, Armando Lourenco, and Gladys Hicks – the District's and the Owner's witnesses – are experts in the areas of zoning and interpretation of zoning regulations in the District of Columbia. These experts agree that, based on the clear language and intent of 11 DCMR § 201.1(n), each of the four proposed

buildings is a youth residential care home that is permitted as a matter of right in a C-2-B zoning district. (Tr. 2/12/02 at 227:12-17).

10. The District's Zoning Regulations regulate the use of the land on which the four buildings are to be constructed. (Tr. 2/5/02 at 49:17-19).

11. The Zoning Administrator is not to aggregate proposals for adjacent record lots in determining whether zoning relief may be required. (Tr. 2/12/02 at 261:15-22).

12. The Zoning Administrator is to look at record lot lines in applying the occupancy limitations established by the Zoning Commission. (Tr. 2/12/02 at 261:23-262:2).

13. Each individual building constructed on a separate lot of record constitutes a separate CBRF.

14. A 500-foot radius limitation applies only to CBRFs for seven (7) or more residents. (Tr. 2/12/02 at 228:8-13).

15. Had an application proposed construction of four separate youth residential care facility buildings on a *single* record lot, the application could not properly have been approved by the Zoning Administrator. A proposal to construct more than one principal structure on a single lot would have required the approval of the Board of Zoning Adjustment. (Tr. 2/12/02 at 259:2-8, 228:14-25, 229:1-6, 263:3-21).

16. The District's Comprehensive Plan was approved by the City Council to guide land use and development. (Tr. 2/5/02 at 121:15-17).

17. The Comprehensive Plan, as an expression of the hopes, desires, aspirations and determination of residents, sets forth policy that should inform the decisions of

the Zoning Administrator. (Tr. 2/5/02 at 125:15-24, Written Testimony of Brian Furness).

18. CBRF development and expansion is controlled through the zoning, licensing, and permitting processes of the District government, within a framework provided by the Comprehensive Plan. (Tr. 2/5/02 at 143:12-23).

19. The Comprehensive Plan is not self-executing and does not directly regulate the development of private property in the District of Columbia. (Tr. 2/12/02 at 231:3-232:3, Zoning Administrator's Statement in Opposition to DCOP Report, Applicability of Comprehensive Plan to Appeal of the Decision of the Zoning Administrator).

20. The District of Columbia's Zoning Regulations are not superceded by the Comprehensive Plan or the Ward Plan. (Tr. 2/5/02 at 48:13-49:5).

21. Where there is an inconsistency between the Comprehensive Plan and the Zoning Regulations, the authority to resolve the inconsistency rests with the Zoning Commission. (Tr. 2/12/02 at 232:4-13).

22. To invoke the Comprehensive Plan or the Ward Six Plan as a basis for denying a matter-of-right use would exceed the authority of the Zoning Administrator. (Tr. 2/12/02 at 256:6-16).

23. In considering the Applications for four buildings on separate record lots, the Zoning Administrator was not to consider whether the four buildings were to be constructed by one builder or by four different builders. (Tr. 2/5/02 at 56:17-57:5, Tr. 2/12/02 at 225:9-17).

24. How use of a proposed building is to be related to use of other buildings is not to be considered by the Zoning Administrator in deciding whether to issue a building permit. (Tr. at 232:21-233:6).

25. The Zoning Administrator is required to apply the Zoning Regulations in effect until such time as they are amended by the Zoning Commission.

OPINION

The Board of Zoning Adjustment (hereinafter "the Board") has jurisdiction to hear this appeal and render a decision and order pursuant to D.C. Code, 2001 Ed. § 6-641.07(f). Appellant has the burden of proof pursuant to 11 DCMR § 3324.2. In order to reverse the Zoning Administrator's decision approving the issuance of the building permits, appellant must demonstrate by a preponderance of the evidence that the construction proposed for 1308, 1310, 1312 and 1314 Potomac Ave, S.E., is not permitted as a matter of right.

The appellant has not met its burden of proving that the construction of four separate Youth Residential Care Homes is not permitted as a matter of right.

Appellant has not cited any regulation in the District of Columbia that states that construction of four (4) Youth Residential Care Homes, built side-by-side by the same owner is not permitted as a matter of right. Instead, Appellant has produced testimony that the Zoning Administrator should have looked beyond the regulations that he is required to follow in order to reach a conclusion inconsistent with the law.

Appellant has suggested that the Zoning Administrator must consider programmatic use of the four buildings to be constructed but cannot point to any authority for that requirement. Similarly, Appellant has argued that this "facility"

constitutes one building for purposes of land-use restrictions and that, therefore, a special exception is required.

Appellant has failed to demonstrate, by a preponderance of the evidence, that Zoning Administrator should have deviated from the Zoning Regulations that require each principal structure to be constructed on a separate lot of record. It should be noted that this Board recently determined that the construction of four separate buildings to be used as youth resident care homes would be permitted as a matter of right so long as they were constructed on separate lots of record. See BZA Order No. 16531 at 2, 13. Appellant has not shown, by a preponderance of the evidence, a basis for this Board to overrule its previous determination.

The Zoning Administrator properly issued building permit nos. B438335, B438336, B438337 and B438338 because the construction is permitted as a matter of right, and the Comprehensive and Ward Plans do not supercede the Zoning Regulations.

11 DCMR § 201.1(n) expressly provides that a YRCH for up to six children and two resident supervisors is permitted as a matter of right. If a YRCH is to accommodate more than six children, it will be allowed as a matter of right by 11 DCMR § 721.5 only if (1) the number of children does not exceed 15, and (2) there is no other CBRF for more than six residents within the same square or on a property within 500 feet of the subject property. If a YRCH for more than six children meets neither of these requirements, then 11 DCMR § 3104.1 requires a special exception.

11 DCMR § 3202.3 expressly prohibits the issuance of a building permit for the construction of a principal structure unless the land to be used has been divided so that "each structure will be on a separate lot of record." The only exceptions to this prohibition pertain to mass transit and commercial uses that are irrelevant to this case.

Therefore, the building permits could be lawfully issued in this case only if each of the four proposed structures were to be on a separate lot of record. 11 DCMR § 3202.1 provides that a building permit shall not be issued for the proposed construction of a structure unless that structure complies with the Zoning Regulations. Conversely, a building permit shall be issued if the proposed construction complies with the Zoning Regulations.

Appellant has not shown that any of the Zoning Regulations would prohibit the issuance of Building Permit Nos. B438335, B438336, B438337 and B438338 to the Owner. The testimony is uncontroverted that the Zoning Administrator applied the Zoning Regulations in deciding to issue the building permits to Father Flanagan's Boys Home. Appellant has not shown that there is any regulatory basis or legal precedent for the Zoning Administrator to look beyond the Zoning Regulations and require this Owner to undertake an obligation that is not required of any other builder and not grounded in law.

Finally, the testimony is uncontroverted that the Comprehensive Plan and the Ward 6 Plan are intended to serve as a guide in land-use planning and development and do not supercede the District's Zoning Regulations. While the desires, expressions and determination of the community, as evidenced by the Ward Six Plan, speak to future development and placement of CBRFs, that Plan, like the Comprehensive Plan, is intended only as a guide and is not dispositive of particular land-use determinations by the Zoning Administrator.

Conclusion

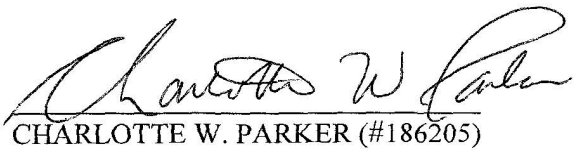
Appellant has failed to demonstrate by a preponderance of the evidence that the decision of the Zoning Administrator should be reversed and that the proposed use requires a special exception. Based upon the record herein, including testimony, the arguments of counsel, and the relevant regulations, Building Permit Nos. B438335, B438336, B438337 and B438338 were properly issued by DCRA on September 6, 2001.

For the foregoing reasons, the Southeast Citizens for Smart Development, Inc.'s appeal of the decision of the Zoning Administrator to issue four building permits for the construction of four Community Based Residential Facilities at 1308-1314 Potomac Avenue, S.E., is DENIED.

Respectfully submitted,

ROBERT R. RIGSBY
Corporation Counsel, D.C.

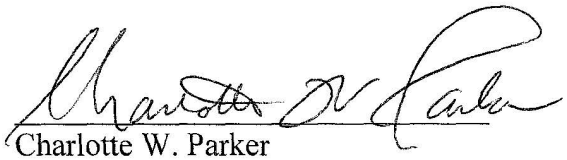
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing District of Columbia's Findings of Fact, Conclusions of Law and Proposed Decision and Order were faxed and mailed postage prepaid this 26th day of April, 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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