VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: March 11, 2020 Decision of the Board of Zoning Appeals of Fairfax County, Virginia	Case No. CL2020-5490 Case No. CL2020-5521

MOTION OF THE COMMONWEALTH OF VIRGINIA TO FILE AMICUS BRIEF IN SUPPORT OF RESPONDENTS

The Commonwealth, by counsel, hereby moves the Court for leave to file an *amicus curiae* brief addressing a central issue in this case—whether state zoning law requires "by right" treatment of certain group homes for people with disabilities in order to comply with fair housing obligations. The Commonwealth respectfully requests that the Court grant its motion and order that its brief (attached hereto as Exhibit 1) be deemed filed. In support of this motion, the Commonwealth states as follows:

1. This case involves, among other things, whether pursuant to § 15.2-2291, group homes for people with disabilities qualify as "by right" uses for zoning purposes. The Commonwealth has examined this issue and, based on its experience enforcing the Virginia Fair Housing Law, has concluded that § 15.2-2291 unambiguously harmonizes zoning law with fair housing law in prohibiting discrimination – including the imposition of restrictive conditions – on qualifying group homes for people with disabilities.

2. The Commonwealth has a special interest and expertise in this subject. The explicit policy of the Commonwealth is "to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of race, color, religion, national origin, sex, elderliness, familial status, source of funds, sexual orientation, gender identity, status as a veteran, or disability, and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons, in order that the peace, health, safety, prosperity, and general welfare of all the inhabitants of the Commonwealth may be protected and ensured." Va. Code § 36-96.1. The Office of the Attorney General is responsible, in part, for carrying out this policy through enforcement of the Virginia Fair Housing Law. *See* §§ 36-96.16

and 36-96.17. Moreover, because the Virginia Fair Housing Law has been deemed substantially equivalent to the federal Fair Housing Act, the Commonwealth is able to maintain a productive workshare agreement with the U.S. Department of Housing and Urban Development (HUD). Any weakening of the state law threatens this status and could undermine the relationship – including financial compensation – with HUD.

3. The Commonwealth is empowered to file *amicus curiae* briefs in the Virginia Supreme Court and Virginia Court of Appeals without seeking leave of the court. Va. Sup. Ct. R. 5:30(b)(ii) and Va. Sup. Ct. R. 5A:23(a)(1), respectively. While there is no corresponding rule for *amicus* briefs in circuit courts, the two existing rules on *amicus* briefs support the allowance of the Commonwealth to file an *amicus* brief in circuit court.

4. The Commonwealth is not seeking leave to intervene as a party in these cases. Instead, the Commonwealth seeks only to file an *amicus* brief to clarify its position on fair housing laws to the Court. In contrast to a motion to intervene, an entity need not have standing to file an *amicus* brief.

5. Virginia circuit courts regularly grant motions to file *amicus* briefs. *See, e.g.*, *Soering v. McDonnell*, 84 Va. Cir. 564 (2012) (granting the Rutherford Institute's motion to appear as *amicus curiae*); *Little Piney Run Estates, LLC v. Bd. of Supervisors of Loudoun Cty.*, 74 Va. Cir. 400 (2007) ("Counsel for the newspaper was permitted to appear and argue as *amicus.*"); *Hudson v. Va. Emp. Comm'n*, 69 Va. Cir. 318 (2005) (noting the "position of the Veterans of Foreign Wars, which was allowed to file a memorandum in support of Hudson as *amicus curiae*"); *Shenandoah Publ'g House, Inc. v. Cook*, No. 97-176, 1997 WL 1070422 (Fauquier Cir. Ct. Sept. 12, 1997) ("[T]he Court granted The Fauquier Citizen's motion to file a Memorandum Amicus Curiae, and the Citizen's Memorandum lodged in the file of this case is deemed filed.").

6. This motion and the accompanying brief, filed contemporaneously with Respondents' brief are timely. *Cf.* Va. Sup. Ct. R. 5:30(d) ("A brief *amicus curiae* will be accepted only if filed on or before the date on which the brief of the party supported is required to be filed."). Accordingly, the Court's consideration of the arguments contained in the brief will not delay these proceedings.

7. Counsel for the Commonwealth has contacted all parties to seek their position on this motion. Respondents dba Newport Academy consent to this motion. Counsel for Leslie B.

Johnson, Zoning Administrator and the Fairfax County Board of Supervisors does not oppose this motion. Counsel for Petitioner Anders Larson Trust does not consent to the motion. Neither Counsel for Petitioners Victor Tsou and Janet Tsou nor Counsel for Petitioners Matthew Desch, Daniel DuVal, and Jason Hein responded with a position before the timing of the hearing necessitated the filing of this motion any accompanying brief.

WHEREFORE, for the reasons set forth above, the Court should grant the motion of the Commonwealth and order that the accompanying brief be deemed filed. A proposed order is attached as Exhibit 2.

Dated: November 19, 2020

Respectfully submitted,
COMMONWEALTH OF VIRGINIA

By Counsel: Digitally signed by R. Thomas Payne II Date: 2020.11.19 10:59:21 -05'00'

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EXHIBIT 1

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: March 11, 2020 Decision of the Board of Zoning Appeals of Fairfax County, Virginia	)	Case No. CL2020-5490 Case No. CL2020-5521

BRIEF OF AMICUS CURIAE COMMONWEALTH OF VIRGINIA IN SUPPORT OF RESPONDENTS

Municipal restrictions on group homes that make housing more expensive, onerous, or ultimately unavailable to persons with disabilities violate the letter and spirit of fair housing laws. Specifically, zoning ordinances that impose conditions on residential facilities serving people with disabilities that are more restrictive than conditions imposed on dwellings occupied by single families necessarily treat people with disabilities worse than people without disabilities, resulting in unlawful discrimination. Courts across the country have held that many such conditions, including the imposition of special health and safety requirements or neighbor notification provisions and other special procedural requirements applicable only to group homes, violate fair housing protections. *See, e.g.*, *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1211-16 (D. Conn. 1992) (Requiring a zoning application for a special exception to provide a residence for persons who are HIV-positive was deemed to be the result of intentional discrimination where the residence met the town's zoning criteria for a "family" residence.); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296-97 (D. Md. 1993) (A zoning ordinance that required notice to neighbors of a group home's existence constituted a discriminatory classification in violation of the Act because it was not imposed on any other properly zoned residential.); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 844-45 (N.D. Ill. 2001) (Requirements that group homes occupy detached single-family houses; that they be operated only by non-profit organizations; that there can be no more than one person per room; and that they be subject to special inspections violate the FHAA.); *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 46-48 (6th Cir. 1992) (A zoning ordinance that imposed rigorous safety requirements on homes for

individuals with developmental disabilities and did not tailor those requirements to specific types of disabilities violated the Act.).

In 2009, the Commonwealth challenged as violative of fair housing laws Wythe County's imposition of wastewater and public notice requirements to a proposed group home for eight or fewer residents with disabilities. *Commonwealth of Virginia ex rel. Fair Housing Board v. Wythe County, et al.*, Civil Case No.: CL09-126 (2009). The court entered a consent order in which Wythe County acknowledged its violation at the next Board of Supervisors meeting. *Id.* Consent Order (2009).

To avoid this type of disability discrimination in a zoning context, Virginia Code § 15.2-2291(A) makes categorically clear that zoning ordinances must treat group homes occupied by those with disabilities as they would homes occupied by single families: "[z]oning ordinances for all purposes shall consider a residential facility[1] in which no more than eight individuals with mental illness, intellectual disability, or developmental disabilities reside, with one or more resident or nonresident staff persons, as residential occupancy by a single family. [...] *No conditions more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption shall be imposed on such facility*" (emphasis added). In other words, a qualifying group home shall be treated like a single-family home, and no additional special use requirements – including corporate status or certain services – can be imposed without contravening longstanding fair housing law.

INTEREST OF AMICUS CURIAE

The Commonwealth's dedication to fair housing is longstanding and express: It is the policy of the Commonwealth "to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of ... handicap [now 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; *see also* 1972 Acts ch. 591. The Commonwealth maintains a robust fair housing enforcement system at the state level. The Virginia Fair Housing Office (housed in the state

[1] A "residential facility" means "any group home or other residential facility for which the Department of Behavioral Health and Developmental Services is the licensing authority pursuant to this Code." Va. Code § 15.2-2291(A). Note that subsection B mirrors this language but applies to residential facilities that are licensed by the Department of Social Services. Because the group home in this case has been licensed by the Department of Behavior Health and Developmental Services, this brief discusses subsection A only. However, the same reasoning applies to subsection B.

Department of Professional and Occupational Regulation) investigates allegations of housing discrimination from around the Commonwealth. The Virginia Real Estate Board and Virginia Fair Housing Board make determinations about whether there is reasonable cause to believe discrimination may have occurred. Va. Code § 36-96.11. The Office of the Attorney General advises the Office and the Boards on fair housing matters. If either Board finds reasonable cause, the Office of the Attorney General litigates the matter in circuit court. Given the Virginia Fair Housing Law's substantial equivalency with the federal Fair Housing Act, this enforcement mechanism essentially allows for the enforcement of both the state and federal fair housing laws. This provides administrative and judicial economy for the parties and assures consistency in the application of both sets of statutes.

While the instant matter is one of land use and zoning, the key question involves application of protections emanating from the Virginia Fair Housing Law, namely whether a group home for people with disabilities can be subjected to certain conditions by the Fairfax Zoning Administrator. Given the Commonwealth's duty to enforce fair housing laws, and its experience doing so, the Commonwealth maintains an interest in this action.

ARGUMENT

The General Assembly intended Virginia Code § 15.2-2291 to operate as a state zoning preemption statute to prohibit discrimination against people with disabilities by making small licensed group homes "by right" uses without any need for special exception procedures.

The Virginia General Assembly enacted the precursor of § 15.2-2291[2] to comply with federal and state mandates that prohibited discrimination against people with disabilities. *Report of the Joint Subcommittee Studying Site Selection of Residential Facilities for Mentally Disabled*, Senate Document No. 36 (1990) [hereinafter *"Commonwealth Joint Subcommittee Report"*]. Recognizing that zoning restrictions often erected barriers to the establishment of group homes for those with disabilities, the legislature made it abundantly clear that localities must not impose any zoning or land use restrictions – other than those that apply to residences for single families – on residential group homes for up to eight people with disabilities. *Commonwealth Joint*

[2] Va. Code § 15.1-486.3.

Subcommittee Report. In enacting the language of § 15.2-2291, the General Assembly harmonized zoning law with fair housing law.

The Federal Fair Housing Act ("Fair Housing Act") was enacted as part of the Civil Rights Act of 1968. Pub. L. No. 90-284, Tit. VIII, §§ 801-819, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. ch. 45, §§ 3601-3619, 3631 (1994 & Supp. III 1997)). Virginia passed a corresponding state fair housing law in 1972. 1972 Acts ch. 591. Congress amended the Fair Housing Act in 1988 to extend protections against housing discrimination to persons with disabilities. Pub. L. No. 100-430, Tit. VIII, § 9, 102 Stat. 1619, 1635 (1988) (current version at 42 U.S.C. § 3631 (1994 & Supp. III 1997)). The Congress that passed the 1988 Fair Housing Amendments Act recognized that individuals with disabilities "have been denied housing because of misperceptions, ignorance, and outright prejudice." U.S. House of Representatives, Committee on the Judiciary, Report 100-711: the Fair Housing Amendments Act of 1988, note 21 at 18, 100th Cong., 2nd Sess. (1988) [hereinafter *"U.S. House Report"*]. Adding disability protections to the Fair Housing Act was a "clear pronouncement of a national commitment to end the unnecessary exclusion of persons with [disabilities] from the American mainstream." *Id.* Therefore, the Fair Housing Act as amended "repudiates the use of stereotypes and ignorance, and mandates that persons with [disabilities] be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion." *Id.*

When extending fair housing rights to people with disabilities, Congress articulated that the new protections prohibited the use of restrictive zoning tactics to block group homes for people with disabilities. In the words of the U.S. House Report: "The Committee intends that the prohibition against discrimination against those with [disabilities] apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." *Id.* at 24.

The Virginia legislature responded swiftly to the new disability protections in housing to assure the laws of the Commonwealth complied with the new federal rights. In 1989, the Virginia General Assembly established a Joint Subcommittee to "study methods of site selection

of community residences for the mentally disabled . . . which includes assimilation into the community." Senate Joint Resolution 220 (1989). Members of the Joint Subcommittee were tasked with assuring that state policy acknowledged that "neighborhood opposition cannot affect facility siting," and that local government should not impose special use requirements that "run the risk of creating a record which might show a discriminatory intent in siting decisions." *Commonwealth Joint Subcommittee Report* at 9. After a thorough study, the Joint Subcommittee identified problems causing the lack of housing for people with mental disabilities and proffered legislative solutions. The first problem in the list noted "zoning laws and related requirements," further explaining the problem that "pervasive [...] practices such as the imposition of special conditions, requirements for special use permits, and public hearing requirements" created "a barrier to access to certain areas" and exacerbated "community misunderstanding and opposition." *Commonwealth Joint Subcommittee Report* at 3.

The Joint Subcommittee requested and received counsel from the Virginia Office of the Attorney General that "analyzed the import of the federal [fair housing] statutes for several provisions of state law." *Id.* at 4. Advice from Attorney General staff (and others) revealed a consensus that the new federal fair housing law invalidated local "[c]onditional or special use permits, building code requirements, and similar provisions which apply specifically and exclusively to the mentally disabled." *Id.* at 5. Moreover, "[s]pecial hearing requirements, review panels, neighborhood advisory groups, and the like as a condition of or adjunct to group homes siting specifically for the mentally disabled" would violate fair housing protections. *Id.* On that point, the Report specifically called attention to advice from the Attorney General's Office warning that even if such restrictions were "fashioned to fit a neutrality standard," public comments may nevertheless reveal underlying discriminatory animus against people with disabilities and establish evidence of an impermissible basis for group home siting decisions. *Id.*

Based on this advice, the Joint Subcommittee confirmed that these type of zoning practices would violate fair housing rights by treating people with disabilities worse than people without disabilities, and that the law in effect at that time (former § 15.1-486.2) would permit such discrimination. *Id.* at 4-6. Accordingly, the Joint Subcommittee 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. *Id.* at 6, 8.

The recommended language, which became law in 1990 (1990 Acts ch. 814), "specifically addressed a major problem faced by group homes for the mentally disabled by adding a provision which defines group homes for the mentally disabled for eight or less as a single family use and requires that they be subject to no special requirements not imposed on single-family uses generally." *Commonwealth Joint Subcommittee Report* at 8. The "practical effect [of the recommended language] is to ensure that group homes for the mentally disabled will be able to site 'by right' without special permits and other requirements." *Id.*

Notably, the legislature articulated specific criteria for the types of facilities that qualify for this single-family treatment. By its unambiguous language, § 15.2-2291 applies to residential facilities in which no more than eight individuals with mental illness, intellectual disability, or developmental disabilities reside, with one or more resident or nonresident staff persons. The only categories to consider are how many reside at the facility, whether they have disabilities, and whether there at least one staff person at the facility. Contrary to Petitioners' argument, nothing in this section, nor in the Virginia Fair Housing Law, distinguishes between a nonprofit and a for-profit group home or residential facility, despite that very distinction having been considered and rejected by the legislature in the 2000 General Assembly session.

Introduced in 2000, Senate Bill 449 was drafted to distinguish between for-profit and nonprofit group homes in granting the protections in § 15.2-2291, affording the protections to the latter only. The bill summary "[c]larifies that the relevant jurisdictions are required to consider only *nonprofit* group homes or other *nonprofit* residential facilities in which no more than eight . . . disabled . . . persons reside . . . as residential occupancy, i.e., having the same restrictions, etc. as single family resident zoning." S.B. 449 (2000) (emphasis added). "In other words," if this bill were to become law, "in the case of for-profit facilities operated as businesses, the designated jurisdictions may apply other zoning restrictions." *Id.* Responding to the legislation, the Attorney General opined that "[t]o incorporate such a distinction in § 15.2-2291, which seeks to implement the Virginia Fair Housing Law, would result in a direct conflict with the legislative intent of the law." Dec. 8, 2000, Op. Va. Att'y Gen., 2000 WL 33912660 at *2. The bill was left in committee (died) on a unanimous vote. S.B. 449 (2000).

Moreover, nothing in the statute dictates or even enumerates what types of services can or must be allowed or disallowed at a residential group home serving people with disabilities to qualify for single-family use treatment. Instead, determination of appropriate services is made by the Department of Behavioral Health and Developmental Services, not the zoning administrator. While the zoning administrator processes the request for a *use determination*, and confirms the number of proposed residents, it is for the Department of Behavioral Health and Developmental Services – in accepting an *application for a license* – to assess whether prospective residents qualify as people with disabilities and whether the proposed services will meet their needs. If a group home satisfies both agencies, then its use is "by right," and "[n]o conditions more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption shall be imposed on such facility." § 15.2-2291(A).

CONCLUSION

In 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. This was required to prevent municipalities from using zoning and land use tactics to discriminate against group homes in which people with disabilities reside. The legislative approach mandates that group homes serving eight or fewer people with disabilities be treated as a single-family use. The law prohibits imposition of restrictive conditions on such group homes, instead requiring zoning administrators to treat the homes as "by right" use. We respectfully request that the Court affirm the BZA's March 11, 2020, decision affirming the August 21, 2019 Determination of the Zoning Administrator.

Dated: November 19, 2020

Respectfully submitted,
COMMONWEALTH OF VIRGINIA

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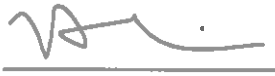
By: 

Helen Hardiman

EXHIBIT 2

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IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: March 11, 2020 Decision of the Board of Zoning Appeals of Fairfax County, Virginia	)	Case No. CL2020-5490 Case No. CL2020-5521

[PROPOSED] ORDER

On this day came amicus curiae Commonwealth of Virginia, by counsel, on Motion to Seeking Leave to File an *Amicus Curiae* Brief.

UPON CONSIDERATION WHEREOF, and for good cause shown, it is

ADJUDGED, ORDERED AND DECREED that the *Amicus* is hereby granted leave to file the brief *amicus curiae* attached as Exhibit 1 to the Motion.

ENTERED this ____ day of November 2020.

_____

Judge

WE ASK FOR THIS:

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