Form 150
(Revised 04/29/02)

Case No. 16935

BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

MOTION

Notice: See other side of motion form for instructions.

Applicant, Appellant, Appellee, Party, Intervener	vs.	Applicant, Appellant, Appellee, Party, Intervener
Southeast Citizens for Smart Development		Dept. of Consumer & Regulatory Affairs

Motion of:
(state what you want the Board to do)

See attached Motion

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Points and Authorities:
(state the each and every reason why the Board should grant your motion, including relevant references to the Zoning Regulations or Map)

See attached

CERTIFICATE OF SERVICE

I hereby certify that on this (date) 15 day of (month) January (year) 2003 I served a copy of the forgoing Motion on each entity that has requested party status; or entities that have be granted party status – on the above referenced BZA case via

☐ First-class mail ☒ Hand delivery ☐ Other (specify)

(ATTACH A LIST OF PARTIES SERVED)

Signature:	Phil Feola Applicant* /by MB		
Print Name:	Phil Feola	Firm/Organization	Shaw Pittman LLP
Address:	2300 N Street, N.W. Washington. D.C. 20037		

* *In the event an authorized agent files a motion on the behalf of the maker of the motion, a letter signed by the maker of the motion authorizing the agent to act on his/her behalf shall accompany the notice of application.*

BZA Case No. 16935 Exhibit No. 24

To be notified of hearing and decision:
(Maker of Motion or Authorized Agent)*

Name:	Phil Feola, on behalf of Father Flanagan's Boys Home				
Address:	2300 N Street, N.W. Washington, D.C. 20037				
Phone No.:	202-663-8789	Fax No.:	202-663-8007	E-Mail:	phil.feola@shawpittman.com

ANY APPLICATION THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL NOT BE ACCEPTED.

Board of Zoning Adjustment
District of Columbia
CASE NO.16935
EXHIBIT NO.24

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Southeast Citizens for Smart Development Appellant,	)	
vs.	)	**Case No. 16935**
Department of Consumer and Regulatory Affairs,	)	
Appellee.	)	

MOTION TO DISMISS

Father Flanagan's Boys Home ("**Girls and Boys Town**") is the owner of the property located at 1308-1314 Potomac Avenue, S.E., which is the subject of Appeal No. 16935. Girls and Boys Town hereby moves this Board to dismiss the appeal as untimely, having been filed nearly eleven months after the appellant had notice of the Zoning Administrator's decision on which this appeal is based.

I. The Law

Pursuant to 11 DCMR 3200.2, appeals to the Board may be taken by any person aggrieved by any decision of an administrative officer granting a building permit or any other decision based in whole or part upon any Zoning Regulations. Pursuant to 11 DCMR 3112.2, such appeal must be timely filed. "The timely filing of an appeal with the BZA is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). If an appeal is not timely filed, the BZA is without power to consider it. *Sisson v. District of Columbia Bd. Of Zoning Adjustment*, 805 A.2d 964,969 (D.C. 2002); *Mendelson v. District of Columbia Bd. Of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994);; *Woodley Park Comty. Ass'n v. District of Columbia Bd. Of Zoning Adjustment*, 490 A.2d

628,635 (D.C. 1985). *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917,923 (D.C. 1980) "Because the rules of the BZA adopt no specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely." *Waste Management of Maryland v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C. 2001). The District of Columbia Court of Appeals has held that two months between notice of a decision and appeal therefrom is the limit of timeliness. *Id.* "[I]n the absence of exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal – circumstances outside the party's control – we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness." *Id* (emphasis in original). The Court also stated in *Waste Management, supra*, that a reasonable time to appeal is measured by the time that fairness dictates to enable an aggrieved party to evaluate the appropriateness of seeking review, *to obtain the assistance of counsel*, and to take the other steps necessary to proceed.

To underscore and memorialize the two-month time limit on appeals established in *Waste Management*, the District of Columbia Zoning Commission recently amended § 3112 of the Zoning Regulations. That regulation now requires that all appeals be filed within 60 days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier.

For the purposes of calculating timeliness, "the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of." *Mendelson*, 645 A.2d at 1093. In the context of a building permit, the party appealing is chargeable with notice on the date DCRA approves and issues the permit.

In *Woodley Park, supra*, the Court of Appeals, in ruling on the issue of timeliness, was presented with a set of facts nearly identical to those in this Second Appeal. In *Woodley Park*, a

developer was issued a building permit in October of 1978. In August of 1979, as part of an application for a certificate of occupancy, the developer submitted revised plans to the Zoning Administrator, revising the amount and configuration of parking spaces provided. One month after issuance of the revised permits, in September, 1979, the Woodley Park Community Association filed an appeal to the BZA, challenging not only the revised parking plans, but also the height, setbacks and use of the property. The height, setbacks and use were not revised when the parking was revised, but instead, remained the same as originally approved one year before when the original permit was issued. The Court ruled that as to the recently revised parking plans, the appeal was timely. Regarding the appeal of height, setbacks and use, however, because these items had not been revised along with the parking plans, the Court stated that the appellant "had full actual notice of the aspects of the building project relating to height, setback, and use. Nevertheless, one year elapsed between the issuance of the building permit and the filing of the appeal on October 12, 1979. During this time, construction work on the hotel was commenced and substantially completed." The facts underlying this Second Appeal are nearly identical to those in *Woodley Park.*

II. Background and Timeline

A. September 6, 2001.

On September 6, 2001, DCRA issued the following building permits (collectively, "**Building Permits**"): (1) Permit No. B438336, for 1314 Potomac Avenue, S.E., Lot 134; (2) Permit No. B438337, for 1312 Potomac Avenue, S.E., Lot 135; (3) Permit No. B438338, for 1310 Potomac Avenue, S.E., Lot 136; and (4) Permit No. B438335, for 1308 Potomac Avenue, S.E., Lot 137. The Building Permits authorized the construction of four residences ("**Homes**"), each with a proposed use as a youth residential care home for up to six children and two adults.

B. September 12, 2001.

On September 12, 2001, the Appellant filed a timely appeal of the Building Permits, challenging the use of the Homes as youth residential care homes ("**First Appeal**"). The subject of the First Appeal was related entirely to the proposed use of the Homes. No violation of area zoning requirements, including those related to side yard setbacks and parking, was alleged.

C. December 4, 2001 – May 7, 2002.

The Board heard the First Appeal, over the course of five hearings, beginning on December 4, 2001, and ending with the Board's decision meeting on May 7, 2002. Throughout the course of these hearings, the Board reviewed plans underlying the Building Permits, and questioned the Architect about various aspects of such plans. Throughout these hearings, there was no evidence, testimony or discussion alleging violations of any of the area zoning requirements of the Homes.

D. June 21, 2002.

On June 21, 2002, the Board issued BZA Order No. 16791, approving the First Appeal, basing its ruling entirely on *the proposed use* of the Homes as youth residential care homes. There were no Findings of Fact relating to the Zoning Regulations for side yard setbacks or parking requirements. The Order, however, did provide certain dicta that the plans underlying the Building Permits did not meet certain parking and side yard setback requirements relating to single family dwellings, despite the absence in the record of any testimony or evidence relating thereto.

E. July 2, 2002.

In accordance with the Board's direction, Girls and Boys Town filed revised permit applications changing the proposed use of the Homes to single family dwellings. The change in

proposed use was the *singular alteration to the Building Permits*; no permit drawings were altered in any way.

F. July 8, 2002.

DCRA issued revised permits ("**Revised Permits**"), with the one and only difference from the Building Permits being the change in the proposed use to single family dwellings. The Zoning Regulations relating to area zoning restrictions for both youth residential care homes and single family dwellings are *one and the same*. Therefore, no changes to side yard setbacks and parking were necessary, and therefore no changes were made.

G. August 1, 2002.

Almost eleven months after the issuance of the Building Permits, the Appellant, on August 1, 2002, filed its second appeal ("**Second Appeal**"). The Second Appeal alleges that the Revised Permits were issued in error because they do not meet certain parking and side yard requirements of the Zoning Regulations. The revision of the permits in July of 2002, however, made no changes whatsoever to any aspect of the Homes relating to parking or side yard setbacks, or any other area zoning restrictions. The Appellant is appealing a decision of the Zoning Administrator made almost eleven months before. On the date that the Second Appeal was filed, construction of the Homes was nearly completed. In accordance with the Court of Appeals unambiguous ruling in Woodley Park, and a host of other cases addressing timely appeals, the Second Appeal is untimely. As such, the Board does not have the power to consider this appeal and must dismiss it.

III. Zoning Regulations Relating to Area Restrictions.

The applicable area zoning requirements – relating to height, FAR, lot occupancy, minimum lot width, parking, side yards, rear yards, etc. – are *one and the same* regardless of whether the proposed use is a youth residential care home or a single family dwelling. The applicable Zoning Regulations for the C-2-B Zone District are as follows:

(i) height of a single family dwelling (sfd)- §770.1, height of a youth residential care home (yrch)- §770.1;

(ii) FAR of a sfd - §771.2, FAR of a yrch - §771.2;

(iii) lot occupancy of a sfd – §772.1, lot occupancy of a yrch - §772.1;

(iv) rear yard requirement of a sfd - §774.1, rear yard requirement of a yrch - §774.1;

(v) side yard requirement of a sfd - §775; side yard requirement of a yrch - §775;

(vi) the amount of parking spaces required for a sfd and yrch are both listed under the *Residential Uses* section of §2101.1 – the amount required is identical: 1 space. All other zoning regulations relating to parking, including the entire Chapter 21 of Title 11, *including §2117.4*, are one and the same, regardless of whether the proposed use is a single family dwelling or a youth residential care home.

Because these area zoning requirements are one and the same, regardless of which of the two proposed uses exist, the permit revision changing the proposed use to single family dwelling did not alter even the most specific sections of the Zoning Regulations under which the Zoning Administrator evaluated and approved the permit plans for the Homes.

IV. Appellant Had Notice of All Information Pertinent to The Second Appeal Eleven Months Before Filing.

The Second Appeal addresses issues that were readily apparent when the original permits were issued in August of 2001. It appears from the amount of material generated in the First Appeal that the Appellant, since even before the issuance of the original Building Permits, has thoroughly scrutinized every aspect of these permit applications. The Appellant has not been without professional assistance in this task – it has had the benefit of land use counsel as well as zoning experts. This is not a case of an appellant being naive or unknowledgeable about the Zoning Regulations, or about the facts to which those Regulations are being applied. The Appellant, and its zoning lawyers and zoning experts, carefully studied the permit plans and applications, cross-examined the Zoning Administrator, project architect and Girls and Boys Town's Site Director, and throughout five hearings and a multitude of pleadings, never once uttered any dissatisfaction with the side yards or parking for the four Homes. The compliance of the Building Permits with area zoning requirements, rightfully so, was never questioned.

V. No Alterations in Permit Plans.

Other than the change in the proposed use, as necessitated by the Board's decision in Appeal No. 16791, there have been no changes whatsoever to the permit drawings underlying the Building Permits and Revised Permits, from the time of issuance on September 6, 2002, to the date of this Statement. Likewise, the specific sections of the Zoning Regulations applicable for the review of side yard setbacks and parking requirements have not changed at all, *i.e.*, there are no facts regarding the Revised Building Permits, including those related to parking, side yards, or the applicable Zoning Regulations, that were not readily apparent to the Appellant, its zoning

counsel and zoning experts at the time of the issuance of the Building Permits on September 6, 2001.

VI. Summary.

The Appellant has had actual and constructive knowledge of the side yard and parking characteristics underlying the Building Permits and Revised Building Permits since September 6, 2001. It was not until almost eleven months later, August 1, 2002, that the Appellant filed the Second Appeal, which now, *for the first time*, alleges violations of side yard setback and parking requirements. The July, 2002, revisions to the Building Permits made no changes to the side yards, no changes to the parking, and triggered no change in the Zoning Regulations under which the Zoning Administrator evaluates side yard or parking requirements. The Court of Appeals has ruled that two months is the limit on timeliness of an appeal to the BZA. The Court has also ruled that, when appealing a revised permit, timeliness must be measured from the date of issuance of the revised permits *only if* the zoning issues being challenged were part of such revision. Otherwise, for aspects of a project that are unchanged from the time of issuance of the original building permit, *timeliness must be measured from the date of the original issuance of such permit*. The Second Appeal, alleging violations of parking and side yard requirements, was filed almost eleven months after issuance by DCRA of the original Building Permits. No changes to side yards or parking were made as part of the Revised Permits. The Appellant has had, since September 6, 2001, constructive and actual knowledge of all information pertinent to the filing of the Second Appeal, including professional assistance from zoning counsel and experts, and an open opportunity to address any issues before this Board during the First Appeal. In accordance with 11 DCMR 3112.2, and in accordance with the law as decided by the D.C. Courts, the Board must dismiss the Second Appeal as it is not timely filed.

Respectfully Submitted,

SHAW PITTMAN LLC

By: Phil T. Feola/by MS
Phil T. Feola

By: Martin P. Sullivan
Martin P. Sullivan

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2003 I served a copy of the foregoing Motion to Dismiss, via hand delivery to:

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