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DATE: November 13, 2003

TO: Andrea Ferster

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TEXT:

Per your voice mail.

BZA
Case No. 17121
Exhibit No. 3

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Board of Zoning Adjustment
District of Columbia
CASE NO. 17121
EXHIBIT NO. 3

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Consumer and Regulatory Affairs

Office of the Director



September 18, 2003

Phil T. Feola, Esq.
Martin P. Sullivan, Esq.
Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037

Re: Reasonable Accommodation Request – Fr. Flanagan's Boy's Home

Dear Messrs. Feola and Sullivan:

This is in response to your July 10, 2003, letter requesting that I reconsider my November 22, 2002, decision denying your client's Fair Housing Reasonable Accommodation Request, which you submitted on October 11, 2002, for housing located at 1308 – 1314 Potomac Avenue, S.E.

In your October 11, 2002, request, you stated that your client "requests accommodation from 11 DCMR 732.1." That provision of the Zoning Regulations provides that certain community-based residential facilities "shall be permitted in a C-2 District as a special exception if approved by the Board of Zoning Adjustment." As the accommodation requested under the federal Fair Housing Act (42 U.S.C. §3601 *et seq.*), you sought authorization for your client to use and occupy those housing units as youth residential care homes, a subcategory of community-based residential facility, without requiring approval from the Board of Zoning Adjustment. One of the items submitted in support of your request was an affidavit, dated January 9, 2002, from Michael L. Handwerk, Ph.D., Director of Clinical Services, Research and Internship Training, at Fr. Flanagan's Boys Home in Boys Town, Nebraska. Through his affidavit, Dr. Handwerk sought to establish that the subject housing would be occupied by handicapped persons, as that term is defined in the Fair Housing Act.

In my Decision and Order, dated November 22, 2002, I stated that "[a]fter reviewing the Applicant's request for accommodation, the Director concludes that Father Flanagan's did not describe any condition or impairment that meets the definition of handicapped as defined in the Fair Housing Act (42 [USC] §3602(h))."

Although in your request you had asserted that the four residences would house handicapped children, Dr. Handwerk's affidavit was insufficient to support such a finding. The affidavit stated that "the children to be served by Girls & Boys Town at its planned long-term residential facilities at Pennsylvania Avenue will be abused, neglected, and abandoned children referred by the local government protection agency." Dr. Handwerk then discussed the studies he had made of the children served at the long-term facilities at Boys Town, Nebraska, and used the results of his studies to reach a conclusion as to whether children in local facilities will be "handicapped." Notably, although he concluded that the "majority of the children" served at the facilities in Boys Town, Nebraska, "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," his affidavit specifically recited: "I conclude that the same will be true as to Girls & Boys Town's planned long-term facilities at Sargent Road in the District of Columbia." No conclusion was offered with regard to the children who would reside at the Pennsylvania Avenue/Potomac Avenue site that was the subject of the Fair Housing Reasonable Accommodation Request. Your request was accordingly denied.

However, now with your July 10, 2003, letter requesting reconsideration of that decision, you submitted a copy of a different affidavit from Dr. Handwerk. This affidavit, dated January 30, 2003, had not previously been submitted to the Department by Fr.Flanagan's, nor had it otherwise been shared with the Department. The newer affidavit does offer a conclusion as to the children who would reside at the subject housing units on Pennsylvania Avenue. After reciting much of the same background and analysis as stated in his January 9, 2002, affidavit, Dr. Handwerk states that: "Because the background and population of the children to be served at the Pennsylvania Avenue Homes [the subject housing units] are the same as that of the children in the study described above, I conclude that the same will be true as to the children who will reside in Girls and Boys Town's planned Pennsylvania Avenue Homes, namely 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."

On reconsideration of your Fair Housing Reasonable Housing Accommodation Request, I find that you have now satisfied the procedural requirements for such requests, as set forth in 14 DCMR §111 ("Procedures Regarding Requests for Reasonable Accommodation under the Fair Housing Act"), and have established that the subject housing will be for handicapped persons. Accordingly, your request is GRANTED, with the requested accommodation provided as follows.

Pursuant to a "Stipulated Agreement Between the United States and the District of Columbia" executed in September 1997, the District of Columbia amended its zoning regulations to specifically incorporate such reasonable accommodations for a community-based residential facility that is intended to be operated as housing for persons with handicaps. Section 330.5 of the Zoning Regulations provides, in pertinent part.

> The following uses shall be permitted as a matter of right in an R-4 District [and a C-2 District, by extension]: ...
>
> (i) Community-based residential facility; provided that, notwithstanding any provision in this title to the contrary, the Zoning Administrator has determined that such community-based residential facility, that 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 that substantially limits one or more of such person's major life activities, or a record of having, or being regarded as having, such an impairment, but such item does not include current, illegal use of, or addiction to, a controlled substance.

Having granted your Fair Housing Reasonable Accommodation Request, I have determined, on behalf of the Zoning Administrator, that your proposed community-based residential facilities, to be located at 1308 – 1314 Potomac Avenue, S.E., are "intended to be operated as housing for persons with handicaps." Accordingly, pursuant to the provisions of 11 DCMR §330.5(i), your use of these housing units as community-based residential facilities[1] for persons with handicaps is a matter-of-right use.

I have been informed by the Administrator, Building and Land Regulation Administration, that, except for the unit located at 1314 Potomac Avenue, S.E., these housing units otherwise comply with applicable zoning requirements that are of general and uniform applicability to all matter-of-right uses in an R-4 District. In accordance with Zoning Regulation §405.6 (11 DCMR §405.6), which pertains to side-yard requirements in residential districts, in an R-4 District a community-based residential facility for persons with handicaps is not required to have any side yards. Thus, no side yard is required for these units. That regulation does stipulate, however, that "if [a side] yard is provided, it shall be at least three inches (3 in.) wide per foot of height of building, but not less than eight feet (8 ft.) wide." Inspection of the property at 1314 Potomac Avenue, S.E., reveals that there is a non-complying three-foot side yard. Consequently, no certificate of occupancy for that

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[1] An April 1, 2003, oral decision of the Board of Zoning Adjustment in Appeal No. 16935, Appeal of Southeast Citizens for Smart Development, Inc. (currently pending issuance as a final, written decision), held that the unit at 1314 Potomac Avenue, S.E., when considered as a single-family semi-detached dwelling in a C-2 District, did not comply with Zoning Regulation §775.3, which provides that "[a] one-family semi-detached dwelling is subject to the side yard requirements of an R-2 District [which requires an 8-ft. side yard]." However, in now granting Fr. Flanagan's Fair Housing Reasonable Accommodation Request, a certificate of occupancy will be issued for that unit pursuant to Zoning Regulation §330.5(i), which requires compliance with the requirements applicable to an R-4 District—not an R-2 District. A community-based residential facility in an R-4 District is not required to have a side yard (11 DCMR §405.6), and the referenced BZA decision would not be applicable.

unit may be issued until its side yard is either eliminated or expanded to comply with the size required by §405.6.

Upon satisfactory completion and submission by your client of the standard application forms for certificates of occupancy for these units (and correction of the zoning deficiency noted above with respect to one unit), and with payment of all applicable fees, the Building and Land Regulation Administration will promptly issue the certificates of occupancy

Sincerely yours,



David A. Clark

cc: Denzil Noble, Administrator
Building and Land Regulation Administration