GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 16896-A of Randle Highlands Manor, L.P., pursuant to 11 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
DATE OF DECISION ON RECONSIDERATION: July 1, 2003

ORDER DENYING RECONSIDERATION

On April 17, 2003, applicant Randle Highlands Manor, L.P., ("Applicant") moved for reconsideration of the Board of Zoning Adjustment's ("Board") March 28, 2003 order denying its application for variance and special exception relief. *See,* § 3126 of Title 11 of the District of Columbia Municipal Regulations ("DCMR"). On May 1, 2003, opposition party representative Geraldine Marshall filed an untimely response to the request for reconsideration. *See,* 11 DCMR § 3126.5.

In its Motion for Reconsideration, Applicant set forth six alleged errors in the Board's order and, pursuant to § 3126.6, presented as new evidence two letters from the Director of the District of Columbia Department of Housing and Community Development ("DHCD") which were not in the record before the Board on January 28, 2003. On April 30, 2003, Applicant supplemented its Motion for Reconsideration with *Community Housing Trust v. Department of Consumer and Regulatory Affairs,* 257 F.Supp.2d 208 (D.D.C. 2003), an April 16, 2003 decision of the United States District Court for the District of Columbia concerning the discriminatory application of the District's zoning regulations.

The Applicant asserts that the Board should consider the two letters from DHCD in reconsidering its decision. The first letter is dated January 28, 2003, the date of the Board's decision meeting, and the second is dated April 16, 2003. The first letter states DHCD's approval of the proposed use. The second letter reiterates and fleshes out this approval. The Applicant feels that these letters warrant reconsideration of the Board's order because language in the order led the Applicant to believe that the absence of a clear statement of DHCD approval of the proposed use may have contributed to the

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denial of the application. Although the Applicant does not direct the Board to the language in question in the order, from what the Board can glean from the Applicant's motion, it appears to be referring to footnote number 1, on page 1 of the order. Footnote number 1 shows that the Board was attempting to ascertain whether the subject property, which Applicant purchased from the District of Columbia Homestead Program, could be improved with an assisted living facility, because the Program requires the purchaser of Homestead property to "[s]ell each unit to first-time homebuyer who will live in it for at least five years."

The Board has reviewed and considered both DHCD letters. While the Board is appreciative of DHCD's approval of the proposed use, the Board's decision was not at all based on the use of the proposed facility, whether or not approved by DHCD. The Board merely questioned whether this facility is permissible on a Homestead Property, but did not consider this issue in making its decision. The Board reached its decision based on a neutral application of the zoning law, and DHCD's approval of the proposed use is not relevant to the Board's zoning analysis of FAR and height variances. Therefore, the fact that DHCD's position relative to the proposed use may not have been clear to the Board on January 28, 2003 had no bearing on the Board's decision.

Applicant further asserts that the Board erroneously found that a smaller facility might be possible at the subject location, that the proposed facility would cause traffic and parking congestion, and that the primary need for the requested relief was the maximization of profit. Applicant complains that the Board did not follow its own and case law precedent and that it ignored the recommendation of Advisory Neighborhood Commission ("ANC") 7(B) and the testimony of community residents.

The Applicant also claims that the use of the proposed facility as a senior residence facility led to opposition and was a factor in the Board's decision. The Applicant claims that *Community Housing Trust* does not allow use to be considered if it leads to a discriminatory application of the zoning regulations.

After reading the Federal District Court case and considering all of the Applicant's contentions, the Board denies the Applicant's motion for reconsideration. Concerning the size of the facility and the economic justification therefore, the Board reiterates that this facility, with its more-than-double-matter-of-right FAR, is just too dense for the subject property. The property is not appropriate for a building of this size and there is nothing inherent in the property or in any of the other factors cited by the Applicant which necessitates the density. The density is necessary because of financial constraints. Due to the greater density, there will be a greater negative effect on local traffic and parking.

As far as the Applicant's contentions concerning ignoring precedent, each special exception and variance application is considered on its own facts. The Board is not unmindful of caselaw and its own past decisions allowing variance relief based on a

confluence of factors. The factors Applicant relies on, however, are too far afield and do not create uniqueness nor result in undue hardship to the Applicant. Nor can they sustain a special exception when weighed against the negative impacts on the neighborhood.

The Applicant also claims that the Board "ignored" or "disregarded" the testimony of local residents and of the ANC Chairman, as well as the written letter of the ANC. It is not apparent how the Applicant came to this conclusion. The Board listens to, and considers, all the evidence in the record in every case before it. It does not disregard testimony, but it may choose not to rely on certain testimony. *See, e.g., Bakers Local Union v. Board,* 431 A.2d 176, 178-179 (D.C. 1981). The Board may also weigh some testimony more heavily than other testimony. *See, e.g., Kopff v. District of Columbia Alcoholic Beverage Control Board,* 381 A.2d 1372, 1385 (D.C. 1977). ("Individual ... members are presumed capable of properly assessing the reliability and weight of evidence.") Further, the Board considered the letter from the ANC, but was prevented from according it the "great weight" to which it would otherwise have been entitled because it failed to meet all the requirements of 11 DCMR § 3115.1. *See,* March 28, 2003 Order, at 4-5.

The Applicant also points the Board to the *Community Housing Trust* case. The case concerned the discrepancy between the certificate of occupancy ("C of O") requirements applicable to six unrelated disabled persons living together versus those of six unrelated non-disabled persons living together. The latter, under 11 DCMR § 199.1, constitutes a "family," and therefore, does not need a C of O, but the former is considered to constitute a Community-Based Residential Facility, which needs a C of O. Under this scenario and the facts in the case, the zoning regulations were held to be discriminatory both facially, and as applied to persons with disabilities.

Community Housing Trust is distinguishable here. First, unlike in *Community Housing Trust,* which involved a residence for men with mental disabilities, the Applicant did not claim that the proposed facility would be operated as housing for persons with handicaps. This would have been a matter-of-right use in an R-5-A zone district. *See,* 11 DCMR § 330.5(i) and March 28, 2003 Order, Finding of Fact No. 10. Second, the Board's decision was not based to any degree on the use of the facility, but on the size of the facility. The FAR and height variances requested here have nothing to do with the status of the residents. The same zoning tests would apply and would be addressed by the Board whether or not the residents were disabled. This is not true in *Community Housing Trust.* There, different zoning regulations applied depending solely on whether or not the residents were disabled.

Community Housing Trust also discusses the "tainting" effect of neighborhood opposition. In the instant case, there was some community opposition, and some community support. Both were irrelevant to the Board's decision making. The Board re-emphasizes that its decision was based on the magnitude of the relief requested and the

failure of the Applicant to meet the special exception and variance tests, not on the existence of an opposition party or on the status of the residents of the proposed facility.

For these reasons, it is hereby **ORDERED** that Randle Highlands Manor L.P.'s Motion for Reconsideration is **DENIED.**

VOTE: **3-1-1** (Geoffrey H. Griffis, David A. Zaidain, and James H. Hannaham (by proxy) to deny, Curtis L. Etherly, Jr. opposed to the motion, Ruthanne G. Miller not voting, not having participated in the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member approved the issuance of this order.

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

FINAL DATE OF ORDER: DEC 0 1 2003

UNDER 11 DCMR 3125.9, "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. LRFM/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16896-A

As Director of the Office of Zoning, I hereby certify and attest that on DEC 0 1 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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ATTESTED BY:

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