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April 9, 2003

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D.C. OFFICE OF ZONING
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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. 16935 Appeal; Father Flanagan's Boys Home

Dear Chairman Griffis:

Enclosed are one original and 20 copies of an Amended Motion to Dismiss the above referenced appeal, on behalf of the Intervenor/Property Owner Father Flanagan's Boys Home.

Please call us with any questions or comments.

Sincerely,

Martin Sullivan

Document #: 1317853 v.1

BZA
Case No. 16935
Exhibit No. 39

Board of Zoning Adjustment
District of Columbia
CASE NO.16935
EXHIBIT NO.39

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

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

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AMENDED MOTION TO DISMISS

Background

Father Flanagan's Boys Home ("**Girls and Boys Town**") is the owner of the properties located at 1308, 1310, 1312 and 1314 Potomac Avenue, S.E., which are the subject of Appeal No. 16935 ("**Appeal**"). On January 15, 2003, Girls and Boys Town filed a Motion to Dismiss the Appeal ("**Motion**") because the Appeal was not timely filed. The Motion is incorporated herein and attached hereto as Exhibit 1. At the April 1, 2003 hearing on the Appeal, the Board requested that Girls and Boys Town file an Amended Motion to Dismiss the Appeal ("**Amended Motion**") in light of the testimony of the Zoning Administrator delivered at the April 1st hearing.

The Law

As detailed in the Motion, the law on the timeliness of appeals is clear. "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). 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). 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 was presented with a set of facts nearly identical to those in this Appeal. In *Woodley Park*, a developer was issued a building permit in October 1978. In August 1979, the developer submitted revised plans to the Zoning Administrator, revising only the amount and configuration of parking spaces provided. One month after issuance of the revised permit, 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 which had not changed from the first permit. The Court of Appeals ruled that the appeal was timely as it related to the revised parking plans, but untimely as to issues of height, setbacks and use because these items had not changed from the first permit.

The Board's Discussions

On January 28, 2003, the Board dismissed the Motion, in part, without prejudice, the apparent rationale being that when Girls and Boys Town revised the subject permits in June 2002, changing the proposed use, the "definition" of the structure "changed," thus changing the specific side yard restrictions applicable to the subject structures.

The Board's rationale, however, is incorrect and incomplete. First, the Board is mistaken in claiming that the applicable side yard restrictions changed when the proposed use changed. Second, regardless of how the Board believes the structures *should have been* defined, the Zoning Administrator's unchallenged testimony delivered on April 1st is that his office *did* define the structures semi-detached dwellings, and did apply the side yard restrictions under Section 775.3 in the original permit on September 6, 2001. Thus, an appeal of this decision should have been taken no later than November 6, 2001. Third, if the Board is implying that there were extenuating circumstances which extended the Appellant's deadline for filing an appeal, it would have to find that some circumstance affected the *ability* of the appellant to file an appeal, which of course the Board knows to be impossible, as SCSD did file a first appeal challenging the use.[1] Finally, the Board has based its premise on the notion that a youth residential care home for six children is to be treated differently from a single-family dwelling, a proposal that is not only discriminatory on its face,[2] but one that has been flatly rejected by the Zoning Commission in Zoning Commission Order No. 725.

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1 It is significant that SCSD was fully armed with zoning counsel and zoning experts in that first appeal and can not credibly claim now that they were not aware that the Zoning Administrator was defining these semi-detached single-family dwelling structures as semi-detached single-family dwelling structures.

2 As the Board was informed in the last SCSD appeal, the children that were to be the future residents of these homes are considered handicapped under the Fair Housing Amendments Act.

The Zoning Administrator's Testimony

In the hearing before the Board on April 1, 2003, the Zoning Administrator testified that his Office determined the three structures to be semi-detached single family dwellings prior to the issuance of the original building permits and were subject to the side yard dimensions required in Section 775.3. He also testified that the structures were not changed in the revised permits and were also subject to Section 775.3. The Board has already concluded that there were no changes to the permit drawings and no proposed changes in the structures.[3] In other words, the decision of the Zoning Administrator now under question - whether or not these structures' side yard dimensions are in compliance with the Zoning Regulations – was made ten months before it was challenged in the Appeal. The revised permits, regardless of how fundamentally significant the Board deems that revision to be, did nothing to change those side yard dimensions or the section of the Zoning Regulations under which they were approved. There was nothing to prevent the appellant from appealing the side yards then, rather than waiting until July 2002.

SCSD's second appeal addresses issues that were readily apparent when the original permits were issued in September 2001. It appears clear from the amount of material generated by the appellant in its first appeal that it had thoroughly scrutinized every aspect of the 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. The appellant has not articulated any circumstances to justify an extension to the sixty day filing deadline. Furthermore, it is impossible for the 775.3/775.5 theory to be a source of confusion for the appellant when the

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[3] The appellant agrees, stating that Girls and Boys Town "filed with DCRA four new applications for permits which appeared to indicate only a change in use, not a change in the physical aspects of construction." (Page 2 of the appellant's pre-hearing statement, filed with the Board on January 7, 2003.)

appellant was not even aware of this theory until the Board first introduced it on January 28, 2003.

Conclusion

The Board need only consider, with regard to this appeal, whether the decision of the Zoning Administrator on the side yard requirements was made as of September 6, 2001, and whether there has been a change to that decision of the Zoning Administrator. If the answer to the first question is yes, and the second answer no, then the side yard issues should have been appealed by November 6, 2001 and the current appeal was not filed timely. As noted by the Court, if an appeal is not filed timely, the Board does not have jurisdiction to entertain it. The Board must dismiss the side yard allegations and the appeal.

Respectfully submitted,

Shaw Pittman LLC

Phil Feola

Martin P. Sullivan

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

Document #: 1298970 v.1

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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Document #: 1299866 v.1

CERTIFICATE OF SERVICE

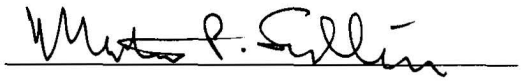
I hereby certify that on this 9th day of April, 2003 I served a copy of the foregoing Amended Motion to Dismiss, via hand delivery, to:

Southeast Citizens for Smart Development, Inc.
c/o Mary F. Withum, Esq.
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Washington, D.C. 20003

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Document #: 1317454 v.1