

November 3, 2020

Leslie B. Johnson
Fairfax County Zoning Administrator
Department of Planning and Zoning
Zoning Administration Division
12055 Government Center Parkway, Suite 807
Fairfax, Virginia 22035-5505

Re: Newport Academy Requests for Use Determination
11740 Plantation Dr. and 11901 Plantation Dr.

Dear Ms. Johnson:

We are property owners on Plantation Drive in Great Falls, Virginia and write concerning the use determination requests (the “Plantation Drive Requests”) dated October 8, 2020 made on behalf of Newport Academy. Newport Academy seeks to operate a mental health treatment facility for adolescents, including treatment for substance abuse addiction, at the two referenced residential properties (the “Properties”). The Properties are located on a common private driveway off Kentland Drive in Great Falls along with the six other residences owned by the undersigned. We object to the granting of a determination by the Zoning Administrator that the proposed use of the Properties by Newport Academy would be permitted “by right” under the Zoning Ordinance. For the reasons set forth below, the Plantation Drive Requests should be denied, and the proposed use should not be permitted in the absence of a special use exception approved by the Board of Supervisors.

Plantation Drive is an Inappropriate Location for the Proposed Use Due to the Inadequacy of the Single Lane Private Driveway Serving the Properties and the Adverse Impact of the Proposed Use on Local Traffic and Pedestrian Safety

Plantation Drive is a one lane private driveway originally made as a pipestem off Kentland Drive for a single house many decades ago and now serving eight residences in total. Although the lots are large, the eight properties all utilize the same single car-width driveway to access Kentland Drive. The driveway is narrow and roughly paved and in places has dangerous blind spots both on curves through a wooded area and because of changes in elevation. Two vehicles cannot pass through most portions of the driveway without driving off the road. See attached images. There is no place for trucks and other vehicles to turn around at the driveway’s dead end where the rough pavement abruptly ends.

The Plantation Drive Requests state that the proposed use of the Properties by Newport Academy presents “*no problems for... local traffic*”, but in fact the proposed use presents substantial and untenable risks of harm from significant additional traffic, including large trucks, on the single lane driveway. This driveway is used by pedestrians, including children walking to and from their bus stop. There have been numerous incidents involving vehicles on the driveway in recent years.

The proposed use would result in a deluge of traffic from the many staff members working at the two Properties, including the “*psychiatrists, therapists, counselors, nurses, dieticians, care coordinators and experiential therapy practitioners*”, all referred to in Newport Academy’s requests, as well as the succession of short-term resident patients, family members and other visitors, and large vehicles including

food service suppliers, commercial cleaners and other delivery trucks. The single lane private road infrastructure at this site simply cannot safely accommodate the proposed use of the Properties, as has been demonstrated by prior use. The impact of the proposed use on local traffic and safety is a legitimate, non-discriminatory basis for denial of the Plantation Drive Requests under the Fair Housing Amendments Act of 1988 (“FHAA”), and the corresponding provisions of Commonwealth of Virginia and Fairfax County law.¹ We urge the Zoning Administrator to act to protect the physical safety of the community from the very real and unreasonable risks of harm from the proposed use in light of the inadequacy of the single lane private driveway for the operation of the Properties as a residential treatment facility.

Newport Academy Seeks to Establish an Adolescent Mental Health Treatment Operation on Two Physically Adjacent and Functionally Combined Properties in Violation of the 8-Person Limit for Group Homes

While Newport Academy has submitted two ostensibly separate requests to operate same-sex residential mental health treatment facilities at the two co-located Properties, the Plantation Drive Requests should be viewed as one integrated request under the Zoning Ordinance. The Properties were leased together from Sagebrush Treatment Center, which previously operated a residential treatment center at the Properties (consistently in violation of the Zoning Ordinance). The two individual use determination requests - one for each of the Properties - were submitted by Newport Academy to the Zoning Administrator on the exact same day, and, if the proposed use is approved, the Properties will constitute an integrated operation on Plantation Drive. The Properties are physically located in close proximity to one another off of the same narrow private driveway shared with our six houses and would be functionally combined under common management. Any sharing between the two co-located houses of on-site management, operational support, operating expenses, staffing, patient treatment, meetings, activities or other patient services, including patient transportation services, as well as any other on-site shared services, shared expenses and operational integration, which will inevitably occur, will render the proposed operation to be a multi-unit treatment facility that cannot receive a “by right” use determination under the Zoning Ordinance. For these reasons alone, since the combined facility proposed to be operated on Plantation Drive will serve more than 8 mentally ill persons, the proposed use of the Properties does not meet the definition of a “group residential facility” under the Zoning Ordinance². The Plantation Drive Requests therefore should be denied.

Although the foregoing are dispositive grounds for rejection of the Plantation Drive Requests, the proposed use of the Properties also does not satisfy the legal requirements for a “group residential facility” and would violate the Zoning Ordinance absent a special use exception, because (i) Newport Academy proposes no limitation on transient occupancy of the Properties or on the provision of services to transient occupants or other non-residents, and (ii) Newport Academy’s residents and patients would

¹ . See, e.g., *Jt. Statement of Dep't of Hous. & Urban Dev. and Dep't of Justice, State and Local Land Use Laws and Practices and the Application of the Fair Housing Act*, issued Nov. 10, 2016, at 14, Q 19 second para. (valid unaddressed concern about inadequate parking facilities could justify denying the requested accommodation).

² Furthermore, even if the number of patients at the two Properties are not aggregated, reasonable requirements restricting the operation of group homes in close proximity have been upheld under the Fair Housing Act and are necessary on Plantation Drive in light of the significant adverse impact of the proposed use on local traffic and pedestrian safety. See, *Jt. Statement* at 14; *Avalon Residential Care Homes, Inc. v. City of Dallas*, 130 F. Supp. 2d 833 (N.D. Tex. 2000).

include residents with substance abuse addiction, who are expressly excluded from the definition of disabled persons entitled to protections under the FHAA and the applicable provisions of the Code of Virginia and the Zoning Ordinance.

Newport Academy’s Proposed Use Violates the Zoning Ordinance Because it Does Not Limit Transient Occupancy of its Facility or the Provision of Services to Transient Occupants and other Non-Residents

Newport Academy states in its requests that “*Newport Academy’s residents typically stay between 30 to 90 days, with the national average for length of stay being 45 days.*” However, there is no minimum period that its patients must reside at the Properties. In addition, Newport Academy’s proposed use does not restrict the provision of services to transient occupants or other non-residents, nor the conduct of other commercial activities at the Properties involving persons who are not residents of the Properties. Such activities are subject to regulations validly applicable to all single families on a non-discriminatory basis under the Zoning Ordinance.

Although the Zoning Ordinance does not impose any special residency requirement on single families and such a requirement could not legally be imposed exclusively on qualified group residential facilities, the Zoning Ordinance does regulate transient occupancy.³ The proposed Newport Academy facility, however, would permit occupancy by its adolescent patients for periods of less than 30 days (although that might not be “typical”, according to Newport Academy). Such transient occupants would not satisfy either the residency requirements for a group residential facility under the Zoning Ordinance or the Zoning Ordinance regulations otherwise applicable to such transient occupancy. The absence of a minimum length of stay eliminates any limitation on the provision by Newport Academy of treatment services to transient patients (and other individuals that do not qualify as residents) in violation of the restrictions against such commercial activities under the Zoning Ordinance. Similarly, the conduct of commercial activities involving non-residents, including for example “open houses” and other marketing and promotional activities, ancillary visits related to Newport Academy’s business, outpatient services, and combined treatments with residents from other facilities or the community generally, all are not limited under Newport Academy’s proposed use. These activities legally are subject to the same non-discriminatory regulations under the Zoning Ordinance as are applicable to non-group home, single families. The failure of Newport Academy’s proposed use to limit such activities, which do not constitute adolescent mental health residential treatment services, and to prohibit commercial activities for which an accommodation from the Zoning Ordinance is not reasonable and appropriate, constitutes an independent basis to deny the Plantation Drive Requests.

Newport Academy’s Proposed Use Does Not Qualify as a “Group Residential Facility” Under the Zoning Ordinance Because Newport Academy Proposes to Treat Patients with Addiction to Controlled Substances

It is clear from Newport Academy’s various submissions, public communications and marketing materials that a significant number of Newport Academy’s patients have primary or secondary substance abuse addiction, and that treatment for substance abuse addiction will be a material element of the

³ See Zoning Ordinance Sec. 10-105. The term “transient occupancy” is defined at Sec. 20-300 of the Zoning Ordinance to mean “[u]se of a DWELLING or MOBILE HOME, or part thereof, for sleeping or lodging purposes for fewer than 30 consecutive nights”.

services provided to patients at the Properties. While we understand that this issue is subject to litigation currently pending in the Fairfax County Circuit Court in the matter involving the Board of Zoning Appeals determination for Kurtz Road in McLean, Virginia on March 11, 2020, it is a fact that the unambiguous wording of Virginia Code Sec. 15.2-2291 and the Fairfax County Zoning Ordinance expressly prohibit granting a “group residential facility” designation for residents with addiction to controlled substances.

Group Residential Facilities are defined by Sec. 20-300 of the Zoning Ordinance – consistent with Virginia Code Sec. 15.2-2291(A) – as follows:

A group home or other residential facility, with one or more resident or nonresident staff persons, in which no more than: eight (8) mentally ill, intellectually disabled or developmentally disabled persons reside **and** such home is licensed by the Virginia Department of Behavioral Health and Developmental Services...The terms handicapped, mental illness and developmental disability ***shall not include current illegal use or addiction to a controlled substance*** as defined in Sect. 54.3401 of the Code of Virginia or as defined in Sect. 102 of the Controlled Substance Act (21 U.S.C. 802) (*emphasis supplied*).

The Zoning Ordinance defines a facility outside of that criteria as follows:

For the purpose of this Ordinance,...a dwelling unit or facility for more than four (4) persons **who do not meet the criteria set forth above or** for more than eight (8) handicapped, mentally ill, intellectually disabled or developmentally disabled persons shall be deemed a CONGREGATE LIVING FACILITY. (*emphasis supplied*).

Using language nearly identical to the Zoning Ordinance, Virginia Code Sec. 15.2-2291(A) defines “group homes” for certain individuals as single family residences for zoning purposes – but not where the “group home” is comprised of residents that are currently using illegal substances, who have an addiction to a controlled substance or where the focus is on commercial treatment rather than residency. Compare Zoning Ordinance Sec. 20-300 with Va. Code Sec. 15.2-2291(A) (“**For purposes of this subsection, mental illness and development disability shall not include any current illegal use of or addiction to a controlled substance as defined by Sec. 54-3401**”).

Under the Zoning Ordinance, Fairfax County allows group homes for persons being treated for addiction to controlled substances in residential zones only with a special exception permit designating a Congregate Living Facility or a Medical Care Facility. Zoning Ordinance Sec. 20-300. Accordingly, the approval of the Plantation Drive Requests would violate Virginia Code Sec. 15.2-2291 and Zoning Ordinance Sec. 20-300b under the express provisions of such laws because the proposed use does not qualify as a “Group Residential Facility” due to the proposed treatment of patients with addiction to controlled substances.

Denial of the Plantation Drive Requests Will Not Violate the Fair Housing Act.

Both Virginia Code Sec. 15.2-2291 and Sec. 20-300 of the Zoning Ordinance were enacted to comply with the FHAA, which prohibits discrimination against group homes in residential neighborhoods through local zoning laws. However, the purpose behind the FHAA was to protect housing opportunities

for persons *handicapped by permanent mental illness*, see 42 U.S.C. Secs. 3601, et seq., not a behavior condition such as drug addiction or transitory diagnoses masking that behavioral condition. See 42 U.S.C. Sec. 3601(h) (“[H]andicap...does not include current, illegal use of or addiction to a controlled substance as defined in section 802 of Title 21”).

Recognizing that fact, both the General Assembly and the Fairfax County Board of Supervisors in the aftermath of the 1988 Amendments carved out an exception to the “group home” protections in exempting on-site treatment for drug use or addiction, as directly reflected in the text of Section 2291(a) and Section 20-300 discussed above.

Federal courts interpreting the exemption regarding “addiction to controlled substances” have upheld this distinction and thus disagreed with Newport Academy’s interpretation that “drug treatment” (whether through a primary or secondary diagnosis) is somehow protected by the FHAA. See United States v. Southern Mgmt. Corp., 955 F.2d 914 (4th Cir. 1992) (persons suffering from drug addiction are not automatically protected by the FHA).

We acknowledge the seemingly contrary authorities relied upon by the Zoning Administrator in past determinations. However, we believe, as explained above, that Newport Academy’s proposed use is not a “Group Residential Facility” under the express provisions of the Virginia Code and the Zoning Ordinance, and that the denial of the Plantation Drive Requests would not be discriminatory under the FHAA. Indeed, the denial of the proposed use should be a matter of state law, not a discretionary action, as the Zoning Ordinance explicitly excludes drug treatment facilities from this zoning use and state law provides no further protection. As a matter of law, the denial, which is non-discretionary, should not constitute a discriminatory action against those with mental illness.

Licensing of Newport Academy by VDBHDS is not Dispositive of the “By Right” Use Determination

State licensure of Newport Academy is not a dispositive factor in granting a “Group Residential Facility” zoning use for the proposed use of the Properties. If the Virginia Department of Behavioral Health & Development Services (“VDBHDS”) grants to Newport Academy a license to operate a treatment facility, that authority is limited to the terms of the express grant by VDBHDS and does not constitute a right to the zoning determination of a “Group Residential Facility” under the Zoning Ordinance. Newport Academy intends to provide mental health treatment, including for substance abuse addiction, to short-term adolescent patients, including transient occupants. As such, the proposed use fits within the “Congregate Care” definition in the Zoning Ordinance. The approval of a license by VDBHDS to Newport Academy to operate the facility on the Properties does not lead conclusively to a determination that the proposed use constitutes a “group residential facility”, and it would be inappropriate and contrary to the Zoning Ordinance and the Virginia Code for the Fairfax County Zoning Administrator to rely on the decision by a Richmond-based state administrator, who has no knowledge of the Properties or the Zoning Ordinance, as the basis for determining that the requirements of the Zoning Ordinance have been satisfied with regard to the Plantation Drive Requests.

Furthermore, the FHAA does not provide a blanket legal exemption from the Zoning Ordinance for VDBHDS-licensed facilities, only an obligation to provide “reasonable accommodation” from compliance with non-discriminatory local regulations and requirements affecting the proposed use. As noted above, Newport Academy’s proposed use does not limit transient occupancy of the Properties;

Newport Academy discloses only its “typical” and “national average” lengths of stay. Nor does Newport Academy’s proposed use limit the provision of services to transient occupants or other non-residents, such as outpatient services, or limit the conduct of other commercial activities at the Properties involving non-residents, such as marketing or promotional activities, other gatherings of non-resident persons to advance the commercial objectives of Newport Academy, patient treatment involving non-resident persons, or other commercial activities. Even though it may be permissible in the view of the Zoning Administrator, that the core activity of providing adolescent residential mental health services have a “commercial flavor”, these other commercial activities, which are not limited under Newport Academy’s proposed use of the Properties, are valid subjects for non-discriminatory regulation by the County in the same manner and to the same extent as any other single family residence, notwithstanding VDBHDS licensure of the facility. No use determination may be granted under the Zoning Ordinance that encompasses or permits any such activities, nor any accommodations, other than “reasonable accommodations”, granted with respect to activities of Newport Academy at the Properties, which would exclude all of the foregoing commercial activities.

For the foregoing reasons, we respectfully request that the Plantation Drive Requests be denied by the Zoning Administration Division.

Very truly yours,

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cc: Laura S. Gori, Senior Assistant County Attorney
John W. Foust, Supervisor, Dranesville District