17121

Form 125 — Exhibit 1
(Revised 03/15/02)

Case No. BZA-2002-1234

BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

APPEAL

Notice: Click Here for Appeal Form Instructions

Pursuant to Section (s) §3100 and §3101 of the Zoning Regulations of the District of Columbia, an appeal is hereby taken

from the administrative decision of:*		David Clark, Administrator, DCRA	
made on*	09/19/2003	, to the effect that*	

Determining that the Youth Residential Care Home for 24 residents to be operated by Father Flanagan's Girls and Boys Town ("Boys Town") at 1308, 1310, 1312, and 1314 Potomac Ave., S.E. was a matter-of-right use pursuant to 11 DCMR § 330.5(f).

Address(es)* of Affected Premises	Square(s)*	Lot(s)*	Zoning Districts*
1308, 1310, 1312, and	1045	137, 136, 138, &	C-2
1314 Potomac Ave. SE	1045	134	C-2

Present Use of Property:*	vacant lot		
Proposed Use of Property:*	Youth Residential Care Home		
Owner of Property:*	Father Flanagan's Boys Home	Telephone No.:*	(402)498-1136
Name, address and telephone number of lessee:			

Name, address and telephone number of appellant, if other than owner:

Southeast Citizens for Smart Development, Inc., 701 14th St., N.W. Wash. DC 20003, (202)544-3785 ANC 6B, 921 Pennsylvania Ave., S.E. Wash. D.C. 20003 (202)543-3344

State specifically manner in which appellant is aggrieved by the administrative decision, the allegations of error in the administrative decision, and the relevant sections of the Zoning Regulations (see reverse for more detailed explanation).

Please use a separate piece of 8 ½" x 11" to respond and attach it to the Form 125 Appeal.

Date:* 12/12/2003 Signature: [signature], Vice Chair

* If appeal is filed by agent of the Appellant, Form 125 Appeal shall be accompanied by a letter signed by the appellant authorizing the agent to act on his behalf in this appeal

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

Name:*	Andrea C. Ferster						
Address:*	1100 17th St., NW	City:*	Washington	State:*	DC	Zip:*	20036
Phone No.:*	(202)974-5142	Fax No.:	(202)331-9680	E-Mail:	aferster@transact.org		

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

BZA
Case No. 17121
Exhibit No. 1

2003 DEC 15 P 2:10
DISTRICT OF COLUMBIA

Board of Zoning Adjustment
District of Columbia
CASE NO. 17121
EXHIBIT NO. 1

BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Appeal of Decision by DCRA to issue certificates of occupancy to Father Flanagan's Boy's Home construct single family dwellings at 1308, 1310, 1312 and 1314 Potomac Ave., S.E. (Square 1045, Lots 134, 136, 137, 138)	) No. _____

Attachment to Form 125

This Appeal if filed by Southeast Citizens for Smart Development, Inc. ("SCSD") and Advisory Neighborhood Commission ("ANC") challenging the determination by David Clark, Administrator of the D.C. Department of Consumer and Regulatory Affairs ("DCRA") issued on September 18, 2003, on behalf of the Zoning Administrator, that the Community Based Residential Facility ("CBRF") for 24 residents to be operated by Father Flanagan's Girls and Boys Town ("Boys Town") at 1308, 1310, 1312, and 1314 Potomac Ave., S.E. was a matter-of-right use pursuant to 11 DCMR § 330.5(i).

Background

By Decision and Order issued on June 21, 2002 in Appeal No. 16791, the BZA found that the dwellings presently under construction by Boys Town at 1308, 1310, 1312, and 1314 Potomac Ave., S.E. constituted a single CBRF for 24 residents, and therefore could only be approved as a special exception by the BZA pursuant to 11 DCMR § 732.1. Boys Town petitioned for review of this decision to the D.C. Court of Appeals (Case No. 02-AA-802), which petition for review is still pending.

On November 10, 2003, SCSD's counsel received a copy of a letter from Boys Town's counsel to the Clerk of the D.C. Court of Appeals in Case No. 02-AA-802, referencing a letter from DCRA dated September 18, 2003, which Boys Town characterized as granting "a reasonable accommodation" to Boys Town to operate four youth residential care homes on the record lots on Potomac Avenue S.E. that are at issue in the appeal now pending before the Court." According to Boys Town, this letter "provides a basis for the District to issue the certificates of occupancy necessary under District law to permit the four homes to be occupied." A copy of this letter is attached.

On November 13, 2003, at the request of SCSD's counsel, Boys Town's counsel faxed to SCSD a copy of the DCRA's decision dated September 18, 2003. A copy of this fax is attached hereto. Copies of this decision had not previously been provided to SCSD or ANC 6B, nor did DCRA provide ANC 6B or SCSD with actual or constructive notice of this decision. SCSD and ANC 6B now appeal this decision. This appeal is timely under the BZA rules, which permit aggrieved parties to file an administrative appeals of any "determination . . .made by an administrative officer . . . on the administration or enforcement of the Zoning Regulations"

"within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, whichever is earlier." 11 DCMR §§ 3112.2, 3112.2(a).

Manner in which Appellants are aggrieved

Appellant SCSD is a nonprofit corporation organized to facilitate community involvement and education in planning of neighborhood development in Ward 6. SCSD is composed of and represents numerous persons who reside and/or own property within the immediate area of the proposed by Boys Town for its proposed facility at Potomac and Pennsylvania Ave., S.E , including persons who reside within 200 feet of the proposed development.

Appellant ANC 6B is the ANC that is most directly affected by DCRA's decision. Boys Town's proposed CBRF will be located in ANC 6B, which includes numerous persons who reside within 200 feet of the proposed development.

ANC 6B and SCSD are aggrieved by DCRA's action, which purports to authorize the issuance of certificates of occupancy for a Youth Residential Care Home ("YRCH") for 24 children without the necessity of securing a special exception from the BZA. Without BZA review of Boys Town's large facility, there will be no mechanism for considering the impacts of the development on the surrounding neighborhood, or for determining whether the development is compatible with the goals and objectives set for thin the Comprehensive plan on other neighborhood planning efforts for the development of the property. As a result, this large institution will adversely affect their use and enjoyment of their homes.

Allegation of Error and Relevant Sections of Zoning Regulations

In a letter to Boys Town dated September 18, 2003, DCRA Director David Clark "determined, on behalf of the Zoning Administrator, that your proposed community-based residential facilities . . . are intended to be operated as housing for persons with handicaps," and that Boys Town was therefore entitled to certificates of occupancy as a matter-of-right pursuant to the provisions of 11 DCMR § 330.5(i). Under Section 330.5(i), which was adopted as part of amendments to the zoning regulations adopted by the Zoning Commission in 1999 (Zoning Commission Order No. 869), a community based residential facility is permitted to locate as a matter-of-right in an R-4 zone (and all other less restrictive zones), provided that:

> the Zoning Administrator has determined that such community based facility, which otherwise complies with the zoning requirements of this title that are of general and uniform applicability to all matter of right uses in an R-4 District, is intended to be operated as housing for persons with handicaps. For purposes of this subsection, a "handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more of such person's major life activities, or a record, or being regarded as having, such impairment, but such term does not include current, illegal use of or addition to a controlled substance.

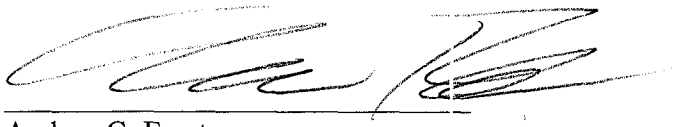
11 DCMR § 330.5(i).

DCRA's determination of September 18, 2003, that Boys Town's proposed community-based residential facilities . . . are intended to be operated as housing for persons with handicaps," was in error because there was insufficient evidence demonstrating that the proposed residents of the YRCH would be "handicapped" within the meaning of the zoning regulations. Specifically, DCRA relied on an affidavit from Boys Town's staff psychologist at Boys Town's Nebraska facility, which states in a conclusory manner, that it is likely that "about two-thirds of those children will have mental and/or emotional disorders which substantially limit one or more of their major life activities such as caring for themselves, learning and working."

However, this very general assertion by a Nebraska psychologist is contradicted by the more specific sworn testimony of Connie Washington, Site Director for Boys and Girls Town of Washington, before the BZA in Appeal 16791, that the four homes comprising the Pennsylvania Avene Campus of Boys Town will function like any other family. See Transcript of BZA Hearing in Appeal No. 16791, at 298 (Feb. 19, 2002)("the kids also participate in the preparation of the meals, as with any household living together as a family.") . She also stated that "It is expected that the children will attend neighboring schools," *id.* at 303, and that the "kids participate in Boys Club baseball," "school football," and "school band." *Id.* at 312. This sworn testimony is consistent with Community Updates and Fact Sheets distributed by Boys Town describing the children who will reside in the YRCH, and denying that these children will be "troubled." Based on this evidence, the BZA found that "[t]he children will participate in recreational activities according to their individual interests," Decision and Order in BZA Appeal No. 16791, Finding of Fact # 31 (June 21, 2002). This evidence demonstrates that any emotional disorders that the children have sustained as a result of experiencing abuse or neglect will not impair their ability to carry out their normal activities of going to school and engaging in recreational activities.

SCSD and ANC 6B will also present evidence regarding the regulatory history surrounding the promulgation of Section 330.5(i) in the Zoning Regulations, which demonstrates that the Zoning Commission understood that "a Youth Residential Care Home is typically not a handicapped facility, although some handicapped individuals may be among the residents." Memo to D.C. Zoning Commission from Jill C. Dennis, Director, Office of Planning, at 4 (Oct. 20 1997). This is consistent with the case law as well. See Sunderland Family Treatment Services v. City of Pasco, 903 P.2 986 (Wa. 1995) (holding that "abuse and neglect are environmental and cultural factors. These factors may undoubtedly produce physical or mental effects. However, these effects do not in every case limit the victim's participation in major life activities."). Under these circumstances, the generalized statements of a Nebraska psychologist is insufficient to demonstrate that the children who will reside at the Pennsylvania Avenue YRCH will be "handicapped" within the meaning of the zoning regulations.

Respectfully submitted,



Andrea C. Ferster
1100 17th Street, N.W. 10th Fl.
Washington, D.C. 20036
(202) 974-5142

CERTIFICATE OF SERVICE

I hereby certify that, on December 12, 2003, a copy of the foregoing Appeal was served by mail on:

Julie Olson, Chair
ANC 6B
921 Pennsylvania Ave., S.E.
Washington, D.C. 20003

Marie-Claire Brown,
Assistant D.C. Corporation Counsel
441 4th Street, N.W. Room 600 South
Washington, D.C. 20001

Phil Feola
ShawPittman
2300 N Street, N.W.
Washington, D.C. 20037-1128



Andrea C. Ferster

ANC 6B
Capitol Hill / Southeast
Advisory Neighborhood Commission 6B
921 Pennsylvania Avenue SE
Washington, DC 20003

December 12, 2003

Board of Zoning Adjustment
Office of Zoning
Government of the District of Columbia
441 4th Street NW
Washington, DC 20004

Re: Southeast Citizens for
Smart Development Appeal
of Boys Town

Dear Board Members:

ANC 6B has authorized Andrea C. Ferster to represent our Commission in an appeal before the BZA, along with the Southeast Citizens for Smart Development, regarding the decision by David Clarke, Director, Department of Consumer and Regulatory Affairs, on September 18, 2003, to grant "a reasonable accommodation," thereby leading to the issuance of certificates of occupancy, for the use of Boys Town's single community-based residential facility located at 1308, 1310, 1312 and 1314 Potomac Ave., SE.

Very Truly Yours,

Julie S. Olson

Julie Olson
Chairperson, ANC 6B

cc: Southeast Citizens for Smart Development

Southeast Citizens for Smart Development, Inc.

December 12, 2003

Geoffrey Griffis, Chair
Board of Zoning Adjustment
441 4th Street, NW - Suite 210 South
Washington, DC 20001

Dear Mr. Griffis:

This letter authorizes Andrea Ferster, Esq., to represent Southeast Citizens For Smart Development, Inc. and to act on its behalf in appealing to the D.C. Board of Zoning Adjustment the decision of the D.C. Department of Consumer and Regulatory Affairs, issued on September 18, 2003.

Sincerely,

Wilbert L. Hill

Wilbert L. Hill
Chair

Will Hill, Chair
701 14th St., SE
Washington, DC 20003
*202 544-3785 * (Email) willonthehill@starpower.net*