IN THE
COURT OF APPEALS OF VIRGINIA

RECORD NOS. 1161-23-4 & 1164-23-4

HILARY KOZIKOWSKI, *et al.*,
Appellants,

v. RECORD NO. 1161-23-4

MONROE RE, LLC, *et al.*,
Appellees.

AARON KOZIKOWSKI, *et al.*,
Appellants,

v. RECORD NO. 1164-23-4

MONROE RE, LLC, *et al.,*
Appellees.

BRIEF FOR APPELLANTS

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STATEMENT OF THE CASE

These consolidated appeals come from final orders of the Circuit Court for Loudoun County affirming decisions of the Board of Zoning Appeals ("BZA"). *See* R.1708-10; R.2861-63 (No.1164).[1] The appeals present the question whether Newport's use of its property in Loudoun County's Agricultural Rural-1 ("AR-1") zoning district as a non-residential rehabilitation facility for persons with mental health issues, many of whom are drug addicts, comports with the Loudoun County Zoning Ordinance (the "Ordinance")[2] and Virginia's Fair Housing Law.[3] The answer is no.

For three reasons, Newport's use of property is unlawful. *First*, it is undisputed that the Newport facility is a "Congregate Housing Facility"—a use not permitted by the "Ordinance" in the AR-1 zone. Nor is the use authorized, or the Ordinance trumped, by the provision of the Fair Housing Law on which Newport relies. *See* Va. Code § 15.2-2291 ("Section 2291"). The Fair Housing Law forbids discrimination in housing against persons with disabilities. But the Ordinance does

[1] All record citations are to the record in appeal No. 1161-23-4 unless followed by "(No.1164)" in which case the citation is to the record in appeal No. 1164-23-4.

[2] All citations to the Ordinance are to the Loudoun County, Virginia Revised 1993 Zoning Ordinance, as amended through April 4, 2023, available at https://tinyurl.com/yhrxyvhc.

[3] Newport Appellees are Monroe RE, LLC; Monroe Real Estate, LLC; and Virginia Health Operations, LLC d/b/a Newport Academy (collectively, "Newport").

not discriminate. Its restriction on congregate housing facilities in AR-1 is generally applicable, facially neutral, and non-discriminatory. It applies to all congregate facilities, whether or not persons with disabilities reside there. And even if Section 2291 allowed Newport to operate a congregate facility for persons with mental disabilities despite Loudoun County's non-discriminatory zoning restriction (which it does not), Section 2291 also provides that no more than eight unrelated persons with mental disabilities may reside at a group home, and the total number of persons at Newport's congregate facility (which is a family compound with three houses) exceeds that eight-person limit.

Second, Section 2291 imposes a residency requirement—indeed, a *double* residency requirement. It provides that "[z]oning ordinances for all purposes shall consider a *residential* facility in which no more than eight individuals with mental illness, intellectual disability, or developmental disabilities *reside* … as residential occupancy by a single family." *Id*. § 15.2-2291 (emphases added). But Newport operates a non-residential facility, and its rehab patients are not residents. Newport patients stay for a discrete, limited period of time (30-90 days) dictated by their insurance coverage, and then they return home to their true place of residence. Because the duration of their temporary stay at Newport is purely a function of the reason they came (i.e., for rehab), they cannot be considered residents. They are no more residents than are hotel guests or hospital patients.

Third, Section 2291 does not excuse Newport from the Ordinance's restriction on congregate facilities because Newport accepts as patients current users of illegal drugs and drug addicts. *See id*. ("For the purposes of this subsection, mental illness and developmental disability shall not include current illegal use of or addiction to a controlled substance"). Newport does not require its patients to pass a drug test before entering its program or require those with a history of addiction or substance abuse to have successfully completed a supervised drug rehabilitation program prior to coming to Newport.

These appeals also raise the question whether persons aggrieved by a zoning determination have a right to appeal to the board of zoning appeals. Some of the Appellants live on property adjacent to Newport's property. The Newport facility adversely affects their quality of life, property values, and safety. After the Deputy Zoning Administrator erroneously determined that Newport's proposed use of its property was permitted by right, Appellants appealed that zoning determination to the BZA. But the BZA dismissed their appeal on the view that the zoning determination was merely an advisory opinion. The Circuit Court affirmed the dismissal, even though it found that Appellants had standing to challenge the zoning determination.

The BZA and trial court erred. The court's finding that Appellants have standing necessarily means they were aggrieved by the zoning determination—and

hence could appeal it to the BZA. And in a recent case decided by the Virginia Supreme Court involving a zoning dispute over another Newport facility, the Court held that neighbors just like Appellants had standing to appeal a zoning determination to the BZA and challenge it in court. *Anders Larsen Trust v. Bd. of Supervisors of Fairfax Cnty.*, 301 Va. 116 (2022).

ASSIGNMENTS OF ERROR

The assignments of error in Record No. 1161-23-4 are:

1. The trial court erred in ruling that the Loudoun County Deputy Zoning Administrator's November 29, 2021 determination letter—which determined that Appellees' proposed use of three adjacent properties in Loudoun County as a for-profit treatment center for groups of persons with mental illness and substance abuse problems was permitted—was not appealable to the Board of Zoning Appeals, even though the determination letter expressly stated that it was "binding"; that persons "may rely upon this determination"; that "any person aggrieved" by the determination "may appeal" it to the Board; and that failing to do so within 30 days would make the determination "final and unappealable." Preserved: R.1-22; R.1392-95; R.1461-63; R.1785; R.2150-61; R.22 (No.1164); R.126 (No.1164).

2. The trial court erred by failing to set aside as contrary to law the Deputy Zoning Administrator's determination that Appellees' proposed use of three adjacent properties in Loudoun County as a for-profit treatment center for groups of

persons with mental illness and substance abuse problems was permitted by Virginia Code § 15.2-2291, even though the Deputy Zoning Administrator determined that "the proposed use is a Congregate Housing Facility, a use not permitted in the AR-1 zoning district." Preserved: R.1-22; R.459-66; R.1395-98; R.1463-64; R.2167-71; R.2213-28; R.11-15 (No.1164); R.102-09 (No.1164); R.138-40 (No.1164); R.144-46 (No.1164); R.409-16 (No.1164); R.2846-50 (No.1164).

The assignments of error in Record No. 1164-23-4 are:

1. The trial court erred in ruling that Appellees' proposed use of three adjacent properties in Loudoun County in the AR-1 zone as a for-profit treatment center for groups of persons with mental illness and substance abuse problems was permitted by Virginia Code § 15.2-2291 (Section 2291), even though the Loudoun County Deputy Zoning Administrator determined that the proposed use was a Congregate Housing Facility, "a use not permitted in the AR-1 zoning district." R.1-22; R.459-66; R.1395-98; R.1463-64; R.2167-71; R.2213-28; R.11-15 (No.1164); R.102-09 (No.1164); R.138-40 (No.1164); R.144-46 (No.1164); R.409-16 (No.1164); R.2846-50 (No.1164).

2. The trial court erred in ruling that Section 2291, which applies to a "residential facility" in which up to eight persons with mental illness or intellectual disabilities "reside," applied to Appellees' non-residential treatment center for non-residents who stay at the center only temporarily. Preserved: R.1-22; R.459-66;

R.1398; R.1465; R.1786-92; R.1892-95; R.2230-31; R.2235-40; R.13 (No.1164); R.109 (No.1164); R.112-14 (No.1164); R.268-71 (No.1164); R.416-17 (No.1164); R.2850 (No.1164).

3. The trial court erred in ruling that Section 2291 permitted Appellees to operate their treatment center because Section 2291 forbids treatment of "current illegal use of or addiction to a controlled substance," and Appellees do not require persons they treat who are former users of illegal controlled substances or addicts to have completed a supervised drug rehabilitation program, as Section 2291 requires. Preserved: R.1-22; R.466-68; R.1231-33; R.2048-49; R.2240-54; R.13 (No.1164); R.120-21 (No.1164); R.124 (No.1164); R.129-30 (No.1164); R.133-34 (No.1164); R.417 (No.1164); R.2850 (No.1164).

STATEMENT OF FACTS

"Newport provides treatment to young adults, aged 18-28 experiencing depression, anxiety, trauma, and other mental health issues." R.717 (statement of Newport CEO Joseph Procopio). In early 2022, Newport purchased the property at issue, consisting of a three-parcel family compound with three detached houses. The compound has a single shared driveway and shared amenities, including a pool and two tennis courts. The compound is located on Gleedsville Road in Leesburg, Virginia.

Newport is a large, for-profit enterprise with facilities in eleven states. R.714.

Newport expects $20,073 in daily operating earnings from its Leesburg facility, "or a total of more than $600,000 per month." R.1320 (Procopio Decl.).

Procopio stated to the BZA that the three houses "will each be a single-sex residence." R.718. He said the average stay at Newport is 47 days. R.717. *Cf*. R.27 (Newport's request for zoning determination stating that Newport visitors "typically stay between 30 to 90 days, with the national average for length of stay being 45 days").

Many Newport patients are illegal drug users or drug addicts. *See* Part IV, *infra*. Although Newport claims it does not admit persons "with a *primary* substance abuse diagnosis," R.720 (emphasis added), Newport *does* admit those who have a *secondary* diagnosis of substance abuse. R.86. Newport does not conduct criminal background checks on its patients. R.68. Nor does it require incoming patients to pass a drug test as a requirement for admission to Newport. R.195 (No.1164).

Before committing to purchase the property, on September 22, 2021, Newport requested a zoning determination from the Department of Planning and Zoning. R.26-32. Newport asked the Department to "issue a zoning determination" that the proposed use of the property as a Newport treatment facility "would be permitted, by-right" in the AR-1 zone. R.27. Newport represented that each house "would serve up to eight adolescents between the ages of 12 and 17." R.27. Newport later changed its tune about the age of its patients. Procopio told the BZA that the facility

will serve "young adults between 18 and 28 years of age." R.718. *See also* R.69 (Newport COO Jameson Norton's email to some of the Appellants stating that the facility "will be for young adult females"). The facility now advertises for 18-35 year-old adults, both men and women.

On November 29, 2021, the Deputy Zoning Administrator, Michelle Lohr, responded to Newport's request and made a written zoning determination. R.23-25. She determined that, although "the proposed use is a Congregate Housing Facility, a use not permitted in the AR-1 zoning district," nonetheless "the proposed use would be permitted" under Virginia Code § 15.2-2291. R.23.

On December 5, 2021, Newport put a flyer in the mailboxes of some of the adjacent property owners notifying them of the zoning determination. R.33.

The twelve Appellants are six married couples who own homes in close proximity to the Newport facility and are aggrieved by the zoning determination.[4] Some of them live on property directly adjacent to the Newport parcels. Appellants timely appealed the zoning determination to the BZA.

On April 28, 2022, the BZA held a four-hour public hearing. Appellants and many other community members spoke in strong opposition to the proposed

[4] The Appellants are Hilary Kozikowski, Aaron Kozikowski, Lawrence Thomas, Mary Catherine Thomas, Thomas Wright, Cheryl Wright, Michael Wright, Lynne Wright, William Feitshans, Beverly Feitshans, Craig Palmer, and Addie Palmer.

Newport facility and the zoning determination. R.133-38; R.210-47; R.253-59; R.264-66; R.458; R.270-73; R.277-83; R.291-300. But instead of addressing the merits of the zoning appeal, the BZA in the end voted (over dissent) to dismiss the appeal on the grounds that Newport had not applied for or obtained a zoning permit; that Appellants lacked standing; and that the zoning determination was not a determination but merely an advisory opinion. R.307-19.

Appellants commenced an action in the Circuit Court challenging the BZA's decision and the zoning determination. R.1-22. The court stayed its hand while Newport obtained a conditional permit from the Department of Behavioral Health and Developmental Services and a zoning permit from the Department of Planning and Zoning—both of which Newport obtained (R.1862-64; R.1982-83; R.18 (No.1164); R.447 (No.1164))—and while the BZA processed and decided Appellants' appeal of the zoning permit. R.1848-54; R.1969-76; R.2085-89.

Appellants appealed the zoning permit to the BZA. At a many hours-long public hearing on January 26, 2023, Appellants and other Leesburg residents protested the permit and the Newport facility. R.189-289 (No.1164). One speaker, Caleb Kershner, a member of the Loudoun County Board of Supervisors, stated that "allowing commercial treatment uses to AR-1 areas could well act like a cancer on the AR-1 District, fundamentally changing the residential nature and the neighborhoods in that AR-1." R.191 (No.1164).

Newport's CEO, Mr. Procopio, also spoke. He confirmed that "[o]ur intentions are to move forward with all three homes. … [W]e will seek a permit to open [the second] home …, and we'll do the same with the third home." R.187 (No.1164). As of the filing of this brief, Newport has obtained its second permit and has applied for its third permit.

The BZA, by a bare 3-2 vote, passed a motion to uphold the issuance of the zoning permit. R.296 (No.1164); R.308-09 (No.1164). BZA members Edward Moffett and Robert Kelly Gray voted against the motion. *Id*. Mr. Moffett stated that it is "clear" that Newport "is not a residential facility within the meaning of [Section] 2291." R.299 (No.1164).

Challenging the BZA's decision to uphold the permit, Appellants brought a second action in the trial court. R.1-17 (No.1164); R.347-62 (No.1164).

Both court cases were assigned to the Honorable Paul Sheridan (Ret.). The court held multiple hearings in the two cases. *See* R.1732-1855 (Sept. 26, 2022); R.1856-1977 (Nov. 7, 2022); R.1978-2090 (Dec. 12, 2022); R.2091-2136 (Feb. 21, 2023); R.2137-2429 (Apr. 11, 2023).

The final hearing in both cases was held on April 11, 2023. At the end, the court offered no findings of fact or conclusions of law. Instead, it asked Newport counsel "[w]hat are you asking me to rule." R.2423. Counsel asked it "to affirm the BZA, the two BZA decisions" by signing "two simple orders to that effect." R.2424.

The court did so. Final Orders, R.1708-10; R.2861-63 (No.1164). After so ruling, Judge Sheridan volunteered that "I can't think of a case with more loaded appeal issues" and that "another Court may say a different thing." R.2425. Appellants objected to the final orders. R.1709; R.2862 (No.1164).

Appellants appealed the final orders to this Court, which consolidated the two appeals. *See* Order (Aug. 15, 2023).

STANDARD OF REVIEW

In an appeal from a circuit court judgment reviewing a decision of a board of zoning appeals, a presumption of correctness attaches to the circuit court's factual findings, but its conclusions of law are reviewed *de novo*. *Prince William Bd. of Cnty. Supervisors v. Archie*, 296 Va. 1, 9 (2018). Importantly, "the judgment of a circuit court in such cases is no longer presumed to be correct on appeal." *Hale v. Bd. of Zoning Appeals for Town of Blacksburg*, 277 Va. 250, 268 (2009).

ARGUMENT

I. The Zoning Determination Appealed to the BZA Was Appealable.

Appellants had a statutory right to appeal the Zoning Determination to the Board of Zoning Appeals because they were aggrieved by the Determination, which determined that Newport's proposed use of the property as a congregate facility for the short-term treatment of insured persons with mental health issues and substance abuse problems was permitted by right under the Ordinance. *See* Va. Code § 15.2-2311. Therefore, the trial court erred in affirming the BZA's dismissal of

Appellants' appeal based on the BZA's view that the Zoning Determination was a mere advisory opinion and because Newport had not yet applied for or received an administrative zoning permit (which it did later).

A. Newport Requested and Received a Zoning Determination That its Proposed Use of the Property Was Allowed by Right Under the Loudoun County Zoning Ordinance and Virginia Fair Housing Law.

On September 22, 2021, Newport, through its attorneys at McGuire Woods, submitted a request for a zoning determination under the Ordinance to the Loudoun County Department of Planning and Zoning (the "Department"). R.26-28. There is no doubt the submission was a request for a zoning determination regarding Newport's proposed use of the property as a treatment facility. The submission stated that "*we request that you issue a zoning determination* for each of the Properties confirming that in the event Newport Academy were to purchase one or more of the Properties, it would be permitted, by-right, to operate its proposed residential facilities on each, *upon appropriate licensure* …." R.27 (emphases added). In completing the online application intake form, Newport stated that it was applying for a "Zoning Determination confirming a proposed use is permitted on each of the Properties as detailed in the uploaded letter." R.31.

On November 29, 2021, the Department responded to Newport's request for a zoning determination—by making a zoning determination. *See* R.23-25 (the "Zoning Determination" or "Determination"). The Department assigned the Zoning

Determination the number "ZCOR-2021-0233." R.23. "ZCOR" is a designation used by the Department for zoning determinations. R.29.

In the Zoning Determination, Deputy Zoning Administrator Michele Lohr determined that Newport's proposed use was a "Congregate Housing Facility"—a use prohibited by the Loudoun County Zoning Ordinance in the AR-1—but nevertheless was a permitted use because of Virginia's Fair Housing Law, specifically, Virginia Code § 15.2-2291. R.23-24. She informed Newport that "[t]he short answer to your inquiry is the proposed use is a Congregate Housing Facility, a use not permitted in the AR-1 zoning district. However, the proposed use would be permitted" under Virginia Code § 15.2-2291(A). R.23.[5]

The Zoning Determination described itself as a "binding" "determination," stating that "[t]his determination applies … to the referenced property and is … binding upon the County [and] the Zoning Administrator … with respect to [the] property." R.24.

The Zoning Determination expressly "advised that any person aggrieved" by it "may appeal said decision within 30 days to the Board of Zoning Appeals in strict

[5] The Determination stated that "[t]o establish use, issuance of a zoning permit is required." R.24. The Determination also assumed that Newport's "facilities would be licensed by the Virginia Department of Behavioral Health and Developmental Services [VDBHDS]." R.23. Newport said the facilities "would be licensed" by VDBHDS. R.26.

accordance with Section 15.2-2311 of the Code of Virginia." R.25. It admonished that "[t]his decision is final and unappealable if not appealed within 30 days." *Id*.

Armed with the Zoning Determination, Newport sought to ensure that its new neighbors could not claim they had no notice of it. On December 5, 2021, Newport slipped a flyer into adjacent landowners' mailboxes. R.33. The flyer noted that, on November 29, the Deputy Zoning Administrator "issued a zoning determination that our proposed use of the homes is a permitted use in this zoning district." *Id*. Newport did not mention that the Determination was appealable or that the deadline to appeal was December 29, smack dab in the middle of the busy holiday season.

B. The BZA Dismissed Appellants' Appeal, and the Circuit Court Affirmed in Part the BZA's Ruling.

After Appellants learned of the Zoning Determination and its looming appeal deadline, they appealed to the BZA. At the end of the long public hearing held on the appeal, a BZA member moved to dismiss the appeal for three related reasons:

> A, there is no pending application nor a permit issued to the subject properties. B, the appellants lack standing as they are not aggrieved persons under the Virginia code 15.2-2311 as the zoning determination did not grant or deny appellants real or personal property right, nor was there an application under review. And C, ZCO[R]-04-2021-0233 [the Zoning Determination] was an advisory opinion.

R.307. After brief discussion, R.308-19, the motion passed by a 3-1 vote. R.319.

BZA member Edward Moffett voted against the motion and sharply criticized it. He said "I find it absolutely incredible that there's an argument that they're not

an aggrieved party. I think that's plainly wrong on any standard." R.310. He also said "it's more absurd quite frankly, to say that these people don't have standing. They've testified to the possible loss of market value. They testified to the noise. They've testified to the number of cars, to the fact that there might be ten staff members for each resident." R.311. And he rejected the idea that the Determination was a mere advisory opinion. "[I]t was characterized as a determination. Everybody thought it was a determination. And they thought we better appeal and the appeal was accepted." R.312.

The trial court disagreed with the BZA in part. At a hearing on September 26, 2022, and in an Order entered on October 21, 2022, the court ruled that Appellants had standing under the Virginia Supreme Court's decision in *Anders Larsen Trust v. Board of Supervisors of Fairfax County*, 301 Va. 116 (2022). *See* R.1471 ("The Court FINDS that Petitioners have standing under *Anders Larsen*"); R.1853 ("The citizens complaining have standing.").

Like the instant case, *Anders Larsen* involved a zoning challenge to a Newport "treatment center [that] would operate from a house located in a residential neighborhood." *Anders Larsen*, 301 Va. at 118. Reversing the decision of the Circuit Court for Fairfax County, the Supreme Court held that "[s]everal neighbors, who either own houses or live in houses next to the proposed treatment center" in McLean, had standing to bring the challenge. *Id*. The Supreme Court held that the

neighbors' standing was established by their allegations that the Newport facility would cause "increased traffic" and resulting danger to pedestrians; "diminished property values and lessened quality of life"; and "safety and burglary risks" from persons escaping from the Newport facility. *Id*. at 120. *See also id*. at 122. The Appellants here are similarly situated (indeed, identically situated) to the neighbors in *Anders Larsen*.

Although the trial court rejected the BZA's erroneous view as to Appellants' standing, the court ultimately affirmed the BZA's dismissal of the appeal. Final Order, R.1708.[6] The court made no findings with respect to the BZA's conclusion that the Zoning Determination was an advisory opinion or the BZA's observation that Newport had not (as of that time) applied for or obtained a permit. Near the end of the final hearing, the court turned to counsel for Newport and asked, "Just a second. What are you asking me to rule"? R.2423. Newport's counsel answered that he wanted the court to sign the orders he had prepared. R.2424. The court did so. R.1708.

C. The Trial Court Erred by Affirming the BZA Because Appellants Had a Right to Appeal the Zoning Determination.

The trial court erred by affirming the BZA because the Zoning Determination that Appellants appealed to the BZA was an appealable action. Under Virginia law,

[6] The Final Order did not disturb the court's earlier Order finding that Appellants had standing under *Anders Larsen*.

a zoning administrator has a duty to respond to requests for zoning determinations. *See* Va. Code § 15.2-2286(A)(4) ("The zoning administrator shall respond within 90 days of a request for a decision or determination on zoning matters."). The Loudoun County Zoning Ordinance also imposes an even more demanding duty on the Zoning Administrator to respond to requests for zoning determinations. Section 6-401 of the Ordinance provides that the Zoning Administrator's duties include "rendering determinations as to the uses permitted … in the various zoning districts." Ordinance § 6-401(C). It also provides that the Zoning Administrator has the duty "[t]o issue interpretations of this Ordinance upon proper application. Such interpretations shall be binding as to the applicant and as to the specific facts presented in the application for interpretation after the completion of the thirty (30) day appeal period. … Such interpretations shall include notification of appeal procedures and timelines." *Id*.

In making the Zoning Determination, Deputy Zoning Administrator Lohr exercised her authority under Code § 15.2-2286 and Ordinance § 6-401. Newport asked for a zoning determination, and Ms. Lohr provided one. She called it a determination, and Newport described it as such in its flyer. And in keeping with § 6-401, Ms. Lohr's Zoning Determination indicated that it was binding as to the facts presented in the application; that it could be appealed for 30 days only; and it offered information about appeal procedures and timelines.

Appellants had a clear right to appeal the Zoning Determination to the BZA under Virginia Code § 15.2-2311, the statute governing zoning appeals. That statute provides that "[a]n appeal to the board may be taken by any person aggrieved … by any decision of the zoning administrator." *Id*. § 15.2-2311(A). Under the statute, any "person aggrieved by any decision of the zoning administrator has the right to appeal to the board of zoning appeals." *Lilly v. Caroline Cnty*., 259 Va. 291, 296 (2000).

The statute governing boards of zoning appeals, Va. Code § 15.2-2309, is consistent with the zoning appeals statute. It provides that such boards have the duty "[t]o hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto." *Id*. § 15.2-2309(1). This statute broadly defines a "determination" as "any order, requirement, decision or determination made by an administrative officer." *Id*.

The Zoning Determination was an appealable decision and determination under § 15.2-2311 and § 15.2-2309. Discharging her duty to respond to Newport's request for a zoning determination on its proposed use, the Deputy Zoning Administrator decided and determined that Newport's "proposed use is a Congregate Housing Facility, a use not permitted in the AR-1 zoning district, but that "the proposed use would be permitted" under Virginia Code § 15.2-2291(A). R.23.

The zoning appeals statute, § 15.2-2311, states that "a written order of the zoning administrator … shall include a statement informing the recipient that he may have a right to appeal … a written order within 30 days in accordance with this section, and that the decision shall be final and unappealable if not appealed within 30 days." Va. Code § 15.2-2311(A). The Zoning Determination included that required statement, thus confirming that it was an appealable decision. R.25. And the Zoning Determination expressly stated it was "binding"; that persons "may rely upon this determination; that "[t]his decision is final"; and that it may be "appealed within 30 days." R.24-25. The document speaks for itself.

Appellants had to appeal the Zoning Determination within 30 days. Section 15.2-2311 provides that a zoning decision shall be "unappealable if not appealed within 30 days." Va. Code § 15.2-2311(A). "If this mandatory appeal is not timely filed, … the zoning administrator's decision becomes a 'thing decided' not subject to court challenge." *Lilly*, 259 Va. at 296 (quoting *Dick Kelly Enters. v. City of Norfolk*, 243 Va. 373, 378 (1992)). If Appellants had not timely appealed the Zoning Determination to the BZA, it would have become a "thing decided." *Id*. *See also* Va. Code § 15.2-2311(C) (unless appealed, zoning administrator's decision or determination generally is not "subject to change, modification or reversal" after 60 days); *Spectrum Healthcare Res., Inc. v. Bd. of Supervisors of Prince William Cnty.*, 83 Va. Cir. 418, 2011 WL 12663424, at *2 (Cir. Ct., Prince William Cnty., Oct. 5,

2011) (zoning administrator "decision letters … are binding upon everyone if not appealed by someone").

D. Appellants Were Aggrieved by the Zoning Determination.

The zoning appeals statute permits an appeal by "any person aggrieved" by zoning decision or determination. Va. Code § 15.2-2311(A). The record establishes that Appellants were, and still are, aggrieved by the Zoning Determination. The Determination approved Newport's planned use of the property as a short-term treatment center for persons with mental health issues, some of whom are drug addicts, and led Newport to purchase the property and proceed with its plans.

As noted above, the trial court found that Appellants have standing under *Anders Larsen*. *See* R.1471 ("The Court FINDS that Petitioners have standing under *Anders Larsen*"); R.1853 ("The citizens complaining have standing."). And as the Supreme Court explained in *Anders Larsen*, "only an 'aggrieved' party has standing to challenge a zoning decision." 301 Va. at 121. Therefore, the trial court's unchallenged finding that Appellants have standing under *Anders Larsen* necessarily means they are persons aggrieved by the Zoning Determination.

Appellees did not object to the trial court's Order finding that Appellants possess standing. R.1471. And the record contains abundant evidence that Appellants were and are aggrieved by the Newport facility in the same ways that the neighbors in *Anders Larsen* were aggrieved, and in other ways as well. *See* R.133-

38; R.210-47; R.253-59; R.264-66; R.458; R.270-73; R.277-83; R.291-300; R.790-873; R.189-289 (No. 1164); R.2578-96 (No. 1164). There is no doubt that Appellants, each of whom "owns [or] occupies real property … in close proximity to the property that is the subject of the" Zoning Determination, *Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals of City of Va. Beach*, 231 Va. 415, 420 (1986), were and are aggrieved by the Determination and thus had a right to appeal it to BZA.

E. The Zoning Determination Was Not a Mere Advisory Opinion.

The BZA avoided Appellants' challenge to the Zoning Determination by deeming it to be a mere advisory opinion. R.307-19. But that dog won't hunt.

As shown above, the Zoning Determination was an appealable determination and decision within the meaning of Virginia Code § 15.2-2311 and § 15.2-2309. It was error for the BZA to punt on Appellants' appeal by treating the Determination as an advisory opinion, and it was error for the court below to condone the BZA's subterfuge. That the Zoning Determination was an appealable decision is evident from the document itself. The document clearly states that it is a "final," "binding," and "appealable" "determination" that person "may rely upon." R.24-25. The BZA's sly attempt to retrospectively reconceive it as an advisory opinion flies in the face of the Zoning Determination's plain language and is ineffective.

The Zoning Determination provided detailed instruction for appealing it.

R.25. Following those instructions, Appellants paid an appeal fee of $350. *Id*. The BZA gladly accepted Appellants' appeal fee and never refunded the money after its late-breaking epiphany that the Determination was an advisory opinion. BZA member Moffett rightly called the stance of his fellow BZA's members "absolutely incredible," "just astonishing" and "absurd." R.310-11. His exasperation with his colleague's dereliction of duty leaps off the page: "And to call this now at this late hour an advisory opinion where it was characterized as a determination. Everybody thought it was a determination. And they thought we better appeal and the appeal was accepted." R.312.

F. The Fact That Newport Had Not Yet Applied for or Received a Zoning Permit Is of No Moment.

The BZA's last reason for dismissing Appellants' appeal was the fact that Newport had not (as of that time) applied for or received a zoning permit. This excuse also falls flat. A person aggrieved by a decision of the zoning administrator has a right to appeal to the BZA. *See* Va. Code § 15.2-2311. The statute does not require a permit application or the issuance of a permit as a prerequisite to appealing a zoning decision. The BZA simply invented that requirement, contrary to the statute. Nor does BZA's view find any support in the Zoning Determination, which decided that Newport's proposed was permitted by right. The Determination cautioned that "[t]o *establish* the use, issuance of a zoning permit is required." R.24 (emphasis added). Newport needed a permit to engage in the use permitted by the

Determination. But once the Determination was made, the issuance of a permit was a ministerial act.

The lack of a permit did not matter in *Anders Larsen*. There, the Virginia Supreme Court held that Newport's neighbors had standing to appeal even though no permit was applied for or issued in that case. *See* 301 Va. at 120 (noting the zoning administrator's conclusion that "a special use permit is not required for [Newport's] operation").

The BZA's permit requirement never made any sense—except as way to dodge Appellants' challenge to the Zoning Determination. It was obvious that Newport, now that it had the favorable Determination, would apply for permits, which it did. And it was obvious that the Department of Planning and Zoning, having already made the Determination favorable to Newport, would grant Newport's permit applications, which it did. The permit applications and permit grants were preordained once the Zoning Determination was made—which supports the appealability of the Determination.

In sum, Appellants, who are aggrieved by and had standing to challenge the Zoning Determination, clearly had a right to appeal the Zoning Determination to the BZA. The BZA and trial court erred to the extent that they adopted a contrary view. And for the reasons set forth in Parts II, III, and IV, the Zoning Determination—and the permit issued to Newport based upon it—were also wrong.

II. Section 2291 Does Not Exempt Newport From Loudoun County's Non-Discriminatory Restriction on Congregate Facilities in the AR-1 Zone.

The Deputy Zoning Administrator, BZA, and court below concluded that Newport may use the property in the AR-1 zone as a congregate housing facility for the short-term treatment of persons with mental health issues, including persons with substance abuse issues. That is wrong. Section 2291 does not give Newport a free pass from having to comply with the Loudoun County's non-discriminatory restriction on congregate facilities in the AR-1 zone.

The Deputy Zoning Administrator correctly determined that Newport's use is not permitted by the Ordinance because Newport's use is a congregate facility. *See* Zoning Determination, R.23 ("The short answer to your inquiry is the proposed use is a Congregate Housing Facility, a use not permitted in the AR-1 zoning district."). A "Congregate Housing Facility" is defined as "A structure other than a single-family dwelling where no more than (4) unrelated persons reside under supervision for special care, treatment, training or similar purposes, on a temporary or permanent basis." Ordinance, Art. 8, Definitions. Congregate housing is permitted in many zoning districts in Loudoun County—but not in the AR-1 zone. *See*, *e.g.*, Ordinance §§ 4-803 (Planned Development-Town Center); 4-1353 (Planned Development-Mixed Use Business); 2-303 (A-10 zone), 3-103 (R-1 zone); *see also* R.1150 (No.1164) (listing 26 zoning districts that allow congregate use).

As the Deputy Zoning Administrator correctly found, "A Congregate housing

facility is not a listed use in the AR-1 zoning district and is therefore not a permitted use on the subject [Newport] property." R.24. That much is not disputed by any party in this case. But the Deputy Zoning Administrator went further and decided that, despite it being a congregate facility, Newport's use is permitted by a statute, Section 2291. R.24. That was error.

The General Assembly enacted Section 2291 to conform Virginia law to the federal Fair Housing Act and bar discrimination. Specifically, Section 2291 was intended to mirror the FHA's prohibition against discrimination in housing against persons with disabilities. But Loudoun County's restriction on congregate housing *does not discriminate* against such persons. The congregate restriction is generally applicable, facially neutral, and non-discriminatory in purpose and effect. Therefore, the restriction comports with the FHA *and* Section 2291.

A. The Fair Housing Law Prohibits Housing Discrimination Against Persons With Disabilities.

"The primary objective of statutory construction is to ascertain and give effect to legislative intent." *Conger v. Barrett*, 280 Va. 627, 630 (2010) (cleaned up). And, "when a given controversy involves a number of related statutes, they should be read and construed together in order to give full meaning, force, and effect to each." *Id*. at 630-31 (cleaned up). The relevant and related statutes here are the Virginia Fair Housing Law, including Section 2291, and the federal Fair Housing Act. Section 2291 must be construed in the context of these related enactments.

Virginia's Fair Housing Law declares it is "the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of … disability, and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons." Va. Code § 36-96.1(B). Section 2291 is an anti-discrimination provision that derives from and reflects this important public policy.

In 1988, Congress amended the Fair Housing Act to extend federal protections against housing discrimination to persons with disabilities. The Commonwealth soon followed suit. The General Assembly formed a special subcommittee to study the issue and produce a report, which it did. *See Report of the Joint Subcommittee Studying Site Selection of Residential Facilities for Mentally Disabled*, *S. Doc. No. 36* (1990) ("*Report*"), available at https://tinyurl.com/p5285wh3.

After consulting the Virginia Attorney General, the Subcommittee reported that a "consensus already has emerged" that the 1988 amendments to the FHA address local zoning ordinances that discriminate against persons with disabilities. *Report* at 4. The Subcommittee gave examples, including "[c]onditional or special use permits, building code requirements, and similar provisions *which apply specifically and exclusively to the mentally disabled*." *Id*. at 5 (emphasis added). In 1990, after receiving the Subcommittee's report and recommendations, the General Assembly amended Virginia law by repealing a problematic provision (former Va.

Code § 15.1-486.2) that required local zoning regulations to provide for persons with mental disabilities "in an appropriate zoning district or districts" and replacing it with what is now Section 2291. The Attorney General had advised that former § 15.1-486.2 "likely was invalid." Report at 7.

In 2000, the Attorney General filed an *amicus* brief describing the work of the Subcommittee and the General Assembly's legislative response to it. *See* Brief of Amicus Curiae Commonwealth of Virginia in Support of Respondents, *In re: March 11, 2020 Decision of the Bd. of Zoning Appeals of Fairfax Cnty., Va.*, Nos. CL2020-5490 & CL2020-5521 (Cir. Ct., Fairfax Cnty., filed Nov. 19, 2020) (R.433-442 (No.1164)). The Attorney General recognized that "[i]n enacting § 15.2-2291, the legislature reconciled zoning law with fair housing law so that both adequately *prohibited housing discrimination on the basis of disability*." *Id*. at 7 (emphasis added); *see also id*. at 5-6 (explaining that the Subcommittee had "recommended that the existing problematic code section (former § 15.1-486.2) be repealed and replaced with zoning language that harmonized with prohibitions on discrimination against people with disabilities in the federal fair housing law").

In short, Section 2291 is an anti-discrimination statute. That is the purpose of Virginia's Fair Housing Law and the 1988 amendments to the federal FHA, on which Section 2291 was based. Section 2291's operative language is that "[n]o conditions more restrictive than those imposed on residences occupied by persons

related by blood, marriage or adoption shall be imposed on [a] facility" in which up to eight persons with mental disabilities reside. Va. Code § 15.2-2291(A). The Ordinance's prohibition on congregate housing facilities in AR-1 complies with Section 2291 because it applies in a neutral fashion to traditional family residences as well as group homes for persons with mental disabilities.

B. The Loudoun County Zoning Ordinance Does Not Discriminate Against Persons With Mental Disabilities.

When read and properly understood against this backdrop, Section 2291 does not immunize Newport's use of its property from the Loudoun County Zoning Ordinance's restriction on congregate housing facilities in the AR-1 zone. Nothing in Section 2291 suggests that the General Assembly intended to supersede local zoning ordinances that apply equally and neutrally to all facilities, regardless of the nature of the families who live therein.

In *Trible v. Bland*, 250 Va. 20 (1995), which concerned Section 2291 (then codified at § 15.1-486.3), the Virginia Supreme Court recognized that "[t]he General Assembly has granted localities broad authority to adopt zoning ordinances" and "a municipality may, by ordinance, classify the territory under its jurisdiction into districts and, in each district, may determine the utilization of premises for residential uses." *Trible*, 250 Va. at 24. *See* Va. Code §§ 15.2-2283 and 15.2-2284. The U.S. Supreme Court has described the purpose of zoning restrictions of the sort at issue in this case.

> Land use restrictions aim to prevent problems caused by the "pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388 (1926). In particular, reserving land for single-family residences preserves the character of neighborhoods, securing "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9 (1974).

City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 732-33 (1995).

Loudoun County permits congregate housing facilities in some zoning districts, but not in the AR-1 zone. Its zoning ordinance defines a Congregate Housing Facility as "[a] structure other than a single-family dwelling where more than (4) unrelated persons reside under supervision for special care, treatment, training or similar purposes, on a temporary or permanent basis." Ordinance, Art. 8, Definitions.

The Ordinance's restrictions on congregate facilities does not discriminate against persons with disabilities, mental or otherwise. The above definition is generally applicable, facially neutral, and treats all unrelated persons exactly the same. The restriction applies whether or not the unrelated persons have any disabilities. It applies to a group home of persons free of mental health issues just as much as it applies to Newport's treatment facility for persons with such issues. It is in a different category than "[c]onditional or special use permits, building code requirements, and similar provisions which apply specifically and exclusively to the mentally disabled." *Report* at 5.

The County's non-discriminatory restriction is valid and applies to Newport. In operating a congregate facility for the short-term treatment of insured persons with mental health issues, including substance abusers, Newport is not entitled to special treatment. It is entitled to equal, non-discriminatory treatment, but not special treatment. And the Ordinance provides equal, non-discriminatory treatment. Newport may operate its congregate facility in many parts of Loudoun County, but not in the AR-1 zone.

There can be no doubt that the Ordinance's restriction on congregate housing is valid as a general matter. "The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances." *Norton v. Bd. of Supervisors of Fairfax Cnty.*, 299 Va. 749, 858 S.E.2d 170, 173 (2021) (quoting *Bd. of Cnty. Supervisors of Fairfax Cnty. v. Carper*, 200 Va. 653, 660 (1959)). A zoning ordinance therefore "is presumed to be valid so long as it is not unreasonable and arbitrary," and "[t]he burden of proof is on him who assails it." *Id.* "The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained." *Id.*

The Ordinance is not preempted by Section 2291 because there is no irreconcilable conflict between the two. Virginia's Fair Housing Law, including Section 2291, forbids discrimination, and the Ordinance does not discriminate.

"[T]he principles that we must apply when considering whether a local ordinance is in conflict with the public policy of this Commonwealth as embodied in its statutes" include this: "'If both the statute and the ordinance can stand together and be given effect, it is the duty of the courts to harmonize them and not nullify the ordinance.'" *Blanton v. Amelia Cnty.*, 261 Va. 55, 63, 64 (2001) (quoting *King v. Cnty. of Arlington*, 195 Va. 1084, 1091 (1954)). The public policy enacted by the Fair Housing Law is "to prohibit discriminatory practices with respect to residential housing" based on disability. Va. Code § 36-96.1(B). The Ordinance does not discriminate based on disability. It therefore does not conflict with Section 2291. Where, as here, "there is no clear expression of legislative intent to preempt local land use authority, the explicit grant of zoning powers to regulate the use of land and buildings remains in effect." Va. Att'y Gen. Op. No. 18-069 (Aug. 23, 2019), 2019 WL 10734397, at *3 (citing cases).

Cases decided under the FHA confirm the foregoing analysis. In *His House Recovery Residence, Inc. v. Cobb County*, 806 F. App'x 780 (11th Cir. 2020), for example, the Eleventh Circuit rejected claims brought by His House, a group home for persons with disabilities. His House claimed that the county's zoning ordinance, limiting the number of residents His House could have, discriminated against its disabled residents in violation of the FHA and the Americans with Disabilities Act. The Eleventh Circuit rejected the claim. It explained that "[f]or this claim to have

survived summary judgment, the Ordinance, on its face, would need to discriminate against people with disabilities. But the Ordinance, does not, on its face, treat recovering individuals any differently than non-recovering individuals. None of the Ordinance's provisions distinguish based on the presence of disability. The limitation on the number of residents applies to all group homes …." *Id*. at 785. So too here.

Similarly, in *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597 (4th Cir. 1997), the Fourth Circuit rejected an FHA claim brought by a group home for persons with disabilities. The Fourth Circuit's observations about the FHA are instructive here:

> In enacting the FHA, Congress clearly did not contemplate abandoning the deference that courts have traditionally shown to … local zoning codes. And the FHA does not provide a "blanket waiver of all facially neutral zoning policies and rules, regardless of the facts," *Oxford House, Inc. v. City of Virginia Beach,* 825 F. Supp. 1251, 1261 (E.D. Va. 1993), which would give the disabled "carte blanche to determine where and how they would live regardless of zoning ordinances to the contrary," *Thornton v. City of Allegan,* 863 F. Supp. 504, 510 (W.D. Mich. 1993).

124 F.3d at 603. The Fourth Circuit explained that the FHA "only requires an 'equal opportunity,' not a superior *advantage*." *Id*. at 605 (emphasis in original). Here, Newport seeks not equal treatment but a superior advantage. The FHA does not require that, and neither does Section 2291.

C. Newport's Congregate Facility Violates the Eight-Person Limit in Section 2291.

Even if Section 2291 permitted Newport to operate a congregate housing facility in the AR-1 zone (which it does not), Newport's facility would still be unlawful because Newport accepts more than eight persons at a time at the facility. Section 2291 applies to a "facility in which *no more than eight individuals* with mental illness, intellectual disability, or developmental disabilities reside." Va. Code § 15.2-2291(A) (emphasis added). Newport's operation of a congregate facility on adjacent parcels—with shared staff, access, and amenities—renders each building not a distinct household, but rather a "portion" of one congregate facility. *See* Ordinance, Art. 8, Definitions. Because the Newport property constitutes a single treatment facility on a compound of contiguous land, the proposed patient count greatly exceeds the statutory maximum of eight per "facility," disqualifying it from favorable zoning treatment as a residential facility.

Newport counts each of its three houses as a separate facility. In its request for a zoning determination, it told the Department of Planning and Zoning that "each" of the houses "would serve up to eight" persons. R.27. But Newport's approach is wrong. Indeed, Newport is operating *one congregate facility* and thus the number of persons staying in the three houses will greatly exceed the eight-person limit applicable to the facility.

The structure and design of Newport's facility consists of three houses that

were built to form an enclosed family compound. R.589-91; R.2260-61. The houses were built in close proximity for ease of interaction. And Newport purchased the entire compound and all three houses from a single family. Importantly, the family compound that Newport now owns has a single gated entry and a single shared driveway that provides the only access to Gleedsville Road—confirming the unitary nature of the compound. R.589-91. The compound also has shared amenities, including two tennis courts, a bocce ball court, and a swimming pool. R.109-11 (No.1164); R.135-37 (No. 1164); R.189-92 (No.1164); R.589; R.1151-70 (No.1164).

Given its structure and design, the Newport compound must be regarded as a single congregate facility, not three separate facilities. *Webster's Unabridged Dictionary* online defines the adjective "congregate" as "designed for, devoted to, or housing an undifferentiated group of persons, especially one whose institutional treatment, care, or custody is provided for through mass facilities." And it defines "facility" as "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." *Id.* These definitions support, indeed confirm, the conclusion that Newport's compound of three houses is one congregate facility. That means that Newport may not treat more than eight persons at one time. It may not triple that number because there are three houses in the compound.

The record contains evidence of Newport's plan to use the three houses as a single congregate facility. Appellant Hilary Kozikowski submitted a sworn affidavit stating that on December 10, 2021, she received a phone call from Newport COO Jamison Norton, who told her how the three houses will operate:

> We have … a nurse for the whole collective group. For each house during the daytime there's going to be about 10 support staff. The chef, and sou chef, we won't have two in every house, we'll generally have one working kitchen that will make food and then each of the other houses we heat it up, where only one is doing the hard lifting and then two are just, you know, they have meals in on-site at the other two but we do a lot of the backend preparation in only one of the houses.

R.1594. Newport no doubt acquired a family compound to permit such congregate use of the three houses. R.2261-62.

Accordingly, because Newport's facility exceeds the eight-person limit in Section 2291, its use is an unlawful congregate housing facility. *See United States v. District of Columbia*, 538 F. Supp. 2d 211, 215 (D.D.C. 2008) (noting, and not disturbing, the BZA's finding that four youth residential care homes "should be treated as one 'facility' having 24 children").

III. Newport's Non-Residential Facility and Its Non-Resident Patients Fail Section 2291's Residency Requirements.

Newport's facility for the short-term treatment of insured patients, and the transient patients who temporarily stay there before going back home, fail Section 2291's double residence requirement. To ensure that land use emulates household living, Section 2291 imposes two residency requirements on treatment facilities to

qualify for classification as a single-family occupancy—those seeking treatment must "reside" at the facility; and the facility itself must be "residential" within the strictures of the statute. *See* Va. Code § 15.2-2291(A).

The Newport facility meets neither of these conditions. Newport's patients do not become residents of Loudoun County during their temporary stay. Because patients attend the facility for the specific, limited purpose of seeking treatment—and intend to return to their homes once their insurance coverage is exhausted—their stay on the premises is too transient to make them residents. In turn, the facility cannot be "residential" if no one resides there. Thus, the Newport facility cannot enjoy statutory classification "as residential occupancy by a single family" if lacks the hallmark characteristics of a residence. *See* Va. Code § 15.2-2291(A).

Although Newport intends to offer inpatient services, the transient and transactional nature of a patient's stay disqualifies one from being a "resident" of the facility. Neither the Virginia Code nor the Ordinance provides a definition of "resident." In the absence of a statutory definition, courts fall back on the "age-old principle" that such words "are to be interpreted and applied according to their common-law meanings." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320 (2012). Under common law, a "resident" is understood to mean a "person who occupies a dwelling within the State, has present intent to remain within the State for a period of time, and manifests the genuineness

of that intent by establishing an ongoing physical presence within the State together with indicia that his presence … is something other than merely transitory in nature." *Resident*, *Black's Law Dictionary* 1177 (5th ed. 1979). By this definition, residency requires more than just the occupation of a dwelling—it requires one to demonstrate intent to remain in a place beyond the completion of some limited purpose. *See Hall v. Wake Cnty. Bd. of Elections*, 187 S.E.2d 52, 55 (N.C. 1972). Newport "residents" do not find jobs, open bank accounts, register to vote, pay local taxes, obtain driver's licenses, or join social clubs while they are in Loudoun County.

Accordingly, Virginia courts have consistently found, across several legal contexts, that mere presence in a location is insufficient to establish residency. *See*, *e.g.*, *Long v. Ryan*, 71 Va. 718, 720 (1878) (attachment); *Cooper's Adm'r v. Commonwealth*, 121 Va. 338, 350-52 (1917) (taxation); *Hiles v. Hiles*, 164 Va. 131, 136-38 (1935) (jurisdiction over divorce proceedings); *Griffin v. Woolford*, 100 Va. 473, 478-80 (1902) (statutes of limitation).

So too is this the case in the context of housing regulations. *See Cooper's Adm'r*, 121 Va. at 344 ("In the construction of statutes, the meaning of the word 'residence' depends upon the context and purpose of the statute."). An influential court decision in an FHA case defined one's residence as a "temporary or permanent dwelling place, abode or habitation *to which one intends to return as distinguished from the place of temporary sojourn or transient visit*." *United States v. Hughes*

Mem'l Home, 396 F. Supp. 544, 549 (W.D. Va. 1975) (quoting *Webster's Third New Int'l Dictionary* (1961)) (emphasis added). Here, Newport visitors have no intention of staying for long—and they couldn't even if they wanted to. Their visits to Newport are temporary and transient. As Newport itself wrote to its neighbors, after receiving treatment, "our residents … return home and resume their lives." R.33. They return to their family homes, not to Newport.

In delineating between a "residence" and a mere place of "transient visit," courts have looked to a number of factors, including the "length" of one's stay, *Schneider v. Cnty. of Will*, 190 F. Supp. 2d 1082, 1087 (N.D. Ill. 2002), the extent to which "occupants treat [the] building like their home," *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1215 (11th Cir. 2008), and "the relationship between the resident and the owner of the property," *Conn. Hosp. v. City of New London*, 129 F. Supp. 2d 123, 134 (D. Conn. 2001) (citing *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1328 (D. Or. 1996) (collecting cases)). But to Virginia courts, whether a person "inten[ds] to return to the dwelling [is] the dispositive element in determining whether someone [is] a resident" for fair housing purposes. *Bd. of Supervisors of Fairfax Cnty. v. Bd. of Zoning Appeals of Fairfax Cnty.*, Law Nos. 150970, 150851, 1997 WL 1070562, at *4 (Va. Cir. Ct. Apr. 7, 1997).

Newport patients cannot be said to intend to return there because they "would certainly be moving on to some other residence" once their treatment is completed.

Woods v. Foster, 884 F. Supp. 1169, 1174 (N.D. Ill. 1995). A patient's time at Newport is not contingent upon uncertain "success in finding more permanent housing," *id.*, or their experience on-site, but rather is predetermined based on the robustness of their parents' insurance coverage. *See Insurance*, Newport Academy, https://www.newportacademy.com/admissions/insurance (last visited Sept. 20, 2023). Because patients live at the facility "for a temporary purpose with the design of leaving when that purpose has been accomplished," they are but "'mere sojourner[s].'" *Hall*, 187 S.E.2d at 55 (quoting *Groves v. Comm'rs of Rutherford Cnty.*, 105 S.E. 172, 173 (N.C. 1920)). And those on a "temporary sojourn" cannot be residents. *Bd. of Supervisors*, 1997 WL 1070562, at *4.

Nor can such intent be established by claiming Newport's patients have "nowhere else to return to and no other home." *Id.* Although it is possible for a person to "intend to return" to a place of temporary accommodation, this is not the case where the stay is only a "short-lived" visit away from "some other residence" to which the person will "certainly" return. *Woods*, 884 F. Supp. at 1173-74. Here, Newport patients have another home to return to—namely, their parents' home. Unlike the children living under the care of the Department of Child Protective Services in *Board of Supervisors* who were "removed from their homes due to severe family problems," *Bd. of Supervisors*, 1997 WL 1070562, at *7, patients at Newport are voluntarily sent there by their families with the plan to return home after their

short stay, which averages 45-47 days. *See Get Help for Your Teen Today*, Newport Academy, https://www.newportacademy.com/admissions/get-started (last visited Sept. 20, 2023). Newport visitors "typically stay between 30 to 90 days, with the national average for length of stay being 45 days." R.27. That 96% of Newport patients have their treatment funded by their *parents'* insurance demonstrates that Newport patients are not "otherwise homeless," *Woods*, 884 F. Supp. at 1171, but rather are explicitly at Newport because they come from a household that has the means to afford such treatment. *See Admissions, FAQs*, Newport Academy, https://tinyurl.com/mtm526u7 (last visited Sept. 20, 2023). In fact, Newport employs a "family counseling" model of therapy "which continues on a weekly basis" throughout their stay at the facility, demonstrating that patients' parents play an active role in treatment until the patients return to their family homes. *Programs, Attachment-Based Family Therapy*, Newport Academy, https://www.newport academy.com/programs/attachment-based-therapy (last visited Sept. 20, 2023). It is simply not the case that Newport's patients stay at the facility because they are "in need of a place to live." *Baxter v. City of Belleville*, 720 F. Supp. 720, 731 (S.D. Ill. 1989). Rather, patients stay at Newport for the "temporary purpose" of short-term treatment, *see Hall*, 187 S.E.2d at 55, and then "mov[e] on" back to their actual residence once coverage lapses. *See Woods*, 884 F. Supp. at 1174. *See* R.457 (No.1164) (report of putative expert supporting Newport that group homes like

Newport provide a "place to live while [the clients] continue to prepare for return to their family homes").

Several of the other relevant factors also counsel against viewing patients as "residents" of Newport. As the Eleventh Circuit has explained, "the more occupants treat a building like their home—*e.g.,* cook their own meals, clean their own rooms and maintain the premises, do their own laundry, and spend free time together in common areas," the more likely they are residents. *Schwarz*, 544 F.3d at 1215. Many of these common aspects of household living are absent at Newport. For instance, rather than having patients cook their own meals, Newport employs on-site chefs who "[p]repare [and] present breakfast, lunch, dinner, and snacks daily." *See, e.g.*, *Cook - Daytime Hours - Full Benefits*, Newport Healthcare, https://tinyurl.com/mr2rrs6e (last visited Sept. 20, 2023). Nor do patients launder their own linens or clean the facility—that work is done by a professional housekeeper. *See Housekeeper*, Newport Healthcare, https://tinyurl.com/ynm449tn (last visited Sept. 20, 2023). And while patients may access common areas at the facility from time to time, any socializing—"from time they wake up until they go to sleep … [and] throughout the night"—is monitored by staff. R.718. Therefore, that the amenities of Newport's facilities scarcely resemble those of a home undermines viewing the patients as residents.

So too does the transactional and imbalanced relationship between Newport

and its patients. Similar to a motel or bed and breakfast, which are not residential facilities, *see Patel v. Holley House Motels*, 483 F. Supp. 374, 381 (S.D. Ala. 1979); *Schneider*, 190 F. Supp. 2d at 1082, Newport is a for-profit treatment center that conditions access on payment. And unlike those who are allowed to remain in temporary residential care without a "set date" for departure, *Conn. Hosp.*, 129 F. Supp. at 135; *see also Woods*, 884 F. Supp. at 1174 (the "length of time [people remain at a homeless shelter] depends on their success in finding more permanent housing"); *Lauer Farms, Inc. v. Waushara Cnty. Bd. of Adjustment*, 986 F. Supp. 544, 559 (E.D. Wisc. 1997) (seasonal workers may stay in on-site housing "so long as the growing and harvesting season lasted"), Newport's patients know ahead of time when their insurance coverage will lapse and "liv[e] there as mere transients" until that day comes. *Baxter*, 720 F. Supp. at 731. Like a place of public accommodation, patients stay at Newport for a predetermined period of time, based on their (or their insurance providers') ability to pay. And when the money runs out, leaving Newport is an "automatic occurrence." *Conn. Hosp.*, 129 F. Supp. at 135. The "practical realit[y]" of the fixed maximum period a patient may stay signals that Newport was never meant "to be a home," *McGee v. Poverello House*, No. 1:18-cv-00768-SAB, 2021 WL 3602157, at *18 (E.D. Cal. Aug. 13, 2021); *Baxter*, 720 F. Supp. at 731, but rather a temporary accommodation available only for a limited stay.

The "highly structured nature" of patients' time at Newport also is foreign to a usual residence. *Conn. Hosp.*, 129 F. Supp. at 133. While house rules will not always render group "homes [as] no longer residential," *id.*, a treatment facility begins to lose its residential character if it is exceedingly "more restrictive than ... other places that people call home." *United States v. Univ. of Neb. at Kearney*, 940 F. Supp. 2d 974, 980, 981 (D. Neb. 2013). At Newport, patients are not allowed to leave the property "unless accompanied by a staff member." R.719. To enforce this rule, "all windows and doors" at the facility are alarmed. *Id.* These restrictions of the freedom of patients are not "largely self-imposed" safeguards designed by "willing participants" to "facilitate recovery." *Conn. Hosp.*, 129 F. Supp. at 133. Instead, Newport's "structured schedule of clinical and experiential therapy and … academic/life skills component" is institutionally enforced and mandatory. Newport Healthcare, *The Science of Healing 2022 Edition: Patient Outcomes and Key Findings* 4 (2022), https://tinyurl.com/m2myv8rv. Nor can it be said that the environment of a Newport facility mirrors the "essence of family life—structure that provides standards of behavior, love and support freely given even in the face of misbehavior." *Conn. Hosp.*, 129 F. Supp. at 134. Patients at Newport are not merely given "freedom to choose to live by rules that will facilitate recovery." *Id.* at 133. Rather, the custodial relationship between Newport staff and patients makes it difficult to conclude that patients treat the facility "like their home," *Schwarz*, 544

F.3d at 1215, undercutting the claim that they are residents thereof.

Lastly, although some courts have found that stays shorter than the average stay at Newport—47 days—constitute residency, *see Lakeside Resort Enters., LP v. Bd. of Supervisors*, 455 F.3d 154 (3d Cir. 2006), duration of one's stay is not dispositive. Time and again have courts recognized that length of time "is not the exclusive factor in determining whether the place is a residence." *Bd. of Supervisors*, 1997 WL 1070562, at *4 (quoting *Woods*, 884 F. Supp. at 1173). Far more significant than arbitrary time tables is the "nature" of the occupancy. *See Conn. Hosp.*, 129 F. Supp. at 133-35. In light of numerous factors—including the "dispositive" lack of intent to return—demonstrating the nature of patients' stay at Newport is not residential, Newport cannot qualify as a "residential facility."

IV. Newport Enjoys No Special Zoning Status Under Section 2291 Because It Accepts Patients Who Are Illegal Drug Users and Addicts.

Newport has a liberal (and lucrative) policy of allowing users of illegal drugs and drug addicts to come to and stay at its facility. Because of Newport's open-door policy for drug users and addicts, Section 2291 confers no special zoning status on Newport's use of property.

Section 2291 provides that, "[f]or the purposes of this subsection, mental illness and developmental disability shall not include current illegal use of or addiction to a controlled substance as defined in § 54.1-3401." Va. Code § 15.2-2291(A). Thus, Newport can claim no preferred zoning status under Section 2291

if it accepts drug users and addicts—which it does.

The operative language in Section 2291—"current illegal use of or addiction to a controlled substance"—comes from the FHA, which has identical language. The FHA states that the term "[h]andicap" with respect to a person "does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21)." 42 U.S.C. § 3602(h). The only difference between Section 2291 and the FHA provision is a comma.

The Court of Appeals for the Fourth Circuit construed this FHA provision in *United States v. Southern Management Corp*., 955 F.2d 914 (4th Cir. 1992). The case involved the Crossroads drug abuse rehabilitation program in Alexandria. The court described the program as follows: "During the first phase of the program, [Crossroads'] clients live at the Crossroads facility, receive counseling and therapy, and are tested for drug use on a regular basis. After a drug-free year, each client is evaluated for suitability for the second, or 'reentry,' phase of the program. In this reentry phase, clients live in apartments rented by [Crossroads], while continuing to be supervised and monitored by Crossroads employees." *Id*. at 916.

Southern Management Corp. ("SMC"), an apartment complex manager, refused to rent to Crossroads for reentry-phase clients who had successfully completed phase one of the program and been drug-free for one year. The federal government sued SMC, alleging that its refusal to do so violated the FHA.

SMC argued that the Crossroads clients were drug addicts and so not protected by the FHA. "SMC argue[d] that 'addiction' must include persons addicted to, but no longer using, controlled substances." *Id*. at 920. The Fourth Circuit, however, declined to adopt the view that "once an addict, always an addict, and addicts may not seek the Act's protection." *Id*. Instead, the court agreed with the government that a drug addict "may, after a period of abstinence and rehabilitative efforts, be said to no longer have an 'addiction,' as that term is used in the statutory exclusion." *Id*. at 920-21.

But the Fourth Circuit also sided in part with SMC. *See id*. at 922 ("[W]e are not willing to say that SMC's statutory-construction argument is without any merit."). It held that, for a drug addict to shed his addiction for FHA purposes, he must not be using drugs and must have successfully completed a supervised drug rehabilitation program. It is not enough, the Fourth Circuit ruled, that an addict is not currently using drugs if he has not also successfully completed a supervised rehabilitation program.

The Fourth Circuit derived this rule from the Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) ("ADA"). The ADA, amending the Rehabilitation Act of 1973, provides that the term "individual with handicaps" does not include "an individual who is currently engaging in the illegal use of drugs." *Southern Mgmt.*, 955 F.2d at 922 (quoting ADA § 512(a) (codified at 29 U.S.C.

§ 706(8)(C) (1991) (current version at 42 U.S.C. § 12210)). The ADA also provides that that definition does not include an individual with handicaps who:

> (I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; [or]
>
> (II) is participating in a supervised rehabilitation program and is no longer engaging in such use[.]

Id. (quoting 29 U.S.C. § 706(8)(C)(ii) (1991)).

The Fourth Circuit explained that "[g]iven the congruity of purpose behind the various antidiscrimination statutory schemes, this later expression of intent in a related statute should inform our inquiry. Therefore, we hold that the exclusion from the definition of 'handicap' of 'current, illegal use of or addiction to a controlled substance' shall be construed consistently with 29 U.S.C. § 706(8)(C)(ii)(I)-(II) [1991]." *Southern Mgmt.*, 955 F.2d at 922-23.

Accordingly, under the test laid down in *Southern Management*, someone who has been a drug addict is not considered to be a current drug addict only if he or she "has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use." *Id*. (Newport patients cannot concurrently "participat[e] in a supervised rehabilitation program," *id*., at the same time they are at Newport.) If a drug addict comes to Newport and has not completed

a supervised rehabilitation program, he or she is not entitled to the protections of the FHA—or the parallel Section 2291. Newport admits many such addicts.

This Court should follow *Southern Management* and construe Section 2291 in harmony with the Fourth Circuit's construction of the FHA provision on which Section 2291 was lifted word for word. Virginia courts often look to decisions of the Fourth Circuit for guidance in resolving legal issues,[7] and doing so is especially appropriate where, as here, the issue relates to the interpretation of a Virginia code provision identical to the federal statute on which the Virginia provision was based.

Because *Southern Management* should govern Section 2291 as well as the FHA, Newport enjoys no special zoning status under Section 2291. This is so because Newport fails the *Southern Management* test. In *Southern Management*, the Crossroads clients who sought to live in the SMC apartments had completed phase one of the Crossroads rehabilitation program and been drug-free for one year. 955 F.2d at 916. Newport imposes no comparable requirements.

It is undisputed that Newport permits persons who have used or been addicted to illegal drugs to stay at its facility. It is also undisputed that Newport does not

[7] *See*, *e.g.*, *N. Va. Kitchen, Bath & Basement, Inc. v. Ellis*, 299 Va. 615, 626 (2021) (calling Fourth Circuit decision "instructive"); *Nationwide Mut. Fire Ins. Co. v. Erie Ins. Exch.*, 293 Va. 331, 338 (2017) (finding Fourth Circuit opinion "persuasive"); *Coe v. Coe*, 66 Va. App. 457, 476 (2016) (adopting "persuasive" Fourth Circuit standard); *Abateco Servs., Inc. v. Bell*, 23 Va. App. 504, 514 (1996) (finding the "Fourth Circuit's reasoning" to be "persuasive").

require such persons to have successfully completed a supervised drug rehabilitation program or be concurrently enrolled in such a program. Thus, Newport policy allows such persons in its facility and forfeits any special zoning status conferred by Section 2291.

Newport told the BZA that "it is Newport's established policy that no one who enters treatment may be a current user of controlled substances" and that "if Newport determines that a resident is using controlled substances while in their care, they are subject to administrative discharge." R.704. Thus, even recent past drug use and addiction does not make a person ineligible for Newport. Nor does Newport ever require the successful completion of a supervised drug rehabilitation program. And even drug use during one's stay at Newport does not result in automatic expulsion; it merely makes the user "subject to" discharge. *Id*.

What this means is that Newport does not consider past drug use, even very recent drug use, as disqualifying. *See* R.86 (CEO Procopio statement that, "As we have said before, an applicant whose primary diagnosis is a mental health disorder, but has a secondary diagnosis of substance abuse, will be admitted to" Newport). Indeed, the record compels the inference that Newport will accept as a patient someone who admits to recent drug use or addiction so long as he pledges not to use while in the facility.

Newport attempts to circumvent the plain meaning of Section 2291 by stating

that it will not admit patients "with a primary substance abuse diagnosis," R.720, but only those with a secondary diagnosis of substance abuse, R.86. Section 2291, however, makes no such distinction. So long as one patient is being treated in some capacity for "current illegal use of or addiction to a controlled substance," Newport falls out of Section 2291's protection. Va. Code. § 15.2-2291(A).

In fact, Newport concedes that its patient population includes a high percentage of drug addicts. Newport told the trial court that "20 percent of these residents have some sort of secondary diagnosis, including drug addiction. And what that means is there is some group of people at the Newport facilities that -- that have an addiction." R.2381-82. *See also* R.82 (CEO Procopio's testimony that "The percentage of Newport Academy residents, or clients, who have a secondary substance abuse issue is hovering around 20 percent."). Contrary to *Southern Management*, however, Newport does not require its patients who are addicts to have been drug-free for a year, and it does not require them to have successfully completed a supervised drug rehabilitation program. For those reasons, Section 2291 does not give Newport a free pass from the zoning restriction on congregate housing facilities.

CONCLUSION

For the foregoing reasons, the trial court's final orders affirming the BZA's decisions should be reversed, and this Court hold unlawful and set aside both the Zoning Determination and the permit issued to Newport.

Respectfully submitted,

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Dated: September 20, 2023

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of September, 2023, an electronic version of this brief has been filed with the Court of Appeals of Virginia through VACES, and an electronic copy has been emailed to opposing counsel. This brief contains 12,033 words, excluding those portions that by rule do not count toward the word limit.

Appellants hereby request oral argument.

/s/ H. Christopher Bartolomucci
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