GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16896 of Randle Highlands Manor, LP, pursuant to11 DCMR § 3103.2, for a variance from maximum number of stories under § 400, and a variance from the floor area ratio requirements under § 402, and pursuant to 11 DCMR § 3104.1, for a special exception to allow the construction of a community residence facility (assisted living facility for seniors and other qualified persons, 52 residents and 40 rotating staff) under § 358, in an R-5-A zone district, at premises 2700 R Street, S.E. (Square 5585, Lot 812).

HEARING DATES: July 16, 2002, October 22, 2002, January 7, 2003
DECISION DATE: January 28, 2003

DECISION AND ORDER

The applicant in this case is Randle Highlands Manor, LP, ("Randle Highlands" or "Applicant"), the owner of the property that is the subject of this application. When the Applicant acquired the property under the District of Columbia Homestead Program,[1] it was improved with an abandoned apartment building, which the Applicant subsequently razed. The Applicant then readied the site, at the corner of 27th and R Streets, S.E., for the construction for the new senior residence facility, which is planned to have room for 52 residents, and to employ a rotating staff of 40 persons.

In a memorandum dated April 29, 2002, the Office of the Zoning Administrator of the District of Columbia notified the District of Columbia Board of Zoning Adjustment ("Board") that zoning relief would be necessary for the Applicant's proposed construction. On May 1, 2002, the Applicant applied to the Board for such relief.

On July 16, 2002, the Board held a public hearing on the application. The hearing was continued until October 22, 2002, at which time certain preliminary matters were dispensed with, but no further testimony was taken. The hearing was again continued until January 7, 2003, on which date it was completed. After the hearing, the Board determined that additional information was needed from the parties and the District of Columbia Office of Planning ("OP") prior to making its decision. After receipt of such information, the Board held a public decision meeting on January 28, 2003, and, for the reasons stated below, voted 2-3-0 to deny the application.

PRELIMINARY MATTERS

[1]There was some question whether the Applicant, having purchased the property through the Homestead Program, could use it for the Applicant's intended use. The Homestead Program requires the Applicant to "[s]ell each unit to a first-time homebuyer who will live in it for at least five years." *See,* September 10, 1998 letter from Homestead Program Administrator. This question was never resolved to the Board's satisfaction.

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Board of Zoning Adjustment
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EXHIBIT NO.66

Notice of Application and Notice of Hearing. By memoranda dated May 1, 2002, the District of Columbia Office of Zoning ("OZ") notified the City Council Member for Ward 7 and the Advisory Neighborhood Commission ("ANC") member for Single Member District 7B06 of the filing of the application. By memoranda dated May 16, 2002, OZ also notified OP and ANC 7B of the filing of the application. Pursuant to 11 DCMR § 3113.13, the OZ published notice of the hearing on the application in the District of Columbia Register and on May 29, 2002, mailed notices to the ANC, the Applicant, and to all owners of property within 200 feet of the subject property, advising them of the date of the hearing. Further, the Applicant's affidavit of posting indicates that on June 28, 2002, it placed a zoning poster on both the 27th and R Street, S.E. street frontages of the subject property, in plain view of the public.

Requests for Party Status. The Board granted party status to the Randle Highlands Civic Association, which was represented by Ms. Geraldine Marshall. ANC 7B was automatically a party to the proceeding. There were no parties in support.

Applicant's Case. The Applicant presented testimony and evidence from Ms. Lisa Bolden, general partner for Randle Highlands, Limited Partnership, who testified that the other member of the Limited Partnership is the Anacostia Economic Development Corporation, which actually acquired the subject property through the D.C. Homestead Program. Ms. Lynn French also testified for the Applicant. Ms. French was the Homestead Program Administrator at the D.C. Department of Housing and Community Development at the time the subject property was purchased. At the time of her testimony, however, Ms. French was employed as the Senior Policy Advisor to the Deputy Mayor for Children, Youth, Families and Elders. Ms. French therefore testified both as to her knowledge of the attempts to sell the subject property, concluding with the sale to the Applicant, and as to the need for assisted living facilities in the Randle Highlands neighborhood. The Applicant also presented the testimony of Ms. Brenda Turner, the Director of Aging Services for the Greater Washington Urban League. The Applicant presented four more witnesses, Mr. O.V. Johnson, former chairperson for the D.C. State Designated Committee for the American Association of Retired Persons, Ms. Marie Harris Aldridge, a resident of the Randle Highlands neighborhood, Albert Butch Hopkins, President and CEO of Anacostia Economic Development Corporation and Ms. Magda Westerhout, the architect for the project.

Government Reports. On July 11, 2002, OP submitted a late report which was accepted by the Board and which recommended approval of the special exception and floor area ratio variance requested by the Applicant. OP, however, was uncertain whether the Applicant was requesting variance relief from § 400.1, specifically with reference to the limitation on the number of stories permitted, because the Applicant did not address this relief in its pre-hearing statement. OP therefore recommended that the Board consider whether this variance relief was necessary, but did not make a substantive recommendation. Per the Board's request, OP submitted a Supplemental Report on January 15, 2003, and concluded, to the best of its ability, which was constrained by several factors, such as confidentiality considerations, that there are no other Community Based Residential Facilities within 500 feet of the proposed structure. On January 17, however, OP submitted a memorandum to the Board stating that, after more research, it had concluded that there is one such facility within a 500-foot radius of the subject property.

ANC Report. By letter dated June 26, 2002, ANC 7B indicated that it voted at a June 15, 2002 meeting to support the application. The letter, however, does not meet the requirements of §3115.1 in that it does not specify whether a quorum was present at the meeting, nor whether proper notice of the meeting was given, nor does it contain the actual vote count.

Parties and Persons in Support. There were no parties in support, but Ms Marie Harris Aldridge, a local resident, and Mr. Ned Sloan, Counsel and Vice President of the D.C. Branch of the N.A.A.C.P., testified as persons in support. Several letters in support were received into the record, including letters from three members of the Council of the District of Columbia.

Parties and Persons in Opposition. The Randle Highlands Civic Association appeared as a party in opposition, through its representative, Ms. Geraldine Marshall. The Association is comprised of members of the Randle Highlands community. Mr. Idus Holmes, who lives in the community, testified as a person in opposition. Also, several letters and a petition in opposition were entered into the record.

Hearing. The public hearing on the application began on July 16, 2002, and continued on October 22, 2002, when the only business attended to was the granting of party status to the Randle Highlands Civic Association. The hearing was again continued to January 7, 2003, when it was completed.

Decision Meeting. At the public decision meeting on January 28, 2003, the Board voted 2-3-0 to deny the application, for the reasons stated below.

FINDINGS OF FACT

1. The subject property is located in Ward 7, in an R-5-A zone district, which permits only a low height and density, pursuant to 11 DCMR § 350.2.

2. The subject property is an almost square lot encompassing approximately 15,454 square feet. It is located at the intersection of R and 27th Streets, S.E. and bounded on a third side by a 15-foot-wide public alley.

3. The Applicant originally proposed to construct a 39-unit assisted living facility ("facility") on the subject property, but due to economic concerns, increased the number of units to 52. The facility will have a rotating staff of 40 persons, or 25 full-time equivalent positions.

4. The facility building will be 38 feet high, but will be 4 four stories tall. Its FAR will be 1.97.

5. The facility will provide 10 off-street parking spaces.

6. The facility will provide around-the-clock help with residents' daily needs, but will not provide on-site medical care, such as is provided in a nursing home, except 24-hour nursing care to residents with Alzheimer's disease.

7. 11 DCMR § 358.1 permits a facility such as this one, for up to 25 residents, as a special exception in an R-5 zone district. 11 DCMR § 358.8 permits such a facility, for more than 25 residents, as a special exception, only if certain specified conditions are met.

8. There is one other community-based residential facility for seven or more persons within a radius of 500 feet from the subject property. There are also 4 community-based residential facilities for seven or more persons within one-half mile of the site. There are no such community-based residential facilities in the same square as the subject property.

9. The Applicant is a for-profit limited partnership, which intends to charge between $1700.00 and $2000.00 per month, per resident, to provide assisted living care to its 52 residents.

10. The Applicant did not claim that the facility would be operated as housing for persons with handicaps, which is a use permitted as a matter of right in this zone district, 11 DCMR § 330.5 (i).

CONCLUSIONS OF LAW

The Special Exception

Generally, the Board is authorized to grant a special exception where, in its judgment, the special exception will "be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely, the use of neighboring property." 11 DCMR § 3104.1, D.C. Official Code § 6-641.07(g)(2) (2001). Each special exception permitted, however, must also meet all the conditions enumerated in the particular section pertaining to it. In this case, the Applicant had to meet not only the requirements of § 3104.2, but also the conditions listed in § 358, particularly § 358.8, of the zoning regulations.

The Applicant has failed to meet the conditions necessary to authorize the granting of the requested special exception. There is another community-based residential facility for seven or more people within a 500-foot radius of the subject property. *See,* 11 DCMR § 358.3. Section 358.7 allows the Board to overlook this fact if the Board finds that the cumulative impact of these facilities would not have an adverse impact on the neighborhood because of traffic, noise or operations. The Board, however, concludes that there will be adverse impacts to the neighborhood due to the size of the proposed facility vis-a-vis the size of the lot it is to be built on, along with the parking and traffic congestion to be generated by the operation of the facility, including deliveries, and the comings-and-goings of residents, visitors and numerous part-time staffpeople. These adverse impacts preclude the granting of the special exception not only under § 358.7, but also under § 3104.1.

The R-5-A zone district permits only a low height and density. The matter-of-right FAR permitted is .9. The FAR of the Applicant's proposed project is 1.97, more than double the matter-of-right FAR. A density of this greatly increased amount cannot be sustained on the subject property. The increased density permits the increased number of units, necessary,

according to the Applicant, to make the project economical. The increased density, however, also makes for more residents, more visitors, and more staff, thereby causing more parking and traffic congestion.

Section 358.8 specifies that a facility such as the Applicant's for more than 25 persons may only be approved if two showings are made: (1) "the program goals ... of the District of Columbia cannot be achieved by a facility of a smaller size at the subject location," and (2) "there is no other reasonable alternative to meet the program needs of that area of the District." The Applicant did not successfully make either of these showings. As to number one, the Applicant claimed that a 52-unit facility was necessary to make a profit, but not that such a large facility was necessary to meet the District's goals. Indeed, the Applicant did not show that a smaller assisted living facility or matter-of-right residential construction was infeasible on the subject property. As to number two, the Applicant made no showing as to whether or not there exists any reasonable alternative to meet the needs of the area for assisted living facilities. In fact, it is clear that a reasonable alternative does exist, in the form of a smaller facility. The Board also is unconvinced by the record that there is no other parcel of land available to the Applicant as a "reasonable alternative" site.

The Variances

The Board is authorized to grant a variance from the strict application of the zoning regulations in order to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property...." D.C. Official Code § 6-641.07(g)(3), 11 DCMR § 3103.2. Relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." *Id.* An applicant for an area variance must make the lesser showing of "practical difficulties," as opposed to the more difficult showing of "undue hardship," which applies in use variance cases. *Palmer v. D. C. Board of Zoning Adjustment,* 287 A.2d 535, 541 (D.C. 1972). The Applicant in this case, therefore, had to make three showings: uniqueness of the property, that such uniqueness results in "practical difficulties" to the applicant, and that the granting of the variance would not impair the public good or the intent and integrity of the zone plan and regulations.

The Applicant failed to show any extraordinary or exceptional situation or condition of the subject property. The property is essentially a square, encompassing approximately 15,454 square feet. It has a gentle slope, but is not narrow, shallow or oddly-shaped in any way. It fronts on two streets and is bounded on a third side by a 15-foot-wide public alley. The property is an unexceptional, unimproved corner lot.

The Applicant appears to rely on a confluence of factors to establish the uniqueness of its property. The Applicant contends that among the District's goals is the provision of services to elderly residents, that there are "no similar facilities" in the Randle Highlands area, and that it could not find another suitable parcel in the area large enough to accommodate a 52-unit facility.

None of these factors, however, constitute an extraordinary or exceptional situation or condition of Applicant's property. First, the District's goals, while arguably relevant to the special exception herein, are irrelevant to the area variance tests. Second, whether or not there are other assisted living facilities in the Randle Highlands neighborhood may again be relevant to a special exception analysis, but does not figure into an area variance analysis. Third, the Board finds that the record is inconclusive on the availability of other neighborhood tracts of land suitable for the Applicant's facility. It appears that the only exceptional situation of the property is that it is too small for the building which ensures profitability for the Applicant. While it is true that "factors extraneous to the land" itself may be considered when determining if a property has an extraordinary or exceptional situation or condition, none of the extraneous factors cited by the Applicant have even the remotest connection with the land, any legal constraints on it, any buildings on it, or its past use or zoning history, all factors which the Board may consider. *See, e.g., French v. District of Columbia Bd. of Zoning Adjustment,* 658 A.2d 1023 (D.C. 1995); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment,* 579 A.2d 1164 (D.C. 1990); *Monaco v. District of Columbia Bd. of Zoning Adjustment,* 407 A.2d 1091 (D.C. 1979); *De Azcarate v. District of Columbia Bd. of Zoning Adjustment,* 388 A.2d 1233 (D.C. 1978); *Clerics of St. Viator v. District of Columbia Bd. of Zoning Adjustment,* 320 A.2d 291 (D.C. 1974). Therefore, the Board concludes that the Applicant has failed to make a convincing showing of an extraordinary or exceptional situation or condition of its property.

Nor has the applicant made a convincing showing of any practical difficulties arising out of the property itself--unique or not. The only real practical difficulty encountered by the Applicant is economic. The Applicant states "[t]he economics of the assisted living facility business make it financially impossible to construct and operate an attractive facility to moderate income individuals without a minimum number of tenants," in this case, 52. (*See,* Applicant's Statement in Support of the Application of the Randle Highlands Manor Limited Partnership, at 8). Therefore, the greater height and FAR, resulting in a greater massing and density than permitted in an R-5-A zone, are not needed because of any exceptional condition of the land or even because of the internal configuration of the building, but only to make Applicant's facility profitable. There has been no credible showing that no other use can be made of the property as a matter-of-right. It may even be that a different applicant, in different financial circumstances, could build a smaller, but still profitable, assisted living facility on the site.

The salient fact is that this property is located in a residence zone district where only low height and density are permitted. The Zoning Regulations do not guarantee that every lot may be put to every allowable use. The fact that a particular lot can not accommodate a CBRF use does not make it unique or present a practical difficulty. To hold that FAR and other variance relief must be granted to the extent necessary to permit an economically viable CBRF to operate on a particular lot would result in the automatic approval of any "similar demands from neighboring property owners. Approval of such requests would in effect be amending the Zoning Regulations thereby undermining the function of the Zoning Commission whose task it is to make the basic legislative judgments in drafting regulations." *Palmer, supra,* 287 A.2d at 539.

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Board, however, finds OP's recommendations unpersuasive when weighed

against the evidence in the record and the applicable legal principles. Because the ANC's June 26, 2002 letter to the Board was deficient in several respects under 11 DCMR § 3115.1, as noted earlier, the Board can not give great weight to the ANC's issues and concerns. In any event, the ANC's letter did not raise issues that would have altered the analysis made in this case.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has failed to satisfy the burden of proof with respect to the application for a special exception to allow the construction of a community residence facility under §§ 3104.1 and 358 and with respect to the application for a variance from the floor area ratio requirements of § 402 and from the maximum number of stories under § 400. It is therefore **ORDERED** that the application be **DENIED.**

VOTE: **2-3-0** (Curtis L. Etherly, Jr., and David A. Zaidain, to grant, and Geoffrey H. Griffis, Anne M. Renshaw and James H. Hannaham, to deny.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each voting Board member has approved the issuance of this Order denying the application.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 2 8 2003

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT. LM/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 16896

As Director of the Office of Zoning, I hereby certify and attest that on MAR 2 8 2003 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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