

**In the Matter of:**

**Hiliary Kozikowski, et al**

**v.**

**Monroe RE, LLC, et al**

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**Hearing Transcript**

April 11, 2023

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*Casamo*

**Court Reporting  
Videography  
Videoconferencing**

Phone: 703-837-0076  
Fax: 703-837-8118  
Toll Free: 877-837-0077

1010 Cameron Street  
Alexandria, VA 22310  
transcript@casamo.com

1 V I R G I N I A  
2 IN THE CIRCUIT COURT OF LOUDOUN COUNTY  
3 -----X  
4 :  
5 HILARY KOZIKOWSKI, et al., :  
6 Petitioners, : Case Nos. CL22-238  
7 v. : and CL23-1194  
8 MONROE RE, LLC, et al., :  
9 Respondents. :  
10 :  
11 -----X  
12  
13 Leesburg, Virginia  
14 Tuesday, April 11, 2023  
15  
16 The above action came on to be heard  
17 before the Honorable Paul F. Sheridan, a Substitute  
18 Judge in and for the Circuit Court of Loudoun  
19 County, in Courtroom 7, 18 E. Market Street,  
20 Leesburg, Virginia 20176, beginning at 10:06 a.m.  
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A P P E A R A N C E S

For the Plaintiffs:

GIFFORD R. HAMPSHIRE, ESQUIRE

JIM MEIZANIS, ESQUIRE

Blankingship & Keith, P.C.

4020 University Drive

Fairfax, Virginia 22030

(703) 691-1235

ghampshire@bklawva.com

jmeizanis@bklawva.com

For Defendant Loudoun County:

NICHOLAS LAWRENCE, ESQUIRE

Assistant County Attorney - Loudoun County

1 Harrison Street, SE

Leesburg, VA 20175

(703) 777-0307

1 For Defendants Monroe RE, LLC, and  
2 Monroe Real Estate, LLC:  
3 JOHN D. WILBURN, ESQUIRE  
4 JOHN SPEARS, ESQUIRE  
5 McGuire Woods  
6 1750 Tysons Boulevard, Suite 1800  
7 Tysons, Virginia 22102  
8 (703) 712-5372  
9 jwilburn@mcguirewoods.com

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E X H I B I T S

MARKED/RECEIVED

Petitioner's Exhibit 1	5	5
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Certified Copy of License  
from Virginia Department of  
Behavioral Health and Developmental  
Services

<p style="text-align: right;">Page 4</p> <p>1 PROCEEDINGS</p> <p>2 (The Court Reporter was sworn by the Clerk</p> <p>3 of the Court.)</p> <p>4 (Quoted material is as spoken and may not</p> <p>5 agree with the document quoted.)</p> <p>6 THE COURT: Counsel, you're ready to go?</p> <p>7 MR. HAMPSHIRE: Yes, sir.</p> <p>8 MR. WILBURN: Yes, Your Honor.</p> <p>9 THE COURT: How do you wish to proceed?</p> <p>10 MR. HAMPSHIRE: I believe the petitioner's</p> <p>11 can go first, Your Honor.</p> <p>12 THE WITNESS: That sounds right.</p> <p>13 MR. HAMPSHIRE: Your Honor, Gifford</p> <p>14 Hampshire with Blankingship and Keith.</p> <p>15 And, as a housekeeping matter, the first</p> <p>16 thing we want to do is to, per agreement of counsel,</p> <p>17 here is a certified copy of the license from the</p> <p>18 Virginia Department of Behavioral Health and</p> <p>19 Developmental Services which we ask to be admitted</p> <p>20 into the record, per agreement of counsel.</p> <p>21 THE COURT: Without objection?</p> <p>22 MR. WILBURN: That's correct.</p>	<p style="text-align: right;">Page 6</p> <p>1 And the record, of course, here</p> <p>2 included -- and, as a matter of housekeeping, Your</p> <p>3 Honor, I have two notebooks. One that I've handed</p> <p>4 up is authorities, legal authorities, that I intend</p> <p>5 to discuss. You should have a copy. The Clerk has</p> <p>6 a copy.</p> <p>7 And then the other is petitioner's case</p> <p>8 supporting documents, which are -- because the</p> <p>9 record in this case is so voluminous I think both</p> <p>10 sides have selected various documents from the</p> <p>11 record for emphasis today. And you'll see --</p> <p>12 I'm going to refer to those by tabs. And</p> <p>13 also you will see a record number in the top</p> <p>14 right-hand corner for reference to the record in the</p> <p>15 case.</p> <p>16 (Off the record.)</p> <p>17 MR. HAMPSHIRE: Thank you, sir.</p> <p>18 As I was saying, we're here on the Court's</p> <p>19 appellate jurisdiction pursuant to Virginia Code</p> <p>20 Section 15.2-2314 deciding this case on the record.</p> <p>21 And the record, of course, included the</p> <p>22 appeal papers to the Board of Zoning Appeals below.</p>
<p style="text-align: right;">Page 5</p> <p>1 THE COURT: What do you want -- do we</p> <p>2 letter or number?</p> <p>3 THE CLERK: Number.</p> <p>4 THE COURT: Go ahead and mark it for me,</p> <p>5 please.</p> <p>6 THE CLERK: Plaintiff's 1.</p> <p>7 THE COURT: That's admitted.</p> <p>8 (Petitioner's Exhibit 1 was</p> <p>9 marked for identification and</p> <p>10 received into evidence.)</p> <p>11 MR. HAMPSHIRE: Thank you, sir.</p> <p>12 Again, my it please the Court, Gifford</p> <p>13 Hampshire of Blankingship and Keith. With me is Jim</p> <p>14 Meizanis. Mr. Bartolomucci is -- cannot be here</p> <p>15 today. He is actually arguing a motion in an</p> <p>16 unrelated case in -- out of state.</p> <p>17 Your Honor, but we are here -- it's worth</p> <p>18 noting that we are here on appeal pursuant to</p> <p>19 Virginia Code Section 15.2-2314. The Court today --</p> <p>20 this is not a trial. The Court is sitting today in</p> <p>21 its appellate capacity pursuant to that code</p> <p>22 section.</p>	<p style="text-align: right;">Page 7</p> <p>1 And those are set forth in the tab in our notebook</p> <p>2 entitled petitioner's case supporting documents, Tab</p> <p>3 3.</p> <p>4 THE COURT: Thank you.</p> <p>5 MR. HAMPSHIRE: And you will see -- I've</p> <p>6 highlighted, I believe actually on all copies.</p> <p>7 Counsel has a copy as well.</p> <p>8 And first we have to note that the reason</p> <p>9 this is handwritten is because, as luck would have</p> <p>10 it, the day our appeal was due we had to file the</p> <p>11 appeal within 30 days of the zoning permit being</p> <p>12 issued, our license to Adobe Reader went out so we</p> <p>13 had to do this by hand. And, luckily, Mr. Meizanis</p> <p>14 has better handwriting than I do.</p> <p>15 But I wanted to emphasize for the Court</p> <p>16 that the basis for the appeal, as we pled it below,</p> <p>17 was, as highlighted, the appellant's appeal on the</p> <p>18 same grounds as stated their 12/27/21 statement in</p> <p>19 support of approval of the application attached</p> <p>20 hereto relating to the appeal of the 11/29/21 zoning</p> <p>21 determination.</p> <p>22 And attached that is, number one, a very</p>

<p style="text-align: right;">Page 8</p> <p>1 bad copy of the zoning permit. I have a better copy 2 for you today that I will reference. 3 But also attached to that is our 4 December -- December 27, '21, Statement of 5 Justification for Appeal to the Board of Zoning 6 Appeals in the first application. 7 The reason we did that, Your Honor, is 8 because of the fact that the Court had yet to rule 9 on that point and still has yet to rule on our claim 10 in the first appeal whether or not the zoning 11 determination of November of 2021 was an appealable 12 decision. 13 The County and Newport took the position 14 in that appeal that the Zoning -- and the BZA so 15 ruled in the first appeal that the zoning -- that 16 the zoning determination was not appealable because 17 it was not accompanied by a permit, specifically a 18 zoning permit. 19 And so our position in the appeal below 20 was we don't agree with that, but because there had 21 not yet been a ruling, and there still is not a 22 ruling, as to whether or not that November 29, '21,</p>	<p style="text-align: right;">Page 10</p> <p>1 talks about standards for issuance of zoning permits 2 and that no permit shall be issued with a structure 3 to be construed, or the use contemplated, would be 4 in violation of the provisions of the zoning 5 ordinance. 6 And since it was our position below, and 7 it is still our position, that because the only 8 place in the record of this case where there is 9 actually an analysis of whether the use is 10 allowed -- 11 First of all, what use is contemplated and 12 whether those uses comply with the zoning ordinance 13 is in the zoning determination itself. 14 And you will see the zoning determination, 15 set forth on Tab 14 of these materials, dated 16 November 29, '21. 17 And you will see there that the Zoning 18 Administrator is responding to Mr. Murphy and 19 Mr. Mikulic of McGuireWoods, Mr. Wilburn's partners, 20 in a response to their letter dated September 22, 21 2021. 22 THE COURT: Tell me again where you're</p>
<p style="text-align: right;">Page 9</p> <p>1 zoning determination is an appealable order, 2 appealable determination, we were forced to appeal 3 that zoning permit on the basis of the zoning 4 determination. 5 And we took that position, as stated in 6 the record before the Board of Zoning Appeals, 7 because if you look at Tab 10 of the materials that 8 I provided you -- and I referred to do this a second 9 ago. 10 Actually, it's Tab 10 in the -- in the 11 legal authorities. Excuse me. Petitioner's case 12 supporting documents, the same notebook, Tab 10. 13 You will see that this is a code section that we 14 discussed the last time we were before you and 15 several times before that. 16 These are the code sections and the 17 Loudoun County zoning ordinance that dictate when a 18 zoning permit would/shall be issued. Section 6-101 19 talks about application for the zoning permit. 20 Subsections A through H talk about all the things 21 that have to be submitted for a zoning permit. 22 And, significantly, Subsection 6-1002</p>	<p style="text-align: right;">Page 11</p> <p>1 looking. 2 MR. HAMPSHIRE: I'm looking at Tab 14 in 3 the notebook you have in front of you. 4 THE COURT: Thank you. 5 MR. HAMPSHIRE: You're welcome. 6 So you see that that is the zoning 7 determination that we've been referring to. It's 8 responding to the specifications or the requests 9 that had been paid by Mr. Murphy and Mr. Mikulic. 10 And you will see in the first paragraph the -- a 11 short answer to your inquiry is that that proposed 12 use is a congregate housing facility, a use not 13 permitted in AR-1 zoning district. However, the 14 proposed use would be permitted as a dwelling, 15 single-family detached on each of the properties and 16 if the use meets the zoning ordinance definition of 17 family, and the criteria of Section 15.2-2291(A) of 18 the Code of Virginia, licensure by the Department of 19 Behavioral Health and Developmental Services is 20 required. 21 And it then goes on in the next paragraph 22 to describe the actual use that had been provided,</p>

<p style="text-align: right;">Page 12</p> <p>1 the use parameters, if you will, that had been 2 provided by Mr. Murphy. And the subject property is 3 described as a single group residential facility for 4 no more than eight adolescents, with one or more 5 than -- with one or more nonresident staff persons. 6 The residents would participate in individual 7 therapy, group therapy, academic study, and a 8 variety of other activities, including music, 9 therapy, life skills, counseling, and yoga, 10 meditation, and other fitness activities. The 11 residents would not have access to the other two 12 properties. The length of stay is typically between 13 30 and 90 days. And the facilities would be 14 licensed by the Virginia Department of Behavioral 15 Health and Developmental Services as an MH 16 therapeutic group home for children and adolescents 17 with serious emotional disturbance. 18 The Zoning Administrator goes on to say 19 that the use described meets the definition of a 20 congregate housing facility defined in Article 8 of 21 the zoning ordinance. And then she lists the 22 definition. A structure, other than a single-family</p>	<p style="text-align: right;">Page 14</p> <p>1 from the Virginia State Department of Behavioral 2 Health and Developmental Services it, therefore, 3 meets the definition of family and therefore is 4 allowed. 5 In this proceeding below, on pages 45 to 6 46 of the transcript, and -- the Zoning 7 Administrator, when given a chance by the Board of 8 Zoning Appeals states in response to my argument: I 9 know that a number of times the statement has been 10 made that the zoning determination determined that 11 this use as a congregate facility not permitted. 12 That was part of the determination, he 13 says, but a key part of the determination was also, 14 however, if it was found to be a group home licensed 15 by the state then it would be permitted under state 16 code 2291 and the definition of family in the 17 ordinance. 18 He said state code provision, and that's 19 2291. I think that was clear from the context. 20 So the correctness of the zoning 21 determination as pending provided that -- excuse me. 22 So as confirmed by the Zoning</p>
<p style="text-align: right;">Page 13</p> <p>1 dwelling, where more than four unrelated persons 2 reside under supervision for special care, 3 treatment, and training for similar purposes on a 4 temporary permit basis. 5 And concludes that a congregate housing 6 facility is not listed as a use in the AR-1 district 7 and, therefore, is not permitted. 8 However, it goes on to say that the 9 proposed use may be permitted as a single-family 10 dwelling if it meets the definition of family 11 defined in the zoning ordinance as, and then 12 including Subsection C, a group identified in 13 Subsection 15.2-2291 of the Code of Virginia. And 14 then it goes forward. 15 So, as we have discussed many times 16 before, and as we described, if you look at Tab 3 of 17 our materials, from the very beginning we described 18 this -- this zoning determination as sort of a 19 paradox. 20 On the one hand, it is, according to the 21 Zoning Administrator, not allowed under the language 22 of the zoning ordinance. But if it has licensure</p>	<p style="text-align: right;">Page 15</p> <p>1 Administrator, it was a state -- and I think as 2 argued by Newport and the County, it is the state 3 licensure that under 15.2-2291 that required the 4 zoning determination to conclude that this use is 5 legal, even though otherwise not legal under the 6 zoning ordinance. 7 Now, before I move forward with that, 8 getting back to the appealability of the -- of the 9 zoning determination, because the Court has yet to 10 rule on that, and that is the critical document in 11 this whole appeal. It's what has really led to 12 every other issue in this -- in this appeal. 13 Now, we have always contended, 14 notwithstanding our -- that we were required to 15 appeal that zoning permit, we have always contended 16 that that document is appealable on the plain 17 language of 15.2-2309 and 15.2-2311. 18 I would like to point those out for the 19 Court in the legal authorities and the other 20 documents that we have here. And this is the -- 21 this is the supporting documents, again under Tab -- 22 Tab 5 if you -- on the Petitioner's Case Supporting</p>

<p style="text-align: right;">Page 16</p> <p>1 Documents.</p> <p>2 The language of 15.2-2309 under Tab 5 is</p> <p>3 entitled Powers and Duties of Boards of Zoning</p> <p>4 Appeals. And it continues over to the next page.</p> <p>5 But the very first subparagraph, subparagraph 1,</p> <p>6 says to hear and decide appeals from any --</p> <p>7 emphasized, any order, requirement, decision, or</p> <p>8 determination.</p> <p>9 THE COURT: Where -- tell me where you</p> <p>10 are.</p> <p>11 MR. HAMPSHIRE: I'm on the second page</p> <p>12 after -- on Tab 5 of the notebook entitled --</p> <p>13 THE COURT: And you're reading where on</p> <p>14 that document?</p> <p>15 MR. HAMPSHIRE: I'm on -- I'm on the</p> <p>16 second page. The page number at the bottom 769.</p> <p>17 THE COURT: Right.</p> <p>18 MR. HAMPSHIRE: And up at the top,</p> <p>19 number 1.</p> <p>20 THE COURT: They're highlighted?</p> <p>21 MR. HAMPSHIRE: Yes.</p> <p>22 THE COURT: Okay. Go ahead.</p>	<p style="text-align: right;">Page 18</p> <p>1 of Zoning Appeals under Virginia Code</p> <p>2 Section 15.2-2311(A), which says that an appeal to</p> <p>3 the Board may be taken by any person aggrieved or by</p> <p>4 any officer, department, board, or bureau of the</p> <p>5 locality affected, by what, any decision of the</p> <p>6 Zoning Administrator or from any Board requirement,</p> <p>7 decision, or determination made by any other</p> <p>8 administrative officer in the administration or</p> <p>9 enforce of this Article.</p> <p>10 Again, just like in 15.2-2309, there is</p> <p>11 absolutely no requirement that the determination or</p> <p>12 the decision be accompanied by a permit or some</p> <p>13 other permit or some other paper, if you will, that</p> <p>14 allows the use to commence.</p> <p>15 So the Board of Zoning Appeals in this</p> <p>16 case, I submit, created a lot of mischief that has</p> <p>17 led to a lot of unnecessary hearings in this case by</p> <p>18 concluding that because the zoning determination of</p> <p>19 November of 2021 was unaccompanied by a permit to</p> <p>20 allow the use to commence, somehow it was</p> <p>21 meaningless or somehow it was not appealable.</p> <p>22 And that is contradicted by the plain</p>
<p style="text-align: right;">Page 17</p> <p>1 MR. HAMPSHIRE: To hear and decide appeals</p> <p>2 from any -- emphasized, any order, requirement,</p> <p>3 decision, or determination made by the</p> <p>4 administrative officer in the administration or</p> <p>5 enforcement of this Article or any ordinance or --</p> <p>6 any ordinance adopted pursuant thereto.</p> <p>7 And I know what that section does not say.</p> <p>8 It does not say that a determination has to be</p> <p>9 accompanied by a permit.</p> <p>10 It does not say that the determination has</p> <p>11 to allow a use to commence.</p> <p>12 All it says is that the Board of Zoning</p> <p>13 Appeals has the power and the duty, the duty, to</p> <p>14 hear and decide appeals from any requirement,</p> <p>15 decision, or determination made by the</p> <p>16 administrative officer in the administration or</p> <p>17 enforcement of this Article, which is Article 7 of</p> <p>18 Title -- of Chapter 22 of Title 15.2, which is the</p> <p>19 enabling authority for local zoning ordinances.</p> <p>20 Likewise, Your Honor, if you flip the page</p> <p>21 to the next tab, which is Tab 6, there we have</p> <p>22 appeals to the Board, meaning appeals to the Board</p>	<p style="text-align: right;">Page 19</p> <p>1 language of both of these code sections. And</p> <p>2 everything else has -- has followed from that.</p> <p>3 THE COURT: How do you reconcile that with</p> <p>4 concepts of finality in the appealable issues?</p> <p>5 MR. HAMPSHIRE: It's a good question, Your</p> <p>6 Honor. And if you turn to -- if you could turn to</p> <p>7 Tab 14. And this is -- and this is a -- this is</p> <p>8 also visited. We're back in the zoning</p> <p>9 determination.</p> <p>10 And if you turn to page 3 of that zoning</p> <p>11 determination, you will see set forth on the last</p> <p>12 paragraph, please be advised that any person</p> <p>13 aggrieved by any office, department, or agency of</p> <p>14 Loudoun County affected an order, requirement,</p> <p>15 decision, or determination made by the</p> <p>16 administrative officer in the administration or</p> <p>17 enforcement of the provisions of this zoning</p> <p>18 ordinance may appeal said decisions within 30 days</p> <p>19 to the Board of Zoning Appeals in strict accordance</p> <p>20 with 15.2-2311, which is the code section we just</p> <p>21 went through, of Virginia.</p> <p>22 Significantly, next sentence, this</p>



<p style="text-align: right;">Page 20</p> <p>1 decision is final and unappealable if not appealed 2 within 30 days. 3       And that is a requirement in the statute 4 and it follows a line of cases which actually 5 predated the insertion 2311 that says -- and we've 6 gone through these before, Dick Kelly Enterprises is 7 one. Rinker versus the City of Fairfax is another. 8       That a zoning -- if a Zoning Administrator 9 issues at determination about what uses are possible 10 on a property and the -- a person aggrieved does not 11 appeal within 30 days after that decision is 12 rendered -- and that's 30 calendar days, not 13 weekends, holidays, or anything else -- then that 14 decision is final and unappealable and not subject 15 to collateral attack. 16       And in those cases, that line of cases 17 which is well-established, provides that you're 18 basically out of luck if you don't appeal that 19 determination. 20       So that's the finality that the General 21 Assembly is talking about. It's not finality of 22 allowing a use to start. It's finality of the</p>	<p style="text-align: right;">Page 22</p> <p>1 Review. Those are the boards that sit to say, fine, 2 you got the zoning, but in order to build that 3 building you have to get a design approved. In a 4 historic district, for example, it's compliance with 5 the design guidelines. 6       All of those are examples of other permits 7 that have to fall in place before the doors can 8 actually open, which is all the Zoning Administrator 9 said here, before the use can actually commence -- 10 you will see she said -- he said that you have to 11 get a license from the Virginia Department of 12 Behavioral Health and Developmental Services and you 13 have to get a zoning permit, which is somewhat like 14 an occupancy permit. It's a final permit that 15 includes the zoning sign-off, but it is not the 16 detailed determination of whether the use can 17 commence. 18       Now, in answer to the Court's question, I 19 feel I also need to mentioned that there was 20 briefing from the County about this issue. And the 21 County cited in the last appeal a number of cases 22 that we said simply do not apply.</p>
<p style="text-align: right;">Page 21</p> <p>1 opinion, whatever that opinion is. 2       And, again, we talked last time a little 3 bit about other examples and the Court asked me a 4 question and I referenced the last time that we had 5 in earlier brief, in briefs in the earlier appeal, 6 we had mentioned other examples of -- of why it's 7 not usual, in fact it's common and ordinary, that a 8 zoning determination is not accompanied by a permit 9 that allows development to start. 10       And in footnote of our brief filed on 11 August 12, 2022, we referenced other examples, such 12 as special use permits, a rezoning, planning 13 commission permit, which requires a determination of 14 consistency with the comprehensive plan, site plans, 15 building permits, occupancy permits, Federal Army 16 Corps of Engineers, wetlands permits. For a motor 17 vehicle dealership, you can get a zoning 18 determination that it's allowed but you might have 19 to get a -- you probably will have to get a permit 20 from the Virginia Department of Motor Vehicles to 21 allow the dealership to actually open. Certificates 22 of Appropriateness from Boards of Architectural</p>	<p style="text-align: right;">Page 23</p> <p>1       The first one was Vulcan Materials versus 2 the Board of Supervisors. We say that case did not 3 apply because it involved oral advice over the phone 4 delivered by the Zoning Administrator and the 5 Supreme Court said that's not a written 6 determination; it's simply an advisory opinion 7 issued orally over the telephone. 8       The case of Lilly versus Caroline County 9 distinguished that on the basis that in that case 10 there was a written determination. 11       And in the Vulcan case, the Supreme Court 12 of Virginia was careful to note that because the 13 advice was oral, over the telephone, there was no 14 adequate and administrative remedy to contest it, 15 namely, an appeal to the Board of Zoning Appeals 16 pursuant to 15.2-2311. 17       The other case was Norfolk 102 versus the 18 City of Norfolk. That case involved a cash receipt 19 that was signed off by the Zoning Administrator 20 approving a business licensing category. 21       We don't have a cash receipt here. We 22 have an actual determination that specifies uses and</p>

<p style="text-align: right;">Page 24</p> <p>1 is reflective of a deliberate process by the Zoning 2 Administrator about what use is allowed. 3       The General Assembly did not intend to 4 insulate, for all of these reasons, this zoning 5 determination from review. 6       That is exactly what has happened thus far 7 in this case. We have been deprived of review of 8 this zoning determination twice by the Board of 9 Zoning Appeals, the first time under what we think 10 is an invalid argument that it was not accompanied 11 by a permit and, therefore, it was merely an 12 advisory decision. 13       And then the second time, notwithstanding 14 the fact that we attached the appeal from the first 15 appeal, argued it precipitously about the parameters 16 of the zoning determination, the Zoning 17 Administrator himself talked about his analysis, as 18 I've just mentioned. The resolution adopted by the 19 Board of Zoning Appeals completely ignored the 20 zoning determination and didn't mention it once and 21 acted as if -- and you will hear this again today 22 from my colleagues -- that this case has nothing to</p>	<p style="text-align: right;">Page 26</p> <p>1 after all, talking about zoning. We're not talking 2 about building permits. We're not talking about 3 Boards of Architectural Review. We're not talking 4 about motor vehicle dealerships. We're not talking 5 in this case about licensure by the Virginia 6 Department of Behavioral Health and Developmental 7 Services. 8       We're talking about zoning decisions; what 9 is possible on the property. 10       THE COURT: I didn't want to break the 11 rhythm and the skill level, you were clearly so well 12 prepared -- 13       MR. HAMPSHIRE: Thank you, sir. 14       THE COURT: To what extent is it a matter 15 that the Court could consider that no matter what 16 was done about the determination notice, the Court 17 can find either it was legally correct or it was 18 legally questionable or it was legally wrong? 19       MR. HAMPSHIRE: Yes. On the -- 20       THE COURT: To what extent does that 21 matter in the line of argument you're now doing? 22       MR. HAMPSHIRE: I think that is -- that is</p>
<p style="text-align: right;">Page 25</p> <p>1 do with anything but a single zoning permit. 2       We take strenuous issue with that because 3 the whole foundation for this whole dispute is that 4 zoning determination that has yet far evaded a 5 review under the unfounded proposition that it's not 6 a final decision. 7       It is a final decision as set forth on the 8 face of it and as intended by 15.2-2311, Subsection 9 A, and as I said last time, 15.2-2311(C) that says 10 that if a zoning determination is issued by a Zoning 11 Administration about what uses are possible on the 12 property and 60 days goes by without someone -- and 13 someone changes and relies upon that -- makes a 14 material change of position in reliance, in good 15 faith reliance upon that determination, that even 16 the Zoning Administrator can't reverse that opinion. 17       So that means in those two places, at 18 15.2-2311 and also in 15.2-2309 and also on the face 19 of the zoning determination itself, that document 20 was intended to be a final decision. 21       But, importantly, as I said a second ago, 22 those decisions only go as far as they go. We are,</p>	<p style="text-align: right;">Page 27</p> <p>1 addressed in 15.2-23 -- 2314, which is what we're 2 before you today. And that -- as I said at the 3 outset, that provides the Court the jurisdiction to 4 proceed today. 5       And what it says -- 6       THE COURT: I'm assuming jurisdiction. 7 And the question assumes that the Judge got to the 8 merits, not a procedural block or a forfeiture by 9 passage of time. But looking at the just the 10 merits, how does that affect your present argument? 11       MR. HAMPSHIRE: Well, if I understand the 12 Court's question, the Court has jurisdiction to 13 approve, reverse, or modify the decision of the 14 Board of Zoning Appeals under 15.2-2314. 15       And what we are asking you to do is to 16 modify the Board of Zoning Appeals' decision, at 17 least in the first case. 18       THE COURT: The determination decision or 19 the permit? 20       MR. HAMPSHIRE: Well, both. We're asking 21 you to modify the decision to the extent the Board 22 of Zoning Appeals has not decided the question</p>

<p style="text-align: right;">Page 28</p> <p>1 before it twice; namely, whether the zoning 2 determination is correct.</p> <p>3 THE COURT: But what if the Court decides 4 it's correct?</p> <p>5 MR. HAMPSHIRE: Well, if the Court decides 6 it's correct, then that is something that we can 7 appeal to the Court of Appeals.</p> <p>8 THE COURT: Today? Not timely? I mean, 9 all the passage of time that has occurred.</p> <p>10 MR. HAMPSHIRE: All right. Well --</p> <p>11 THE COURT: I'm hearing you talk about 12 they should have had a chance to argue this within 13 the framework we call zoning.</p> <p>14 MR. HAMPSHIRE: Yes, sir.</p> <p>15 THE COURT: I'm saying that for the 16 appellate review at this stage --</p> <p>17 MR. HAMPSHIRE: Yes, sir.</p> <p>18 THE COURT: -- to what extent does it 19 matter whether this Court thinks the determination 20 notice was or was not a proper interpretation of the 21 law?</p> <p>22 MR. HAMPSHIRE: It's the foundation of the</p>	<p style="text-align: right;">Page 30</p> <p>1 to understand that the petitioners have -- have 2 strived mightily through a lot of expense to 3 preserve their rights, because we have to appeal 4 these things within 30 days. Have to appeal the 5 zoning determination within 30 days. And we have to 6 appeal any action by the Board of Zoning Appeals to 7 this Court within 30 days. We did that in both 8 cases. And that's why we had to do it on the eve -- 9 on that Friday before the holiday weekend, we had to 10 do it. Otherwise, we would be out of luck and we 11 would be sitting here arguing -- I would be arguing 12 to you why we should not be deemed to have failed to 13 exhaust our administrative remedies.</p> <p>14 THE COURT: Okay.</p> <p>15 MR. HAMPSHIRE: So -- and, in that regard, 16 I point to Court to paragraph 56 of our amended 17 petition where -- where based upon everything I've 18 just said we make the following allegation.</p> <p>19 Having ruled in the first case that the 20 challenge to the zoning determination could not be 21 considered until a zoning permit was issued, the 22 BZA's successful motion in this case admitting even</p>
<p style="text-align: right;">Page 29</p> <p>1 case. It's -- it's really the foundation of 2 everything as to -- and I think the Court, 3 respectfully, has a duty to make that determination 4 as to whether or not the zoning determination is 5 correct because we have preserved our rights under 6 that zoning determination by appealing it within 30 7 days back in November -- or, December of 2021. That 8 is still pending with the Court.</p> <p>9 THE COURT: Right.</p> <p>10 MR. HAMPSHIRE: And we have essentially 11 appealed it again, at least according to our view of 12 the case, the second time. All the while, nobody, 13 not BZA, not this Court, has yet to decide whether 14 we are right or the County is right about how to 15 interpret that determination or about whether that 16 determination is correct. Excuse me.</p> <p>17 I'm going to get into, in a minute, as to 18 why we think --</p> <p>19 THE COURT: You go back to the track 20 you're on. I didn't mean to digress.</p> <p>21 MR. HAMPSHIRE: No, that's quite all 22 right. It's an important question because we have</p>	<p style="text-align: right;">Page 31</p> <p>1 a reference to the zoning determination, much less a 2 discussion of petitioner's detailed challenge to it.</p> <p>3 In this way, the BZA has continued to 4 practice unlawfully, failing to decide the true 5 merits of the case before it in violation of its 6 statutory duty to do so and with resulting 7 deprivation of substantive and procedural due 8 process of the petitioners.</p> <p>9 So we have -- in that allegation, we have 10 both put the rectitude, if you will, of the zoning 11 determination, whether it's correct, both before the 12 Board of Zoning Appeals and this Court.</p> <p>13 And for all of those reasons, the 14 correctness of the zoning determination was an issue 15 below even though the BZA, in adopting what was 16 clearly a prepared stat motion, we're all going to 17 attempt to ignore it. That's our position.</p> <p>18 Now, having said all of that, here are the 19 issues we think that are before the Court now, in 20 addition to the -- whether or not that zoning 21 determination is correct. And we say this in our 22 brief.</p>

<p style="text-align: right;">Page 32</p> <p>1 First of all, we need to remember that                  2 under 2314, 15.2-2314, it's de novo review of the                  3 legal arguments, of legal issues. And there are                  4 three legal issues that are set forth in our hearing                  5 memorandum.                  6 And the first, I've already alluded to,                  7 and that is, is the Zoning Administrator correct in                  8 the zoning determination and, as stated in the                  9 record by the Zoning Administrator at pages 45                  10 through 46 of the transcript, that licensing by the                  11 Virginia Department of Behavioral Health and                  12 Developmental Services under 15.2-2291 essentially                  13 nullifies the prohibition of congregate housing in                  14 the zoning ordinance.                  15 And we submit that's effectively what the                  16 Zoning Administrator has decided. You got a                  17 prohibition. And I just read it at Tab 14. You had                  18 a prohibition in the zoning ordinance of congregate                  19 housing facilities in the AR-1, but because of state                  20 licensing under 2291 that prohibition is nullified,                  21 it doesn't matter, because 2291 licensing controls.                  22 That's essentially the argument.</p>	<p style="text-align: right;">Page 34</p> <p>1 Appeals at page 1398, I believe it is, we assert is                  2 not correct or it's certainly inconsistent with that                  3 determination which was in effect at the time of the                  4 Board of Zoning Appeals hearing because it listed                  5 only one property.                  6 And that is significant because, quote,                  7 the zoning determination and the staff report                  8 dictated that -- that -- staff reports don't                  9 dictate, but the zoning determination prescribed, as                  10 interpreted the County's own staff report that each                  11 property needed to be separately licensed.                  12 And you will see on page 1 of that                  13 addendum that each property is not separately                  14 licensed. They are on the same license, on the                  15 first page of that addendum.                  16 Another factual issue is whether,                  17 notwithstanding all of that, even if -- even if you                  18 think that somehow the Zoning Administrator's own                  19 determination that each one of these facilities was                  20 an illegal congregate house facility doesn't apply                  21 somehow.                  22 Member Gray below made a determination</p>
<p style="text-align: right;">Page 33</p> <p>1 So that's the biggest issue, a fundamental                  2 issue that is before the Court.                  3 The second legal issue is, are the                  4 properties residential because 2291 requires                  5 those -- the properties be residential facilities.                  6 And we'll talk about that.                  7 The third issue is, do the patients reside                  8 there? Reside in quotes. And we talked about that                  9 many times.                  10 And another legal issue is, is the zoning                  11 determination plainly wrong because it would allow                  12 persons who are addicted to controlled substances to                  13 reside at the property in violation of the provision                  14 in 15.2-2291. We had a discussion about whether                  15 that means current addiction or addiction. And I                  16 want to discuss that a little bit more fully later.                  17 There are a couple factual issues as well                  18 before the Court. And one is, the license that we                  19 just handed up per agreement of counsel, certified,                  20 sets forth, you will see, at page 1 of the appendix                  21 two properties, not one, two of the three                  22 properties. The record before the Board of Zoning</p>	<p style="text-align: right;">Page 35</p> <p>1 that this was actually a three-unit congregate use                  2 which would mean that instead of a maximum of five                  3 persons or eight persons, you would have essentially                  4 three times that, either three times five or three                  5 times eight. In any event, more than the eight                  6 persons allowed.                  7 THE COURT: So it's the nature of the                  8 three pieces?                  9 MR. HAMPSHIRE: Because of the facts that                  10 were shown at the hearing, the testimony as                  11 described, and I'll go through that in a bit, by the                  12 various residence and also the admission by the                  13 Newport CEO that the intention was basically to                  14 license all of these properties under the same                  15 license.                  16 And we submit that the evidence below was                  17 to basically use them as a single facility.                  18 THE COURT: Does the Court know from                  19 anything in the record how many structures there                  20 would be?                  21 MR. HAMPSHIRE: Yes, sir. Three. There's                  22 no issue that there would be three. That's in the</p>

<p style="text-align: right;">Page 36</p> <p>1 zoning determination itself at Tab 14.</p> <p>2 THE COURT: Does the record tell me that</p> <p>3 the cap of eight would apply to each of the three</p> <p>4 separate buildings?</p> <p>5 MR. HAMPSHIRE: The record thus far would</p> <p>6 say that -- yes, as proposed there would be actually</p> <p>7 five in -- in the building that is proposed at --</p> <p>8 under the zoning permit.</p> <p>9 So there would be less than eight in</p> <p>10 each -- eight or less in each building as far as we</p> <p>11 know from the record.</p> <p>12 THE COURT: Go ahead.</p> <p>13 MR. HAMPSHIRE: Now -- so let's get to the</p> <p>14 first issue. And that is -- and I think this is the</p> <p>15 most important issue. It's certainly going to be</p> <p>16 the most important issue on any appeal to the Court</p> <p>17 of Appeals and Supreme court.</p> <p>18 And that is that whether or not the state</p> <p>19 licensure under the Virginia Department of</p> <p>20 Behavioral Health, under 15.2-2291 preempts,</p> <p>21 nullifies, supersedes, whatever term you want</p> <p>22 to use -- remember, most refer to it as supremacy.</p>	<p style="text-align: right;">Page 38</p> <p>1 County to regulate that use of land in its</p> <p>2 jurisdiction. And that power is set forth in</p> <p>3 Article 7 of Chapter 22 of Title 15.2 of the Code of</p> <p>4 Virginia.</p> <p>5 And you will see a page number. And this</p> <p>6 is an actual copy from the Code of Virginia, not off</p> <p>7 of the internet, but from the actual book, at</p> <p>8 page 687. And if you look at 2291 --</p> <p>9 I'm sorry to keep you going back and forth</p> <p>10 between books.</p> <p>11 But on Tab 7 of the other notebook you</p> <p>12 will see a page number down at the bottom under</p> <p>13 15.2-2291, page 724.</p> <p>14 THE COURT: I'm confused.</p> <p>15 MR. HAMPSHIRE: All right.</p> <p>16 THE COURT: Which book do you want me in?</p> <p>17 One or two?</p> <p>18 MR. HAMPSHIRE: I want you to look at both</p> <p>19 of them for a second.</p> <p>20 THE COURT: All right. I'm looking at --</p> <p>21 MR. HAMPSHIRE: I want you to look at --</p> <p>22 THE COURT: -- Tab 1 in what are called</p>
<p style="text-align: right;">Page 37</p> <p>1 I'm not sure that's exactly correct.</p> <p>2 But it basically preempts, supercedes,</p> <p>3 trumps, if you will, the prohibition of congregate</p> <p>4 housing facilities in the AR-1 district as</p> <p>5 determined by the Zoning Administrator.</p> <p>6 And if you turn to the book entitled legal</p> <p>7 authorities, and that's -- it looks like this, Your</p> <p>8 Honor. It has a page of authorities on the -- on</p> <p>9 the front. And it's tabbed. If you can just go to</p> <p>10 Tab 1 of that.</p> <p>11 THE COURT: Which one is that?</p> <p>12 MR. HAMPSHIRE: This one that says</p> <p>13 authorities on the front.</p> <p>14 THE CLERK: I think you have it open.</p> <p>15 MR. HAMPSHIRE: It might be underneath</p> <p>16 there.</p> <p>17 THE COURT: I just found it. Take me to</p> <p>18 the right place.</p> <p>19 MR. HAMPSHIRE: Yes, sir. Tab 1.</p> <p>20 What I would like the Court to appreciate</p> <p>21 is that we are here, after all, talking about</p> <p>22 zoning. We are talking about the power of Loudoun</p>	<p style="text-align: right;">Page 39</p> <p>1 the authorities.</p> <p>2 MR. HAMPSHIRE: The authorities.</p> <p>3 THE COURT: You want me to look at what</p> <p>4 else?</p> <p>5 MR. HAMPSHIRE: And then if you turn to</p> <p>6 the other notebook, the one you just had,</p> <p>7 petitioner's case of supporting documents. I think</p> <p>8 it's right there. And you look at Tab 7.</p> <p>9 THE COURT: That's 2291.</p> <p>10 MR. HAMPSHIRE: 2291. And you will see a</p> <p>11 page -- yes, sir. You will see a page number down</p> <p>12 at the bottom.</p> <p>13 THE COURT: 724.</p> <p>14 MR. HAMPSHIRE: Yes, 724.</p> <p>15 The point I'm trying to make is that</p> <p>16 15.2-2291 is part of a very long chapter, article if</p> <p>17 you will, Article 7 of Title -- of Chapter 22 of</p> <p>18 Title 15.2 of the Code of Virginia.</p> <p>19 That -- that Chapter 7 confers broad</p> <p>20 authorities on -- broad authority on localities to</p> <p>21 regulate the use of land within their jurisdiction.</p> <p>22 And I -- and we're back to Tab 1 here in</p>

<p style="text-align: right;">Page 40</p> <p>1 the authority book, I have cited to you 15.2-2283, 2 which sets forth the purpose of a zoning ordinance. 3 And I have highlighted here, Romanette 4 (iii), to facilitate the creation of a convenient, 5 attractive, and harmonious community. 6 I have -- the very next page is 15.2-2284, 7 matters to be considered in drawing and applying 8 zoning ordinances and districts. Zoning ordinances 9 and districts shall be drawn and applied with 10 reasonable consideration for existing uses -- for 11 existing use and character of property, the 12 comprehensive, the suitability of property for 13 various uses. 14 And then I didn't need to make you turn to 15 another notebook, because -- I'm sorry, Your Honor, 16 because then we get all the way to page 724 in this 17 very tab, the very next page -- 18 THE COURT: Slow down a second. I'm still 19 is 690. 20 MR. HAMPSHIRE: Okay. 21 THE COURT: Now take me to the next page. 22 MR. HAMPSHIRE: Now, if you would be</p>	<p style="text-align: right;">Page 42</p> <p>1 THE CLERK: I think it's another notebook. 2 THE COURT: Tell me. 3 THE CLERK: I think it's the other 4 notebook, Your Honor. 5 THE COURT: I'm going to reveal how 6 little -- the Judge couldn't do anything without all 7 the staff. Come up here. 8 MR. HAMPSHIRE: It's the one that says 9 authorities. 10 THE CLERK: What was the page number? 11 MR. HAMPSHIRE: It should be 676 at the 12 bottom under Tab 1. 13 THE COURT: Thank you. 14 MR. HAMPSHIRE: Thank you very much. 15 Sorry about that, Your Honor. 16 THE COURT: Tell me what words you want me 17 to look at. 18 MR. HAMPSHIRE: Okay. I want you to look 19 at Article 7, zoning, 15.2-2280, zoning ordinances 20 generally, which -- which is the very first section 21 in Article 7, which says that any locality may by 22 ordinance classify the territory under its</p>
<p style="text-align: right;">Page 41</p> <p>1 able -- the next page is 724. And that's a page 2 you've already seen. That's the Code Section 3 15.2-2291. I just forgot a second ago that it was 4 also in this book. So I'm sorry to make you switch 5 books. 6 And then if you go to the next page, 676, 7 which is zoning ordinances generally, which provides 8 that any locality named by ordinance -- 9 THE COURT: I'm confused. 10 MR. HAMPSHIRE: Okay. 11 THE COURT: Tell me the page. 12 MR. HAMPSHIRE: Page 676, the very last 13 page under Tab 1. 14 MR. LAWRENCE: Your Honor, in my book 15 those pages are in a different order. It's the 16 second to last page of the tab Mr. Hampshire is 17 referring to. 18 THE COURT: Let me try and get to the 19 proper place. 20 MR. HAMPSHIRE: You should see one that 21 says Article 7, zoning, with page 676 at the bottom. 22 Under Tab 1.</p>	<p style="text-align: right;">Page 43</p> <p>1 jurisdiction or any substantial portion thereof into 2 districts of such number, shape, size as it may -- 3 as may -- it may deem best suited to carry out the 4 purpose of this Article and each district may 5 regulate, restrict, permit, prohibit and 6 determination the following. 7 And number one is the use of land, 8 buildings, structures, et cetera. And it goes 9 through a whole bunch of different things. 10 Now, if Your Honor would return next, when 11 the Court is ready, to Tab 2. 12 Against that background, I would like to 13 cite for the Court, and this is in our brief, the 14 Attorney General opinion that has been referred to 15 here in a different context. And it's the 2000 -- 16 year 2000 Westlaw 33912660 Attorney General opinion 17 to the Honorable Frederick M. Quayle. And this -- 18 and this has been cited by Newport before for the 19 proposition that is so forth at the very last page, 20 last sentence, that talks about that there is no 21 distinction in 2291 between for profit and not for 22 profit groups, resident -- and for profit group home</p>

<p style="text-align: right;">Page 44</p> <p>1 and residential facility.</p> <p>2       And that's true and what that refers to is</p> <p>3 not whether the use is residential or commercial,</p> <p>4 but whether or not a residential use is operated by</p> <p>5 an entity that has a status that is either for</p> <p>6 profit or not for profit.</p> <p>7       But the more -- so but in all cases the</p> <p>8 use has to be residential, as is set forth here.</p> <p>9       On the last page it says, clearly it is</p> <p>10 the policy of the Commonwealth, as expressed in the</p> <p>11 Virginia Fair Housing Law, which 2291 is Virginia's</p> <p>12 version of the Fair Housing Law, quote, to provide</p> <p>13 for fair housing throughout the Commonwealth. Note</p> <p>14 the word housing. To provide for fair housing</p> <p>15 throughout the Commonwealth to all its citizens,</p> <p>16 regardless of handicap, and to the end the</p> <p>17 discriminatory practices with respect to the -- to</p> <p>18 what residential housing -- residential housing by</p> <p>19 any person or group or by any person or group</p> <p>20 purposes.</p> <p>21       Now, over on the first page, if you look</p> <p>22 at the first page of the decision, you will see that</p>	<p style="text-align: right;">Page 46</p> <p>1 15.2-2291, is not intended to be a local land use or</p> <p>2 zoning statute.</p> <p>3       THE COURT: What if the language to a</p> <p>4 judge reviewing the competitive arguments being made</p> <p>5 here, doesn't seem to judge to require a comparison?</p> <p>6 That each -- the statutory act in one and what the</p> <p>7 Attorney General calls the aspirations or statutory</p> <p>8 statements in the others, what if they reconcile in</p> <p>9 the opinion of the judge trying the case?</p> <p>10       MR. HAMPSHIRE: And excellent question and</p> <p>11 what I want to get to in a second.</p> <p>12       THE COURT: Then go ahead on your -- go</p> <p>13 your course. You'll get there.</p> <p>14       MR. HAMPSHIRE: Okay. Thank you, sir.</p> <p>15       Because I do -- I do content, and I think</p> <p>16 Mr. Wilburn agrees with me but reaches a different</p> <p>17 conclusion, that these statutes are not in conflict.</p> <p>18 But the significance of them not being in conflict</p> <p>19 is -- is maybe where we disagree. And I'll get to</p> <p>20 that in a minute.</p> <p>21       THE COURT: And judges would love clear</p> <p>22 legislation.</p>
<p style="text-align: right;">Page 45</p> <p>1 the question that was asked was whether this</p> <p>2 amendment, which was in the form of Senate Bill 449</p> <p>3 at the time, sought to amend 15.2-2291 the way I</p> <p>4 just described, to restrict it to -- to</p> <p>5 not-for-profit groups that have that tax status.</p> <p>6       But in that context, on the last -- the</p> <p>7 last sentence of the last full paragraph on that</p> <p>8 page, which is highlighted, the language is</p> <p>9 significant, that the Attorney General says that</p> <p>10 both the federal and state housing laws are remedial</p> <p>11 in a sense that they seek to suppress the denial of</p> <p>12 housing opportunities, housing opportunities, of</p> <p>13 persons falling within the classification designated</p> <p>14 these law -- designated in these laws.</p> <p>15       The next sentence is critical. Neither</p> <p>16 the federal nor state fair housing laws are intended</p> <p>17 to be land use or zoning statutes.</p> <p>18       And so that is -- the first signpost we</p> <p>19 have that based upon the broad enabling authority</p> <p>20 that I just referred to in Article 7, we have the</p> <p>21 Attorney General of Virginia saying that that --</p> <p>22 Virginia's version of the Fair Housing Act,</p>	<p style="text-align: right;">Page 47</p> <p>1       MR. HAMPSHIRE: Right. It would be nice,</p> <p>2 but I think we would all be out of business perhaps</p> <p>3 if everything was clear.</p> <p>4       THE COURT: Okay.</p> <p>5       MR. HAMPSHIRE: So under -- the next tab</p> <p>6 is Tab 3 and it's another Attorney General opinion.</p> <p>7 And it's 2019 Westlaw 10734397, August 23, 2019, and</p> <p>8 an opinion to Delegate Rasoul.</p> <p>9       And what you'll see that's related here is</p> <p>10 that Delegate Rasoul related to the Attorney General</p> <p>11 that the gun shop had recently opened in the City of</p> <p>12 Salem and that the General Assembly had enacted a</p> <p>13 separate statute entitled 15.2-25 -- 915 to prohibit</p> <p>14 localities -- Let me do that again. 15.2-915 to</p> <p>15 prohibit localities from adopting ordinances that</p> <p>16 restrict the purchase, possession, transfer,</p> <p>17 ownership, carrying, storage, or transportation of</p> <p>18 firearms.</p> <p>19       And the question is, relevant to your</p> <p>20 inquiry -- down at the bottom, the Attorney General</p> <p>21 says, an ordinance is preempted and the issue is,</p> <p>22 was the County's zoning ordinance preempted by to</p>

<p style="text-align: right;">Page 48</p> <p>1 regulate the location of shops selling guns somehow 2 preempted by this law that prohibited localities 3 from restricting -- from adopting ordinances that 4 restricted the purchase of guns. 5 That was the essential question before the 6 Attorney General. You've got an ordinance that 7 prohibits localities from regulating the purchase, 8 sale of firearms, can localities still regulate the 9 location of where those shops go that sell firearms. 10 And the Attorney General said they can. 11 Down at the bottom, relevant to your 12 inquiry, an ordinance is preempted if it 13 expressly -- if it is expressly prohibited by state 14 law, or if the state has enacted regulations so 15 comprehensive that the state is considered to have 16 occupied the entire field. 17 And we all learned this preemption issue 18 in law school. Does the federal government intend 19 to occupy the field such that a state can't 20 regulate? Does the state intend to occupy the field 21 such that the locality can't regulate? 22 And what the Attorney General says here,</p>	<p style="text-align: right;">Page 50</p> <p>1 THE COURT: But am I hearing correctly 2 that the Attorney General says it's all right to 3 sell guns next to the school? 4 MR. HAMPSHIRE: No. What he's saying is 5 that a locality can -- I think it's just the 6 reverse. That a locality can regulate the location 7 of where gun shops can go. 8 THE COURT: Okay. 9 MR. HAMPSHIRE: Without -- without 10 violating the prohibition on localities regulating 11 the sale. 12 So the Attorney General is saying that the 13 General Assembly did not intend to occupy the field 14 of location of gun shops by saying localities can't 15 regulate the sale of guns. 16 THE COURT: I ask this because of the 17 inherent problem in this case of 2291 versus rural 18 zoning. 19 MR. HAMPSHIRE: That's right. 20 THE COURT: The determination letter tried 21 to reconcile and mesh and let them function, both. 22 Others will say they're contradictory.</p>
<p style="text-align: right;">Page 49</p> <p>1 no. While -- on the next page, while this language 2 targets specific activities relating to firearms, it 3 does not restrict the locality's authority to 4 control the location of a firearm sales through 5 established zoning -- excuse me, location of a 6 firearm sales establish through zoning. 7 And it goes through this broad enabling 8 authority I went through before under 15.2-2280, 9 namely that a locality can -- can -- may, by 10 ordinance, classify the territory into districts of 11 such size, shapes, or numbers best suited to carry 12 out the purposes and cites 15.2-2284 as well. 13 Did Your Honor have a question? 14 THE COURT: I'm pausing. I didn't know I 15 was radiating the pause. 16 MR. HAMPSHIRE: Oh, okay. 17 THE COURT: Basically, this says you can 18 have a gun sale next to a school, but you can't 19 modify rural -- the concept of selling guns next to 20 a school is dramatic in my opinion. This is not, 21 lacking grammar, the -- 22 MR. HAMPSHIRE: Yes, sir.</p>	<p style="text-align: right;">Page 51</p> <p>1 MR. HAMPSHIRE: Well, I'm going to get to 2 that precise issue. 3 THE COURT: Don't let me -- don't let me 4 derail you once again. Go ahead. 5 MR. HAMPSHIRE: Thank you. But I think 6 you know where I'm going. 7 So if the Attorney General says that 8 Section 15.2-915 is not so comprehensive that it 9 demonstrates a clear intent of the part of the 10 legislature to usurp a locality's authority under 11 15.2-2280 or 2284 to regulate the location of 12 firearms. 13 And this is -- this is interesting 14 language here, the sentence that follows. When the 15 General Assembly intends to preempt a field, it 16 knows how to express its intention. 17 And it will be our argument later that 18 there is nothing that the General Assembly knows how 19 to say that preempts the right of Loudoun County to 20 regulate the location of these facilities and it 21 didn't say it. 22 And next page is, accordingly, where there</p>



<p style="text-align: right;">Page 52</p> <p>1 is no clear expression of legislative intent to 2 preempt the local land use authority, the explicit 3 grant of zoning powers to regulate the use of land 4 and buildings remains in effect and that this is 5 consistent with the tenet of the statutory 6 construction holding that if both the statute and 7 ordinance can stand together, courts are obligated 8 to harmonize them, rather than nullifying the 9 ordinance. 10       Let me repeat that. If -- this is 11 consistent with the statute of tenet -- tenet of 12 statutory construction holding that if both the 13 statute and ordinance can stand together, courts are 14 obligated to harmonize them rather than nullifying 15 the ordinance. 16       We submit to you that the -- that the 17 zoning determination essentially nullified the 18 Loudoun County zoning ordinance by saying that even 19 though a congregate housing facility is prohibited 20 the state licensure trumps that probation and that 21 is in violation of this principle. 22       The next tab, the Attorney General cites</p>	<p style="text-align: right;">Page 54</p> <p>1 law, the state law must control, but we reject -- I 2 put in the word but -- we reject Tiny House's 3 contention that the General Assembly by enacting the 4 ABC Act intended to prohibit local governments from 5 utilizing as a means of controlling the location and 6 concentration of establishments selling alcoholic 7 beverages. 8       And on -- if you see over on the other 9 side, the Court adopted Tiny House's argument, we 10 would be granting the ABC Commission the exclusive 11 right to determine what location of establishments 12 selling alcoholic beverages. Counsel for Tiny House 13 conceded that the ABC Act preempts the local 14 ordinances as regarding location and concentration 15 of this type of establishment, then the ABC 16 Commission could grant a license for such an 17 establishment in a residential area and the local 18 government would be powerless to prevent it. 19       That is exactly the argument by the County 20 and Newport and the logic of the Zoning 21 Administrator that if the Virginia Department of 22 Behavioral Health and Developmental Services issues</p>
<p style="text-align: right;">Page 53</p> <p>1 the City of Norfolk versus Tiny House, which is the 2 next tab, Tab 4. 3       And this arises not in a firearms context, 4 but in an alcoholic and beverage control context. 5 This is also cited in our -- in our materials. And 6 this is a 222 Virginia 214, 1981, case from the 7 Supreme Court of Virginia. 8       And you will see here that this case 9 concerned the City of Norfolk that tried to enjoin 10 Tiny House, Inc., from selling alcoholic beverages 11 on the premises for consumption until Tiny House had 12 obtained a special use permit by Norfolk and that 13 Norfolk -- the City of Norfolk then filed a bill of 14 complaint seeking injunctive relief. And Tiny House 15 responded with an answer and cross-claim alleging 16 that the ordinance was null and void because the ABC 17 commission had exclusive authority to regulate the 18 control and sale of alcoholic beverages. 19       And in analyzing that, if the Court turns 20 to page 4 of the opinion, in the highlighted 21 headnote 5, the Supreme Court held that we agree 22 that in conflicts between state law and municipal</p>	<p style="text-align: right;">Page 55</p> <p>1 a license Loudoun County is powerless to prevent it. 2       THE COURT: Where is the opposition by the 3 County to that issuance? 4       MR. HAMPSHIRE: It's in the zoning 5 determination itself and it's in all the arguments 6 that has been made here, the arguments in the 7 briefs. 8       THE COURT: Do we -- do we impute to the 9 Board as they acted in this case with knowledge of 10 not only this case law as to what powers exist to 11 either modify or change locally existing zoning 12 interpretation? 13       MR. HAMPSHIRE: Well, I know that at least 14 in the last appeal I started off my argument, the 15 record will reflect, by a citation to the 2000 16 Attorney General's opinion at Tab 2. And I made 17 that very point, that reciting this last paragraph 18 that it's the policy of the Commonwealth to provide 19 fair housing -- provide fair residential housing to 20 the -- and to not -- and to prohibit discriminatory 21 practices and not to determine what is residential 22 for the purposes of local zoning.</p>

<p>1 But the upshot of this opinion -- and 2 after all the Court, the BZA was charged with 3 determining whether the zoning determination was 4 correct and didn't address the issue. And the Court 5 is now charged with determining whether that zoning 6 determination is correct. 7 And that zoning determination essentially 8 says, we submit, that the Virginia Department of 9 Behavioral Health and Developmental Services has 10 occupied the field of mental -- of where 11 licensing -- excuse me, where licensed residential 12 treatment facilities can go, where they can be 13 located. 14 THE COURT: That sounds like you're 15 arguing that all applicants to that Board would get 16 an answer allowing the variation from local zoning. 17 I don't know yet -- you may educate me 18 yet -- to what extent they struggled with -- both 19 the Board, both the zoning people here and the state 20 board, to if there was any signs that they thought 21 this took awhile to work it out as to how they 22 meshed, as to how they didn't want to overrule the</p>	<p>Page 56</p> <p>1 to concerned citizens in the Fairfax case, the 2 Anders Larsen case, in the beginning stages of that. 3 And, interestingly, it doesn't have a date on it. I 4 am not sure why that is. 5 But the very -- but this is J. Benz, who 6 is the Director of the Office of Licensing of the 7 Department of Behavioral Health and Developmental 8 Services. And she starts off her letter by saying, 9 first, it's important to clarify -- this is in 10 response to a letter from the concerned citizens. 11 First, it's important to clarify that 12 DBHDS has no control over local zoning ordinances or 13 zoning permits issued by local governments. The 14 zoning permits for this provider were approved by 15 Fairfax County. If you have questions concerning 16 the zoning of this property, I encourage you to 17 contact Fairfax County directly. 18 So we know from the record -- there is 19 nothing to contradict this in the record, but we 20 know from the record that at least the licensing 21 official for the Department of Behavioral Health and 22 Developmental Services views that department as</p>
<p>1 other. 2 Does that question make any sense to you? 3 MR. HAMPSHIRE: Yes, sir. 4 And I think we have a telltale sign of 5 that in the other notebook, the case authorities. 6 THE COURT: Your testing how well I can 7 find things. Which book are you looking at? 8 MR. HAMPSHIRE: I'm looking at the other 9 book. The one that says petitioner's case -- 10 THE COURT: Don't tell me the other one. 11 I can't read that way. Which is it? 12 MR. HAMPSHIRE: It's called petitioner's 13 case -- 14 THE COURT: Somebody to my left knew what 15 book it was. Okay. 16 MR. HAMPSHIRE: I'll refer to this as the 17 document book, the supporting document book. 18 The very last tab, Tab 24, is instructive 19 to your question. 20 THE COURT: Thank you. 21 MR. HAMPSHIRE: And this -- and this is 22 from the record and it's a letter that was written</p>	<p>Page 57</p> <p>1 having no role in local zoning and the location of 2 where these facilities can go. 3 THE COURT: To what extent can the other 4 side argue that the conduct, acts, and decision by 5 the Board here equaled they were doing their own 6 choice without any intent to harm or disrupt the 7 rural zoning usages? 8 MR. HAMPSHIRE: Well, I would say that the 9 Board here, at least in the first appeal, made no 10 decision. They made no decision about whether the 11 zoning determination was correct. 12 In the second appeal, they made a 13 decision, but they omitted any discussion of the 14 zoning determination. They restricted themselves to 15 just the discussion of zoning -- 16 THE COURT: You're saying they should have 17 articulated impact on zoning? 18 MR. HAMPSHIRE: I think they should have 19 gone through the analysis and made it a better -- 20 they got to it a little bit. They got to it a 21 little bit by saying -- agreeing that because the -- 22 because the property was licensed, therefore it</p>
<p>Page 58</p>	<p>Page 59</p>

<p style="text-align: right;">Page 60</p> <p>1 was -- it was allowed.</p> <p>2       Let me get to it because I have it here.</p> <p>3       Here it is. Tab 15 in -- in the notebook</p> <p>4 you have, the supporting notebooks document, is</p> <p>5 the -- is the letter dated February 22, 2023, to Mr.</p> <p>6 Wilburn and Mr. Allen and myself, which -- from the</p> <p>7 Zoning Administrator which goes through the findings</p> <p>8 of the Board when it met on January 26, 2023, in</p> <p>9 this second appeal. And it goes through the motions</p> <p>10 and the findings, A, B, C, D -- A through H -- A</p> <p>11 through K essentially.</p> <p>12       So you will see the first part of it is</p> <p>13 some factual allegations. G, dwelling,</p> <p>14 single-family detached, including manufactured</p> <p>15 housing, is a permitted use. Definition of family</p> <p>16 is in 15.2-2291. I is basically a quotation of</p> <p>17 2291. J says that 15.2-2291(A) doesn't distinguish</p> <p>18 between commercial and noncommercial uses. And K is</p> <p>19 that the zoning permit complies with the zoning</p> <p>20 ordinance.</p> <p>21       I would submit to you that none of those</p> <p>22 findings addressed the arguments that we made in</p>	<p style="text-align: right;">Page 62</p> <p>1       THE COURT: But they don't say anything</p> <p>2 about their looking at the impact on zoning. The</p> <p>3 zoning people here in Loudoun seem to be saying we</p> <p>4 do know about the problem. They don't express it,</p> <p>5 though.</p> <p>6       MR. HAMPSHIRE: Right. I think that's our</p> <p>7 point. And they're operating in different spheres,</p> <p>8 if you will. And this is the point, because the</p> <p>9 Virginia Department of Behavioral Health and</p> <p>10 Developmental Services has not preempted the local</p> <p>11 zoning field as reflected in J. Benz's letter I just</p> <p>12 read to you at Tab 24, they purport to say nothing</p> <p>13 about whether or not the location, the proposed</p> <p>14 location of a facility, is appropriate under local</p> <p>15 zoning.</p> <p>16       The only thing they're doing is issuing a</p> <p>17 license that these -- that this facility is properly</p> <p>18 licensed as a facility that can provide mental</p> <p>19 health services.</p> <p>20       And so that -- so that that -- I would</p> <p>21 agree with you there. So the point being, that the</p> <p>22 analysis and the zoning -- we get back to what is at</p>
<p style="text-align: right;">Page 61</p> <p>1 both the first appeal and the second appeal about</p> <p>2 the rectitude, if you will, of the zoning</p> <p>3 determination.</p> <p>4       And the very arguments that I'm making to</p> <p>5 you now as to the fact that you have a paradox, you</p> <p>6 have -- you have a zoning ordinance that says no</p> <p>7 congregate housing facilities in the AR-1, but that</p> <p>8 doesn't matter if you've got a state license.</p> <p>9       THE COURT: No. No, they're saying it</p> <p>10 matters if the congregate housing has to be measured</p> <p>11 against the number of bodies that can be residents.</p> <p>12 It's a battle between impacting statements that</p> <p>13 don't directly address the same numbers, the same --</p> <p>14 there is no reference in the Board's issuance of a</p> <p>15 permit from the state level talking about its impact</p> <p>16 on rural.</p> <p>17       MR. HAMPSHIRE: Correct. When you say</p> <p>18 Board, you mean the Department of Behavioral Health</p> <p>19 and Developmental Services?</p> <p>20       THE COURT: Yes. I call them various</p> <p>21 things. You know what I'm saying.</p> <p>22       MR. HAMPSHIRE: I agree with you.</p>	<p style="text-align: right;">Page 63</p> <p>1 issue here, and that is, is the zoning determination</p> <p>2 correct? Is the zoning determination correct in</p> <p>3 saying that even though it's prohibited as a</p> <p>4 congregate housing facility, it's nevertheless</p> <p>5 allowed because of 15.2-2291 and licensure under</p> <p>6 15.2-2291?</p> <p>7       And our point is that those are two</p> <p>8 different things.</p> <p>9       THE COURT: You're saying in part that the</p> <p>10 zoning authority in Loudoun should have articulated</p> <p>11 why they're allowing these homes, these residences,</p> <p>12 to be used for treatment centers?</p> <p>13       MR. HAMPSHIRE: What I'm saying is that</p> <p>14 the zoning determination should have stopped at --</p> <p>15 when it concluded that the use proposed is a</p> <p>16 congregate housing facility not allowed in the AR-1.</p> <p>17       THE COURT: But they have a statutory</p> <p>18 basis to disagree with that, but that definition</p> <p>19 from the Board, the state Board, saying that if</p> <p>20 you've got this number of bodies under these</p> <p>21 conditions then they are residents.</p> <p>22       Now you're -- now you're injecting the</p>

<p style="text-align: right;">Page 64</p> <p>1 patients being residents that gets in the middle of 2 whatever statutory governing law there is. 3 MR. HAMPSHIRE: Yes. And I would like -- 4 I would like to disagree with that fundamental 5 premise if I could, respectfully. 6 Because they are operating at different 7 spheres, the Loudoun County Zoning Administrator, 8 when he was writing that opinion, should not have -- 9 did not need to and should not have discussed what 10 is allowed or the consequences of licensing because 11 the consequence of licensing has nothing to do with 12 local zoning. 13 As -- as these cases and as the Attorney 14 General opinion reflects, it has to do with a 15 completely different issue under the statutory 16 framework, namely, is this facility properly 17 licensed to provide mental health services as a 18 group home. 19 As reflected in J. Benz's letter, that has 20 nothing to do with where they can be allowed; just 21 like prohibition on firearms has nothing to do with 22 where firearm shops can be allowed. And just like</p>	<p style="text-align: right;">Page 66</p> <p>1 the zoning part of what we're looking for here, they 2 made reference to the state Board and 2291. They 3 did not say this impacts our congregate and other 4 factors that we have existing in the zoning of the 5 County. 6 Are you saying that they are charged with 7 not considering it because they didn't spell it out? 8 MR. HAMPSHIRE: They, being the County? 9 THE COURT: Yes. 10 MR. HAMPSHIRE: Yes. They are charged 11 with one thing and that is, is a use allowed under 12 the Loudoun County zoning ordinance. And the 13 Loudoun County zoning ordinance provides that these 14 are -- as determined by the Zoning Administrator, 15 these are congregate housing facility because of 16 their focus on treatment, training, and are 17 specifically not single-family homes. 18 THE COURT: Right. 19 MR. HAMPSHIRE: That's what they're 20 charged with. They are not charged with continuing 21 and determining the significance of state licensure, 22 because state licensure is a completely different</p>
<p style="text-align: right;">Page 65</p> <p>1 the prohibition on -- or just like the authority 2 that the Virginia ABC department has over the sale 3 of alcoholic beverages has nothing to say about 4 where ABC shops can be allowed. 5 Those are two different things and the 6 broad authority to local governments to regulate the 7 location -- the location of facilities is not 8 granted by the licensing and the licensing has 9 nothing to do with it. As reflected by these cases 10 I've discussed and also as reflected as a practical 11 matter by J. Benz's letter, if you have a problem 12 with the zoning, talk to Fairfax County. 13 So the zoning determination was plainly 14 wrong and continuing past the dead stop, if you 15 will, that this is not allowed as a congregate 16 housing facility and continuing with it's allowed 17 anyway if you got a license, because that license 18 has nothing to do with the location under the broad 19 statutory framework under Article 7 of Chapter 22 of 20 Title 15.2 of the Code of Virginia. 21 THE COURT: To what extent can they make 22 an argument, the other side, that the reference by</p>	<p style="text-align: right;">Page 67</p> <p>1 purpose than local zoning. It has nothing to do 2 with the location of facilities, which is the 3 purview of local zoning, as we've seen in the 4 firearms case and the ABC case. 5 And there's another case, which is -- 6 THE COURT: Is your argument -- number 7 one, it's thorough and obviously skilled and it 8 demonstrates your long experience with these issues. 9 What if the zoning people just said we are 10 deliberately varying from the rural zoning because 11 of state law and we think that's impacting in a way 12 that should -- that should be compatible? 13 MR. HAMPSHIRE: Well, I would say this, 14 that -- that the Loudoun County Board of Supervisors 15 has the power to do that. And that's the Tribble 16 versus Bland case. 17 The Tribble versus Bland case, which is 18 immaterial says that if the legislation body of the 19 locality makes a legislative determination to be 20 more -- more permissive than the state statute with 21 respect to how many people are allowed, if you're 22 going to issue a special permit, they could do that.</p>

<p style="text-align: right;">Page 68</p> <p>1 That's what we have in this case. We 2 don't have a Loudoun County Board of 3 Supervisors saying -- modifying legislatively -- 4 which by the way, would require hearing before the 5 Planning Commission and the Board of Supervisors and 6 public input. 7 We don't have the Loudoun County Board of 8 Supervisors making a legislative determination to 9 alter the definition of congregate housing facility. 10 What we have is an unelected official, an 11 Administrator, whose job it is to make tough 12 decisions about the zoning ordinance, making this 13 determination about what has been legislated means. 14 So -- and he made that determination. To 15 his credit, he made that determination that it was a 16 congregate housing facility not allowed the AR-1. 17 Where he erred was continuing beyond that 18 to say that notwithstanding that, legislative 19 judgment by my bosses, the Loudoun County Board of 20 Supervisors, state licensure allows this use anyway. 21 And that is significant. When you get 22 down to the ground level and you think about this,</p>	<p style="text-align: right;">Page 70</p> <p>1 haven't done it. 2 And this is -- this is an administrative 3 interpretation, a discretionary one, but still an 4 administrative interpretation of what the Loudoun 5 County zoning ordinance, as drafted, means. 6 THE COURT: Okay. 7 MR. HAMPSHIRE: So the other -- you know, 8 the other decision, just to mention it, is on Tab 5 9 of the authorities notebook is the County of 10 Chesterfield versus Windy Hill. And that 11 essentially -- I don't need to belabor it. It 12 essentially followed the Tiny House case. In that 13 case, the conditional use permit prohibited the sale 14 of alcoholic beverages at outdoor recreational 15 facilities in the AR-1 zone. 16 And the Supreme Court of Virginia said 17 that that did not conflict with the power of the 18 Alcoholic Beverage Control Board to regulate the use 19 of alcohol. 20 And you will see on the next page, page 2, 21 at page 629, the -- what was at issue was a 22 condition, number 9, in the special use permit which</p>
<p style="text-align: right;">Page 69</p> <p>1 what you have is the Loudoun County Zoning 2 Administrator -- and I respect the job that he has 3 to do and I think he did the best job he could. But 4 we just respectfully say it was in error. 5 Where you have an unelected official 6 charged with making these tough decisions saying 7 this kind of use which involves concentration of 8 training, therapy, mental health services, people 9 cycling in and out every 45 days or so, is okay to 10 go in a residential neighborhood where nobody else 11 can do the same thing. That's the bottom line. 12 THE COURT: What if he had -- what if he 13 had articulated that and then it was written out by 14 the authorities in charge of zoning? What if they 15 just said it? Don't they have the power to do that? 16 MR. HAMPSHIRE: If the Loudoun County 17 Board of Supervisors said it. 18 THE COURT: Okay. 19 MR. HAMPSHIRE: And after public hearings 20 and the chance for my clients to participate in the 21 crafting of legislation through their elected 22 representatives, sure, they could do that. But they</p>	<p style="text-align: right;">Page 71</p> <p>1 provided that no alcoholic beverages shall be 2 permitted on the property. And, therefore, this 3 sports complex was constructed and Windy Hill became 4 the operator. 5 So in that context, if you flip over to 6 page 5, you will see the citation to Windy Hill -- 7 to the -- excuse me, to the Tiny House case. 8 Windy Hill argues that condition 9 is a 9 prohibition measure outlawed by Code 4.1-128(C), 10 which is the Alcoholic Beverage Control issue. 11 And the Tiny House answers this question 12 exclusively, the ordinance under question is not a 13 prohibition measure, it's not designed to prevent 14 the control or use of alcohol or to regulate the 15 business of those who dispense it. That is 16 exclusive power of the ABC Commission. The 17 ordinance seeks only to prevent the use of land in 18 the matter the city has deemed detrimental to the 19 general welfare of its habitants and deemed as 20 having a deleterious effect on the community. 21 That is exactly what we have here. We 22 have the Board of County Supervisors who have said</p>

<p style="text-align: right;">Page 72</p> <p>1 in defining congregate housing facility that putting 2 these facilities, with their emphasis on training 3 and treatment, et cetera, in an AR-1 district is 4 deleterious because they're not -- and they're not 5 allowed. 6       And so the fact that they are licensed 7 does not preempt that legislative determination. 8       And, again, the Loudoun County Board of 9 Supervisors is free to amend that definition. But 10 thus far, that definition is in place and these 11 people, my clients, have a right to rely upon it. 12 They have invested their life savings in reliance 13 upon that. And all of the sudden we have an 14 administrative official, unelected, saying they can 15 go there anyway because it's licensed. 16       The Supreme Court of Virginia, Attorney 17 General, has said no, no, those agencies do not 18 occupy the field of local zoning. So it basically 19 trumped the prohibition of congregate housing in the 20 AR-1. 21       So what I would like to get to next, Your 22 Honor, is -- is 2291 itself. And that is found at</p>	<p style="text-align: right;">Page 74</p> <p>1 through, it's the obligation of the Court, as the 2 Court indicated a second ago, in the event of where 3 there is no obvious intent by the General Assembly 4 to preempt the field, if you will, of the location 5 of facilities to harmonize the two -- the two 6 statutes -- excuse me, the local ordinance and the 7 state statute. 8       And so let's talk a little bit, if you 9 will, about how we can harmonize them. 10       First of all, I think what we look at is 11 the term residential facility. And I think it's 12 significant, as I said last time, that if you look 13 at the language of the defined term, residential 14 facility, you will see that it's -- the language 15 used is, quote, for the purpose of this subsection, 16 comma, residential facilities, quote, within a -- a 17 residential facility, quote within a quote, means 18 any group home or other residential facility for 19 which the Department of Behavioral Health and 20 Developmental Services licenses the authority 21 pursuant to this Code. 22       The very first point we need to</p>
<p style="text-align: right;">Page 73</p> <p>1 Tab 7 of the supporting documents notebook. And, of 2 course, I think we all probably have it memorized by 3 now. 4       THE COURT: Certain words. 5       MR. HAMPSHIRE: Yeah. 6       So I think what we have to remember from 7 the cases that I have just recited, Windy Hill, Tiny 8 House, the Attorney General opinions, what we need 9 to look for on 2291, Subsection A, is a clear 10 expression of legislative intent by the General 11 Assembly to preempt the local land use authority to 12 determine the proper location of licensed 13 facilities. 14       And I submit to you, Your Honor, that 15 there is nothing in the language of 2291(A) that 16 says that. 17       And as stated by the Tiny House case, I 18 believe it was, the General Assembly clearly knows 19 how to say that if it wants to say it. The General 20 Assembly has not said that. There is nowhere you 21 can find that in this code section. 22       And pursuant to that law that we just went</p>	<p style="text-align: right;">Page 75</p> <p>1 acknowledge is that the General Assembly -- this 2 gets back to my point, the 15.2-2291 is one statute 3 within all of Article 7 of Chapter 22 of Title 4 15.22 -- 15.2, Title 15.2, that deals with the 5 enabling power for local zoning. It's one statute. 6       Yet, the General Assembly has said here 7 that the term residential facility doesn't apply to 8 all of Article 7. 9       THE COURT: Say that again. 10       MR. HAMPSHIRE: The General Assembly has 11 said here that the term residential facility is, 12 quote, for the purpose of this subsection only. 13       And I submit to you, it's not -- and not 14 for the purpose of this chapter or for the purpose 15 of this article, which would have encompassed all of 16 the enabling statutes for Article 7, which enables 17 local governments to have zoning ordinances. And we 18 went through those a second ago. 19       So it's only for the purpose of this 20 subsection, meaning 15.2-2291, Subsection A. 21       And I submit to you the reason they did 22 that gets back to what we discussed a second ago,</p>

<p style="text-align: right;">Page 76</p> <p>1 and that is that this, while it's set forth within 2 Article 7, there's no issue hear as reflected in 3 these -- in the Attorney General opinions that this 4 is part -- this is Virginia's version of the Fair 5 Housing Act Amendments of 1988. 6 And so what that General Assembly wanted 7 to be careful of, to say that this defined term, 8 residential facility, applies only to the different 9 purpose of the Virginia -- Virginia's version of the 10 Fair Housing Act of 1988. So that's the first thing 11 we need to look at. 12 In addition to the absence of any language 13 saying we -- this is intended to preempt local 14 zoning for the purpose of what is a residential 15 facility, it also applies only to this subsection 16 and not to all of Article 7. 17 And so the way -- in harmonizing, we need 18 to say -- we need to recognize that. We need to say 19 that the Loudoun County's ordinance that -- that 20 prohibits congregate housing facilities in the AR-1 21 can coexist with this -- this code section because 22 this code section has nothing to do with whether a</p>	<p style="text-align: right;">Page 78</p> <p>1 family. 2 So you have to -- and then the next 3 sentence is instructive because the next sentence 4 informs the first sentence. And it says, for the 5 purpose of this subsection, mental illness and -- 6 well, it shall not include addiction to a control 7 substance. 8 Actually, what I'm intending to say is the 9 sentence that follows that. Because here is the 10 operative prohibition. This is the operative 11 language of the statute. This is what the General 12 Assembly intended as a limitation, as the one and 13 only limitation on local zoning. 14 And that is that no condition is more 15 restrictive than those imposed on residences 16 occupied by persons related by blood, marriage, or 17 adoption shall be imposed on such facility. 18 And we know from the legislative history, 19 and we've cited this in our brief, the amicus curiae 20 brief in -- in the Fairfax case which is in our 21 material, and also as reflected in the Attorney 22 General opinions that I referred to earlier, the</p>
<p style="text-align: right;">Page 77</p> <p>1 facility is appropriate in an AR-1 zone. 2 It has only to do with whether or not it 3 is a -- it is a licensed facility by the Virginia 4 Department of Behavioral Health and Developmental 5 Services. 6 THE COURT: Let me interrupt you. 7 MR. HAMPSHIRE: Sure. 8 THE COURT: 15.2-2291(A) starts with 9 saying, zoning ordinances for all purposes shall 10 consider a residential facility in which no more 11 than eight individuals and then on and on and on. 12 MR. HAMPSHIRE: Right. 13 THE COURT: Isn't that statute saying 14 you've got to treat this as a single-family house? 15 MR. HAMPSHIRE: That's a great question 16 and I've got an answer for you. And that is that 17 what it's saying here is that -- that you need -- 18 that local governments need to treat such 19 facilities, if they have mentally disabled people in 20 them, as residential occupancy by a single family. 21 It does not say as a single-family 22 dwelling. As residential occupancy by a single</p>	<p style="text-align: right;">Page 79</p> <p>1 whole legislative rationale for Virginia adopting 2 15.2-2291 in response to the Fair Housing Act 3 Amendment of 1988 on the federal level -- 4 THE COURT: Right. 5 MR. HAMPSHIRE: -- was to prevent what is 6 set forth here, discrimination. Discrimination 7 against people who are disabled. Unrelated, 8 disabled persons attempting to reside in residential 9 neighborhoods. 10 And what you can't do, the General 11 Assembly has said to Loudoun County and all other 12 the counties and cities and towns throughout the 13 Commonwealth is, you cannot impose special permit 14 requirements, special use permit requirements, on 15 those kinds of facilities that you don't impose upon 16 facilities occupied by traditional families, 17 families related by blood, marriage or adoption. 18 You just can't do it. 19 That is the evil that the General Assembly 20 intended to prohibit; and rightly so. 21 But it's significant in this case that 22 Loudoun County's prohibition on congregate housing</p>

<p style="text-align: right;">Page 80</p> <p>1 facilities does not do that. The record is 2 undisputed that the prohibition on congregate 3 housing facilities in the Loudoun County zoning 4 ordinance applies across the board. Nobody can do 5 it. 6       If you're a licensed facility under our 7 view, you can't do it. And if you are a traditional 8 family, you can't do it. 9       THE COURT: Why not? 10       MR. HAMPSHIRE: Because the definition of 11 congregate housing facility. And we can turn 12 that -- I have that hear. 13       THE COURT: What in the language at 2291 14 means they can't do what they did versus -- versus 15 the concept of congregate? 16       MR. HAMPSHIRE: Okay. The language I've 17 just referred to, that no conditions more 18 restrictive can be -- can be imposed on such 19 residences by persons related by blood, marriage, or 20 adoption shall be imposed on such facility. 21       What it's saying is that is what you 22 cannot do. You cannot say, for example -- Loudoun</p>	<p style="text-align: right;">Page 82</p> <p>1 only on 90-day increments or 45-day increments. 2 Those are cycling in and out. 3       But the term occupancy by a residential -- 4 as residential occupancy by a single family simply 5 says you need to treat that person -- you need to 6 treat that family like you treat the other families. 7       And that is further explained by the word 8 that I just -- the words that I just read. It says 9 nothing about whether the localities can exercise a 10 broad zoning authority to determine what is -- what 11 is residential occupancy for the purpose of all 12 families. 13       In other words, the General Assembly 14 recognizes the power of Loudoun the County and other 15 counties to regulate what uses are appropriate in 16 residential zones like the AR-1 zone. But if you're 17 going to allow traditional families to reside there, 18 you have to allow licensed group homes to reside 19 there. You can't treat them any differently. 20       And then that gets us to the whole issue 21 of reside. 22       THE COURT: Let me interrupt you again.</p>
<p style="text-align: right;">Page 81</p> <p>1 County cannot say you need a special permit that a 2 licensed group home needs a special permit to 3 operate a congregate housing facility whereas 4 traditional families can operate on by-right. 5       THE COURT: But that -- that has got to be 6 measured against the whole statute. A makes a 7 residential facility with all the details there. 8 It's a single-family house. 9       MR. HAMPSHIRE: Correct. But there is no 10 expression in this statute that says that 11 localities, in determining what is -- what is a 12 single-family house, has to allow a use that is 13 otherwise not allowed in the zoning ordinance, 14 namely, a therapy use, a use that emphasizes 15 treatment, as opposed to residency. You have to 16 treat it as residential occupancy by a single 17 family. 18       And the other thing that's interesting 19 is -- Your Honor, is the choice of the word single 20 family, residential occupancy by a single family. 21 And, you know, the record is undisputed here that we 22 don't a -- we have a family -- a single family, but</p>	<p style="text-align: right;">Page 83</p> <p>1       MR. HAMPSHIRE: Yes, sir. 2       THE COURT: Why doesn't the concept of 3 them defining a -- residential occupancy by a single 4 family seem to be addressing exactly the concept of 5 not just the rural zoning and all, but the 6 congregate residential usage? 7       I don't know how you can argue and deal 8 with congregate as a definition that doesn't have to 9 make us consider the start of 15.2-2291(B), the 10 first sentence. 11       MR. HAMPSHIRE: Okay. Let me -- let me 12 try to -- let me try to address that through -- 13       THE COURT: Well, I don't mean to make you 14 go looking, but zoning ordinances for all purposes 15 shall consider a residential facility in which no 16 more eight infirm or disabled persons reside with 17 one or more resident counselors or other staff 18 persons as residential occupancy by a single family. 19       MR. HAMPSHIRE: So we need to -- we need 20 to look at what does -- what does Loudoun County -- 21       THE COURT: Help me with what that means 22 in regard to your argument that congregate living</p>



<p style="text-align: right;">Page 84</p> <p>1 exists here.</p> <p>2 MR. HAMPSHIRE: I think the statute needs</p> <p>3 to be read within its four corners. So in the first</p> <p>4 sentence, zoning ordinances shall -- for all</p> <p>5 purposes shall consider residential facility in</p> <p>6 which basically disabled people -- a licensed</p> <p>7 facility where disabled people live as residency by</p> <p>8 single occupancy -- residence occupied by a single</p> <p>9 family.</p> <p>10 What that means is, as instructed by the</p> <p>11 sentence below, is that if you are going to regard a</p> <p>12 home, a facility as residential occupancy by a</p> <p>13 single family for traditional families you have to</p> <p>14 do the same for group home families. You have to</p> <p>15 regard them as residential occupancy by a single</p> <p>16 family.</p> <p>17 Because remember the legislative history.</p> <p>18 The legislative history is, prevent discrimination</p> <p>19 of housing. So the intent of the first sentence is,</p> <p>20 don't impose any special requirements on group home</p> <p>21 families occupied by mentally ill persons that are</p> <p>22 licensed; don't consider them not residential if</p>	<p style="text-align: right;">Page 86</p> <p>1 MR. HAMPSHIRE: Right. So Loudoun County</p> <p>2 has defined congregate housing as a structure, other</p> <p>3 than a single-family dwelling, where more than four</p> <p>4 unrelated persons reside under supervision for</p> <p>5 special care, treatment, training, or similar</p> <p>6 purposes.</p> <p>7 So, significantly, Loudoun County has</p> <p>8 defined congregate housing facility as something</p> <p>9 other than a single-family dwelling.</p> <p>10 So when you go back to 15.2-2291, it says</p> <p>11 that zoning ordinances shall consider a residential</p> <p>12 facility as residential occupancy by a single</p> <p>13 family. Instructed by the sentence -- two sentences</p> <p>14 later that you can't impose special conditions.</p> <p>15 So having defined a congregate housing</p> <p>16 facility as something other than a single-family</p> <p>17 dwelling, as long as you're not defining it</p> <p>18 differently for group home families -- excuse me.</p> <p>19 As long as you're not defining</p> <p>20 administering it differently for group families than</p> <p>21 you are for traditional families you're in</p> <p>22 compliance with 2291.</p>
<p style="text-align: right;">Page 85</p> <p>1 you're going to consider the same facility occupied</p> <p>2 by traditional families as residential. Don't treat</p> <p>3 them differently. That's what that means.</p> <p>4 THE COURT: But you -- but you have the</p> <p>5 position that what the County did here was allow</p> <p>6 congregate housing? As a nonexpert in the field,</p> <p>7 but one charged with learning it to rule on it --</p> <p>8 MR. HAMPSHIRE: Right.</p> <p>9 THE COURT: -- that sentence strikes me as</p> <p>10 at least needing to be put next to congregate in</p> <p>11 terms of how we analyze if the County relied on this</p> <p>12 kind of code section and other things in its</p> <p>13 decision.</p> <p>14 MR. HAMPSHIRE: All right. Well, let me</p> <p>15 -- if I could, Your Honor, if I could ask you to</p> <p>16 turn to Tab 9 of the -- of the supporting documents</p> <p>17 book.</p> <p>18 THE COURT: I'm there.</p> <p>19 MR. HAMPSHIRE: I'll try to answer your</p> <p>20 question this way.</p> <p>21 THE COURT: I am looking at congregate</p> <p>22 housing highlighted.</p>	<p style="text-align: right;">Page 87</p> <p>1 THE COURT: Why doesn't the one charged</p> <p>2 with appellate review of all of this say to you, the</p> <p>3 author of the decision in this case that you're</p> <p>4 appealing from has to be charged with knowledge of</p> <p>5 this definition of congregate housing facility in</p> <p>6 your Tab 9. And it talks about four unrelated</p> <p>7 persons and other things.</p> <p>8 The concept of congregate then defined</p> <p>9 here had to be we charge knowledge of that to the</p> <p>10 County people who are making a decision. And they</p> <p>11 make express reference so you could reconcile 2291</p> <p>12 with other parts of what we're doing.</p> <p>13 So are you telling me that the four</p> <p>14 persons has any impact on our decision here, as we</p> <p>15 see it here, congregate housing facility defined?</p> <p>16 MR. HAMPSHIRE: Well, where more than</p> <p>17 four, it says. So it would be -- you know, it</p> <p>18 includes 8 or 10 or whatever.</p> <p>19 THE COURT: Well, Tab 9 in your exhibit,</p> <p>20 the second page, congregate housing facility, we're</p> <p>21 talking about -- okay. We're more than four. Okay.</p> <p>22 I'm getting hung up on the eight versus the four.</p>

Hearing Transcript

<p style="text-align: right;">Page 88</p> <p>1 So you can keep going. 2 MR. HAMPSHIRE: So having -- having eight 3 or less is more than four. 4 THE COURT: There you go. 5 MR. HAMPSHIRE: Yeah. 6 THE COURT: Just disregard. Keep moving. 7 MR. HAMPSHIRE: So the point I'm trying to 8 make, and it's an awfully good question, Your Honor, 9 is that when you look at the first sentence of 10 15.2-2291(A) where you have to consider it, 11 something a residential facility, and you have to 12 consider that not as a single-family home but as 13 residential by -- occupancy by a single family, 14 okay, what that is saying in light of the sentence 15 two sentences later is, if you're going to have a 16 prohibition, as you do on congregate housing 17 facilities in the AR-1, don't enforce it for group 18 home families and not for traditional families. Or, 19 if you're going to have a special permit requirement 20 for -- for group home families where you don't have 21 one for traditional families, that is violative of 22 this section.</p>	<p style="text-align: right;">Page 90</p> <p>1 County -- I want to make a distinction between the 2 County Board and the zoning people. The County 3 Board is the legislative body of the County and 4 can -- 5 THE COURT: I keep -- I keep spilling one 6 over into the other. You know what I mean, though. 7 MR. HAMPSHIRE: Right. So if we're 8 talking about the Zoning Administrator, yes, I think 9 that -- in the zoning determination itself the 10 Zoning Administrator determined that this use is a 11 congregate housing facility and it is not allowed in 12 the AR-1. 13 But then because of state licensure, it is 14 allowed under 2291. And the point I'm trying to 15 make is that under the cases that I have referred to 16 and the Attorney General opinions that I've referred 17 to, there is no express intent by the General 18 Assembly in 2291 to basically preempt that 19 determination, because the congregate -- the 20 probation on congregate housing facilities in AR-1 21 applies across the board to everybody. There is no 22 special permit that is being applied in the record</p>
<p style="text-align: right;">Page 89</p> <p>1 But this is -- that is consistent with the 2 whole underlying theme I'm trying to -- I'm 3 referring to here, is that there is nothing -- 4 there's no express intent by the General Assembly in 5 15.2-2291 or the legislative history that led to it 6 that indicated an attempt to usurp or preempt the 7 power of Loudoun County to determine what is 8 residential in the first place. 9 THE COURT: How about it reflects, when 10 you compare everything you just said, to the County 11 knowing about their own definition of four people in 12 a congregate housing definition and they choose the 13 state-wide board's eight? Why don't we have -- can 14 it be anything other than they knew what they were 15 doing? 16 MR. HAMPSHIRE: Who are we saying? 17 THE COURT: The County Board, the zoning 18 people. 19 MR. HAMPSHIRE: Well -- 20 THE COURT: They have to know about that 21 definition of congregate. 22 MR. HAMPSHIRE: And they do. Well, the</p>	<p style="text-align: right;">Page 91</p> <p>1 to group home families that's not being applied to 2 traditional families. 3 And, therefore, the zoning determination 4 was clearly wrong in order to provide by -- by 5 concluding that even though it's not allowed 6 under -- under the zoning determination -- excuse 7 me, under the zoning ordinance, its nevertheless 8 allowed under 2291, perhaps adopting the very 9 reasoning that Your Honor was referring to. 10 But, again, you have to have a clear 11 expression of legislative intent to occupy the field 12 of local zoning. And you just don't have that here. 13 And it's -- so the point is that Newport's 14 focus on specialized training and treatment that we 15 see set forth in the zoning determination is 16 consistent both with 2291 and the congregate housing 17 prohibition in the zoning ordinance. 18 The Court is required under the Attorney 19 General's opinion and case law to harmonize those 20 two. And so the way to do that is to conclude, just 21 as the Supreme Court did in the ABC -- in the Tiny 22 House and Windy Hill cases that what the Virginia</p>

<p style="text-align: right;">Page 92</p> <p>1 Department of Behavioral Health and Developmental 2 Services is doing under 2291 is simply determining 3 whether a facility is properly licensed as such, but 4 is saying nothing, absolutely nothing, with respect 5 to whether it's appropriate in a given location. 6       And whether it's appropriate in a given 7 location, as demonstrated by those Supreme Court 8 opinions and the Attorney General opinion, is the 9 sole and absolute province of Loudoun County on it's 10 zoning ordinance. And, therefore, the Zoning 11 Administrator was plainly wrong and basically 12 undercutting Loudoun County's own zoning ordinance 13 by wrongly concluding that that prohibition is 14 trumped, preempted, whatever word you want to use, 15 by state licensure. 16       That's our point. 17       We also would like this point to -- 18 discuss a little bit about the word reside because 19 you will see -- 20       THE COURT: What word? 21       MR. HAMPSHIRE: Reside. And we've 22 discussed this before.</p>	<p style="text-align: right;">Page 94</p> <p>1       And, significantly, just to go back a 2 notch, if you look at the -- the first -- the second 3 paragraph, you will see that even Newport, through 4 the author of this letter, viewed the zoning 5 determination as a determination that the proposed 6 use is a permitted use in the zoning district, 7 provided there is Virginia Department of Behavioral 8 Health licensing, issues a state license. 9       But the point -- so even -- even Newport 10 viewed it as a determination back then. And, 11 indeed, they had asked for it as a determination. 12 So to say that's meaningless you know -- is just in 13 contradiction of the record, that his advice somehow 14 didn't mean anything. 15       But when you go down to the end of the 16 second paragraph, you will see a statement by the 17 author of this letter that we provide compassionate 18 care focused on teaching the life skills that will 19 permit our residents to return home and resume their 20 lives. 21       If you look at the tab before that, which 22 is Tab 23, you will -- and this is in the record as</p>
<p style="text-align: right;">Page 93</p> <p>1       You will see in 15.2-2291 -- and in 2 addition to all the -- the issues that I just 3 discussed about there being no intent to preempt the 4 field of local zoning, the General Assembly is also 5 very careful there to make sure that even with 6 respect this statute that people actually reside on 7 the property. 8       And the zoning determination at Tab 14 is 9 clear there is no issue of fact that the persons 10 intend to come and stay for between 30 and 90 days. 11 I believe there was testimony that the average would 12 be around 47 days. 13       And at Tab 23 of the materials, which is 14 also in the appendix, you will see -- basically, 15 this is the letter that started the whole thing. 16 This is the letter that the testimony showed at the 17 first BZA hearing was delivered to my clients by -- 18 in a mailbox and this is how they found out about 19 this whole thing. 20       And in this is -- and this is why they 21 were even able to appeal, because they learned about 22 it through this letter.</p>	<p style="text-align: right;">Page 95</p> <p>1 well. This is a statement by a report and this was 2 introduced at the first hearing. 3       The report is Sylisa Lambert-Woodard, a 4 doctor of various things, about doing social work in 5 George Mason, et cetera. And the last page, turning 6 back to page 8, she talks about benefits of the -- 7 of the program and concludes by saying, on page 8, 8 the program will add to the existing array of 9 services and allow for residents to receive care 10 close to home and will allow family members to 11 participate in support services and activities 12 enhancing the therapeutic element of the program and 13 facilitating seamless transition back to the family 14 home, as appropriate. 15       We compare those facts to what this -- at 16 least the courts in Virginia have required with 17 respect to recite. And for that, we go back to the 18 opinion from Judge Bach, which is Tab 8 of -- let's 19 see. Tab 8 in the other notebook, which is the -- 20 we have discussed this case many times. And if you 21 look at -- 22       THE COURT: Tell me where to go.</p>

<p>1 MR. HAMPSHIRE: After Tab 8, page 3.  2 THE COURT: Tab 8, did you say?  3 MR. HAMPSHIRE: Yes, Tab 8 in the  4 authorities notebook. And page 3. And there is a  5 highlighted paragraph there.  6 THE COURT: I'm in the wrong book.  7 MR. HAMPSHIRE: Okay.  8 THE COURT: With Tab 8. What book am I --  9 should I be in?  10 MR. HAMPSHIRE: The one that says  11 authorities.  12 THE COURT: Here you go.  13 MR. HAMPSHIRE: Yes.  14 Tab 8, the highlighted paragraph. And,  15 you know, there are a lot of issues in this case the  16 Judge Bach dealt with. And he did -- he did a fine  17 job.  18 But what he was dealing with here was a  19 situation that is explained also at footnote 21, I  20 believe it is.  21 Yes, footnote 21.  22 Footnote 21, on page 9, contains a lot of</p>	<p>Page 96</p> <p>1 Kaleidoscope for more -- no more than two months.  2 During this stay they are, in quotes, residents,  3 similar to the homeless individuals in Woods. And  4 I'll discuss that case a second because that's a  5 case in the Northern District of Illinois.  6 The Kaleidoscope children have nowhere  7 else to return to and no other home.  8 And so -- then if you go to Tab 9. That  9 is the Wood's decision from the Northern District of  10 Illinois. And you will see basically that that --  11 headnote 2, that case concerned a homeless shelter  12 for families where guards were demanding sexual  13 favors from the residents.  14 THE COURT: I just read it.  15 MR. HAMPSHIRE: Right.  16 THE COURT: You know Judge Bach.  17 MR. HAMPSHIRE: Yes, sir.  18 THE COURT: It jumps off the page. Bach  19 would have liked to have had criminal chance at the  20 perpetrator.  21 MR. HAMPSHIRE: Right.  22 THE COURT: Anybody doing that to</p> <p>Page 98</p>
<p>1 details about -- about the factual background of  2 what these -- these poor children were dealing with  3 and how they were -- they were basically abused  4 children. They had no -- they had no other home to  5 go to. And so in that context --  6 THE COURT: You mentioned page 9? I don't  7 see a highlighted part of page 9.  8 MR. HAMPSHIRE: No, I didn't highlight it,  9 sir. But it's footnote 21, if you look on page 9.  10 THE COURT: Oh, footnote 21 at the top of  11 page 9; right?  12 MR. HAMPSHIRE: That's right, Your Honor.  13 THE COURT: Okay.  14 MR. HAMPSHIRE: All right. You will see  15 there are a lot of unfortunate details of the -- of  16 the children that were at issue there basically  17 suffering a lot abuse, sexual and otherwise.  18 And, in fact -- and so Judge Bach, on  19 page 3, is referring to those -- those children and  20 he says: While the children's stay at Kaleidoscope  21 is not permanent, it is not a transient visit  22 despite the fact that the children live at</p> <p>Page 97</p>	<p>1 children.  2 MR. HAMPSHIRE: Yes, sir, that's right.  3 THE COURT: I come back to this case,  4 though.  5 MR. HAMPSHIRE: Right. Right. And for  6 that, you know, you look at -- Judge Bach was  7 referring to the Woods case on page 9. And he was  8 saying, just like the people in the Wood's case,  9 they were females who the guards were demanding  10 sexual favors of for staying in the facility that  11 they had no other place to go and they had no other  12 place to go and, therefore, they were entitled to  13 the protection of the act.  14 So in that context, we have to look at  15 both the facts of Woods and Board of Supervisors in  16 the context of what we learned from the -- the --  17 both from the letter from Newport and also the  18 report from Ms. Sylisa Lambert-Woodward where the  19 very purpose of this facility is not to provide a  20 home, but to provide a treatment center next to the  21 real homes of these young ladies for the very  22 purpose of receiving treatment and for going back to</p> <p>Page 99</p>

<p style="text-align: right;">Page 100</p> <p>1 the home afterward.</p> <p>2       The exact opposite of what we had in both</p> <p>3 the Bach case and also in the Woods case. There has</p> <p>4 to be -- while the length of stay is not</p> <p>5 determinative, there has to be some element of</p> <p>6 intent to treat it as your home when you walk</p> <p>7 through the door.</p> <p>8       And I submit that under the undisputed</p> <p>9 facts that are set forth in the zoning</p> <p>10 determination, as supplemented by the letter from</p> <p>11 Newport, as supplemented by the report from Ms.</p> <p>12 Woodard, the facts are that from the moment these</p> <p>13 young ladies walked through door, they're thinking</p> <p>14 about going home, receiving treatment and going</p> <p>15 home.</p> <p>16       That is not the definition of reside in</p> <p>17 the statute. It's a definition of a commercial</p> <p>18 treatment center.</p> <p>19       There are some authorities that are --</p> <p>20 that are cited by Newport in its brief, namely the</p> <p>21 case of Connecticut Hospital versus the City of New</p> <p>22 London, which is at Tab 11 of the authorities</p>	<p style="text-align: right;">Page 102</p> <p>1 where the place of treatment would be and would</p> <p>2 transport? That's not applicable here in any way</p> <p>3 that I know.</p> <p>4       MR. HAMPSHIRE: Well, that's the point.</p> <p>5 It's not applicable because, as opposed to what we</p> <p>6 have here where treatment is the focus.</p> <p>7       THE COURT: And accompanied by residential</p> <p>8 staying overnight.</p> <p>9       MR. HAMPSHIRE: Well, that's the issue, is</p> <p>10 whether it really is residency --</p> <p>11       THE COURT: Okay.</p> <p>12       MR. HAMPSHIRE: -- under the statute. And</p> <p>13 we say that it's not residency because there has to</p> <p>14 be an attempt to treat it as your home. That's the</p> <p>15 first point.</p> <p>16       And then there is not based upon the</p> <p>17 materials that are in the record, the ones that I've</p> <p>18 just referred to. The intent is to go for a limited</p> <p>19 period of time to receive treatment and to go back</p> <p>20 to the family home, which is close by. And the</p> <p>21 whole purpose, as illustrated by these materials, is</p> <p>22 to site the homes, these facilities, these treatment</p>
<p style="text-align: right;">Page 101</p> <p>1 notebook, and also the case of Schwartz versus</p> <p>2 Treasure Island, which is at page -- at Tab 12 of</p> <p>3 the authorities notebook.</p> <p>4       In both of those cases, it's noteworthy</p> <p>5 that while -- that -- for example, in Connecticut</p> <p>6 the residents of those group homes were not</p> <p>7 receiving therapy at those facilities. The Court --</p> <p>8 and this is the -- this is the United States</p> <p>9 District Court for the District of Connecticut --</p> <p>10 noted there at the top of page 2 that the residents</p> <p>11 of these group homes receive therapy and treatment</p> <p>12 of an outpatient basis from Stonington Institute,</p> <p>13 but have received no treatment or therapy at the</p> <p>14 facility itself.</p> <p>15       At the bottom of page 2, going over to</p> <p>16 page 3, they take a van to the Stonington Institute</p> <p>17 for treatment which lasts until the afternoon and</p> <p>18 then they take a van back to the group home.</p> <p>19       And, likewise, in Schwartz, a case relied</p> <p>20 upon by Newport, the --</p> <p>21       THE COURT: Why do you -- why do you deal</p> <p>22 with that where they would live separately from</p>	<p style="text-align: right;">Page 103</p> <p>1 facilities, close to the familiar home.</p> <p>2       THE COURT: But not where they reside?</p> <p>3       MR. HAMPSHIRE: That's right, not -- not</p> <p>4 where they reside. They are going there for another</p> <p>5 purpose, for treatment. That's the focus.</p> <p>6       And then, you know, that jives nicely</p> <p>7 with -- and talking about harmonization, Your Honor,</p> <p>8 that jives nicely with the definition of a</p> <p>9 congregate housing facility because the -- it's not</p> <p>10 allowed in the AR-1 because of the focus on</p> <p>11 treatment and training, as opposed to residency.</p> <p>12 That's why it's not allowed, consistent with the --</p> <p>13 and talk -- in terms of harmonizing the language in</p> <p>14 2291 that says you have to actually reside there.</p> <p>15 You have -- and with the legislative history,</p> <p>16 because the whole purpose of 2291 under the Fair</p> <p>17 Housing Act is to allow people to live in the</p> <p>18 community, to integrate in the community, become</p> <p>19 part of the community. That's not what is going on</p> <p>20 here. They're coming there for treatment and</p> <p>21 they're going back to their home, in direct contrast</p> <p>22 to what -- what is required by -- and what was at</p>

<p style="text-align: right;">Page 104</p> <p>1 issue in both Judge Bach's case, the Woods case, and 2 also at -- in contrast to the issue in the 3 Connecticut case, in the Schwartz case, where 4 treatment was not provided on-site, but there was 5 really an attempt to reside there. 6 I would like to touch a little bit on the 7 other legal issue, which is current use or addiction 8 to a controlled substance. And in the legal 9 authorities -- and we had a discussion about this 10 last time, Your Honor, about the United States 11 versus Southern Management Case. And that is set 12 forth in Tab 13 of the legal authorities, I believe. 13 That's right, in Tab 13 of the legal authorities. 14 The facts of that case -- and we had a 15 discussion of whether under 2291 -- under 2291 we 16 had a discussion last time about what is meant by 17 the sentence: For the purpose of this subsection, 18 mental illness or developmental disability shall not 19 include current use -- excuse me -- shall not 20 include current illegal use of, or addiction to, 21 controlled substance. 22 And that's at Tab 7 of the -- of the</p>	<p style="text-align: right;">Page 106</p> <p>1 receive counseling and therapy, treatment, and are 2 tested for drug use on a regular basis. 3 And then, pursuant to their program, after 4 a drug-free year, each client was evaluated for 5 stability to live in a -- in a second or reentry 6 phrase of the program and that in this phase they 7 would live in apartments rented by the Board. 8 And so what happened in this case is that 9 the Fairfax-Falls Church Community Services Board 10 went -- went to Southern Management Corporation, 11 which operated some complexes in the area Kings 12 Garden area of Northern Virginia, and basically the 13 bottom line is, as the Court says, although the 14 specifics of these contacts were disputed, the 15 bottom line is that the Board was unable to lease 16 any of the units and so suit was brought under the 17 1988 Fair Housing Act of '68. 18 And one of the issues in the case was 19 whether or not the term current illegal use of or 20 addiction to a controlled substance -- 21 THE COURT: I'm reading -- I'm reading 22 from the opinion you asked me to look at. But the</p>
<p style="text-align: right;">Page 105</p> <p>1 supporting documents book. 2 And you asked me, Your Honor, the last 3 time, doesn't that really mean -- doesn't the word 4 current illegal -- doesn't current modify both 5 illegal use and addiction. And I said to you no 6 essentially, citing the United States versus 7 Southern Management case. 8 I reread that case and I am a little bit 9 right and a the little bit wrong in my response to 10 you in response to that. And that is because on 11 rereading that case, which is set forth at Tab 13, 12 the United States District Court for the -- excuse 13 me, the United States Court of Appeals for the 14 Fourth Circuit from 1992 was dealing with that 15 precise issue. 16 And the factual context of that case is 17 interesting and it's set forth on page 2 of the 18 case. And in that case, the Fairfax-Falls Church 19 Community Services Board was operating a Crossroads 20 drug and alcohol abuse in Alexandria. 21 And for the first phase of that program 22 the Board's clients would live at that facility,</p>	<p style="text-align: right;">Page 107</p> <p>1 highlighted language was current, comma, illegal 2 use. I'm looking at the second page of your 3 exhibit, the part up on the right -- upper-right 4 corner. 5 MR. HAMPSHIRE: All right. 6 THE COURT: And then such term does not 7 include current, comma, illegal use. It doesn't 8 read current illegal use. It reads current, pause. 9 MR. HAMPSHIRE: But such term does not 10 include current, comma, illegal use of or addiction 11 to a controlled substance. 12 THE COURT: I thought the debate you and I 13 had in the past for 2291 was the word current read 14 right into the addiction issue. 15 MR. HAMPSHIRE: Right. And if you proceed 16 a little further -- let me see if I can point this 17 out to you, Your Honor. 18 If you look on headnote 5 on page 5, the 19 Court is -- the Court is noting hear about the 20 statutory interpretation and it says that the term 21 handicap does not include current, comma, illegal 22 use of or addiction to a controlled substance.</p>

<p style="text-align: right;">Page 108</p> <p>1 And the Court says the grammar of this 2 sentence erects a formidable stumbling block. 3 SMC, which support the part that I contend 4 that the word current modifies only use and not 5 addiction. 6 So that addiction is not divisible into 7 two categories, meaning -- and then if you turn over 8 to the next page, the Court says, in short, SMC 9 contends that once an addict, always an addict, and 10 addicts may not seek the Act's protection. 11 And I think that's precisely the 12 conversation that you and I had earlier. Does 13 current modify addiction as well as current use, as 14 well as use of controlled substance. 15 THE COURT: Well, I equate, just for 16 argument sake, use with addiction. You're an 17 addict, if you're using the drug, you're an addict 18 and you're dealing in addiction. 19 MR. HAMPSHIRE: Right. And I think that 20 the point that SMC was making is that you can be 21 under the common -- not only the common, but as 22 supported by expert testimony in this case, that</p>	<p style="text-align: right;">Page 110</p> <p>1 once an addict is always an addict. 2 We are not willing to say that SMC's 3 statutory construction argument is without any 4 merit. And expanding the scope of the Fair Housing 5 Act protect the handicap individuals, Congress was 6 not addressing the question of addiction as handicap 7 for the first time, possibly a new distinction 8 between current and former addicts being drawn, but 9 little assistance to help distinguish between the 10 two. 11 And so the bottom line to this opinion is 12 that the Fourth Circuit recognized that while we're 13 not going to adopt the idea that once an addict 14 always an addict, there are certain parameters that 15 need to be complied with. And that is set forth 16 in -- in the bottom of page 7. On 7 the holding is 17 that we hold that the exclusion from the definition 18 handicap of current illegal use or addiction to a 19 controlled substance shall be construed consistently 20 for 29 USC Section 706-8, which is referred to 21 above, which says that nothing in the -- nothing in 22 the clause shall be construed to exclude an</p>
<p style="text-align: right;">Page 109</p> <p>1 while the two overlap, current use and addiction 2 overlap, there is certainly plenty of situations, 3 people who go to AA and lots of other people who are 4 recovering addicts are still considered addicts 5 because they still have that dependency, it's just 6 they've been able to overcome it. 7 And so SMC's position in this case was 8 once an addict, always an addict, such that you're 9 not entitled to the protection of the Act. 10 And then the Court says in the context 11 under the -- on page 6, while much of the expert 12 testimony below supports SMC's argument on the 13 status of addiction, once attainment never be cast 14 off, other thoughts of intent indicated that 15 addiction was not intended from the strict medical 16 sense. 17 And so then the Court goes through the 18 intent of the -- of the Joint Committee of Congress. 19 And then over on page 7 concludes that while the 20 Committee report appears to refute SMC's arguments 21 that all addicts are per se included, in other words 22 in the report, disagrees with that contention that</p>	<p style="text-align: right;">Page 111</p> <p>1 individual who has, number one, successfully 2 completed a supervised drug rehabilitation program 3 and is no longer engaging in illegal use of drugs or 4 has otherwise been rehabilitated successfully and is 5 no longer engaging in such use, or, two, is 6 erroneously engaging -- excuse me. 7 Roman numeral II is participating in a 8 supervised rehabilitation program and is no longer 9 engaged in such use or is erroneously engaging in 10 such use but not engaging in such use. 11 The point I'm trying to make, getting back 12 to the zoning determination, is that the zoning 13 determination failed to address the evidence that 14 was available to -- to the Zoning Administrator that 15 Newport was proposing to admit persons who are 16 addicted to a controlled substance, or at least used 17 to be addicted to a controlled substance, without 18 any requirement to comply with the parameters of the 19 Southern Management Corporation case, that there be 20 some evidence of a period of nonuse and 21 participation -- and participation in a drug 22 rehabilitation program.</p>

<p style="text-align: right;">Page 112</p> <p>1 So what Newport proposes to do, basically, 2 is to admit persons who have a problem and deal with 3 it later. And the zoning -- the zoning 4 determination was erroneous in failing to set that 5 forth as a requirement. 6 Excuse me. I've just got to get my papers 7 back in order again. 8 THE COURT: Take your time. 9 MR. HAMPSHIRE: Thank you. 10 THE COURT: Speaking of your time, how 11 much longer are you going be? 12 MR. HAMPSHIRE: I'll be about five more 13 minutes I think. 14 THE COURT: Okay. 15 MR. HAMPSHIRE: Thank you very much for 16 your time. 17 THE COURT: I don't want you to give 18 fatigued. 19 MR. HAMPSHIRE: Thank you. 20 I just -- and I just want to -- I just 21 want to point out, because we do have a record of 22 materials and the supporting documents, and these</p>	<p style="text-align: right;">Page 114</p> <p>1 has to be a demonstration of abstinence, 2 rehabilitation, et cetera, pursuant to the Southern 3 Management case. 4 So if you go to the first page -- if you 5 flip to the second page, it says, who does Newport 6 Institute treat? And the very first thing you see 7 there is substance abuse issues. 8 And if you turn a few pages beyond to what 9 to say, A-240, at the bottom at page 313 for the 10 record, you see a bunch of different things there, 11 including drug abuse. 12 Likewise, if you go to Tab 20 and you turn 13 to -- to the page that says -- I don't have it 14 highlighted. It's page 334 at the top. And you see 15 substance abuse issues as -- as some of the things 16 that are being treated. 17 And if you go to 21 and you go to the 18 second page, which is 321 at the top, has A-248 at 19 the bottom, who does Newport Institute treat? It's 20 substance abuse issues. 21 So all of these things indicate that the 22 Zoning Administrator had before him information that</p>
<p style="text-align: right;">Page 113</p> <p>1 are in the record. 2 And I'm referring the Court to page 19 -- 3 excuse me, to Tap 19, Tab 20, and Tab 21, which were 4 part of our appeal. 5 These materials are not some third-party 6 website. These are the Newport Institute website 7 that were available to the Zoning Administrator. 8 And I'll give the Court a minute to get there. 9 THE COURT: You've got to tell me again 10 what book you're in. Tab 19, 20, and 21, are you in 11 the case supporting documents? 12 MR. HAMPSHIRE: We're in the supporting 13 documents book, yes. 14 THE COURT: Got it. 15 MR. HAMPSHIRE: So if you go to 19, again 16 this is -- these are -- 19, 20, and 21 are materials 17 in the record that are from the Newport Institute 18 website that -- that were available to the Zoning 19 Administrator that require the Zoning Administrator, 20 as I said a second ago, to at least require that 21 before -- before residents can be admitted to this 22 facility and gain the protection of the Act, there</p>	<p style="text-align: right;">Page 115</p> <p>1 should have required him to set forth the parameters 2 of the Southern Management case that before 3 people -- before these facilities can be regarded as 4 entitled to -- to locate, they should have required 5 some sort of screening of the residents to ensure 6 that they have gone through rehabilitation and had 7 some period abstinence. 8 THE COURT: Part of that debate you and I 9 had was are they able to house users, somebody that 10 just isn't addicted but is using while they're in 11 the house. 12 MR. HAMPSHIRE: I think that's clear, they 13 can't. 14 THE COURT: That's the expressed fear you 15 have? 16 MR. HAMPSHIRE: Well, I think -- it's not 17 a far. It's just that they are two things that 18 can't be done and to get the protection of 2291. 19 One is to house people who are using drugs. 20 THE COURT: But doesn't 2291 call for them 21 to cease for the residents there if they're using? 22 MR. HAMPSHIRE: It doesn't -- I don't</p>



<p style="text-align: right;">Page 116</p> <p>1 think it sets that out specifically. 2 THE COURT: We had -- we had a dialogue in 3 which I remember I was trying to say what about a 4 recovered addict, can they treat that one. And I 5 hear you argue that the addiction issue is 6 longer-lasting than that. 7 MR. HAMPSHIRE: That's right. 8 THE COURT: I didn't -- I didn't conclude 9 that day that it was. It struck me that if you've 10 got somebody that's, at least temporarily, beating 11 their addiction or they are a lawful person under 12 everything we're talking about here to be in that 13 house -- 14 MR. HAMPSHIRE: Right. And I think that's 15 exactly -- 16 THE COURT: -- versus they're using while 17 they're in the house. 18 MR. HAMPSHIRE: Correct. Well -- and I 19 think the two overlap in the sense of the Southern 20 Management Corporate case indicated they overlap, 21 and that is you can't have -- you certainly can't 22 have active users in the house.</p>	<p style="text-align: right;">Page 118</p> <p>1 of having done that, having gone through a program, 2 having had a period of abstinence, and not having 3 used the day before or the week before. Because if 4 you let somebody into a house that has used the day 5 before without any rehabilitation, in all likelihood 6 they're going to start using once they get in the 7 house. That's what the General Assembly and the 8 Congress really foresaw. 9 And so I think the Fourth Circuit in the 10 Southern Management case understood that and that's 11 why it said that the Southern Management 12 Corporation's position was not completely without 13 merit. 14 THE COURT: Well, when I hear the other 15 side, I will continue their thought pattern on this 16 subject. But having handled about 20 years of drug 17 cases, if you've got a user that has returned to 18 using, you see like a signal that everybody around 19 them knows. 20 MR. HAMPSHIRE: Yeah. 21 THE COURT: Usually. 22 MR. HAMPSHIRE: Right.</p>
<p style="text-align: right;">Page 117</p> <p>1 And Newport would say we're not going to 2 have active users in the house. And if they -- and 3 if they are discovered to be actively using, we're 4 going to kick the out, basically. 5 But you also cannot have people who are 6 addicted to controlled substances. And we had a 7 conversation about what does that mean, does that 8 mean that they can't be currently addicted or they 9 can't have ever been addicted. And that's exactly 10 the issue that the Souther Management case went to. 11 THE COURT: I'm still there. I'm still in 12 that dialogue over the subject. 13 MR. HAMPSHIRE: Right. And it's a fair -- 14 it's a fair issue because you want to be -- and I 15 think the Court in Southern Management recognized 16 that you want to be fair to people. You want to 17 make -- you certainly want to encourage people to 18 kick their addiction and to have the benefits and be 19 rewarded for kicking their addiction. 20 THE COURT: Right. 21 MR. HAMPSHIRE: But there has to be 22 some -- the point is, there has to be some evidence</p>	<p style="text-align: right;">Page 119</p> <p>1 THE COURT: So that's a -- that's a side 2 issue, though. 3 MR. HAMPSHIRE: Right, right. 4 And, your Honor, I just want to conclude 5 with -- I said there were couple factual issues with 6 the legal issue. 7 The factual issue, one of them is, the 8 state license that I handed up to you, the certified 9 state license. 10 Now, we say that when you look at Tab 14, 11 which is the zoning determination, page -- page 2, 12 it says that the residential facility will require 13 licensing through the Department of Behavioral 14 Health and Developmental Services. 15 And when you look at the staff report, 16 which is Tab 17 -- I'm sorry, I may have that wrong. 17 16, I believe. Yeah, Tab 16, which is the staff 18 report for the -- and a couple -- 19 The first page of -- page 2 of the staff 20 report for this -- the second appeal below, it says 21 that -- referring back to the zoning determination, 22 it says that the Deputy Zoning Administrator issued</p>

<p style="text-align: right;">Page 120</p> <p>1 an advisory opinion, referring to it as an advisory 2 opinion, that Newport could operate a group home in 3 the AR-1 district if each home was separately 4 licensed as a group home by the Virginia Department 5 of Behavioral Health and Developmental Services. 6 If you look at page 1398 of the record, 7 which is set forth at page 17 -- Tab 17 -- actually 8 it's 1399, not 1398, on Tab 17 you will see that 9 what was presented to the Board of Zoning Appeals as 10 of January 26, 2023, was this page that shows one 11 facility licensed. 12 But at least according to the certified 13 license that we have handed up, this is inconsistent 14 with that because when you look at the certified 15 license, if you look at the first page of the 16 appendix you will see not one facility on that 17 license number, 351701003, but you will see two 18 facilities. 19 THE COURT: Right. 20 MR. HAMPSHIRE: And what we say is that if 21 the County is correct in its staff report, that in 22 order for a zoning permit to issue that each</p>	<p style="text-align: right;">Page 122</p> <p>1 pursuant to Virginia Code 801-390(A)? 2 MR. HAMPSHIRE: Right. 3 THE COURT: Because that's what I've been 4 looking at at the moment. 5 MR. LAWRENCE: Your Honor, can I inquire 6 if Mr. Hampshire has got copies for the other 7 counsel? I assume that -- 8 THE COURT: You're going to get, number 9 one, a break and, number two, you get that document. 10 MR. LAWRENCE: Thank you, sir. 11 MR. HAMPSHIRE: I did provide a copy to 12 everybody. 13 THE COURT: We're going to give everybody 14 a break pretty soon. 15 MR. HAMPSHIRE: Yes, sir. I'm almost 16 done. 17 All right. I think I've got a copy of it. 18 Are you looking at page 1 of 3? 19 THE COURT: Does it look like this? 20 MR. HAMPSHIRE: Oh, that's -- okay. Yes, 21 sir. 22 I'm trying to see what the Court is</p>
<p style="text-align: right;">Page 121</p> <p>1 facility has to be separately licensed, then apart 2 from everything else I've said up here in the last, 3 I guess, almost two and a half hours -- I can't 4 believe it has been that long -- that the -- that 5 the licensing of this -- of these facilities is 6 inconsistent with the zoning determination and the 7 requirements for the issue of a zoning permit. 8 And, therefore, the zoning permit, apart 9 from everything else, is void. 10 The other factual issue that -- in 11 additional to the legal issues that I said I wanted 12 to touch on briefly is the congregate use issue. 13 And -- 14 THE COURT: Just a second. 15 MR. HAMPSHIRE: Yes, sir. 16 THE COURT: You raise an interesting 17 point. They talk about identifying two addresses, 18 but they didn't say other locations, if I am reading 19 the same thing you're reading. The fourth line 20 down. 21 MR. HAMPSHIRE: Are you on the -- 22 THE COURT: Is this the certificate</p>	<p style="text-align: right;">Page 123</p> <p>1 referring to. 2 THE COURT: The license for Newport. I 3 got 23 -- 20173 and 20179 Gleedsville Road. And 4 then they say addendum including other locations 5 granted on this license. 6 MR. HAMPSHIRE: Yes. And what that refers 7 to, Your Honor, I would submit is, pages 2 and -- 2 8 of 3 and 3 of 3 of the -- of the appendix, which are 9 the facilities in Fairfax County. 10 THE COURT: Well, you were making the 11 point they have to have an individual license for 12 each place. I'm just curious -- 13 MR. HAMPSHIRE: Right. 14 THE COURT: -- having heard that, that the 15 words, and other locations. It's like they'll fill 16 it in whenever you want them. 17 MR. HAMPSHIRE: Right. Well, what we're 18 seeing is a statement from the -- from Virginia 19 Department of Behavioral Health and Developmental 20 Services. 21 And this kind of emphasizes my point 22 there, that they are operating in a different</p>

<p style="text-align: right;">Page 124</p> <p>1 sphere. What the Loudoun County Zoning 2 Administrator has said in the zoning determination 3 is that each facility needs to be separately 4 licensed. And this license shows that they're not 5 separately licensed. 6 Two of the three facilities, anyway, are 7 licensed on the same license, not separately 8 licensed. That's my point. 9 THE COURT: All right. 10 MR. HAMPSHIRE: And, finally, Your Honor, 11 I would like to touch on the last factual issue, and 12 that was there was a -- and we stated -- we went 13 through this in our reply brief to the motion for -- 14 in limine. And that is that apart from everything 15 else, even if Your Honor were to disagree with my 16 legal argument, there was an abundance of evidence 17 below in this BZA hearing that the proposed use of 18 these facilities are real -- these structures are 19 proposed as a single facility that would take one 20 over the maximum of eight persons that allows the 21 protection of 2291. 22 And that came through testimony from a</p>	<p style="text-align: right;">Page 126</p> <p>1 across the homes, exactly their plan in Fairfax, and 2 what they cited for it was California. 3 So the record contained -- there is a lot 4 more references than that. 5 But the record is that as confirmed -- 6 THE COURT: Let me ask you this. 7 MR. HAMPSHIRE: Yes, sir. 8 THE COURT: How did those people making 9 those comments get that information? 10 MR. HAMPSHIRE: Well, that was the subject 11 of our motion in limine last Friday, that they live 12 next door and -- 13 THE COURT: Did they have hearings? 14 MR. HAMPSHIRE: Did they? 15 THE COURT: I'm confused as to how they 16 know what they just said in their material. 17 MR. HAMPSHIRE: Yeah. 18 THE COURT: Was that in a hearing or was 19 that off other method of learning facts or -- how 20 did they acquire those facts that they allege? 21 MR. HAMPSHIRE: Well, they did research 22 based upon other locations.</p>
<p style="text-align: right;">Page 125</p> <p>1 number of people, as we set forth in our opposition, 2 the very first one of which was the Magisterial 3 District Supervisor of the Catocin District, 4 Supervisor Caleb -- Caleb Kershner where he says 5 what is really going on in my opinion is that 6 Newport would use these three homes together to 7 coordinate commercial treatment centers with three 8 times up to -- up to three or 24 residents, which is 9 higher than the code will allow. 10 And Michael Wright testified -- that's at 11 transcript pages 111 to 112. 12 Michael Wright testified, were not talking 13 about three separate homes here for that matter, the 14 houses in question were built as a family compound, 15 they were sold as a compound, and for all intents 16 and purposes, if allowed to operate, they will 17 operate as a compound, et cetera. 18 And there was a lot of other testimony 19 like that through the record. 20 And Sarah Hoffman testified that each one 21 of these job descriptions that we could find online 22 for Leesburg was very blatant about sharing sources</p>	<p style="text-align: right;">Page 127</p> <p>1 THE COURT: Outside of a hearing? 2 MR. HAMPSHIRE: Yes, sir. 3 THE COURT: Okay. 4 MR. HAMPSHIRE: Yeah. 5 But that is -- that is something that I 6 wanted to raise. But our overall point are the 7 legal issues that we have addressed earlier. 8 And to summarize, those are, again, 9 whether the state licensing basically seeks to 10 occupy or preempt the field of local zoning and -- 11 under the case law that I cited. 12 And we say that there is no intent of 13 that, that there is no indication that these 14 persons -- in fact, all of the evidence is to the 15 contrary that they folks would reside on the 16 property. 17 And that there is evidence because -- and 18 that the zoning determination erred in not requiring 19 the parameters of the Southern Management case, 20 namely a period of abstinence, a period of 21 rehabilitation before entering, and that the -- 22 regardless of all, that state license is in</p>

<p style="text-align: right;">Page 128</p> <p>1 violation of the zoning determination because it has 2 two properties instead of one on it and, therefore, 3 it is void under the parameters of the zoning 4 determination. 5 And I do appreciate the attention of the 6 Court for all this time and I'm thankful -- 7 THE COURT: Well, it's a long, 8 complicated, paper-heavy case. 9 MR. HAMPSHIRE: Yes. 10 THE COURT: So we have got to let the 11 parties, through your skills, get it all into the 12 trier of fact. 13 MR. HAMPSHIRE: Right. 14 THE COURT: So thank you. 15 MR. HAMPSHIRE: Thank you, sir, for your 16 attention. 17 THE COURT: I'll ask a question and the 18 answer is we're going to break. 19 MR. WILBURN: I appreciate that. 20 THE COURT: And the question is, everybody 21 needs a break; right? 22 MR. WILBURN: Yes, Your Honor.</p>	<p style="text-align: right;">Page 130</p> <p>1 hearing no difference in opinion. 2 MR. WILBURN: We should be able to do 3 that, Your Honor. 4 THE COURT: I'm due -- I'm due for my 5 second surgery tomorrow morning. So I'm not moving 6 that. Take a break. I'll will see you somewhere 7 between 45 minutes and an hour. 8 MR. WILBURN: Thank you. 9 (A lunch recess was taken from 12:27 p.m. 10 to 1:40 p.m.) 11 12 13 14 15 16 17 18 19 20 21 22</p>
<p style="text-align: right;">Page 129</p> <p>1 THE COURT: How long a break do you need? 2 MR. LAWRENCE: I would leave it up to you, 3 Your Honor. I think five minutes and I'll be ready 4 go. But it is two and half into it. It's 12:30. 5 And I don't know if Your Honor wants to eat lunch. 6 We're going to have -- 7 THE COURT: You will be facing a more 8 pleasant person if I eat. 9 MR. HAMPSHIRE: We're in favor that. 10 MR. LAWRENCE: Well, I would like 11 Mr. Hampton to go at the end. 12 THE COURT: I want you folks fed too. 13 MR. LAWRENCE: About a half an hour, 14 Judge; would that be good? 15 THE COURT: You parties are bad time 16 estimates. Take an hour. 17 MR. HAMPSHIRE: Yes, Your Honor. 18 THE COURT: If you all are back here in 45 19 minutes the clerks all tell me that I can come back 20 in. 21 But in terms of what we're going to do, I 22 assume we're going to finish all arguments today</p>	<p style="text-align: right;">Page 131</p> <p>1 A F T E R N O O N S E S S I O N 2 THE COURT: Good afternoon. 3 MR. LAWRENCE: Good afternoon, Your Honor. 4 Nick Lawrence on behalf of the Board of Supervisors. 5 Your Honor, I wanted to pick up with 6 something Mr. Hampshire was ending with. You may 7 recall he was discussing his view that the 8 Administrator erred because he didn't write a 9 detailed restriction into the permit as to -- 10 THE COURT: Say that again. 11 MR. LAWRENCE: He was arguing that the 12 Administrator erred because, in his view, the 13 Administrator didn't write a detailed restriction 14 into the zoning permit on the subject of drug use. 15 THE COURT: Right. 16 MR. LAWRENCE: And in his view there 17 should have been some detailed list of requirements 18 for -- for Newport to comply with the statutory 19 language about drug use or addiction. 20 It struck me that that argument is 21 completely inconsistent, in fact contrary to what 22 you spent the first hour listening to, because in</p>

<p style="text-align: right;">Page 132</p> <p>1 the first hour he reargued the first case. He  2 reargued whether the November 29, 2021,  3 correspondence is an appealable determination or  4 whether, our view, that it's an advisory opinion  5 that is not final and, therefore, not appealable is  6 correct.</p> <p>7 And he has been at least six months, five  8 or six hearings now, telling you that the zoning  9 permit is meaningless, that it's a mere  10 administrative exercise by some flunky in the  11 basement of the County building and that the real  12 decision was made months and years before when  13 Michelle Lohr wrote this November 29, 2021, permit.</p> <p>14 And they both can't be true. They both  15 can't be true. Either the permit is a meaningless  16 thing done by somebody in the basement of the County  17 building or it's a substantive decision by the  18 Zoning Administrator where he could write this kind  19 of detailed restriction into it.</p> <p>20 But it can't be both meaningless and  21 substantive.</p> <p>22 And so I -- I thought I ought to point</p>	<p style="text-align: right;">Page 134</p> <p>1 aggrieved as it has been construed by the Supreme  2 Court of Virginia.</p> <p>3 You are not free to give the word any or  4 the word aggrieved any meaning that you think is  5 appropriate. You are constrained, as we all are, by  6 the controlling decisions by the highest Court in  7 the Commonwealth.</p> <p>8 And so when we look at the Vulcan  9 Materials case, that's 248 Virginia 18. That's a  10 1994 case that came out one year after our Board of  11 Supervisors adopted the 1993 revised zoning  12 ordinance that's at issue here.</p> <p>13 The Vulcan Materials case tells you that  14 aggrieved in that context has a specific meaning and  15 that it contemplates those decisions that amount to  16 a denial of a personal or property right. That's  17 what it means to be aggrieved by a decision,  18 determination, or requirement. It has to be  19 something that denies your personal or property  20 right.</p> <p>21 And this makes sense. The zoning  22 decision -- the Zoning Administrator makes all kinds</p>
<p style="text-align: right;">Page 133</p> <p>1 that out to you before turning to the issue in the  2 first case, which is the appealability of that  3 November 29, 2021, letter.</p> <p>4 We've briefed this. We've argued it.  5 We've gone up, down, and sideways. But I do feel  6 obliged to address it again.</p> <p>7 When you look at the code sections that he  8 pointed you to, that's 15.2-2309, and he emphasizes  9 the word any in the statute, that is any order,  10 requirement, decision, or determination. And the  11 suggestion, I guess, is that we're asking you to  12 rewrite the statute by inserting the word final,  13 final order, final requirement, final decision, or  14 final determination.</p> <p>15 But we're not asking you to do that.  16 We're telling you that's what the case law requires.  17 We're telling you that's how that provision has been  18 construed by the Supreme Court of Virginia.</p> <p>19 And when you look to the second statute he  20 cited you to, 15.2-2311, any person aggrieved by any  21 order, requirement, decision, or determination,  22 we're telling you that you have to consider the word</p>	<p style="text-align: right;">Page 135</p> <p>1 of decisions in the course a day. Some of them are  2 clearly not appealable.</p> <p>3 He decides where to go to lunch. That is  4 not appealable. He is asked Lord only knows how  5 many questions during the course of the day, during  6 the course of the week, the month, the year.  7 They're not all appealable to the Zoning  8 Administrator -- I'm sorry, to the Board of Zoning  9 Appeals.</p> <p>10 Only those that amount to the denial of a  11 personal property right are appealable.</p> <p>12 Now, if the case law ended there I might  13 think that his argument that any means any would  14 have some merit, but the case law doesn't end there.  15 This is a -- this is a line of cases that the  16 Supreme Court has come back to again and again.</p> <p>17 We've got the Lilly case from 259 Virginia  18 291. That's a 2000 case. And I agree with -- I  19 disagree Mr. Hampshire. I think he misstated both  20 the facts and the holding in that case when he  21 discussed it with you earlier.</p> <p>22 That was not a written opinion. That was</p>

<p style="text-align: right;">Page 136</p> <p>1 a verbal opinion expressed by the Zoning 2 Administrator during the course of a hearing in 3 front of the Planning Commission and then during a 4 subsequent hearing in front of the Board of Zoning 5 Appeals. 6 Now, the fact that it was verbal didn't 7 mean that it was nonappealable anymore than the fact 8 that something is in writing means that it's is per 9 se appealable. 10 The Zoning Administrator's oral, verbal, 11 decision in Lilly was appealable because he made it 12 as a necessary part of the Planning Commission and 13 the Board of Zoning Appeals' consideration of the 14 application in front of it. 15 So even though it was oral, it was 16 appealable because it was a final determination by 17 him as to the meaning of certain provisions of the 18 Caroline County zoning code. 19 And the Planning Commission and the Board 20 of Supervisors needed that opinion in order to 21 consider the application in front of them. 22 So that -- that oral versus written</p>	<p style="text-align: right;">Page 138</p> <p>1 determination and they say, see, it's a 2 determination, it says it's a determination, it must 3 me a determination. 4 Your Honor is a perfectly aware that the 5 Court enters orders all day long, not all of them 6 are appealable. Some are appealable and some are 7 not. And a consistent line that we see is between 8 final orders and other orders. 9 And it happens, Judge. Every once in a 10 while, an attorney will draft an order, take it over 11 to Court. You know, he has drafted the world's 12 strongest demurrer and he is one hundred percent 13 confident the Court is going to sign that order and 14 so he titles it final order and then he writes the 15 demurrer is sustained in its entirety and the case 16 is dismissed with prejudice. And then when you go 17 and you have the argument and the -- the reluctant 18 trial judge looks down at you and says, well, I'm 19 going to sustain your demurrer as to Count I, 20 counsel, but Count II I think states a cause of 21 action and I'm going to allow the case to go 22 forward.</p>
<p style="text-align: right;">Page 137</p> <p>1 distinction is without merit. Oral opinions can be 2 appealable. And that as we see in the Crucible 3 case, this is 278 Virginia 152, where you had a 4 written opinion, the Court nevertheless held that 5 was not appealable because it didn't involve the 6 grant or denial of a right. It was not final. 7 There were things left to do. 8 And that brings us to the James versus 9 City of Falls Church case. That is from 2010 where 10 you had a written opinion that the Court held not to 11 be appealable. And this is the first time the Court 12 tells us that there's a distinction in law between 13 interpretations and determinations. 14 And the Court says an interpretation is 15 distinct from a determination in that it lacks the 16 finality of an order, requirement, decision, or 17 determination. 18 And so when we look at the November 29th, 19 2021, letter from Michelle Lohr that is an 20 interpretation. 21 Now, they point to the appeal language on 22 the last page of it and they point to the word</p>	<p style="text-align: right;">Page 139</p> <p>1 And we stand here at the podium and we 2 mark that order up to reflect the Court's ruling and 3 maybe we don't cross out the word final. And maybe 4 the judge on the bench doesn't catch the fact that 5 the word final hasn't been crossed out and he puts 6 the signature on it. 7 Now, is that a final appealable order 8 because it says its final? Of course not. If that 9 case were appealed to the Court of Appeals, the 10 Court of Appeals would look at it and it would apply 11 the test that they've articulated in case after case 12 after case. 13 Does this order to dispose of all claims? 14 Does it grant or deny all of the relief requested? 15 Does it leave anything to be done other than 16 implementing and supervising the execution of the 17 judgment that the trial Court rendered? 18 And if the answer is that there are other 19 unadjudicated claims, then it's not a final order 20 regardless of what it says, regardless of what 21 objections are noted to it, and regardless of 22 whether the judge signed it.</p>

<p style="text-align: right;">Page 140</p> <p>1 We don't look to the label that is placed 2 upon it for purposes of appeal. We look at what it 3 is. 4 And in this case we've got a Deputy Zoning 5 Administrator, experienced, able, capable, but not a 6 lawyer, and she drafts this thing and she calls it 7 determination and she puts the language on it, the 8 appeal language, that is required to be put on any 9 determination and she sends it off. 10 They don't like it. They note their 11 appeal. And at that point it comes to the attention 12 of the County Attorney's office. And we look at it, 13 I look at it, and I say, I am not sure this thing is 14 a determination. The Deputy Zoning Administer put 15 that label on it, but that's not dispositive under 16 the case law. What's dispositive is what it is, not 17 what somebody has called it. 18 And so Mr. Hampshire mentioned some of 19 these cases, but he didn't address them all. And I 20 don't think you can reconcile them all in a way that 21 results in that November 29, 2021, letter being a 22 binding, appealable determination.</p>	<p style="text-align: right;">Page 142</p> <p>1 grant or to deny the permit. 2 And so that letter is not final and it is 3 not, therefore, appealable. The word any in 2209 -- 4 I'm sorry, 2309, can't be given the literal meaning, 5 any, because the Supreme Court has said it cannot. 6 There is a criticism of the Zoning 7 Administrator that has been made that I think is 8 incredibly unfair and so I want to address it. 9 Counsel tells you that he should have said 10 this fits the definition of a congregate housing 11 facility, period, full stop. He should have ended 12 there. 13 And in prior cases we've heard this -- or 14 prior arguments and prior briefs, we've heard this 15 claim that somehow the County staff contorted itself 16 into a pretzel and went out of its way to benefit a 17 billion-dollar Canadian hedge fund in order to find 18 a way to allow them to do this. 19 And that, Judge, is so unbelievably untrue 20 that I cannot believe people are making that claim. 21 Michelle Lohr did not address 15.2-2291 22 because she was looking for way to allow these</p>
<p style="text-align: right;">Page 141</p> <p>1 It is a mere interpretation under the 2 James case consistent with Vulcan, Crucible, Lilly. 3 And that mere interpretation language isn't 4 something that the Court has used only once in the 5 James case. 6 The Supreme Court repeated it again in the 7 Rhoads case. That's at 294 Virginia 43 and that's 8 from 2017. 9 So when we adopted our zoning ordinance 10 and we included certain provisions in there, they 11 can't be looked at in isolation. They have to be 12 read in the context of the case law that the Supreme 13 Court started handing down in '95, or '94, with the 14 Vulcan case and has continued right up through the 15 last couple of years. 16 When we look at that letter it says, a 17 zoning permit is required to establish the use. 18 That's what it says. Now, that's not leaving 19 nothing for the Zoning Administrator to do. 20 The Zoning Administrator, at the end of 21 that letter, has to receive a permit application, he 22 has to evaluate it, and he has to make a decision to</p>	<p style="text-align: right;">Page 143</p> <p>1 people to do what they've asked to do. She 2 addressed that because they asked her to address it 3 in the letter that they sent to her. 4 When McGuireWoods wrote to her and asked 5 her to prepare this opinion, they specifically 6 referenced that code section and they specifically 7 asked her to address it. 8 This is Exhibit Number 9 in the 9 McGuireWoods trial exhibits. 10 Mr. Wilburn, have you handed that to the 11 Judge? Does he have it? 12 MR. WILBURN: Yes. Your Honor, we passed 13 up a binder. 14 THE CLERK: Which one? 15 MR. WILBURN: Thank you. 16 THE CLERK: What exhibit? 17 MR. LAWRENCE: It's Exhibit Number 9, 18 ma'am. 19 THE COURT: Thank you. 20 MR. LAWRENCE: This appears in the BZA 21 record at Bates number 498 up in the upper 22 right-hand corner.</p>

<p style="text-align: right;">Page 144</p> <p>1 And so when we look at the first page of 2 this September 22, 2021, letter from McGuireWoods, 3 if you look at the last sentence in the second full 4 paragraph, Judge, it says, and I quote, each of 5 these residences would be licensed by the Virginia 6 Department of Behavioral Health and Developmental 7 Services, parentheses, DBHDS, closed parentheses, as 8 an MH therapeutic group home for children and 9 adolescents with serial emotional -- serious 10 emotional disturbance, period, closed quote. 11 So the idea of state licensure isn't 12 something that Michelle Lohr dreamed up in an 13 attempt to accommodate the multibillion-dollar 14 Canadian hedge fund. It's something she was 15 specifically asked to address by the applicant. 16 And when we turn to the second page, the 17 top paragraph on page 2 specifically references 18 Section 15.2-2291, Subsection A, of the Code of 19 Virginia. She addressed this because she was asked 20 to. She evaluated it and analyzed it because she 21 was required to as part of her job. 22 She is not trying to favor anybody. She</p>	<p style="text-align: right;">Page 146</p> <p>1 I provided my analysis of the case law, that the 2 County was going to take the position that that was 3 not, in fact, a binding determination, but that it 4 was a -- an appeal -- an advisory, nonappealable 5 interpretation. They didn't know that. 6 They went to the BZA. They heard that 7 stated unequivocally on the record. They got a very 8 clear ruling from Board of Zoning Appeals that that 9 was not binding, that it was advisory only, and that 10 they would be permitted to raise any objection, to 11 make any argument that was appropriate in the event 12 that a zoning permit was subsequently granted. 13 Now, that's unmistakable from the record. 14 And if you look at the record and the transcript of 15 the BZA hearing, you will hear Mr. Hampshire arguing 16 to the BZA you'll never see this case again, there 17 will never be a permit, there will be no further 18 appeal, the County is trying to pull wool over your 19 eyes and avoid review by telling you that this isn't 20 appealable when they have no intention of requiring 21 a permit and they will never review a permit and 22 there will never be anything to appeal.</p>
<p style="text-align: right;">Page 145</p> <p>1 is not looking to facilitate some people at the 2 expense of others. And the suggestion that happened 3 is wrong. 4 You heard an argument here that the BZA 5 erred in the first case in deciding that the 6 County's analysis, my analysis -- I'll take 7 responsibility, because it's my analysis -- was 8 correct and that the November 29, 2021, letter was 9 not an appealable determination. 10 Mr. Hampshire told you that because the 11 BZA erred in adopting my analysis it has led to, 12 quote, lots of mischief and unnecessary hearings. 13 Now, I sympathize with the petitioner's up 14 to a point. Certainly, if they were my clients and 15 I was looking at that letter with the appeal 16 language, I would feel an obligation to file an 17 appeal to the BZA, because I think if you don't do 18 that you could have people arguing that you've 19 waived that right. 20 And certainly they didn't know before they 21 filed the appeal, before that letter came to the 22 attention of the County Attorney's office and before</p>	<p style="text-align: right;">Page 147</p> <p>1 That's another example of the 2 inconsistency in the positions that the petitioners 3 have taken during the course of these two cases. 4 As I told you at the beginning of my 5 argument, it can't be the fact that that zoning 6 permit is meaningless and that the Administrator 7 erred by not writing additional conditions into it. 8 The fact that they are arguing that there 9 need to be additional conditions demonstrates that 10 is the decision. That is the final appealable 11 decision; not the November 29, 2021, letter. 12 And when they got that ruling from the BZA 13 and when the Chairman of the BZA made clear on the 14 record that he would not take kindly to the County 15 playing any kind of games with this, they could have 16 stopped. They had a determination from a tribunal, 17 a subordinate tribunal, but nonetheless they had a 18 decision from the tribunal that was advisory only, 19 that it granted Newport no rights, and that it 20 couldn't be appealed. 21 Now, I expected Newport to appeal that, 22 but they didn't. They accepted that. The ones who</p>



<p style="text-align: right;">Page 148</p> <p>1 pursued it are the petitioners. They're the ones 2 who pursued it to this case. They're the ones who 3 have required four, five, six hearings now on the 4 question of whether that's appealable. 5       And the thing that makes no sense to me, 6 Judge, they're the ones who don't like it. They're 7 the ones who are here telling you that that 8 decision, the opinions expressed in that letter, 9 that that's wrong. 10       Everybody else in the courtroom agrees 11 with the BZA that that November 29, 2021, letter has 12 no legal effect; that it's advisory only. 13       They're arguing that you declare that it 14 has binding effect and that it's wrong. 15       THE COURT: Let me interrupt you. 16       Would it be -- would it have legal effect 17 from a subsequent act by the Zoning Administrator or 18 the Board adopting the content of the determination 19 letter? 20       MR. LAWRENCE: I don't think so, Judge. 21       THE COURT: But the content could? 22       MR. LAWRENCE: Here's -- well, the</p>	<p style="text-align: right;">Page 150</p> <p>1       THE COURT: How about the argument that 2 their decision adopted the determination letter's 3 interpretation and, therefore, the appealable later 4 act picks up the content of the determination 5 letter? 6       MR. LAWRENCE: I think that's a 7 misrepresentation in the record. And I touched on 8 this in my brief, because Mr. Hampshire, in his 9 papers, makes the argument that the zoning permit 10 incorporates the determination letter. 11       And you probably saw as an exhibit to my 12 brief the exchange of communications between counsel 13 back in November of last year where he asked me 14 about the meaning of some -- some coded notations 15 on -- I think it's the second page of the zoning 16 permit. And I inquired into that and I responded 17 and told him I was informed that it merely meant 18 that it concerned the same property. It doesn't 19 mean that the Zoning Administrator adopted or relied 20 on or rested his decision on that. 21       That -- that determination, as they call 22 it, the letter and the opinion stated in that</p>
<p style="text-align: right;">Page 149</p> <p>1 content, the analysis, could be challenged in the 2 context of the permit. Some of it can certainly be 3 challenged in the context of this permit. 4       THE COURT: All right. 5       MR. LAWRENCE: Part of it can't. And that 6 part is the congregate housing argument that they're 7 making. 8       THE COURT: Explain to me the importance 9 of what you're arguing. If the determination letter 10 is not appealable, but became a part of the thought 11 processes of subsequent later decisions, why doesn't 12 it come in either as a primary issue or as a piece 13 of the facts for the other issue? 14       MR. LAWRENCE: The question in the zoning 15 permit case -- 16       THE COURT: Right. 17       MR. LAWRENCE: -- is whether the decision 18 to issue the permit was correct. That's what's 19 appealable. When we look at 2309 and it says 20 decision, determination, order, or requirement. 21       What is probably appealable in the second 22 case is the decision to issue the permit.</p>	<p style="text-align: right;">Page 151</p> <p>1 letter, are not -- they're no res judicata. They're 2 not estoppel. Nobody in this case is arguing that. 3       We're arguing that you look at the zoning 4 permit, you look at the application, you look at the 5 ordinance and the statute, and you decide based upon 6 the information in this application, based on the 7 information presented to the BZA, based on the 8 ordinance and the statute, was the administrator 9 correct to grant that permit. And if he was 10 correct, the BZA should be affirmed regardless of 11 whether you agree with all, some, or none of the 12 opinion stated in the November 29, 2021, letter. 13       The problem with treating that letter as a 14 determination is that so much of what is discussed 15 there hadn't happened. It hadn't happened. Some of 16 it still hasn't happened. Some of it may never 17 happen. 18       And so they -- they asked the BZA to 19 engage in this hypothetical exercise about what 20 might happen in the future. And they're trying to 21 do the same thing today in terms of the congregate 22 housing argument.</p>

<p style="text-align: right;">Page 152</p> <p>1 And if I could step from the podium, Your 2 Honor. I would like to point at the screen. 3 THE COURT: Sure. 4 MR. LAWRENCE: Mr. Wilburn has this 5 photograph, which on Friday we heard described as an 6 aerial photograph of the three properties that his 7 client owns. 8 And so we've got 20173 labeled here. 9 That's the only property for which a permit has been 10 issued. Okay. The state has issued licenses for 11 two of the properties. The Zoning Administrator has 12 only issued a permit for that one. 13 These two are unpermitted and they cannot, 14 without violating the zoning ordinance, begin 15 operations at those two properties. They have a 16 license for one, but the position of the Zoning 17 Administration -- or the Administrator, my position 18 on behalf of the Board of Supervisors is they can't 19 begin operations there regardless of whether they 20 have a state license until they go through the 21 process of applying for a zoning permit and they 22 satisfy the Zoning Administrator that those</p>	<p style="text-align: right;">Page 154</p> <p>1 There is definitely a problem, because 2 right now they have a state license and a local 3 zoning permit to have five patients, five, at 20173. 4 And the state statute, as Your Honor saw, says 5 eight. 6 And so if they have five patients here and 7 then we look at the license that Mr. Hampshire has 8 submitted and it has got five patients for the 9 second property -- I think it's 20179, but it might 10 be 20191, one or the other -- five plus five is more 11 than eight. Right? That's ten. 12 And so if they're operating this as one 13 facility with ten patients, that -- that could very 14 well be in excess of what the statute addresses. 15 And the Zoning Administrator is aware of that. 16 And they're going to make whatever 17 application they make or they're going to decide 18 this is too hard, we're not going to do it. I don't 19 know. But if they decide that they're going to 20 submit an application, it's up to the Zoning 21 Administrator in the first instance to look at the 22 application, to evaluate these properties, and to</p>
<p style="text-align: right;">Page 153</p> <p>1 properties would be operated in compliance with the 2 zoning code and whatever the requirements are under 3 15.2-2291, that state statute referencing group 4 homes. 5 So what they're asking you to do is, 6 they're asking you to go and make rulings about what 7 would happen and how the law would apply if and when 8 applications are submitted for these properties. 9 Beyond that, though, they're asking you to 10 assume that the Zoning Administrator will make the 11 wrong decision. 12 Now, I don't know if they will submit 13 applications for these properties or not. Mr. 14 Precopio, who is sitting back here in the back row, 15 told the BZA that it was their intention. It's my 16 understanding from Mr. Wilburn that that's being 17 looked at and they're trying to figure out how they 18 can do that consistent with the law. 19 Now, I don't know -- I don't pretend to be 20 a mind reader or future teller. I don't know 21 whether they are going to think they have a way to 22 do it legally or not.</p>	<p style="text-align: right;">Page 155</p> <p>1 decide do I, as the Zoning Administrator, have 2 assurances that these will be operated as separate 3 facilities and that this will not be one gigantic 4 mental health facility with a number of patients in 5 excess of the state statute. 6 And the administrator could look at their 7 application, he could request whatever additional 8 information or assurances he thinks is appropriate, 9 and he could decide I'm not satisfied, I'm going to 10 deny this permit. 11 THE COURT: Am I hearing correctly that 12 you're saying that 20179 and 20191 are not facing a 13 barred timeliness in any appeal they do because it 14 hasn't happened yet? 15 MR. LAWRENCE: It hasn't happened yet. 16 THE COURT: The facts that would under 17 ground [sic] their right of appeal has not happened? 18 MR. LAWRENCE: No application has been 19 submitted, much less decided. 20 THE COURT: Okay. 21 MR. LAWRENCE: And so I told you at an 22 earlier hearing, Judge, the County's interest in</p>

<p style="text-align: right;">Page 156</p> <p>1 this is in having an administrative process that is 2 allowed to work. 3       And if we have decisions coming from the 4 Court telling the Administrator, binding the 5 Administrator, before he had had the chance to 6 review an application and to make a decision, we're 7 going to have chaos. 8       An example from this case is we were 9 before you in September arguing about the letter and 10 they have argument after argument after argument. 11       Well, there is an issue out there with the 12 septic capacity, whether the drain field is 13 sufficient to accommodate eight patients and however 14 many staff people at 20173. 15       THE COURT: And I -- and I ruled that I 16 wasn't going to hear that. 17       MR. LAWRENCE: And you know what happened, 18 Judge? When that went through the administrative 19 process and it was referred over to the Department 20 of Health for its assessment, the Department of 21 Health said, you know what, there is a problem, 22 eight is too many, we're going to limit them to</p>	<p style="text-align: right;">Page 158</p> <p>1 properly appealable. I'm sorry that it said 2 determination. It would have been better if the 3 nonlawyer Assistant Zoning Administrator had said 4 interpretation or something else. But she didn't. 5 She made a mistake and she wrote determination. But 6 that -- 7       THE COURT: You said she made a mistake in 8 the legal analysis or in what way? 9       MR. LAWRENCE: Only in labeling it as a 10 determination. We agree with her reasoning in the 11 letter. 12       THE COURT: So I think we separate, 13 because you hear it in my last question. 14       Is it right or is it a better way to put 15 it or you could have done it better? I think that 16 opinion, taking the interplay with the -- what I 17 call the state agencies, the code, and everything 18 else, was educational for those who made subsequent 19 decisions. But it was a midpoint in their 20 consideration of everything. 21       MR. LAWRENCE: Correct, it wasn't final. 22       THE COURT: Whether it was right or wrong,</p>
<p style="text-align: right;">Page 157</p> <p>1 five. 2       And that's why the license that's in front 3 of you and the zoning permit that's in front of you 4 allows only five and not the eight that Newport 5 requested and not the eight that the statute would 6 allow in a vacuum. 7       THE COURT: Are you arguing that issues 8 surrounding 20179 and 20191 are not before us today? 9       MR. LAWRENCE: That's right. That's 10 exactly right. 11       THE COURT: Go ahead. 12       MR. LAWRENCE: The only way they're before 13 you is on Mr. Hampshire's argument that the November 14 29, 2021, letter is a binding determination that was 15 appealable and that the BZA erred in its decision. 16       But the BZA was right because this septic 17 issue wasn't in front of the BZA. The BZA had no 18 idea about that because no application had been 19 filed. It hadn't been through the administrative 20 process and the professionals who administer these 21 programs hadn't had the opportunity to evaluate it. 22       So the November 29, 2021, letter was not</p>	<p style="text-align: right;">Page 159</p> <p>1 it was in the midpoint. 2       MR. LAWRENCE: And unlike this Court, 3 administrative bodies are allowed to give advisory 4 opinions. This Court is not allowed to do that. 5 This Court has to render adjudications based on 6 existing facts. 7       Now, the other argument that Mr. Hampshire 8 makes, and I don't agree with, is the argument that 9 the November 29, 2021, letter is somehow ripened, 10 that it -- maybe the BZA was right that it wasn't 11 ripe at the time that they ruled, but that it has 12 somehow ripened since then. 13       And I have trouble understanding the 14 analogy. The best I can tell, it used a legal cause 15 of action as something like banana. And you go to 16 the grocery store and there is a shelf full of green 17 bananas. And you look at them and say, well, that's 18 not ripe, I wouldn't want to eat that, but that's 19 okay, I'll buy it, I'll stick it in my pocket, I'll 20 take it home, I'll put it on the window sill and, 21 you know, in a couple days or a week it will turn 22 yellow and it will be good to eat.</p>

<p style="text-align: right;">Page 160</p> <p>1 And I guess he views a legal cause of 2 action as something in -- in the nature of a banana, 3 that you -- you may -- you may pick it, you may file 4 the appeal and it may not be ripe and the BZA at the 5 time may have been correct to determine that it 6 wasn't ripe, but that somehow their decision became 7 wrong based on something that happened a year later. 8 And that doesn't seem right to me.</p> <p>9 We look at the decision the BZA made in 10 the circumstances that existed at the time they made 11 it. And at the time the BZA made the decision that 12 the November 29, 2021, letter wasn't appealable, 13 there was no application for a zoning permit. There 14 was no decision on a zoning permit.</p> <p>15 That letter was just sitting there. There 16 wasn't even a state license. That letter was just 17 sitting there as a list of hypotheticals that 18 Newport ought to consider.</p> <p>19 THE COURT: What in that time period would 20 have been the starting point for the homeowners, the 21 start of their appeal time?</p> <p>22 MR. LAWRENCE: Your Honor, as I said, I</p>	<p style="text-align: right;">Page 162</p> <p>1 right to do anything. It didn't say go forth and 2 commence your use. It said a zoning permit is 3 required to establish the use.</p> <p>4 Our zoning ordinance regulates two things. 5 It regulate structures and it regulate uses.</p> <p>6 Now, here, Newport didn't need a permit to 7 come out and build any structures because these are 8 all pre-existing single-family houses that they just 9 want to repurpose. So they're not asking permission 10 to build a new structure.</p> <p>11 They're asking for permission to put it to 12 a new use. And that's what the zoning permit is 13 required and that's why that letter is not final or 14 appealable, regardless of whether the opinions in it 15 are right or wrong.</p> <p>16 Now, when we turn to the zoning permit 17 itself there are a number of issues that they raise, 18 which I agree we can reach. You can reach the 19 question of, you know, residential versus 20 commercial. You can reach the question of whether, 21 you know, the length of stay matters. You can, you 22 know, address all of Mr. Hampshire's arguments about</p>
<p style="text-align: right;">Page 161</p> <p>1 don't blame then for noting the appeal to the BZA 2 because the letter contained that language, giving 3 them instructions on how to file an appeal.</p> <p>4 But I think those instructions and that 5 language in the letter was in error because it was 6 not a final decision, just like --</p> <p>7 THE COURT: An error because of timing or 8 an error because of content?</p> <p>9 MR. LAWRENCE: Because of substance, 10 because it was discussing and it was based upon 11 things that hadn't happened yet and things that 12 might never happen.</p> <p>13 THE COURT: How about the wisdom or lack 14 of wisdom in the relationship between 2291 and what 15 was happening in the zoning in the County?</p> <p>16 MR. LAWRENCE: I don't think it matters 17 for purpose of whether it's appealable.</p> <p>18 For purposes of whether it's appealable, 19 we don't look to whether the analysis is correct or 20 incorrect. We look to whether it's a final 21 decision.</p> <p>22 And that letter didn't give Newport the</p>	<p style="text-align: right;">Page 163</p> <p>1 how 15.2-2291 ought to be construed.</p> <p>2 The only thing that you can't reach is the 3 question of what happens if and when Newport applies 4 for a second or a third permit, because the Zoning 5 Administrator has to be allowed to make that 6 decision before this Court can review it. They may 7 apply and he may deny the permit or they may apply 8 and he may grant the permit.</p> <p>9 THE COURT: So they would then have a 10 timely appeal?</p> <p>11 MR. LAWRENCE: Correct. That's exactly 12 right. And we were unequivocal about that in the 13 first hearing in front of the BZA, that they would 14 be allowed to appeal the permit and that that would 15 be an appealable decision that they could come from.</p> <p>16 The BZA was unequivocal in its decision 17 that the November 29, 2021, letter was advisory only 18 and it was not appealable. And if they left it 19 there none of what has happened in this court would 20 have happened unless and until they applied for and 21 received a permit.</p> <p>22 And then all of the questions that they</p>

<p style="text-align: right;">Page 164</p> <p>1 want the Court to address, except for the congregate  2 question, would be addressed in the context of that  3 permit. And if they want to litigate the congregate  4 question, that can be litigated if and when Newport  5 applies for a second permit.  6 THE COURT: Let me ask you a question  7 off -- off beat a little bit.  8 If the two pieces of realty that are  9 top -- the top two in that photo over there, in the  10 future have something they want to appeal, can they  11 reasonably argue that the reasoning in the  12 determination letter was used in future decision  13 making?  14 MR. LAWRENCE: I think there are some  15 similarities and there is some overlap. So if this  16 Court rules -- and I'm not presuming how you're  17 going to rule.  18 But if you rule that 15.2-2291 applies to  19 this use of 20173 and Newport comes in with a second  20 application for 20179, the same five patients, the  21 same -- you know, the same state license, I think  22 there would be estoppel issues.</p>	<p style="text-align: right;">Page 166</p> <p>1 I'm just telling you candidly I don't  2 have --  3 THE COURT: But in such a theoretical  4 future, two-party pursuit --  5 MR. LAWRENCE: These two parties?  6 THE COURT: Do we -- do --  7 MR. LAWRENCE: These two parties?  8 THE COURT: No. I think you know where  9 I'm heading.  10 Are you saying that the -- the definition  11 done by -- you know, the written notice analyzing a  12 factor of the two -- the statute and all that, that  13 isn't admissible in the future?  14 MR. LAWRENCE: Well, maybe -- I mean,  15 anything is admissible. You've seen the BZA record.  16 They let anything in.  17 THE COURT: Good. Because I thought -- I  18 thought it's utterly clear that that's admissible if  19 and when it ever gets into something else.  20 MR. LAWRENCE: But that's a different  21 question than whether it's binding.  22 THE COURT: Yes, it is.</p>
<p style="text-align: right;">Page 165</p> <p>1 THE COURT: Why?  2 MR. LAWRENCE: Because they're the same  3 parties and it's the same issue. Now, maybe there  4 would be an argument that it's a different property.  5 But, to me, I think that's a distinction without a  6 difference.  7 I think that -- that that would be very  8 difficult for them to get around. I don't know that  9 the Court --  10 THE COURT: Well, I'm asking the question  11 because I'm listening to all of you and I am trying  12 to get this thing clear and you will get the right  13 result.  14 If those two property owners haven't yet  15 started a cause of action, how can anything that  16 predates their start of their cause of action be  17 time-barred?  18 MR. LAWRENCE: Because all three  19 properties are owned by -- well, it's not  20 time-barred. I'm saying there would be an estoppel  21 issue. They could file an appeal. It wouldn't be  22 untimely.</p>	<p style="text-align: right;">Page 167</p> <p>1 MR. LAWRENCE: Right. And the decision  2 from the BZA and the decision we're asking you to  3 affirm is that it's not legally binding. I mean,  4 people can argue that analysis.  5 THE COURT: I got it. Go ahead.  6 MR. LAWRENCE: People can argue that  7 analysis for whatever purposes they want to. But  8 there's a difference between whether the analysis is  9 correct or not and whether it's a final binding  10 decision or determination.  11 All right. So for all of those reasons,  12 Judge, and the reasons that we have beaten to death  13 in September, November, December and, you know, on  14 Friday, I'm asking you to affirm the BZA in its  15 decision to rule that the November 29, 2021, letter  16 wasn't appealable and that they were correct in that  17 ruling and I would ask the Court to confirm it.  18 Now, when we turn to the substance of the  19 permit case, I think it's important to keep a couple  20 things in mind because for all of the two and a half  21 hours that Mr. Hampshire spoke with Your Honor this  22 morning, there was very little attention given to</p>

<p style="text-align: right;">Page 168</p> <p>1 the zoning ordinance.</p> <p>2       There was some discussion of one of the</p> <p>3 definitions in the ordinance, but there wasn't</p> <p>4 really an opportunity to step through how the</p> <p>5 ordinance actually functions.</p> <p>6       And so it's a long ordinance. You can see</p> <p>7 the binder over there. It's three or four inches.</p> <p>8 But I have taken the liberty of excerpting some of</p> <p>9 the provisions that I believe are of significance to</p> <p>10 Court and I have a copy.</p> <p>11       THE COURT: Thank you.</p> <p>12       MR. LAWRENCE: You've heard a couple of</p> <p>13 times arguments that the zoning ordinance prohibits</p> <p>14 certain uses. All right. It has been said that</p> <p>15 commercial uses are prohibited in the AR-1. It has</p> <p>16 been said that congregate housing facilities are</p> <p>17 prohibited in the AR-1.</p> <p>18       And that, I think, comes from a</p> <p>19 fundamental misunderstanding of how our ordinance is</p> <p>20 structured.</p> <p>21       There are two basic ways that zoning</p> <p>22 ordinances can be structured. The first way is not</p>	<p style="text-align: right;">Page 170</p> <p>1 zoning ordinance, which is they start with a general</p> <p>2 prohibition.</p> <p>3       No building or structure, no use of any</p> <p>4 build structure or land, and no lot of record now or</p> <p>5 hereafter existing shall hereafter be established,</p> <p>6 altered, moved, diminished, divided, eliminated, or</p> <p>7 maintained in any manner except in conformance with</p> <p>8 the provisions of this ordinance.</p> <p>9       And so they're saying everything is</p> <p>10 prohibited. But then in the rest of the four inches</p> <p>11 there is going to be a long list of the things that</p> <p>12 are allowed.</p> <p>13       So that when the hog farmer comes in and</p> <p>14 says, well, it's not a hog farm, it's a hog ranch,</p> <p>15 the Zoning Administrator can look at him and say,</p> <p>16 well, that's a nice try, but because we don't list</p> <p>17 hog ranches either it's still prohibited.</p> <p>18       So Loudoun County doesn't have</p> <p>19 prohibitions on commercial activity. It doesn't</p> <p>20 have prohibitions on congregate housing. What it</p> <p>21 has is a general prohibition and then it has</p> <p>22 permitted uses.</p>
<p style="text-align: right;">Page 169</p> <p>1 our way. Okay. And I think it's the minority</p> <p>2 approach in the United States. That is to identify</p> <p>3 specific uses that the governing body thinks are</p> <p>4 problematic.</p> <p>5       Let's -- let's call it, you know, hog</p> <p>6 farms, for lack of a better analogy, okay. The</p> <p>7 governing body doesn't want hog farms and so they</p> <p>8 wrote a zoning ordinance that says all uses are</p> <p>9 permitted except what we list in this ordinance.</p> <p>10 And the ordinance says hog farms are prohibited.</p> <p>11       And that means hog farms are prohibited,</p> <p>12 but you could have a turkey farm or you could have a</p> <p>13 chicken farm, or you could have a cow farm. Or, I</p> <p>14 guess, you could have a creatively landowner come in</p> <p>15 and say, well, I don't have a hog farm; I have a hog</p> <p>16 ranch. Right? And that's not -- that's not</p> <p>17 prohibited so, you know, why are you trying to shut</p> <p>18 me down.</p> <p>19       And that's the reason why I think that's</p> <p>20 the minority approach. Most jurisdictions,</p> <p>21 including Loudoun County, take the approach that you</p> <p>22 see here in section 1 tack [sic] 103(C) of the</p>	<p style="text-align: right;">Page 171</p> <p>1       And in the AR-1 district, we look to table</p> <p>2 2, tack 102.</p> <p>3       THE COURT: Thank you.</p> <p>4       MR. LAWRENCE: And this is the list of</p> <p>5 uses that are permitted in the AR-1 district. And</p> <p>6 if we look right there at the top of that table we</p> <p>7 see that this is not a residential district.</p> <p>8       It has been referred to as a residential</p> <p>9 district many times, but it's not. That's not what</p> <p>10 the R in AR stands for. It's agricultural rural. R</p> <p>11 does not stand for residential.</p> <p>12       THE COURT: Say that again.</p> <p>13       MR. LAWRENCE: It's agricultural rural. R</p> <p>14 does not stand for residential.</p> <p>15       THE COURT: I'm not following you. Is</p> <p>16 this what I'm supposed to be looking at?</p> <p>17       MR. LAWRENCE: Yes, sir. And if I can</p> <p>18 approach, I'll point it to you. Right here.</p> <p>19       THE COURT: Oh, it's up in the black band.</p> <p>20       MR. LAWRENCE: Yes, sir.</p> <p>21       THE COURT: I got it. Thank you.</p> <p>22       MR. LAWRENCE: So the suggestion that has</p>

<p style="text-align: right;">Page 172</p> <p>1 been made a couple of times that this is a  2 residential district. That's not how -- that's not  3 how our ordinance is constructed. This is an  4 agricultural rural district and the uses that are  5 permitted in that district are contained in this  6 table, which runs approximately seven pages or so.  7 It's divided into categories and I've  8 highlighted them for ease of reference today.  9 So the first category is the agricultural  10 uses. And we have quite a list of them.  11 Now, some of these, I point out, are in  12 fact commercial uses. So if you look right there on  13 the first page, one of the permitted uses is a  14 commercial winery with 20,000 square feet or less.  15 Under that, we have the commercial winery  16 with more than 20,000 square feet. And the  17 difference is one is permitted without any -- any  18 special procedures. The other requires a special  19 exception from the Board of Zoning Appeals.  20 But those are both commercial uses and  21 they are permitted in the AR-1.  22 The idea that commercial uses are</p>	<p style="text-align: right;">Page 174</p> <p>1 MR. LAWRENCE: There are all permitted in  2 the agricultural rural district, which covers, I  3 think, a good 25 percent of the County.  4 THE COURT: Go ahead.  5 MR. LAWRENCE: The next page, we've got  6 public and institutional uses. We've got  7 educational facilities here. Schools are permitted.  8 All kinds of public safety stuff. Religious stuff.  9 We've got utilities. We've got sewage treatment  10 plants. We've got all kinds of things that are  11 permitted in this district, because, again, it's not  12 a residential district.  13 And then if you turn -- I am -- I am on  14 page 5 of the table, Your Honor. We have a whole  15 category of commercial uses, not like back in the  16 agriculture section where I'm looking at them and  17 telling you that even they're in the agricultural  18 category, they're commercial. These are explicitly  19 commercial uses.  20 We have conferences and training centers.  21 We have rural corporate retreats. We have rural  22 resorts. We have coffee houses, banquet facilities,</p>
<p style="text-align: right;">Page 173</p> <p>1 prohibited in the AR-1 is one that I have been  2 struggling to figure where that possibly could have  3 come from, because it doesn't come from our  4 ordinance.  5 If you look on the second page, we've got  6 farm machinery repair. We've got farm-based  7 tourism. We've got farm markets. We've got  8 breweries. We've got nurseries. We've got pet  9 farms, restaurants, sawmills, livery stables. These  10 are all commercial uses and they're all permitted in  11 the AR-1.  12 If you turn to the third page, you see  13 that residential uses are also permitted. And we  14 have two main categories. We have household living and  15 group living. And we'll come back to that.  16 But, again, the point is that the AR-1 is  17 not a residential district. It's a district where  18 some residential uses are permitted, but so are a  19 lot of other uses.  20 We turn to the next page.  21 THE COURT: Would all of these still fall  22 under the general heading of rural?</p>	<p style="text-align: right;">Page 175</p> <p>1 restaurants. We have we offices. We have all kinds  2 of recreation options. We have all kinds of retail  3 sales and services. And then we have all kinds of  4 visitor accommodations, which is interesting because  5 you're being told the fact that these people wrote  6 them out is problematic.  7 Well, what about a bed and breakfast?  8 Those folks don't stay forever. They're not  9 required to reside there indefinitely. They rotate  10 in and out.  11 What about the country inn? What about  12 the country inn with a restaurant with an occupancy  13 of no more than 100? That's a heck of a lot more  14 people than what we're talking about on what Newport  15 is proposing.  16 So the idea, the argument, that the  17 Administrator's analysis is completely inconsistent  18 with the entire zoning ordinance and he has  19 basically gone out of the way to rewrite it as an  20 unelected official usurping the authority of the  21 Board of Supervisors, I have a little bit of trouble  22 swallowing that because the use that Newport is</p>

<p style="text-align: right;">Page 176</p> <p>1 proposing is not inconsistent with anything else 2 that is permitted out there. 3 Now, if that were all there were, I 4 would -- I would have more sympathy with their 5 argument. But the fact is that the zoning 6 ordinance, as it is written, specifically compels 7 the result the Zoning Administrator reached. 8 So going back to residential section table 9 2, tack 102, we've got household living and we've 10 got group living. And one of the permitted uses 11 here under household living is dwelling, 12 single-family detached. That's a defined term. 13 THE COURT: Right. 14 MR. LAWRENCE: And if we go to the 15 definitions, we can read the definition. 16 THE COURT: Thank you. 17 MR. LAWRENCE: So we see the definition of 18 dwelling, single-family detached, this is the 19 definition adopted by the Board of Supervisors, not 20 one surreptitiously inserted by an unelected 21 official, the definition is a residential dwelling 22 unit, other than a portable dwelling, designed for</p>	<p style="text-align: right;">Page 178</p> <p>1 MR. LAWRENCE: Well, Judge, you -- 2 THE COURT: You may, in the hall or over 3 the phone may have heard it, but I haven't heard it 4 in open court. 5 MR. LAWRENCE: I'm glad to hear that, 6 Judge. I really am, because these folks -- 7 THE COURT: Nor have I created it in my 8 own listening. I haven't heard anything like that. 9 I've heard people accused of being wrong, which 10 happens always. 11 MR. LAWRENCE: These folks may be wrong. 12 THE COURT: Not a motive outside the fair 13 game of a honest government. I haven't heard 14 anybody say that. 15 MR. LAWRENCE: I'm glad to hear that, 16 Judge. Maybe I'm -- maybe I'm a little sensitive 17 based on other things I've heard about these folks 18 in this case. 19 MR. HAMPSHIRE: You know, I can represent 20 for the Court, I've never said that in -- 21 THE COURT: You don't have to plead guilty 22 to that which you have not been charged with.</p>
<p style="text-align: right;">Page 177</p> <p>1 and occupied by one family only and not structurally 2 connected or attached to any other dwelling. 3 All right. You may be wondering where I'm 4 going and when I'll get there. But I didn't write 5 the ordinance. I just have to argue it. 6 THE COURT: Thank you. 7 MR. LAWRENCE: What we discover, Judge, is 8 that family, as in the word family, used in the 9 defined term dwelling, single-family detached, the 10 word family is also defined. 11 And the Board of Supervisors defined a 12 family as a group of people living together 13 consisting of, A, one or more persons related by 14 blood or marriage; B, no more than four unrelated 15 persons; and, C, any group identified in 15.2-2291 16 of the Code of Virginia. 17 So, again, Ms. Lohr is not on some 18 improper effort to assist Canadian hedge funds in an 19 elicited matter by looking at 2291. That code section 20 is read into -- 21 THE COURT: I haven't heard anybody accuse 22 anybody of covert favoritism.</p>	<p style="text-align: right;">Page 179</p> <p>1 MR. LAWRENCE: So where does that leave 2 us? That leaves us with kind of a babushka doll, 3 the Russian nesting dolls, where the definition of 4 family incorporates the code section. So the code 5 section is incorporated into the definition of 6 family. It's incorporated into the definition of 7 dwelling, single-family detached. 8 And so if we look at 15.2-2291, which I 9 didn't bring a copy of because everybody else has 10 already brought so many copies of it. 11 THE COURT: I've got one handy up here. I 12 might need help getting to it. Let's see. 13 MR. WILBURN: Tab 6 in our binder. 14 THE COURT: I've have -- I keep telling 15 you, I got more help than you realize. 16 Okay, I've got it. 17 MR. LAWRENCE: So here is 15.2-2291. And 18 we know from the definition of family that the Board 19 of Supervisors has defined family to include any 20 group identified in 15.2-2291. 21 And so when we look at 15.2-2291, I see 22 two groups. I see the group under Subsection A,</p>



<p style="text-align: right;">Page 180</p> <p>1 which consists of no more than eight individuals 2 with mental illness, intellectual disability, or 3 developmental disabilities residing with one or more 4 resident or nonresident staff purposes -- persons. 5       The other group I see is in Subsection B, 6 which is no more than eight aged, infirm, or 7 disabled persons residing with one or more resident 8 counselors or other staff persons. 9       And so there has been a lot of discussion 10 and there has been a lot of argument about what the 11 Attorney General said about this or what some other 12 court in some other jurisdictions said about that. 13       But the Zoning Administrator is not 14 dealing with Fairfax or some other far-flung 15 jurisdiction and whatever their Board of Supervisors 16 did. 17       He is dealing with the ordinance that our 18 Board of Supervisors enacted here. 19       And so the most natural reading of these 20 various definitions and provisions is that these two 21 groups in 15.2-2291 are by definition -- and that's 22 by definition in our ordinance, separate and apart</p>	<p style="text-align: right;">Page 182</p> <p>1 Behavioral Health and Developmental Services, which 2 brings in to play 2291. The County is talking about 3 their relationship with that agency. 4       MR. LAWRENCE: Absolutely. It has to be. 5       THE COURT: So it recognizes that there is 6 a presence in government that may or may not have 7 something they ought to look at when they're doing 8 their zoning or their other permit issuance. 9       MR. LAWRENCE: And any -- any group of 10 eight aged people wouldn't be a dwelling, 11 single-family detached for purposes of our 12 ordinance. They have to be eight aged people living 13 in a home that has been licensed by the Department 14 of Social Services under Subsection B. 15       Or for purposes of our case, the eight 16 persons with mental illness and intellectual 17 disability or developmental disabilities, they have 18 to be residing in a licensed facility under the 19 supervision of the Department of Behavioral Health 20 and Developmental Services. 21       THE COURT: But that's the County zoning 22 ordinance and your -- and your subpart A. You're</p>
<p style="text-align: right;">Page 181</p> <p>1 from the definitions the Legislature wrote into 2 those sections. The groups are families. 3       And so when the Zoning Administrator says 4 that this is a permitted use, he is not engaged in 5 some exercise to rewrite the statute. He is looking 6 at the table. He is saying dwelling, single-family 7 detached. That is a permitted use. 8       And based on the way the Board of 9 Supervisors has defined dwelling, single-family 10 detached and based on the way they define family, 11 and based on their reference to the groups in 12 15.2-2291, what Newport has applied to do is a 13 dwelling, single-family detached by definition for 14 purposes of our ordinance. 15       And I don't want that to get lost sight 16 of, because there is a lot of arguments about the 17 15.2-2291 that I am not sure mean anything once you 18 look at our ordinance and how our Board of 19 Supervisors has defined it. 20       THE COURT: Well, the local -- I mean, 21 we're talking about the piece of paper you just gave 22 me. The County refers to the Department of</p>	<p style="text-align: right;">Page 183</p> <p>1 reading a sentence from the County's definition of 2 homes. 3       The end of that paragraph is where we pick 4 up Department of Behavioral Health and 5 Departmental -- as the licensing authority. They're 6 integrated. 7       MR. LAWRENCE: I agree. 8       THE COURT: To do that job right you have 9 got to look at both. 10       MR. LAWRENCE: You got to look at both. 11       THE COURT: Which is exactly what the 12 determination letter did. 13       MR. LAWRENCE: But I don't think the 14 determination letter, as they describe it, has all 15 the facts. It doesn't -- 16       THE COURT: They did not have a 17 hundred percent dotted Is and crossed Ts. They had 18 the same substantive concepts discussed. The same 19 concept as what, if anything, outside of Loudoun 20 County should we talk about. 21       The document you've got me reading, it 22 ends with Department of Behavioral Health and</p>

<p style="text-align: right;">Page 184</p> <p>1 Developmental Services, their licensing authority. 2 So the concept, genetic in nature, of that 3 agency comes up. So that's why -- that's the only 4 reason I talk about it's included in the 5 determination letter. Whoever did it looked at the 6 section. 7 MR. LAWRENCE: Here's my concern, Judge. 8 Okay. If you look at that letter, the November 29, 9 2021, letter, and you say for purposes of argument 10 everything the Administrator did was entirely 11 correct, I'm going to say that the BZA should have 12 affirmed him, here's the problem I'm concerned -- 13 THE COURT: Just a second. The 14 confirmation of BZA you think is what I'm going to 15 do? 16 MR. LAWRENCE: That's what I'm asking you 17 to do. 18 THE COURT: Or what you're going to do? 19 MR. LAWRENCE: That's what I'm asking you 20 to do. I don't know what you're going to do. 21 THE COURT: I don't either. I'm listening 22 to very learned people give me a ton of paper and</p>	<p style="text-align: right;">Page 186</p> <p>1 right. Well, here's -- 2 THE COURT: Why wouldn't I touch them him 3 both? 4 MR. LAWRENCE: Here's the problem that 5 that will create for me. 6 Mr. Wilburn is not the only smart lawyer 7 out there and his client is not the only party with 8 projects in Loudoun County who has a lot of money 9 and can hire smart lawyers. 10 And so here's the problem that I'm 11 concerned about. Some other person, not named John 12 Wilburn, writes a letter to the Zoning Administrator 13 and they present a set of hypothetical facts that 14 have been cherry picked and they put that in front 15 of the Zoning Administrator and he look at that and 16 says, yeah, it looks right to me, I think you would 17 be allowed to that. 18 And then we find out that was only half 19 the story, that there were a lot more relevant and 20 material aspects of that proposal that were never 21 disclosed to the Administrator in the letter and 22 that the Administrator didn't have the opportunity</p>
<p style="text-align: right;">Page 185</p> <p>1 months of study. I've got a test. I've got to pass 2 a test by understanding all of these different 3 parts. 4 MR. LAWRENCE: So if you affirm the BZA 5 and you agree that they were correct in their 6 decision that the November of 2021 letter was 7 advisory only and that it's not legally binding, 8 that doesn't cause me any problems on behalf of the 9 Board of Supervisors. 10 If you look at that letter and you say 11 everything in that letter is correct, why shouldn't 12 I affirm it, why shouldn't I say that the BZA should 13 have affirmed it, you do cause me problems. And I 14 would like to explain why. 15 THE COURT: Why would you -- why would you 16 object to the determination letter being a part of 17 action by the zoning person -- 18 MR. LAWRENCE: Here's -- 19 THE COURT: -- if, in your theoretical 20 question you just asked me, there both right? You 21 just assumed there both right. 22 MR. LAWRENCE: I do think they're both</p>	<p style="text-align: right;">Page 187</p> <p>1 to address the way he would if he had an application 2 in front of him. 3 THE COURT: But if it's true that the 4 question -- the theoretical letter asked him 5 questions -- asked a lot of questions not before us, 6 that wouldn't have anything to do with what I'm 7 doing here, because I know what was written and what 8 was said. I'm dealing with that, not with what 9 might have been. 10 MR. LAWRENCE: But what I'm concerned 11 about is your -- your making a ruling that that is 12 binding. Because it may be fine in this case. It 13 may be consistent with the permit that eventually 14 came. 15 But in a future case, in a different case, 16 those two might not line up and then we could have a 17 Zoning Administrator who is concerned that he may be 18 bound by an opinion he rendered without having all 19 of the facts. 20 THE COURT: The binding possibility was 21 not what I was asking you about. What I was asking 22 you about was the interplay if the determination</p>

<p style="text-align: right;">Page 188</p> <p>1 letter is right and it is the basis for later acts 2 by that Zoning Administrator or County -- County 3 decision makers, how that impacts their decision. 4 That's all I was asking about. 5 MR. LAWRENCE: I don't think that's what 6 the record reflects. I think the record reflects 7 that the permit -- 8 THE COURT: Bear with the fact I would 9 have asked the question anyhow, because I relate 10 different things in different ways. You have lived 11 with this case forever. 12 MR. LAWRENCE: Yes, sir. 13 THE COURT: But go ahead. We don't need 14 to stay on that. 15 MR. LAWRENCE: If they really were 16 connected, if the Zoning Administrator, for example, 17 on the permit, if he wrote for the reasons stated in 18 the November 29, 2021, letter, the permit is 19 granted, then I would agree with Mr. Hampshire and I 20 would think that Your Honor would be correct to 21 address them both that way. And, frankly, I would 22 have thought that the BZA would have been perhaps</p>	<p style="text-align: right;">Page 190</p> <p>1 single-family dwelling under our zoning ordinance. 2 That is why he is correct to -- to issue the permit. 3 THE COURT: Okay. 4 MR. LAWRENCE: I would like to address 5 some of the arguments in 15.2-2291. 6 There has -- there has been a lot of 7 discussion about this addiction issue. I -- I was 8 happy to hear Mr. Hampshire say that he reread the 9 Southern Management case, because the way that -- 10 the way I thought I heard him describe that on 11 Friday wasn't what I recollected. 12 That case is pretty clear that addiction 13 is not a perpetual condition for purposes of this -- 14 this type of statute and for the federal Fair 15 Housing Act. 16 Instead, they're looking at active use. 17 They're looking at an active substance abuse problem 18 in terms of a disqualification. 19 Mr. Wilburn addressed that on behalf of 20 his client below and they were, in my mind, pretty 21 clear that they do not intend to and are not 22 permitted to treat addiction at this facility.</p>
<p style="text-align: right;">Page 189</p> <p>1 incorrect in its approach. 2 But that's not -- that's not what 3 happened. The Administrator is looking at the 4 zoning permit application. And the future 5 applications, if they come, he will be looking at 6 those and he will be asking whatever additional 7 questions -- 8 THE COURT: At this point I got to tell 9 you what I was additionally thinking. How does it 10 hurt the person who makes the eventual decision for 11 the County if previous documentation by an employee 12 or other person was right? How does the later actor 13 somehow have a negative impact because the other 14 person said something that agreed with or was 15 correct legally? But we're covering this beyond its 16 merit. 17 MR. LAWRENCE: Because in a future case it 18 might not be right. 19 THE COURT: We're talking too much about 20 it. It's not decisive. Let's go. 21 MR. LAWRENCE: Okay. So that's our 22 assessment, Judge, of the permit. This is a</p>	<p style="text-align: right;">Page 191</p> <p>1 Mr. Wilburn went so far as to say that 2 that would be a violation of their state license if 3 they were to try to treat addiction at this 4 facility. 5 Beyond that, the issue of co-morbidities 6 that -- that has come up, they have represented to 7 the BZA and to the -- and to the County staff that 8 they screen for active addictions, that they test 9 for active use or abuse, and that those people, if 10 somehow they make it through the screening and into 11 the program, that they will be discharged, that they 12 will be removed from the Newport facility and sent 13 elsewhere. 14 Mr. Hampshire pointed you at the close of 15 his argument to a number of documents where Newport 16 describes drug treatment. And the County's 17 understanding is that this is an organization with 18 multiple facilities across the country. They don't 19 have just one facility in Loudoun County. You can 20 see that from the license documents that Mr. 21 Hampshire handed up. 22 They have got this licensed group home in</p>

<p style="text-align: right;">Page 192</p> <p>1 Loudoun County. Down in Fairfax they have something 2 that sounds more akin to a hospital for seriously 3 disturbed individuals. 4 They are different facilities. They treat 5 different things. 6 And so I went through the documents pretty 7 carefully and I don't see any indication that 8 Newport intends to treat drug addiction at this 9 facility. I don't see anything that contradicts the 10 representation -- 11 THE COURT: The advertising brochure I was 12 handed the other day, where I didn't let that in, 13 talked about addiction being a subject matter in 14 southwest Virginia or somewhere else, not here. 15 That's how that, I think, came up. 16 MR. LAWRENCE: What struck me -- 17 THE COURT: Advertising or literature 18 regarding other facilities. 19 MR. LAWRENCE: You know, I don't -- I 20 don't know. What I can tell you, Judge, is that the 21 County does not believe that Newport is authorized 22 or could lawfully treat substance abuse or that they</p>	<p style="text-align: right;">Page 194</p> <p>1 address the length of residence. And I just -- I 2 think we have to keep in mind the Zoning 3 Administrator is administrating the ordinance. He 4 is not administering something else. 5 And so if that limitation, if there is -- 6 if there is to be a legal prohibition on a 45-day 7 stay or a 30-day stay or any other length of stay, 8 it has to come from somewhere. And I'm not aware of 9 that being anywhere in our ordinance. 10 It doesn't appear to be in the statute 11 that is referenced either. There is nothing here 12 about length of stay. 13 The argument about whether this is a 14 residential facility or not, there has been a couple 15 of different angles to that and I would like to 16 address them both. 17 So the last sentence reads, for purposes 18 of this subsection residential facility mean any 19 group home or other residential facility for which 20 the Department of Behavioral Health and 21 Developmental Services is the licensing authority. 22 And so at times during these proceedings</p>
<p style="text-align: right;">Page 193</p> <p>1 could have active drug addict patients at this 2 facility without violating the zoning ordinance. 3 THE COURT: I think it's clear that if a 4 person under their care in that house is using 5 illegal drugs, they're obligated to stop. 6 MR. LAWRENCE: They're obligated to 7 discharge them, to send them to a different 8 facility. 9 THE COURT: It's another word for stop. 10 MR. LAWRENCE: Yes, sir. 11 THE COURT: So, yes, I think that's clear. 12 MR. LAWRENCE: Well, I just -- I just want 13 it to be clear because people keep raising it as 14 though it's an open issue, as though -- you know, it 15 was referenced to something that the Zoning 16 Administrator should have written into the permit. 17 And I know he wrote the exact language from 18 15.2-2291 into the permit. It's written into the 19 permit, exactly the limitations from the statute. 20 The argument about length of residence and 21 the definition of residential facility. I don't 22 know of anything in the zoning ordinance that would</p>	<p style="text-align: right;">Page 195</p> <p>1 we've heard the argument that this isn't a 2 residential facility because it's commercial and 3 that commercial uses aren't permitted. 4 And I think we have disposed of that by 5 looking through table 2, tack 102. 6 The other point that I think the Court has 7 to keep in mind is that would -- what would 8 essentially rewrite the statute because, as much as 9 Mr. Hampshire likes the word any in 2309 when it 10 refers to any decision, determination, et cetera, 11 his reading of this statute basically lines that out 12 because the statute reads for purposes of this 13 subsection residential facility means any group 14 home. 15 It doesn't say any government group home 16 or nonprofit or noncommercial. It says any group 17 home. And that's -- that's as far as I can tell 18 where the analysis ought to end because if you look 19 at the license, it's a group home. That is how it's 20 licensed. 21 Now, these folks seem to think that, you 22 know, it shouldn't fall within the provisions of</p>

<p style="text-align: right;">Page 196</p> <p>1 this section. And if there is an issue with the way  2 that the department is issuing licenses, if they are  3 calling things group homes that maybe shouldn't be  4 called group homes, that is a question for a  5 different forum. That's a question for the  6 governor, the legislature, a Court with authority to  7 review these licensing decisions.</p> <p>8 And in this context, in the case that  9 we're here on, we're here on a BZA appeal. And so  10 we have to keep in mind under the University Square  11 case from 1992, I believe -- I'm sorry, 1993.  12 That's 246 Virginia 290. The Court sitting in its  13 appellate capacity has only the authority that the  14 BZA or the Zoning Administrator would have.</p> <p>15 The Zoning Administrator doesn't have  16 authority to review or disregard licensing decisions  17 by the department. The BZA doesn't have that  18 authority either.</p> <p>19 The Zoning Administrator was required to  20 just accept that as a fact. The state has issued a  21 license and the state has said this is a group home,  22 so therefor it's a group home.</p>	<p style="text-align: right;">Page 198</p> <p>1 say any group home and.  2 And so under the -- under the Barr case,  3 Barr against Town and Country Properties -- that is  4 seminal case essentially on statutory construction  5 from 1990. You have to give the provision its  6 common and ordinary meaning and you can't -- you  7 can't rewrite it. You can't remove or and insert  8 and or things of that nature. And --</p> <p>9 THE COURT: If you're talking about  10 individual residences somehow becoming one or more  11 linked, looking at that aerial and the distance and  12 everything involved, it's highly unlikely that  13 anybody is going to connect the three houses.</p> <p>14 MR. LAWRENCE: Well, it's a question for a  15 future case if and when they apply for a permit.</p> <p>16 THE COURT: Well, there is a predictive  17 negative result if you do that under the present law  18 because it says you've got to have one -- you're  19 dealing with one place, you're not going to have  20 bigger units.</p> <p>21 At least the moment that I'm adjudicating  22 in, it's very clear, you're talking about</p>
<p style="text-align: right;">Page 197</p> <p>1 Anybody wishing to challenge that  2 licensing, or that categorization, would have to do  3 that somewhere else because the -- that  4 Administrator doesn't have that authority and the  5 BZA doesn't have that authority.</p> <p>6 In sitting in its appellate capacity, the  7 University Square case say that this Court is  8 similarly restricted. Even if you could take it up,  9 if there were an individual action brought, you  10 know, say that challenged he licensing regulations  11 or to challenge the specific license that was  12 brought in this case, you know, by way a declaratory  13 judgment action or something like that, you can't do  14 it in this case. You're constrained.</p> <p>15 And so the other reading that I -- that I  16 think I heard Mr. Hampshire offer is that any group  17 home or other residential facility ought to be  18 treated as -- as one thing, and that residential  19 facility in the phrase other residential facility  20 limits or restricts the category of group home.</p> <p>21 And so I just don't think that could be  22 right because it says any group home or. It doesn't</p>	<p style="text-align: right;">Page 199</p> <p>1 nonconnected buildings.  2 MR. LAWRENCE: The issue that has come up  3 in other jurisdictions, Your Honor, and the issue  4 that could come up here, potentially, I don't know  5 whether it will or not, is if the -- the three  6 separate unconnected buildings are treated in  7 practical terms as one facility.</p> <p>8 So if you have the same staff serving all  9 three and if you have all three sets of patients  10 using the entire property as one common campus, it  11 could start to look an awful lot like one 25-acre  12 parcel with 24 patients, as opposed to the more  13 limited single-family home, no more than eight  14 patients that the legislature wrote into the  15 statute.</p> <p>16 So there are potentials for -- for abuse.  17 You know, there had been things in other  18 jurisdictions that looked a lot like the provider  19 was trying to stretch this provision beyond what it  20 was really intended to do in ways that affected the  21 people around them.</p> <p>22 And what I can tell you is that the Zoning</p>

<p style="text-align: right;">Page 200</p> <p>1 Administrator is aware of that possibility. And, 2 again, he has to be allowed to evaluate that and 3 make a decision before the Court could review it. 4 So we're not asking you to rule on that 5 today. We think it would be premature. 6 THE COURT: You don't need to, because I'm 7 convinced that we're presently dealing with one 8 separate building. 9 MR. LAWRENCE: One building. 10 THE COURT: We're not going to have a fake 11 connector and make one building and two buildings 12 the same building or claim that because the nurses 13 walked back and forth across the parking lot that 14 they become the same building. That's -- that's 15 irrelevant to what you and I are living with here. 16 MR. LAWRENCE: We've got one permit, one 17 facility, five patients. In our view, it's clearly 18 within both the statute and the ordinance. The 19 Administrator was correct to issue the permit. The 20 BZA was correct to confirm it. And would ask you to 21 confirm it as well. 22 THE COURT: Thank you.</p>	<p style="text-align: right;">Page 202</p> <p>1 Annie Gendaszek who is in charge of 2 compliance. A lot of what our neighbors were 3 concerned about is compliance with these rules and 4 licenses. And she is here today to show her 5 commitment to it. 6 Our General Counsel is here as well, Keith 7 Thompson. 8 And Mr. Precopio, the CEO, who testified 9 at the BZA and some statements here as well. 10 And we appreciate the petitioners and the 11 arguments they made. We know its a difficult issue 12 and we want to be good neighbors and we want to be 13 good members of the community. 14 Turning to -- turning to the legal issues, 15 though, Your Honor, I want to start by saying that 16 the Zoning Administrator's decision was correct. It 17 was correct. 18 There's a lot discussion about whether it 19 was ripe, whether it was appealable or not. And I 20 agree with the County that it was not ripe and not 21 appealable for the reason that the County attorney 22 pointed out.</p>
<p style="text-align: right;">Page 201</p> <p>1 MR. LAWRENCE: Thank you, sir. 2 THE COURT: How long are you going to be? 3 MR. WILBURN: I'm going to try to be 4 quick, but I would think 45 minute. 5 THE COURT: I'm going to take a break. 6 MR. WILBURN: I appreciate that too, Your 7 Honor. 8 THE COURT: What do you -- how about 15 9 minutes? 10 MR. WILBURN: That would be appreciated. 11 THE COURT: Okay. 12 MR. WILBURN: Thank you. 13 (Recess from 3:05 p.m. to 3:20 p.m.) 14 THE COURT: Go ahead. 15 MR. WILBURN: Good afternoon, Your Honor. 16 My name is John Wilburn. I'm with McGuireWoods. 17 Thank you for your patience with us today and the 18 time you're taking. 19 I also do appreciate working with Mr. 20 Hampshire and the arguments he has made. 21 And I wanted to introduce the Court to my 22 clients, who are also present.</p>	<p style="text-align: right;">Page 203</p> <p>1 The other two properties had not applied 2 for a permit. We don't know what a permit 3 application would look like, whether the County 4 would approve it or reject it. 5 If they rejected it, there would be an 6 opportunity to appeal by us or, if they approved it, 7 the petitioners could. 8 And I cited a case on Friday, City of 9 Fairfax against Shanklin, exactly on point with this 10 issue. And there, the Virginia Supreme Court said 11 that a case where a permit had not been requested or 12 issued, that had not been reviewed by the BZA, was 13 not ripe for adjudication, that there were left open 14 too many speculative occurrences. One, whether the 15 land owner would ever apply for a permit; two, 16 whether it would be granted or denied and how the 17 BZA would handle it. 18 And that's the circumstance here. You 19 heard the County attorney agree with -- or knowledge 20 your question and agree that the petitioners, if we 21 apply on 20179 and 20191, that if we applied for a 22 permit, and let's say it was granted, that they</p>

<p style="text-align: right;">Page 204</p> <p>1 would have a cause of action to that, they could 2 exercise their rights of appeal. 3       So the issue is not ripe. It won't be 4 ripened unless and until we apply for a permit. 5       The last point I'll say on this is, Your 6 Honor may recall the issue of the stipulations 7 between counsel. And we talked about this a lot on 8 Friday. 9       But the second of the two stipulations was 10 counsel asking the Court previously, on February 21, 11 to hear argument on these other two properties. And 12 I complained then that it wasn't ripe and why 13 litigate these issues that are not ripe only to, at 14 some point in the future, face litigation again if 15 and when we apply for a permit. 16       And counsel said then we agree that we 17 won't do that if you allow us to litigate these 18 issues, we will waive our right to appeal. 19       And so Your Honor noted in the transcript 20 these other two pieces of property are not yet ripe 21 enough, but we're going to proceed with that 22 agreement.</p>	<p style="text-align: right;">Page 206</p> <p>1       The property -- here is a picture of the 2 property. It's a six bedroom, five bathroom 3 property on about three acres. Adjacent to it is 4 another 10 to 12 acres that we own to the right. 5       The permit application was -- that we 6 applied for was only for 20173, no other properties. 7       The zoning permit, which is part of the 8 record -- it's at Tab 2, it's in the record -- was 9 only for 20173; no other properties. 10       The appeal -- the appeal that the 11 petitioners filed, they identified the address of 12 the property at issue is 20173 Gleedsville Road. 13       The staff report that was before the BZA 14 was only 20173. The staff's presentation was only 15 20173. These other properties were not part of 16 that. 17       And the decision was 20173. 18       And as Your Honor knows, you're sitting in 19 appellate function of that process, that 20 administrative process. And you have a record in 21 front of you on 20173. 22       And so we believe, and we would submit,</p>
<p style="text-align: right;">Page 205</p> <p>1       Now, of course, as Your Honor knows, 2 petitioners withdrew that stipulation. And we 3 recognize that has been withdrawn. 4       But what that means is the petitioners are 5 asking you to find that litigation on 20179 and 6 20191, asking you to find it's ripe enough to rule 7 today. But, if you rule against them, they reserve 8 the right to litigate those issues if and when we 9 apply for a permits. 10       So it is a classic advisory opinion there 11 asking you to render. I won't spend any more time 12 on this unless Your Honor wants me to. 13       But as to that first case, two things that 14 are important. One, the Zoning Administrator's 15 letter was absolutely correct in terms of the 16 analysis. But, two, it's probably not ripe for 17 decision. 18       But if you do decide the issue, I would 19 ask you to affirm her reasoning. 20       The second case is the permit. That's the 21 case that we're here on. That's the case that is 22 ripe and should be decided.</p>	<p style="text-align: right;">Page 207</p> <p>1 that Your Honor is powered to make a decision on the 2 propriety of the permit for 20173. And we think 3 that the permit was properly issued. 4       Now, the County attorney went through, I 5 think very effectively, the zoning ordinance. 6       But I would like to say before talking 7 specifically about that, is I would like to address 8 the petitioner's first argument. And much of the 9 argument that Mr. Hampshire very ably made was that 10 we, meaning Newport, and the County were taking the 11 position that the license preempts -- somehow the 12 licensing process preempts the local zoning 13 ordinance. And that was about an hour of argument. 14       And I can tell the Court, we've never made 15 that argument. To my knowledge, the County has 16 never made that argument. It's a strawman. 17       What the license does is it provides one 18 element, one element, that's required in -- in the 19 statute for. And so the idea that we're asking you 20 or you need to decide a preemption question or not 21 is simply a strawman. It needs not be decided. 22       THE COURT: Help me recall something that</p>

<p style="text-align: right;">Page 208</p> <p>1 we did early in this case. I made a finding that --</p> <p>2 in an early hearing that it was premature. And</p> <p>3 wasn't that based, in part, upon the absence of a</p> <p>4 license?</p> <p>5 MR. WILBURN: Your Honor continued the</p> <p>6 case at the petitioner's request because we had not</p> <p>7 obtained a license yet. That's correct.</p> <p>8 THE COURT: Go ahead.</p> <p>9 MR. WILBURN: But I think your question</p> <p>10 and answer that I just gave underscored why the</p> <p>11 issue for 20173 is ripe and the other two properties</p> <p>12 are not. But in terms of looking at --</p> <p>13 THE COURT: Let me address that. The</p> <p>14 temptation back in February to consolidate, to make</p> <p>15 more efficient, to cut down lawyers hours, and all</p> <p>16 the rest of that, everybody was telling me that it</p> <p>17 was agreed I couldn't do it. I didn't initiate it.</p> <p>18 And I left there thinking we were going to</p> <p>19 deal with everything in this hearing. I didn't</p> <p>20 learn until the day or so before this hearing that</p> <p>21 that -- the stipulated process on how we were going</p> <p>22 to do it had been abandoned. I've expressed an</p>	<p style="text-align: right;">Page 210</p> <p>1 the Court should decide on 20179 and 20191. And the</p> <p>2 stipulation, which I agree, they're not bound to,</p> <p>3 nor should they be if he lacked authority, and I</p> <p>4 accept that, the stipulation was if you -- if you</p> <p>5 decide those issues, Judge -- and we think you can,</p> <p>6 that's the petitioners point.</p> <p>7 If you decide those issues, we'll be bound</p> <p>8 by it. If and when Newport applies for a permit, we</p> <p>9 won't appeal it if it's granted, we'll be bound by</p> <p>10 it.</p> <p>11 So that was the reason for the</p> <p>12 stipulation. And I understand and I agree that it</p> <p>13 has been withdrawn. I don't contest that.</p> <p>14 But there's a consequence to that. What</p> <p>15 it does is it reinforces -- because they have that</p> <p>16 remedy later, because if and when we apply for a</p> <p>17 permit on 20179 or 20191, if it's granted they've</p> <p>18 expressed an intention and they would have a right</p> <p>19 to appeal it.</p> <p>20 So it's clearly not ripe now and any</p> <p>21 decision that you gave of those two now would be</p> <p>22 purely advisory.</p>
<p style="text-align: right;">Page 209</p> <p>1 opinion on all that.</p> <p>2 But one of things said was counsel</p> <p>3 suggested he felt unsettled because he didn't feel</p> <p>4 he spent enough time talking that over with this</p> <p>5 client to make an agreement.</p> <p>6 MR. WILBURN: Understood.</p> <p>7 THE COURT: And I decided I'm not going to</p> <p>8 enforce that, that lawyer telling me, as a good</p> <p>9 professional person, either I shouldn't have done it</p> <p>10 or it just wasn't as well-done as it should have</p> <p>11 been. So they are not bound by that today.</p> <p>12 MR. WILBURN: And I, Your Honor,</p> <p>13 completely agree with your approach to that. I told</p> <p>14 Mr. Hampshire before we ever spoke to the Court, we,</p> <p>15 meaning Newport and I, would not take the position</p> <p>16 that we're bound by that second stipulation for the</p> <p>17 reason that you gave. If he lacked client</p> <p>18 authority, and I accept that, then he shouldn't be</p> <p>19 bound by it.</p> <p>20 The reason, though, I raise it is because</p> <p>21 it underscores -- the whole point of that</p> <p>22 stipulation was so that petitioners could argue that</p>	<p style="text-align: right;">Page 211</p> <p>1 But I agree on the stipulation. I don't</p> <p>2 think you should be held to the stipulation if he</p> <p>3 lacked client authority. And I'm not asking you to</p> <p>4 do that.</p> <p>5 THE COURT: I'm not responding because I</p> <p>6 think everything you just said is right.</p> <p>7 MR. WILBURN: I'll skip. I'll try not</p> <p>8 to -- I'll try to move a little quicker than I</p> <p>9 planned, because going third I think my very abled</p> <p>10 colleagues have covered a lot of this.</p> <p>11 But I think the -- part of the argument</p> <p>12 that is sort of lost -- it wasn't lost by the</p> <p>13 County, but in fairness to Mr. Hampshire he didn't</p> <p>14 touch on this definition.</p> <p>15 Mr. Hampshire said to the Court, he said,</p> <p>16 our clients should have an opportunity to have this</p> <p>17 issue decided by the Board of Supervisors; the</p> <p>18 Zoning Administrator shouldn't rewrite the zoning</p> <p>19 ordinance, the Board of Supervisors should and we</p> <p>20 have a public hearing and we could speak and we</p> <p>21 could challenge it.</p> <p>22 Well, the reality is that did happen. It</p>



<p style="text-align: right;">Page 212</p> <p>1 did happen. After 15.2-2291 was passed by the 2 General Assembly -- and to be clear, it starts with 3 zoning ordinances for all purposes shall and it goes 4 on. It was a mandate from the General Assembly to 5 localities everywhere to modify your zoning 6 ordinances to comply with this, to comply with this 7 requirement. 8       And Loudoun County did exactly what they 9 were supposed to do. They went and they modified 10 their zoning ordinance and they added this Subpart C 11 to the definition of family, any group identified by 12 Section 15.2-2291 of the Code of Virginia. It's in 13 the ordinance. 14       So if we meet the four requirements under 15 15.2-2291, then we're deemed a family and we have a 16 by-right -- or by-right use at that location. So 17 it's in the ordinance. It's not something that the 18 Zoning Administrator did on their own without 19 authority. 20       And then you look at the ordinance and I 21 don't believe any of these four elements are truly 22 in dispute. There are some defenses that have been</p>	<p style="text-align: right;">Page 214</p> <p>1 to the BZA. It's not in dispute. But we will have 2 one or more nonresident or resident staff persons. 3 That's the third element. And the four element is 4 the license itself, which indisputably we have. 5       So, Your Honor, the Zoning Administrator 6 and the County were absolutely correct in it's 7 zoning determination and issuing the permit. 8       It's simply four simple elements that if 9 we satisfy each of those elements we are entitled to 10 be a family under the statute. 11       And it's not a confusing statute. When 12 you look at this, the plain language, zoning 13 ordinances for all purposes shall, it's mandatory, 14 consider a residential facility in which those 15 elements are met as residential occupancy by a 16 single family. There is no legal problem. 17       If we satisfy those four criterias we 18 shall be considered residential occupancy by a 19 single family. And that's allowed under the zoning 20 ordinance. 21       So what we have is the petitioners have 22 raised a series of exceptions or arguments that</p>
<p style="text-align: right;">Page 213</p> <p>1 raised and I'll talk about. 2       But they're just four elements to this. 3 It says zoning ordinances for all purposes shall 4 consider a residential facility in which no more 5 than eight individuals -- that's element 6 number one -- with mental illness -- that's element 7 number two -- with one or more nonresident or 8 resident staff persons -- that's number three. And 9 then at the bottom, you have to have a license. 10 Those are the four and the only four requirements of 11 the statute. 12       The Zoning Administrator properly looked 13 at this statute and found that we could comply if we 14 got license and we operate within those. So here's 15 our license. This is at Tab 7. 16       And the license is very clear. We are 17 licensed by the Commonwealth of Virginia and we're 18 licensed -- it's kind of hard to see, but five beds, 19 so that's less than eight. We are licensed as a 20 provider of mental health services. That is the 21 second element. 22       This is in an affidavit that was presented</p>	<p style="text-align: right;">Page 215</p> <p>1 don't appear in the statute, other than the drug one 2 and I'll talk about that in a moment and ask Your 3 Honor to find that the statute doesn't apply for one 4 of those reasons. 5       I think it's worthwhile to note that there 6 is very little direct authority on this statute and 7 this issue, very little authority on. 8       The County has had opportunity to review 9 this statute and applications for occupancy. 10 They've had an opportunity to -- prior to us, at 11 Tab 4 of the binder, which is our -- a copy of the 12 staff report, the staff notes that on at least eight 13 other occasions -- this is Tab 4 and page 7 of the 14 staff report, Subpart B, that one of the obligations 15 of the County is to apply their zoning ordinance 16 consistently. 17       THE COURT: Tell me where you are. 18       MR. WILBURN: Yes, Your Honor. It's Tab 19 4, which is the BZA staff report. 20       THE COURT: What page? 21       MR. WILBURN: It's page 7. 22       THE COURT: Thank you.</p>

<p style="text-align: right;">Page 216</p> <p>1 MR. WILBURN: I only mention this, but 2 this is not a unique -- our request is not an 3 entirely unique circumstance. On at least eight 4 occasions BZA staff acknowledges that they've had an 5 opportunity to opine on the definition of family, 6 including groups, in 15.2-2291. 7 And so the idea that -- the idea that the 8 County is treating us as a family is somehow 9 nominalist or outside the norm is simply incorrect. 10 They have done it historically for other 11 landowners. The zoning ordinance itself mandates 12 that if we meet the requirements of 15.2-2291 that 13 we be treated as a single residential occupancy like 14 a single family, and the statute itself mandates 15 that. So there is nothing unusual about this. 16 I will stay that our specific dispute that 17 we're here on today has, as best I can tell, only 18 been addressed perhaps three times in Virginia. 19 There is the Kaleidoscope case by Judge Bach which 20 dealt with the issue of reside. And I'll talk about 21 that in a moment. 22 And then there is a case in Fairfax that</p>	<p style="text-align: right;">Page 218</p> <p>1 these arguments by Mr. Hampshire's clients in this 2 case have rejected them, both Zoning Administrators, 3 both Boards of Zoning Appeals, and so for the 4 Circuit Court in Fairfax, Judge Bugg. 5 We talked about the zoning ordinance. 6 These are the petitioner's arguments and I'm going 7 to try and tailor this a little bit based on what 8 Mr. Hampshire actually argue today. 9 The first is that this is a congregate 10 housing facility. That's the argument that they've 11 made. I agree with the County, that issue is not 12 ripe and would not become ripe unless and until we 13 connect these three buildings in some way. But 14 that's the argument they've made. 15 The definition of congregate housing 16 facility doesn't support petitioner's argument. 17 Congregate housing facility is defined as the 18 following: A structure other than a single-family 19 dwelling. 20 Other than a single-family dwelling is the 21 first part of that definition. 22 And you can see a photograph of the</p>
<p style="text-align: right;">Page 217</p> <p>1 Judge Bugg decided in January of this year. 2 THE COURT: What judge? 3 MR. WILBURN: Judge Bugg. And what's 4 unique about that case as persuasive authority is 5 Mr. Hampshire was one of the attorneys for the 6 landowners. I was counsel for Newport, same -- the 7 same client, same issues. 8 The arguments that are being raised here 9 today, congregate living versus residential living, 10 commercial use, reside, those arguments, were all 11 made by Mr. Hampshire's clients in the Fairfax case. 12 And in that case, like here, the Zoning 13 Administrator decided against them. It went to the 14 BZA and the BZA affirmed the Zoning Administrator 15 and then Judge Bugg had a trial on the issue -- 16 which I participated in, as did -- Mr. Hampshire was 17 present -- and rejected each of these issues. And 18 we have supplied that opinion at Tab 13. 19 The reason I say that I understand it's 20 persuasive authority rather than -- it's not coming 21 from the Virginia Supreme Court, but I think it is 22 noteworthy is that every entity that has examined</p>	<p style="text-align: right;">Page 219</p> <p>1 structure. It is a single-family dwelling. There's 2 no dispute about that. 3 So it doesn't fit within the definition of 4 congregate housing facility to begin with because 5 that is a structure other than a single-family 6 dwelling. And that's the end of the analysis on the 7 applicability of congregate housing facility. 8 But if you read on, there are other 9 problems with the definition. It goes on to say 10 where more than four unrelated persons reside. And 11 that's the second problem. 12 Congregate housing facility would only 13 apply if it's not a single-family dwelling and they 14 have to be unrelated persons. 15 But by operation of law, our patients are 16 treated as a family. So the definition simply 17 doesn't apply. It doesn't apply because it's the 18 wrong type of structure and it doesn't apply because 19 our patients, by statute, are deemed a family. And 20 this applies to nonfamily members. 21 The second argument is residents must 22 effectively be homeless. And Mr. Hampshire</p>

<p style="text-align: right;">Page 220</p> <p>1 expresses this a little differently than I just  2 said. What he says is they -- they can't have  3 another home to go back to. And that effectively is  4 homeless.  5 And there are no cases, none that  6 Mr. Hampshire cites, none that we can find that  7 support that. There are two pieces of record  8 evidence that the petitioners cite in support of t  9 his agreement.  10 One is our expert's report submitted to  11 the BZA. That's the record at 758, what she  12 describes the necessity of this facility, how it  13 will cooperate, the health benefits of having this  14 type of facility in a residential neighborhood.  15 Ignoring all about petitioner's focus on a statement  16 in the report where she says this is to get them  17 ready to return to their homes. And the petitioner  18 seized on that and argue if they have another home  19 to go to, they're not residents.  20 And no court, no court, has accepted that  21 theory.  22 The petitioner cites to Kaleidoscope,</p>	<p style="text-align: right;">Page 222</p> <p>1 abused and didn't have a home, he wasn't  2 establishing, as the petitioner invite you to do, a  3 per se rule that you have to be homeless to qualify  4 under the statute. He didn't say that at all.  5 In fact, and I'm quoting, he wrote, the  6 reasoning that residents -- I'm sorry. The  7 reasoning that residents requires an indefinitely  8 long intention to stay is an erroneous application  9 of the law and is plainly wrong.  10 So he rejected the notion the petitioner  11 is urging the Court to accept, that you can't have  12 another place to go home to, that if you go in for  13 treatment, but you hope to return to your family  14 some day, that you're ineligible. That's not what  15 this case says at all.  16 The argument -- Mr. Hampshire's argument  17 was asserted in the Fairfax case. Again, my client;  18 Mr. Hampshire's landowners; the same issues. We  19 went to trial and got a decision in January. And  20 there, the Court rejected the reading of  21 Kaleidoscope that Mr. Hampshire urges.  22 And I think -- I think the reasoning of</p>
<p style="text-align: right;">Page 221</p> <p>1 Judge Bach's decision for that. But that's not what  2 the case says at all. That's at page -- I'm sorry,  3 at Tab 16 I have the Kaleidoscope case. Your Honor,  4 has read it.  5 But right in the -- on the first page the  6 Court notes that the maximum of eight children may  7 stay at Kaleidoscope for no more than 60 days. So  8 in Kaleidoscope, their stay was defined within a  9 60-day period. That was it. They weren't staying  10 permanently. They weren't staying beyond 60 days.  11 They could stay for no more than 60 days.  12 Mr. Hampshire points out that these were  13 children who were severely abused and taken out of  14 their homes. And the Court noted that. Judge Bach  15 properly noted that. And Your Honor is absolutely  16 correct reading the footnotes and reading between  17 the lines here.  18 THE COURT: The case with blatant criminal  19 activity.  20 MR. WILBURN: That's right. And Judge  21 Bach was clearly trying to signal somebody on that.  22 But in pointing out that these children had been</p>	<p style="text-align: right;">Page 223</p> <p>1 Judge Bugg on this was spot on.  2 I apologize, Your Honor. I just want to  3 pull it.  4 Here is what Judge Bugg wrote: While the  5 residents of Newport Academy have a place to return  6 to, unlike the children in Board of Supervisors,  7 that's the Kaleidoscope case, the children here will  8 still be living at the Newport facility for a period  9 of 30 to 90 days, assigned chores and daily tasks to  10 complete. I'm citing the BZA record.  11 Indeed, this is more than just a temporary  12 sojourn or transient visit, as the children will  13 attend school and return to Newport Academy. The  14 BZA's determination that the children of Newport  15 Academy are residents, the facility was not in  16 violation of the spirit or the purpose of the zoning  17 ordinance or the Fair Housing Act.  18 And so the argument -- the most recent  19 pronouncement by any Court on this issue, dealing  20 with by client and Mr. Hampshire's landowners on  21 this identical argument, on the same authorities  22 cited, Judge Bugg rejected an interpretation that</p>

<p style="text-align: right;">Page 224</p> <p>1 said that you couldn't have another home to go to.</p> <p>2 He said 30 to 90 days was appropriate to</p> <p>3 establish residence. And that's -- that's what the</p> <p>4 case law establishes. I mean, we've cited several</p> <p>5 cases in our brief. I won't spend time on this.</p> <p>6 We cited two cases specifically for the</p> <p>7 proposition that you don't have to be homeless. You</p> <p>8 can have a home to go to. In fact, most people who</p> <p>9 come into treatment programs are coming from a</p> <p>10 family environment, but they're going to an</p> <p>11 environment like ours, in-patient where you enjoy</p> <p>12 the benefits of the residency and then you go home.</p> <p>13 I pointed out, Judge Bugg rejected this</p> <p>14 argument. The actual test is the one that Judge</p> <p>15 Bugg articulated in his opinion. But he really</p> <p>16 takes it from the voluminous case law on this topic.</p> <p>17 It is being treated like your residence</p> <p>18 while you are there. And what that means is when --</p> <p>19 when a patient checks into a Newport facility, are</p> <p>20 they there -- are they sleeping there? Are they</p> <p>21 eating there? Are they staying there during the</p> <p>22 period of their residency? Or -- or, this is not</p>	<p style="text-align: right;">Page 226</p> <p>1 or therapy in the evenings. The residents eat all</p> <p>2 meals in a family-style setting. They will sleep</p> <p>3 there. They will stay there during the period of</p> <p>4 their treatment.</p> <p>5 So they meet the requirements. And</p> <p>6 there's also Tab 9, which is the letter from my</p> <p>7 partner to the Zoning Administrator that explains</p> <p>8 that they will treat these homes as their home</p> <p>9 during the period of their stay. They'll take meals</p> <p>10 there. They will sleep there.</p> <p>11 And that we provided, at Tabs 10, 11, and</p> <p>12 12, statements from former Newport residents that</p> <p>13 describe the program specifically and what it was</p> <p>14 like for them. And they would go there and they</p> <p>15 treated as their home while they were there for 30</p> <p>16 days or 45, 60, or 90. They ate there. They spent</p> <p>17 time with the people that were staying there with</p> <p>18 them. And they slept there.</p> <p>19 So they treat it like their residence</p> <p>20 while they're were there. And that's what the case</p> <p>21 law requires; not this artificial date -- not this</p> <p>22 artificial notion that you have to be homeless</p>
<p style="text-align: right;">Page 225</p> <p>1 what ours do, but do they go home each night? Is it</p> <p>2 treated like an outpatient facility? That's the</p> <p>3 distinction.</p> <p>4 And as long as they are doing the former,</p> <p>5 and that is sleeping there, taking meals there,</p> <p>6 living there during the period of their tenancy,</p> <p>7 then they reside within the meaning of the statute.</p> <p>8 The record is filled with evidence of</p> <p>9 those types of activities. I would direct the Court</p> <p>10 Tab 8. And this was in the record. It's the</p> <p>11 statement of Mr. Precopio, that's the CEO who is</p> <p>12 here today.</p> <p>13 And he submitted a statement in support of</p> <p>14 the application and to the BZA and explained the</p> <p>15 process. And among other things, in paragraph 16 he</p> <p>16 explains how it will work. And what he does say is</p> <p>17 that they will stay there, they will take meals.</p> <p>18 I'm sorry. At paragraph 23 is probably</p> <p>19 the better citation.</p> <p>20 Once there, morning will typically set</p> <p>21 aside for academics, vocational training, therapy.</p> <p>22 Afternoons will be group therapy. Additional study</p>	<p style="text-align: right;">Page 227</p> <p>1 otherwise you don't get any benefit. That law</p> <p>2 doesn't say that.</p> <p>3 In terms of length of stay, Judge Bugg</p> <p>4 found that 30 to 90 days was sufficient.</p> <p>5 Judge Bach, in Fairfax Kaleidoscope case,</p> <p>6 found that 60 days was sufficient.</p> <p>7 The record shows that our length of stay</p> <p>8 will average 47 days, somewhere between 30 and 90.</p> <p>9 And then the case law on length of stay</p> <p>10 overwhelmingly supports us on this point. And we</p> <p>11 have cited these cases. They're all in our briefs.</p> <p>12 They're attached here to the -- to the binder.</p> <p>13 But stays as short as 14.8 days are</p> <p>14 sufficient to reside. That's at Tab, I believe, 17.</p> <p>15 I'm sorry, Tab 17, the Court found six weeks is</p> <p>16 sufficient.</p> <p>17 At Tab 18 in the case law, the Court found</p> <p>18 that 14.8 days was sufficiently long.</p> <p>19 Tab 19, the Court found that one month was</p> <p>20 sufficiently long. And the cases go on and on.</p> <p>21 But this idea that there is a bright line</p> <p>22 length of stay would be incorrect. And we do know</p>

<p style="text-align: right;">Page 228</p> <p>1 from the case law is that stays as short as 14.8 2 days qualifies residence under the statute. In 3 our -- the record shows that we will be well beyond 4 that. 5       So the idea that we don't reside, which 6 was -- was Mr. Hampshire's third argument, is simply 7 not supported by the record and not supported by the 8 law. 9       The second argument that Mr. Hampshire 10 made was that the property is not residential. And 11 I think that is wrong. It is demonstrated a couple 12 of ways. 13       One, it's in the agricultural rural 14 district. You can look at it and see. It appears 15 to be a residential single-family home. But perhaps 16 most importantly, Your Honor, the statute 17 establishes that it's residential. 18       And the second sentence from the bottom, 19 the General Assembly wrote, for the purpose of this 20 subsection, residential facility -- it's in quotes, 21 the General Assembly is now defining it -- means any 22 group home -- any group home or other residential</p>	<p style="text-align: right;">Page 230</p> <p>1 have the license by the Commonwealth as -- not just 2 any group home, a mental health residential group 3 home. 4       So we clearly meet the definition of 5 residential facility in the code section. It 6 matches perfectly between our license and the 7 definition of residential facility in the code. 8       THE COURT: Why on page 2 are there two 9 addresses? 10       MR. WILBURN: This is an argument that the 11 petitioners raise. It comes from a misunderstanding 12 of the license. The license, Your Honor -- go 13 back -- I'll go to page 1 to start the answer to 14 your question. And we've have cited in our trial 15 brief all of the Virginia administrative code 16 regulations that support what I'm about to say. So 17 we've cited these. 18       But the license in Virginia, an entity is 19 licensed. And you can actually see it on the face 20 of this license itself. So on the front page it 21 says, a license is hereby granted to. Hereby 22 granted to. And then it identifies the licensed</p>
<p style="text-align: right;">Page 229</p> <p>1 facility for which the Department of Behavioral 2 Health and Developmental Services is the licensing 3 authority pursuant to the code. 4       So any group home that is licensed by the 5 them. 6       Now, when you go back to our license -- is 7 better to look at this, I think, in the binder, Your 8 Honor. It's Tab 7. 9       It's Tab 7. And the license that we 10 have -- maybe I've got it up here. Now, don't. 11       But Tab 7, Your Honor, is our license. 12 And if you look at the second page of that document. 13 I thought I had it. I apologize. 14       It's here on the screen but it's hard to 15 read. 16       But the second page of this license, you 17 see that we are licensed as a mental health 18 residential group home. A residential group home. 19 And that matches the statute. 20       The statute says for purposes of this 21 subsection, residential facility means any group 22 home licensed by the Commonwealth. And here, we</p>	<p style="text-align: right;">Page 231</p> <p>1 entity. 2       So in Virginia, we are licensed. And our 3 license number is 3517. See that on the lower 4 right-hand side? 5       THE COURT: Yes. 6       MR. WILBURN: So provider gets a license 7 number. And then services -- services are 8 separately licensed. You see that see addendum for 9 listing of licensed services? It's on the front 10 page. 11       THE COURT: Right. 12       MR. WILBURN: So if you turn to the next 13 page, you're at the addendum. And you will see a 14 service license number in -- on the left-hand side. 15 And it starts 3517. That matches our provider 16 number from the first page. That is our license 17 number with the Commonwealth. 18       And then the service is the next five 19 numbers that follow, 01-003. And that number -- 20 that seven numbers corresponds to the number at the 21 top where you see, one, licensed as a mental health 22 residential group home service for adults.</p>

<p style="text-align: right;">Page 232</p> <p>1 The Commonwealth has effectively a menu of 2 mental health services that you can be licensed for. 3 Each one of those has a corresponding number. And 4 when you're licensed, your service license number 5 becomes the combination of your providing number, 6 which is that first page, 3517, and then service 7 numbers. 8 For here it's 01-003. That corresponds to 9 the service we licensed at, which is mental health 10 residential group home service for adults. 11 The reason it -- it's a long-winded way of 12 saying for any service that we provide, any time 13 we're licensed anywhere in the Commonwealth for that 14 particular service, the one that's identified here, 15 it will flow down. It will show locations. It will 16 have 1, 2, 3, 4. 17 So, for example, if we're licensed for an 18 01-003 service in Richmond, or someplace else, it 19 will show up here on this sheet, the addendum where 20 the locations are. 21 So it's simply -- and let me -- before I 22 move off of that.</p>	<p style="text-align: right;">Page 234</p> <p>1 And you can even see from the two 2 addresses on page 2 of this license that they have 3 different applications dates, different effective 4 dates, different modification dates. So they were 5 applied for separately, obtained for separately, 6 modified separately. They are different 7 applications. Different properties. Different 8 effective dates. 9 So this is how licensing is done in 10 Virginia. There is nothing -- there is nothing I 11 about this. If there was a complaint about the 12 licensing, then the petitioners have an opportunity 13 to appeal it under the Virginia administrative code 14 and they haven't done it. 15 But while we're on this, Your Honor, 16 Mr. Hampshire offered this information as one of his 17 factual disputes for the purpose of saying -- he 18 argued to Your Honor, he said the zoning 19 determination required that we have a separate 20 license for each property. 21 THE COURT: That's why I asked you the 22 question.</p>
<p style="text-align: right;">Page 233</p> <p>1 You can see this on the second page. So 2 on the second page you see licensed as and there's a 3 different type of service that we're licensed as for 4 the Fairfax facility. And you see that corresponds 5 to a different license service number. 6 If we had -- if we provided this type of 7 service at more than one location, you would see the 8 locations listed below. So it would be a 2, 3, 4. 9 And then you see another example of that 10 on the third page. The third page shows our 11 licensing at another Fairfax address, an outpatient 12 service. And the service number there is 02-038. 13 And that's outpatient services. 14 So the way the licensing works in 15 Virginia -- again, all of this is explained in the 16 Virginia administrative code and we've cited this. 17 You don't -- they don't license a 18 particular property. They license, number one, a 19 provider. And we have that on the first page, 3517. 20 And they license a service and that corresponds to 21 the service license number. And then they identify 22 the locations where you are licensed.</p>	<p style="text-align: right;">Page 235</p> <p>1 MR. WILBURN: That's right. And I think 2 it's, number one, the foundation of that statement 3 by Mr. Hampshire's is just not true. If we go to 4 Tab 15, and this is what Mr. Hampshire pointed Your 5 Honor to, is the Zoning Administrator determination. 6 And what it says here is, however, the 7 proposed use would be permitted as a dwelling, 8 single-family detached on each of the subject 9 properties if the use meets the zoning ordinance 10 definition of family in the criteria of 11 Section 15.2-2291 of the Code of Virginia, period. 12 And here is the important part according 13 to Mr. Hampshire. Licensure by the Department of 14 Behavioral Health and Developmental Services is 15 required, period. That's all it says. It says 16 licensing is required. We have a license. There's 17 no question we have a license. 18 But, in fact, the operative document is 19 not even -- is not even the zoning determination. 20 It would be the permit. The permit establishes how 21 we can operate. And the permit is at Tab 2. The 22 permit is at Tab 2 of the binder.</p>

<p style="text-align: right;">Page 236</p> <p>1 And when you look at the permit, the very  2 first sentence in the permit is as follows: This  3 zoning permit is approved with the condition that  4 the user maintain licensure by the Department -- the  5 Virginia Department of Behavioral Health and  6 Developmental Services.  7 That's all it says. It says the same  8 thing that the zoning determination said. You have  9 to have a license. That's no different than what  10 the code says. The code says we have to have a  11 license.  12 What the code doesn't say is that you have  13 to have a different license number for every place  14 that you provide services. The code doesn't say  15 that. The permit doesn't say that. The zoning  16 determination doesn't say that either.  17 And it would be impossible to do, as laid  18 out in the Virginia administrative code citations  19 that we gave for the reasons that I described  20 earlier. They don't let -- Virginia doesn't license  21 that way. They license providers. And you see that  22 at page 1. And they license services. And you see</p>	<p style="text-align: right;">Page 238</p> <p>1 facility for which you have the license.  2 And our license literally says licensed as  3 a residential group home. So we certainly meet the  4 definition of any group home that's licensed.  5 Therefore, we are a residential facility.  6 And then it takes you to the top sentence:  7 You shall consider a residential facility who meets  8 the requirements -- and we meet all four of those --  9 as residential occupancy by a single family.  10 It's plain and clear and you don't have to  11 jump around and infer things from a word here or  12 there in the way the petitioners ask the Court to  13 do. It's plain and unambiguous on its face.  14 And if we are, as we are, residential  15 occupancy by a single family, then we are by-right  16 in this AR-1 district. And there is no dispute  17 about that.  18 The -- I'm trying to skip my presentation  19 and focus on what Mr. Hampshire said.  20 One is this -- the drug -- the drug issue.  21 And Mr. Hampshire said, Your Honor, the way that is  22 set up, that a patient could do drugs on one day and</p>
<p style="text-align: right;">Page 237</p> <p>1 that at page 2. And then the addendum will show the  2 location where you are licensed to provide that  3 service.  4 So we have more than satisfied the  5 licensing requirement.  6 And the last point I'll say on this, the  7 culmination of that argument is that our permit is  8 void. There's not a single scintilla of legal  9 authority to support that. Nothing in the zoning  10 ordinance. Nothing in the code. No case law. It's  11 ipse dixit; it's because they say it is. And the  12 foundation for it is wrong.  13 And I'm sorry, Your Honor, I may have lost  14 my train of thought there. But that was the issue  15 with -- with the license.  16 The -- we've talked about reside.  17 Properties as residential is I think what I was  18 talking -- what I was addressing. Perhaps -- I'm  19 trying not to be redundant.  20 But it seems to me, you know, the code  21 couldn't be more clear on this point. Residential  22 facility means any group home or other residential</p>	<p style="text-align: right;">Page 239</p> <p>1 the very next day Newport is going to admit them and  2 deal with it later. That's almost a verbatim quote  3 of what he said during his opening argument.  4 And the record says the exact opposite.  5 It says the exact opposite of those points. In  6 fact, we look at the testimony of Mr. Precopio. And  7 Mr. Precopio not only submitted a statement, which  8 is at Tab 8 of the binder, he also spoke at the BZA  9 hearing.  10 And I spoke at the BZA hearing on this  11 point. I'll tell the Court what I said as well.  12 But the record evidence -- and this is  13 from the CEO of the company. It's beginning at Tab  14 8, paragraph 28. And I'll summarize some of this  15 because there's an awful lot about our compliance  16 policy.  17 And what Mr. Precopio said is, once we can  18 a license, the regulator themselves will audit --  19 audit and review our compliance with applicable  20 regulations and assure their operations fall within  21 our service description.  22 And what that means is -- and I have</p>

<p style="text-align: right;">Page 240</p> <p>1 explained this during a previous hearing -- in 2 Virginia, we have an opportunity to pursue a license 3 for drug treatment or mental health. You can't do 4 both. 5       And we have chosen, obviously, a mental 6 health license. And what that means is the 7 licensing body, they audit our records. So they 8 look at our patient records to make sure that we 9 don't have people in there who are using drugs or 10 being treated. 11       THE COURT: What would your records show? 12       MR. WILBURN: Our records would show that 13 we screen those people out if -- and you see that in 14 the rest of this -- 15       THE COURT: How do you make a record? 16 Daily? Weekly? Or what? 17       MR. WILBURN: Well, yeah, the intake 18 records. And the intake records include some of the 19 following. And this is -- this is part of Mr. 20 Precopio's statement. 21       What we do is, we have a detailed 22 questionnaire to the potential patient. And it goes</p>	<p style="text-align: right;">Page 242</p> <p>1 And in that case the Court was called upon to 2 address the question Your Honor asked, I think on 3 Friday. Does -- current addiction and drug use, 4 what does that mean? And here, the Court said what 5 it means, are you currently using. So if you're 6 using drugs, you're ineligible. 7       And we screen for that and we test for 8 that and we exit those people if and when somebody 9 violates. 10       In the Southern Management case, the facts 11 were so much worse and the Court found that were 12 eligible for the program. In the Southern 13 Management case, your entire population of 14 residents, entire population, were drug users. 15 One hundred percent, because they came out of a drug 16 treatment program. So you knew that one hundred 17 percent of your resident population were -- were 18 drug-addicted people. And they were still 19 allowed -- they were still allowed to get the 20 benefit of the statute. 21       And what the Court there said is you have 22 to have a mechanism to try and screen these people</p>
<p style="text-align: right;">Page 241</p> <p>1 to things like drug use. When was the last time you 2 used drugs? Have you been treated for drug abuse? 3 Those sort of things. 4       We don't rely simply on that. We 5 interview their family. We interview people around 6 them. When was the last time that -- if there is an 7 alcohol or a drug problem, when was the last time 8 they abused? When was the last time they used? 9 That's part of our intake process. 10       If we were to treat -- if we were to 11 intake people and treat these people and not exit 12 them, we would be in violation of our license. It 13 makes no sense that we would be -- 14       THE COURT: How do you know day-to-day 15 they haven't used drugs? 16       MR. WILBURN: Well, we test them one to 17 four times a week. One to four times a week they're 18 tested for drug use. And if a person comes back 19 using, they are immediately exited from the program. 20       And to put this in context, Your 21 Honor, Mr. Hampshire relies upon, and cites with 22 favor, the Southern Management Corporation decision.</p>	<p style="text-align: right;">Page 243</p> <p>1 out. And the mechanism that the Court approved in 2 the Southern Management case was testing people one 3 to times a month -- one to two times a month of no 4 drug usage. And the Court said that was fine. The 5 Court said that was fine, they could avail 6 themselves of the benefit of the statute. 7       We're doing multiples of that. We're 8 screening on the intake. We're talking to the 9 families. We're drug sampling these people one to 10 four times a week. 11       So, Your Honor, we have more than 12 satisfied any requirement that might exist to ensure 13 that we don't bring people in in violation of the 14 statute. 15       And when we look at this, the language 16 here doesn't say you can never treat somebody, you 17 can never intake somebody, who was ever an alcoholic 18 or had a drug problem. It doesn't say that. 19       For the purposes of this subsection, 20 mental illness and developmental disability shall 21 not include current illegal use or addiction of -- 22 or addiction to a controlled substance.</p>



Hearing Transcript

<p style="text-align: right;">Page 244</p> <p>1 Well, we screen for that. We do 2 everything we possibly can. The state monitors us. 3 The state audits us. The state does surprise snap 4 inspections without notice. They do planned 5 inspections. We do all of these things. 6 And if you would accept the petitioner's 7 argument on the possibility that somebody may come 8 in some day, then we can never get a permit. That's 9 an impossible standard to meet. 10 And Judge Bugg recognized that when the 11 identical argument was made for him by 12 Mr. Hampshire's colleague. And there, the Court 13 said that Newport's screening was adequate and went 14 on to say that the drug -- petitioner's argument 15 that Newport Academy will treat drug -- will treat 16 individuals who currently use or are addicted to 17 illegal substances are more speculative than 18 factual. 19 That's exactly what they have here. 20 There's no evidence that we intake drug users. In 21 the Southern Management case a hundred percent of 22 them were former drug users. There's no evidence</p>	<p style="text-align: right;">Page 246</p> <p>1 secondary diagnosis, including drug addiction. And 2 what that means is there is some group of people at 3 the Newport facilities that -- that have an 4 addiction. 5 What it doesn't say is that they are 6 currently addicted or currently using. And it is 7 a -- it is a -- 8 THE COURT: So it's distinguished from 9 having a drug problem? 10 MR. WILBURN: Yes, Your Honor. And the 11 case law -- the case law -- I was interested in 12 reading the case law on it. You know, I've said 13 this at the BZA, it's no great secret. 14 My father was an alcoholic and if you 15 asked him to the day he died, he would say he was an 16 alcoholic. I never saw him use alcohol. You know, 17 he -- he had stopped drinking before I was born. 18 But it's something that stays with you. 19 And under the petitioner's reading of the 20 statute, he would be ineligible for services. And 21 the law simply doesn't require that we tell people 22 like that you cannot have mental health services.</p>
<p style="text-align: right;">Page 245</p> <p>1 that we do that. 2 The petitioners cite to a couple of pieces 3 of record on this point and I want to talk about 4 those. 5 One is the advertisement. The 6 advertisement deals with our facilities nationwide. 7 We operate in at least 11 states that I know of. In 8 those states, we provide different services at 9 different locations. Some of those states, we 10 provide a drug treatment facility, so that shows up 11 here. 12 What you won't see here is any reference 13 that we are advertising or we perform drug treatment 14 services at this location, because we don't. And 15 imputing or inferring that we do based on national 16 advertising simply doesn't make sense. 17 The second piece of evidence -- 18 Mr. Hampshire didn't talk about this, but I want to, 19 in fairness to his -- his argument, is that in the 20 Fairfax case that we said that 20 percent of people 21 that go -- that have an mental health issue, 20 22 percent of these residents have some sort of</p>	<p style="text-align: right;">Page 247</p> <p>1 So the systems that we have put in place, 2 they are more than what is required in the Fourth -- 3 sorry, the Eastern District case that Mr. Hampshire 4 cites. We screen a lot more. We do the interviews. 5 We test one to four times a week. We do that. 6 And so I don't know what we can do other 7 than -- if you accept their argument, you have to 8 accept that it's possible you will violate and 9 therefore you don't get a permit. And that's not 10 how -- that's not how this works. 11 What Judge Bugg said, and I agree with him 12 here, if there is a -- if there is a breach of this 13 obligation, it's an enforcement action. We don't 14 intend to breach any obligation. But if there was, 15 it's an enforcement action either by the licensing 16 body or the Zoning Administrator. 17 So that's -- that's the issue on drug use. 18 I want to make sure I covered. 19 I'm not sure if Mr. Hampshire -- I 20 believe -- I don't believe they are abandoning this 21 argument. I didn't hear it argued specifically, but 22 I may have missed it.</p>

<p style="text-align: right;">Page 248</p> <p>1 Their papers argue that we're ineligible 2 because we're a commercial or a for-profit -- 3 for-profit entity. And a couple of quick arguments 4 on that point. 5 First, the statute doesn't say that. It 6 says any. There is no distinction made. 7 Number two -- this is at Tab 28 of your 8 binder. In January of 2000, members of the General 9 Assembly actually moved -- actually introduced a 10 bill to amend this statute, to introduce the words 11 for-profit -- or nonprofit. So what they want to do 12 is amend that last sentence, for purpose of this 13 subsection residential facility means any -- and 14 they actually -- you see the italicized words, 15 nonprofit, nonprofit group home. 16 THE COURT: Does that statute have a 17 present existence? 18 MR. WILBURN: No, it doesn't, Your Honor. 19 This was left in committee; not voted on. 20 And so when we talk about legislative 21 intent, Your Honor, there couldn't be a more clearer 22 expression of legislative intent than we look at the</p>	<p style="text-align: right;">Page 250</p> <p>1 seeks to implement the Virginia fair housing law, 2 would result in the direct conflict with the 3 legislative intent of the law. 4 So the General Assembly did not include 5 that language. When they had an opportunity to 6 amend it, they did not amend it in the say that 7 Mr. Hampshire asked you to interpret it. And the 8 Virginia Attorney General weighed in said it would 9 be illegal to do that. 10 And at the risk of beating a dead horse, 11 at Tab 30 an amicus brief was filed in our Fairfax 12 case. And this was because in our Fairfax case the 13 petitioners, like here, were making the identical 14 argument. They were saying you can't be for-profit 15 under the statute. And we, of course, cited the 16 same law that I am now. 17 But the Virginia Attorney General's office 18 actually weighed in in our Fairfax case and we filed 19 an amicus brief. And they wrote as follows: 20 Contrary to petitioner's argument, nothing in this 21 section nor the Virginia fair housing law 22 distinguishes between a nonprofit and a for-profit</p>
<p style="text-align: right;">Page 249</p> <p>1 statute itself which doesn't have the nonprofit only 2 language in it. That's good enough. 3 But you actually have an example where the 4 General Assembly considered a bill that would make 5 it nonprofit and it did not pass. It wasn't even 6 voted on. 7 And the reason it wasn't voted on, Your 8 Honor, is shown at Tab 29. And this is also in 9 2000. In response to that bill, the Attorney 10 General's Office weighed in. And you will see this 11 in the AG opinion. And the Attorney General said 12 it's our responsibility to ensure that the law is 13 not violated. We're aware of this effort to amend 14 the statute to include -- to make it specific to 15 nonprofit only. And it would violate the law. 16 So the AG's office submitted an opinion to 17 one of the members of the General Assembly and said 18 it will be illegal to do that. And here is a quote 19 from that opinion: Nothing in the Virginia housing 20 law distinguishes between a nonprofit and for-profit 21 group home or residential facility, period. To 22 incorporate such a distinction in 15.2-2291, which</p>	<p style="text-align: right;">Page 251</p> <p>1 group home or residential facility. 2 Despite that very distinction, having been 3 considered and rejected by the legislature in the 4 2000 General Assembly session, I don't think this 5 argument bears a whole lot of dispute. I know it's 6 in their brief and they've argued it repeatedly that 7 this is -- you know, no commercial, has to be 8 nonprofit or a noncommercial function. But it's 9 just wrong. It's just wrong. 10 I don't want to miss something that -- 11 that -- license issue. 12 Before I shut down, do you have any 13 questions about any of these arguments, Your Honor, 14 that I can answer? 15 THE COURT: No. Most previous arguments, 16 previous hearings. But the other counsel sort of 17 warmed me up. 18 MR. WILBURN: It did, Your Honor. And I 19 had so much I wanted to say, but they've done a lot 20 of the groundwork for us. 21 And at the end of the day, and I'm going 22 to sum up now, the statute controls. It's</p>

<p style="text-align: right;">Page 252</p> <p>1 mandatory. And, you know, a residential facility 2 has to be treated as a residential occupancy by a 3 single family if we meet those elements. 4 And the Zoning Administrator, beautifully 5 in my opinion, integrated the statute and the 6 ordinance, looked at what the ordinance said and 7 that here's what the statute -- when you read these 8 together -- 9 THE COURT: Wrote a determination letter 10 first. 11 MR. WILBURN: Yes, Your Honor. The 12 determination -- that's really what I meant, is the 13 determination letter. I think it's well written. I 14 think it's well done. I think it's -- 15 THE COURT: I think it is too. 16 MR. WILBURN: And whether it's appealable 17 or not, honestly I don't care a whole lot. I mean, 18 we're here on the permit for the one property. And 19 the analysis is the same. You know, that analysis, 20 when you look at the staff report that was done, 21 it's the same analysis. It has just got more to it. 22 In the staff report for the permit case, the staff</p>	<p style="text-align: right;">Page 254</p> <p>1 THE COURT: Your teammate over here will 2 be unhappy with you. 3 MR. WILBURN: Well, the determination 4 letter is -- is right. And I think if you ruled on 5 it you would say that analysis is correct. 6 I want to be really mindful not to invite 7 error. I -- I would love for you to rule and say I 8 think the analysis is correct. 9 But the truth of the matter is -- the 10 truth of the matter is I don't know what it does, 11 because let's say you agree with us that -- let's 12 say you say -- you take invitation. The County's 13 position is you couldn't rule on it at all on the 14 merits; you should affirm that it's not -- 15 THE COURT: He argued it should not be 16 before me. 17 MR. WILBURN: Mr. Hampshire and I have 18 collectively said to you if you take it up, you can 19 decide it -- you can decide it under the statute. 20 The statute allows you to take up questions of law 21 even if not decided by the BZA. 22 I have urged you, if you do that, to</p>
<p style="text-align: right;">Page 253</p> <p>1 actually identified all the petitioner's arguments, 2 all the things I'm talking about here and explained 3 why they didn't apply, including citing to the Judge 4 Bugg decision. 5 So we think -- you know, we think -- 6 honestly, I believe the zoning determination letter 7 is sort of beside the point. I mean, procedurally 8 it needs to get cleaned up in some way. 9 But the real issues is, are we -- do we 10 qualify under 15.2-2291. We, in my opinion, clearly 11 do. We meet those elements. There is no preemption 12 issue. There is no conflict issue because the 13 zoning ordinance incorporates this into the 14 definition of family. 15 And so we think -- we would ask Your Honor 16 to affirm the Board of Zoning Appeals in the permit 17 case, affirm their decision, you know, granting our 18 permit. 19 THE COURT: And not rule on the 20 determination letter? 21 MR. WILBURN: Well, you know, I would 22 like -- I --</p>	<p style="text-align: right;">Page 255</p> <p>1 affirm it, to say it's correct. And Mr. Hampshire 2 has asked you to say it's not correct. 3 But there is sort of an intractable 4 problem because you asked -- you asked the question. 5 I'm not honestly following it. 6 You said -- you came up with like this 7 estoppel issue. What happens if you affirm that? 8 What happens later? Pardon me. 9 And the reality is when we apply on 20179 10 we're going to have some plan for it. I don't know 11 what that will look like. We will have some plan. 12 And if it's denied, we may appeal it. If it's 13 granted, petitioners may appeal it. 14 The basic legal concept in that zoning 15 determination are a hundred percent right, but her 16 the permit should issue or not probably is going to 17 turn on some other things, like may be a septic 18 filed or a license or what our operations look like. 19 So I think we're going to have litigation 20 eventually anyway. But I -- 21 THE COURT: Well, he's talking about 22 another reason. When I ruled last time here that I</p>

<p style="text-align: right;">Page 256</p> <p>1 was reimposing the stipulated method and I was 2 worried about able counsel for the other two 3 property holders and the thoroughness he felt had -- 4 he had professionally taken care of things. Their 5 day in court hadn't been done yet. 6 MR. WILBURN: That's right. I hope that 7 whatever happens with 20179 and 20191 -- I don't 8 know what that will be. I know the Zoning 9 Administrator's interpretation of the law is 10 correct. 11 But whether a permit gets applied for and 12 approved will largely depend on what it looks like. 13 THE COURT: Let's not try a future case. 14 MR. WILBURN: And that's -- that why as 15 much as I -- 16 THE COURT: Because it has been a full 17 day. It has been many, many hearings. Let's not -- 18 let's not create what ifs in the future. 19 MR. WILBURN: I agree with that, Your 20 Honor. 21 Do you have any questions about any of my 22 argument or any of the cases?</p>	<p style="text-align: right;">Page 258</p> <p>1 or future zoning permits or whatever it might be. 2 And that's, again, because of the 3 fundamental nature of a zoning determination under 4 15.2-2309. And that is why the General Assembly has 5 said that any determination is appealable and -- and 6 provides, furthermore -- in the language of the 7 statute of -- with respect to 15.2-2311(A), which is 8 the -- the provision for the appeal to the Board of 9 Zoning Appeals -- and this is at Tab 6 of my 10 materials -- that the Zoning Administrator, 11 notwithstanding any charter provision to the 12 contrary -- every city had a charter -- any written 13 notice of a zoning violation, a written order, of a 14 zoning determination dated on or after July 1, 1993, 15 shall include a statement informing the recipient 16 that he may have the right to appeal the notice of 17 zoning violation or written order within 30 days in 18 accordance with this section and the decision shall 19 be -- and the decision shall be final and 20 unappealable if not appealed within the 30 days. 21 A little bit down: The appeal period 22 shall not commence until the statement is given and</p>
<p style="text-align: right;">Page 257</p> <p>1 THE COURT: No. I thank all counsel. 2 You've done a terrific job today. The sheer energy 3 level is codified. I think of trial lawyers as 4 competitive athletes. And I wait for you to get to 5 the fourth quarter and get tired. It doesn't 6 happen. It's -- I did it 19 years and loved every 7 day of it. I've done this longer. 8 But, no, I don't need anything else. 9 MR. WILBURN: Thank you, Your Honor. 10 MR. HAMPSHIRE: Speaking of which, Your 11 Honor, I would like -- I understand it's late and -- 12 but I won't -- I won't go over things that I don't 13 need to. And I do appreciate the Court's attention. 14 For the record, Gifford Hampshire, again 15 for the petitioners. 16 I do -- I do want to say, though, that 17 the -- I do want to say that the zoning 18 determination really is important here for all the 19 reasons that have been discussed, because that 20 zoning determination, from our view of the case, 21 informs the substance of the issue before the Court, 22 and whether we're talking about this zoning permit</p>	<p style="text-align: right;">Page 259</p> <p>1 the Zoning Administrator's written word is sent by 2 registered or certified mail to the last known 3 address. 4 Now, you can -- you can quibble about 5 whether or not that code section applies to a 6 written determination as opposed to an order. 7 The fact of the matter is that the Zoning 8 Administrator followed that provision in putting 9 forth in the zoning determination itself the fact 10 that this zoning determination would become final 11 and unappealable if not appealed. 12 My clients found out about it by the 13 letter that said it was a zoning determination that 14 was put in their boxes, as I discussed earlier, and 15 they appealed it. 16 And I said this before the BZA, that if we 17 had not appealed it I think that the County -- this 18 is speculative, I admit, but the County could 19 certainly take the position that if we did not 20 appeal that within 30 days that we would be estopped 21 by the language of 15.2-2311, that -- that we had 22 failed to exhaust our administrative remedies under</p>

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1 those cases that I referred to earlier, Dick Kelly  
 2 Enterprises, City of Fairfax versus Rinker.  
 3 And the determination set forth in the  
 4 zoning determination would be binding, could not be  
 5 attacked.  
 6 And so those are important determinations.  
 7 The fact that they have not occurred yet -- the fact  
 8 that, as Mr. Lawrence was talking about, that some  
 9 of the uses have not occurred yet, that the uses  
 10 that were described in the zoning determination for  
 11 the other two properties haven't -- haven't occurred  
 12 yet, is the whole point. Because the whole point of  
 13 a zoning determination is not to talk about what has  
 14 already happened or not even what might actually  
 15 happen, but what could happen, what could happen  
 16 under the zoning ordinance.  
 17 THE COURT: Help me understand what you're  
 18 saying.  
 19 MR. HAMPSHIRE: Yes, sir.  
 20 THE COURT: On the first piece of  
 21 property --  
 22 MR. HAMPSHIRE: Yes, sir.

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1 THE COURT: -- the one now facing a  
 2 verdict --  
 3 MR. HAMPSHIRE: Right.  
 4 THE COURT: -- everything from  
 5 construction to usage to in and out and all the  
 6 traffic, all of those issues await us. What is it  
 7 that wouldn't be true in any one of these cases?  
 8 MR. HAMPSHIRE: Well --  
 9 THE COURT: I mean, if the future -- those  
 10 future potentials for litigation don't -- I don't  
 11 feel they are part of what we're doing here today.  
 12 MR. HAMPSHIRE: Well, I will agree with  
 13 you in one sense, that the -- that the issues  
 14 regarding construction or permitting are not before  
 15 us today.  
 16 But if you take an analogy -- if you think  
 17 about a house with a foundation, which might be a  
 18 good analogy for this case. The foundation here is  
 19 the zoning determination. It provides what is  
 20 possible, what can be built on top of that  
 21 foundation.  
 22 And, likewise, the zoning determination

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1 said what is possible, what are you really allowed  
 2 to do. And that's precisely why Newport asked for  
 3 it, because before they spent all that money buying  
 4 these houses, that wanted to know -- not what they  
 5 might actually do, but what is possible, what is  
 6 possible for these houses; not for just one house.  
 7 But for all three houses that they're going to buy,  
 8 what can we do, can we specifically, if we want to  
 9 in the future, not that we're actually going to do  
 10 it, but if we want to in the future, not that we're  
 11 necessarily going to buy these properties. But if  
 12 we do buy these properties, can we operate them in  
 13 the way described? The three of them, each one, for  
 14 providing therapeutic services and training and that  
 15 sort of thing for mentally ill people, can we do  
 16 that?  
 17 And that related not just to one property,  
 18 but to all three properties.  
 19 The Zoning Administrator looked at that,  
 20 took what Newport had to say, and wrote a  
 21 determination about what is possible under the  
 22 zoning ordinance; not what actually might happen,

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1 not what will happen, but what is possible to happen  
 2 to the zoning ordinance.  
 3 And I just need to take a little bit -- I  
 4 need to talk in that regard about the case that  
 5 Mr. Lawrence cited. I've done this before.  
 6 The Vulcan case involved an oral  
 7 determination of an oral statement by the Zoning  
 8 Administrator. He is right that the Lilly case also  
 9 involved a zoning -- an oral determination, but in  
 10 distinguishing Vulcan said, well, we had a permit  
 11 issue involved in that so that provided the  
 12 certainty.  
 13 The Crucible case involved a completely  
 14 different code section, it's 2311, Subsection C,  
 15 which dealt with the estoppel issue, not 2311(A)  
 16 that deals with what you can be appealed before the  
 17 Board of Zoning Appeals.  
 18 So we're dealing with -- unlike those  
 19 cases, we are dealing with a written determination  
 20 purposely written in response to every specific  
 21 request by Newport with respect to what is possible  
 22 for all three properties. And that's as far as it

Hearing Transcript

<p style="text-align: right;">Page 264</p> <p>1 goes. And that's what we appealed. 2 We didn't appeal what might actually get 3 constructed, what actually might be permitted by the 4 zoning permit. We appealed what is possible under 5 those -- under that zoning determination. 6 And we think that, for the reasons I've 7 already argued, that the zoning determination is 8 wrong in that regard. 9 One thing I need to mention, though, with 10 respect to the evidence before the Board of Zoning 11 Appeals, is the statement by Mr. Precopio that -- 12 that it was -- on transcript page 107, that it was 13 his intention to move forward with all three homes. 14 And that today we're addressing a single home that 15 is before you today. Our intentions are, and we've 16 already applied for one license for one of the 17 second homes that's under construction. And we will 18 seek a permit to open that home. And we will do the 19 same with the third home. 20 So there is no doubt in the record of the 21 intentions of Newport. They want to get a permit. 22 But what is it that allows them to do that?</p>	<p style="text-align: right;">Page 266</p> <p>1 THE COURT: The zoning determination 2 wasn't issued on properties two and three; was it? 3 MR. HAMPSHIRE: Yes. 4 THE COURT: It was all three? 5 MR. HAMPSHIRE: It was all three 6 properties. 7 THE COURT: That's important. I didn't 8 know that. 9 MR. HAMPSHIRE: Yes. If you look at it, 10 it involved all three properties. 11 THE COURT: Very important. 12 MR. HAMPSHIRE: And that's what we've been 13 saying, is because Newport wasn't going to buy, you 14 know, up to three million, four million, whatever 15 money they paid for these three properties, without 16 getting a determination with respect to all three of 17 those properties. 18 And that's why our point all along has 19 been that that's an important piece of paper and it 20 says so right on the face of it it's an important 21 piece of paper. And you better appeal it and if you 22 don't you're going to be stuck with it, with respect</p>
<p style="text-align: right;">Page 265</p> <p>1 And there's only one thing in the record 2 that allows them to pursue that permit for all three 3 homes to provide the kind of service they want to 4 provide, and that is the zoning determination. 5 And that's why it is a significant piece 6 of paper. It's a significant and final 7 determination as far as it goes. And it was never 8 intended to go any further than what is possible on 9 the properties. 10 THE COURT: If I have severed properties 11 two and three, if I admit rendering no verdict on 12 anything regarding the two and three today, it's 13 wide open as to who does what? The parties -- the 14 parties then are free to do whatever they want. How 15 do I, by today's ruling on the one case, govern two 16 to three? 17 MR. HAMPSHIRE: Well, as Mr. Wilburn said, 18 the Court, I think, has got to address the 19 fundamental issue first as to whether or not the 20 zoning determination is appealable by anybody, not 21 just by us, but anybody in the whole world, are they 22 allowed to appeal.</p>	<p style="text-align: right;">Page 267</p> <p>1 not just to one of these properties but with respect 2 to all three of these properties. 3 That's why we appealed it. 4 Now, the zoning permit comes along. It's 5 another layer on top of that. And I want to address 6 one thing Mr. Lawrence said, and that is I made a 7 statement before the Board of Zoning Appeals about 8 the zoning permit and that the Board of Zoning 9 Appeals wouldn't see it again. 10 And what I was saying there is that the 11 zoning -- the Board of Zoning Appeals, unlike the 12 issuance of a special use permit, unlike a variance 13 or something else where they have original 14 jurisdiction, they have no discretion about whether 15 to issue a zoning permit. 16 The zoning permit is undisputed in this 17 case, is issued not by -- administratively, by the 18 Department of Building Code and Development, essentially the County's building department. The 19 Zoning Administrator signs off on it. 20 But unless somebody finds out about 21 that -- and my clients are vigilant, so they found 22</p>

<p style="text-align: right;">Page 268</p> <p>1 out about it. And I think Mr. Lawrence even told me 2 it was coming. 3 Unless somebody finds out about that, 4 they're not going to be able to appeal to the Board 5 of Zoning Appeals. But the Board of Zoning Appeals 6 has no the original jurisdiction, if you will, no 7 discretion about whether that permit issues. 8 That permit is already issued by the time 9 of Board of Zoning Appeals looks at it. And it's 10 issued in the course of -- of the building -- the 11 Department of Building Code and Development looking 12 at it. 13 But it has to have that foundation, if you 14 will. And the foundation for the house upon which 15 everything else is built is the zoning determination 16 and the zoning determination regards all three 17 properties. 18 And so the Court is going to have to 19 address that fundamental issue about whether that 20 determination is appealable by anybody. 21 Because, remember, there was another 22 aspect of this case that the Court did rule on, and</p>	<p style="text-align: right;">Page 270</p> <p>1 at under it's individual facts. 2 And, in fact, even if the facts under this 3 case changed somehow, the Zoning Administrator would 4 not be bound by that. 5 So it's a factual decision made on a 6 case-by-case basis. So some sort of presential 7 value should not be a reason not to determine 8 whether or not this is appealable. 9 I would like to talk a little bit about 10 argument about the zoning ordinance definitions. 11 And I have those in Tab 9 of my notebook, the one 12 that says supporting documents. 13 And we talked about the congregate housing 14 facility. And note that it does say a structure 15 other than a single-family dwelling. 16 In Mr. Wilburn's argument, he points to a 17 screen of a pretty house, is that it's a 18 single-family dwelling. That -- looking like house 19 does not make it a single-family dwelling. 20 For that we have to go to the second page 21 under Tab 5 and see what is defined as dwelling 22 single-family attached. Both Mr. Wilburn and Mr.</p>
<p style="text-align: right;">Page 269</p> <p>1 that is whether my clients have standing. That was 2 a -- that was component of the first BZA decision. 3 And it was rendered before Anders Larsen case came 4 out of the Supreme Court of Virginia. 5 And the Court subsequently ruled that, 6 yes, our clients do have standing to contest the 7 zoning determination, again involving all three 8 properties. 9 And so the remaining issue from that first 10 hearing was, is that zoning determination involving 11 all three properties appealable by anybody. 12 And I think the Court has to deal with 13 that, as Mr. Wilburn was indicating, as a 14 preliminary manner. We think it is appealable under 15 the plan language of 15.2-2309 and 2311. 16 As far as Mr. Lawrence's point about 17 presential value of the zoning determination, well, 18 I think -- I think he would acknowledge -- I think 19 that is -- and the Zoning Administrator would 20 certainly agree with this. He said they take these 21 cases on a case-by-case basis, what are the facts 22 that are presented. And each case has to be looked</p>	<p style="text-align: right;">Page 271</p> <p>1 Lawrence focused on the language that it is occupied 2 by one family. 3 And we take issue with that part because 4 we don't think we've just got one family here. We 5 think we've got families cycling in and out. 6 But what is missed in this is the very the 7 first -- it's the second word here, is it has to be 8 a residential dwelling unit, not -- not a -- not a 9 unit that is based on the use of what Newport is 10 proposing. 11 And to determine what a residential use 12 is, you look at the next page under that tab. And 13 we have a definition of residential use. And 14 residential use is defined -- I don't know whether 15 Your Honor wants to get to that in the notebook. 16 But residential use is defined in the code 17 as structures which are built for and occupied by 18 private households and any -- any activity of a 19 private household conducted in a private dwelling. 20 And so when you go back to the definition 21 of congregate housing facility, what you see here is 22 that the Board of Supervisors of Loudoun County have</p>

<p style="text-align: right;">Page 272</p> <p>1 made a determination that an activity in a -- in a 2 structure that might look like a house that is 3 focused on supervision for special care, treatment, 4 training, or similar purposes is not the -- is not 5 in the nature of an activity of a private household 6 occupant -- and conducted by a private family. 7       And that, as I said earlier, needs to be 8 harmonized with 15.2-2291 in the first sentence that 9 we talked about that zoning ordinances for all 10 purposes shall consider a residential facility in 11 which no more than eight individuals with mental 12 illness, intellectual disability, et cetera, as 13 residential occupancy by a single family. 14       So if the Board of Supervisors has, as it 15 has done, made a determination that a congregate 16 housing facility, as the Zoning Administrator has 17 made a determination that a congregate housing 18 facility is not a single-family use, all 2291 is 19 saying is for people who fall within this definition 20 you have to treat them the same way. You have to 21 say that they also do not get to engage in a 22 congregate housing facility, but can operate as a</p>	<p style="text-align: right;">Page 274</p> <p>1 allowed. 2       And they're not allowed for the very 3 reason Mr. Lawrence set forth, is because they're 4 not listed as a permitted use in the AR-1 district 5 under table 2-102 under household living. In fact, 6 they're not -- in fact, because they are listed as 7 something other than a single-family dwelling, 8 they're specifically not allowed. 9       That doesn't mean they can't go somewhere 10 because, again, the evidence before the BZA is -- 11 Member Moffett is there, 26 other zones in the 12 County where they can go, 3 of which are by-right. 13       The other thing I would like to address 14 that Mr. Lawrence said is, that the AR-1 district is 15 not a residential district. Well, he's correct. 16 But it is a rural -- it is called the AR-1, 17 agricultural rural-1 district. 18       And in section 2-101 under purpose and 19 intent, it says that the purpose and intent of the 20 AR-1 district is to -- the very first thing -- 21 support the use of land for rural economy uses with 22 residential uses allowed at densities consistent in</p>
<p style="text-align: right;">Page 273</p> <p>1 single-family home in the AR-1, just like a 2 traditional family can. 3       What is noteworthy in the BZA record is, 4 and this was pointed out by BZA Member Moffett, and 5 that is that there are 26 others zoning districts in 6 Loudoun County other than the AR-1 where a 7 congregate facility is allowed. It's just that -- 8 and it's just that in this case the Board of 9 Supervisors has determined for the AR-1 district 10 that it's not allowed. 11       And I would like to talk just a little bit 12 about Mr. Lawrence's argument about the AR-1 13 district because he stated a lot of arguments that 14 we're not making. 15       We are not making -- and that's in Tab 8 16 of our -- of our supporting documents. 17       We have -- we also have the AR-1 district 18 there. 19       We do not argue, and we have never argued, 20 that all commercial uses are prohibited in the AR-1. 21 What we do argue is that congregate housing facility 22 uses -- congregate housing facility uses are not</p>	<p style="text-align: right;">Page 275</p> <p>1 the general open and rural character of rural 2 economy uses. 3       So while the AR-1 district does allow 4 commercial uses, they're the ones that are set forth 5 in table 102 and they specifically do not allow 6 congregate housing facilities in them. 7       Again, I would like to come back to my 8 fundamental theme before I close, and that is that 9 under the Attorney General's opinion that Mr. 10 Wilburn just mentioned -- this is the very same one, 11 which is the 2000 Attorney General opinion. 12       Let me just get it, if you don't mind, 13 Your Honor, for a second. 14       And this is 2000 Westlaw 33912660, 15 December 8, 2000. This is the one I referred to 16 earlier. 17       Now, it is true, as Mr. Wilburn stated, at 18 the very end of the opinion -- and really, to be 19 fair, the opinion really did deal with this profit 20 versus nonprofit issue that was contemplated by the 21 General Assembly. 22       But that related to the tax status of the</p>



<p style="text-align: right;">Page 276</p> <p>1 entity that would operate these facilities. And the 2 Attorney General -- not whether or not they were 3 commercial or residential. 4 In fact, the Attorney General was very 5 careful to say that -- that clearly, and this is on 6 the last page -- again, I read this earlier. 7 Clear it is the policy of the 8 Commonwealth, as expressed in the Virginia fair 9 housing law, to provide fair housing throughout the 10 Commonwealth of Virginia and to end discriminatory 11 practices with respect to residential housing. 12 Not to allow something like a commercial 13 housing facility in AR-1. So when we see that code 14 section, 15.2-2291, we have to understand that there 15 is no intent by the General Assembly to occupy the 16 field of local zoning. 17 Local zoning still gets to decide what is 18 residential. And that the term residential housing, 19 as defined in that code section -- excuse me, 20 residential facility as defined in that code 21 section, relates only to that subsection, which is 22 the Virginia fair housing law.</p>	<p style="text-align: right;">Page 278</p> <p>1 this case where the position is that state licensing 2 controls, he says that petitioner's appeal argues 3 that the BZA applied the wrong principle in that 4 licensure by the Department of Behavioral Health and 5 Developmental Services was dispositive. 6 But the hearing transcript shows that the 7 BZA went to great lengths to address the 8 definitional challenge, or the definition challenge, 9 as opposed to solely relying upon licensure. Based 10 on the complete reading of the BZA -- transcript of 11 the BZA hearing, the Court does not find that the 12 BZA based its decision on the dispositive nature of 13 the public license. 14 Now, keep in mind, in that case the Zoning 15 Administrator found that the use was allowed. 16 So Judge Bugg was saying the right way to 17 go about this, the right way -- and the BZA in the 18 Fairfax case did it the right way, he's saying -- is 19 to look at the definitions of this -- not of 2291, 20 but of the state -- excuse me -- of the County 21 zoning ordinance. 22 And that's why I come full circle to say</p>
<p style="text-align: right;">Page 277</p> <p>1 And as I indicated earlier, the operative 2 language as the brief of the amicus curiae that you 3 Mr. Wilburn referred to in his presentation, that 4 was their point. The operative language of that 5 subsection to which that defined term implies is to 6 end discrimination in housing. That's what it is 7 intended to do. 8 It was not intended to say to local 9 governments that the General -- that licensure by 10 the state determines now what is residential for the 11 purpose of local zoning. 12 If the Court leaves with no other message, 13 I would like the Court to leave with that. And so 14 I'm not going to clutter up with a lot more stuff 15 because we have been going a long time. 16 I would just like to mention in that 17 regard, though, that the Judge Bugg decision, as I 18 said, was very careful to say exactly that. 19 Bear with me. I'll get the language here. 20 The Judge Bugg decision. He was very 21 careful to note on pages 3 and 4 that in that 22 particular case, in the Fairfax case, as opposed to</p>	<p style="text-align: right;">Page 279</p> <p>1 that the zoning determination should have come to a 2 full stop when it found that the use is a congregate 3 housing facility not allowed in the AR-1. 4 That should have been the end of the 5 inquiry because everything that followed that was 6 based upon an analysis that says that the -- that is 7 dependent upon the state licensure under 2291 being 8 dispositive because of the definitions therein. 9 That is -- 10 THE COURT: You're saying that the County 11 should have stopped when they realized 2291 would 12 impact? 13 MR. HAMPSHIRE: No. What I'm saying is 14 when you look at that -- when you look at the zoning 15 determination itself at -- at Tab 7 of the 16 authorities -- I'm sorry, Tab 14. 17 If you look at Tab 14, you will see that 18 the zoning -- the zoning determination comes to the 19 conclusion, preliminary conclusion. It says, the 20 short answer to your inquiry is that the proposed 21 use -- and, again, this includes all three houses -- 22 the proposed use as a congregate housing facility, a</p>

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1 use not permitted in the AR-1 zoning district and --  
 2 but then goes on to say, however, the proposed use  
 3 will be permitted as dwelling, single-family  
 4 attached if it meets the zoning ordinance definition  
 5 of family and the criteria of 2291 of the Code of  
 6 Virginia, licensure by the Department of Behavior  
 7 Health.  
 8       And then over on the second page it says  
 9 that the structure as a congregate housing facility  
 10 is structured -- that is not listed in the AR-1  
 11 district and therefore not permitted.  
 12       However, and what our point is, that the  
 13 full stop should have come after not permitted in  
 14 the AR-1 district, because the rest of it that  
 15 follows is really dependent upon the dispositive  
 16 nature of the state licensure, an analysis that  
 17 Judge Bugg found -- or at least noted would not have  
 18 been correct, or was not followed by the BZA in the  
 19 Fairfax case.  
 20       And the Zoning Administrator at pages 45  
 21 and 46 of the record pretty much confirmed that.  
 22 Again, let me just read you the quote from pages 45

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1 and -- right, pages 45 and 46 of transcript the  
 2 Zoning Administrator was given a chance by the BZA  
 3 to talk about the zoning determination.  
 4       And he says, I know a couple times the  
 5 statement has been made that the zoning  
 6 determination determined that this use is a  
 7 congregate facility not permitted. That was part of  
 8 the determination. But a key part of the  
 9 determination was also, however, if it found to be a  
 10 group home licensed by the state then it would be  
 11 permitted under state Code 2291 and the definition  
 12 of family in the ordinance.  
 13       My point, Your Honor, in answer to your  
 14 question, is that the Zoning Administrator should  
 15 have stopped after finding that it was not allowed  
 16 in the AR-1 as a congregate housing facility.  
 17       THE COURT: And done what?  
 18       MR. HAMPSHIRE: And said that the use is  
 19 not allowed.  
 20       THE COURT: Why?  
 21       MR. HAMPSHIRE: Because it's a congregate  
 22 housing facility not allowed in the AR-1.

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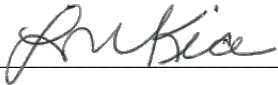
1       THE COURT: I have dealt with congregate  
 2 over and over again. And concept is applicable in  
 3 one set of facts and in another. The concept of  
 4 bringing in 2291 and all the rest of this means that  
 5 the zoning in this County and its use of the usual  
 6 congregate title isn't the end of the debate. We've  
 7 got to take all the competing pieces.  
 8       MR. HAMPSHIRE: It's certainly a  
 9 case-by-case determination.  
 10       THE COURT: Right.  
 11       MR. HAMPSHIRE: And in this case facts  
 12 were as described by Newport in --  
 13       THE COURT: And I found -- I've said  
 14 before, it is not congregate housing. Another Court  
 15 may tell me I'm wrong, but that's where I've been  
 16 for quite a while.  
 17       MR. HAMPSHIRE: All right. Well, in  
 18 answer to your question, we think that the zoning  
 19 determination did find it to be, but for the state  
 20 licensing.  
 21       And the state licensing is -- our point  
 22 is, is not dispositive of the issue. And Judge Bugg

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1 recognized that that -- at least in that case that  
 2 was not the analysis that the BZA went through.  
 3       THE COURT: Okay.  
 4       MR. HAMPSHIRE: I think I'm done, Your  
 5 Honor. Let me just -- if I might just --  
 6       I would just like to conclude with kind of  
 7 a big picture of the point and then I will be done.  
 8       And that is that the bottom line here and  
 9 the reason my clients are upset and think that the  
 10 zoning determination is wrong is because -- it's  
 11 precisely because the AR-1 district does not allow  
 12 congregate housing facilities, as defined. I  
 13 understand Your Honor has a different view of that.  
 14       But certainly they are not listed as a use  
 15 within the AR-1 district.  
 16       The bottom line to this is going to be --  
 17 is going to allow, by virtue of state licensure, a  
 18 residential treatment facility, a commercial-base  
 19 facility, as defined by -- as a commercial housing  
 20 facility in -- that is an incompatible --  
 21 incompatible use with their property.  
 22       And it's not just them saying it's an

<p style="text-align: right;">Page 284</p> <p>1 incompatible use. It's the Loudoun County Board of 2 Supervisors who have legislated this incompatible 3 use. 4       And they are going to have to live with 5 the effects of this incompatible use in a -- next 6 door where they have invested their life savings in 7 reliance upon the AR-1 district and the purpose and 8 intent of the AR-1 district. 9       And I think that is a good place to stop. 10 And I appreciate your attention. 11       THE COURT: You stopped on something that 12 has sorrow built into it. That is, people who 13 sought beautiful country living, might end up with 14 things in their vista that are unpleasant. 15       MR. HAMPSHIRE: Yes, sir. 16       THE COURT: That's important. 17       MR. HAMPSHIRE: Right. 18       THE COURT: As we watch Prince William and 19 Loudoun, everybody created huge buildings where you 20 used to see forests. I get that. 21       MR. HAMPSHIRE: Yes, sir. 22       THE COURT: So there is a lot of --</p>	<p style="text-align: right;">Page 286</p> <p>1       The use right next door is a farm less 2 ordinary. And there was testimony about that. That 3 is a farm for disadvantaged children who get the 4 chance to come out and learn some life skills and 5 commune with nature. 6       And one of my clients actually owns that 7 property and the tenant on the property, the tenant 8 that runs a farm less ordinary testified before the 9 Board of Zoning Appeals and said that his -- his 10 great fear is he is going to have to shut down 11 because of the incompatible nature of these two 12 cases and the deleterious effect that -- that those 13 uses will have on the developmental disadvantaged 14 children who are at that facility. 15       And I want to correct one thing that I 16 said earlier. I referred to the proposed residents 17 as young ladies. The proposed residence as -- as 18 corrected in this record are adults. They are young 19 women who are adults. They are not -- I did not by 20 the term young ladies mean to imply they were 21 children. They are adults who are going to be 22 treated.</p>
<p style="text-align: right;">Page 285</p> <p>1       MR. HAMPSHIRE: I think that's the bottom 2 line. 3       THE COURT: A lot of nonlegal; just plain 4 emotional attachment or appreciate of nature here. 5       MR. HAMPSHIRE: Right. And it's not 6 just -- it's just not -- it's not just emotional. 7 It's also based upon an investment. 8       We understood the law is well established 9 that no one has a right to a zoning classification. 10 The Board of Supervisors is free in their 11 legislative discretion to change that, to change 12 what is meant in a zoning district, what is allowed 13 in a zoning district. 14       In this case the Board of Supervisors has 15 not done that. The Board has kept this zoning 16 district intact and has not heretofore allowed this 17 kind of commercial use in a residential zone. 18       I understand Mr. Lawrence's point that 19 there other commercial uses that are allowed. But 20 those are in the nature of the purpose and intent of 21 the AR-1 district, rural economy commercial-based 22 uses.</p>	<p style="text-align: right;">Page 287</p> <p>1       And there's evidence in the record that 2 not only will adults women be treated, but adult men 3 will be treated on the property next door. There is 4 testimony in the BZA about that. 5       And that is a great fear of my clients, 6 particularly if they have sexual addictions and that 7 kind of thing; that my clients will fear for the 8 safety of their children. 9       So that is the big picture and the reason. 10 But it is an emotional concern that is based on the 11 language of the zoning ordinance and the protections 12 it provides until changed by the Board of Zoning -- 13 the Board of Supervisors. 14       Thank you, sir. 15       THE COURT: Thank you. You look like you 16 want to say something. 17       MR. WILBURN: Well, your Honor, Mr. 18 Hampshire repeated a number of inaccurate statements 19 about the zoning code. And I'm happy to address 20 those. 21       THE COURT: Just a second. What are you 22 asking me to rule.</p>

<p style="text-align: right;">Page 288</p> <p>1 MR. WILBURN: Well, I actually -- I'm 2 asking you, Your Honor, to affirm the BZA, the two 3 BZA decisions. 4 So I'm asking you to affirm the BZA's 5 decision in the first case that the matter was ripe. 6 And I'm asking you affirm the BZA's 7 decision in the second case, the permit case, that 8 the permit was properly granted. 9 So that's the relief that I'm asking for 10 today. 11 I've prepared two simple orders to that 12 effect that simply say based on the arguments of 13 counsel and the record before the Court, the Court 14 affirms. And they are two separate orders for two 15 separate cases. But would be I the relief that I 16 could request. I think it's the same relief the 17 County wants. 18 THE COURT: Well, he wants -- he wants a 19 holding it's the timeliness. You want me to rule on 20 the timeliness of things; right? 21 MR. LAWRENCE: No. We want the same thing 22 Mr. Wilburn just articulated. We think the BZA was</p>	<p style="text-align: right;">Page 290</p> <p>1 Sheridan MacMahon. And I spent a whole lot of time 2 on beautiful property in the -- in this area. 3 MR. WILBURN: I'm sorry. 4 THE COURT: And the argument that -- that 5 change can be -- can be damaging in other ways, I 6 understand. 7 MR. WILBURN: Eleven hundred acres, that's 8 quite a -- quite a piece of land to enjoy. 9 THE COURT: Well, it -- it's beautiful. A 10 gorgeous place. I have to confess, she's down to 11 650 acres. The kids have divided it up. 12 MR. WILBURN: Thank you for the time 13 you've taken with this over these six hearings. 14 THE COURT: I can't hear. 15 MR. WILBURN: I said thank you for the 16 time that the Court has given us, not just these six 17 hearings but -- 18 THE COURT: Well, it's vitally important 19 in every direction. Money. Feelings. Everything 20 else. And I -- I have been living with this thing 21 and trying to get it right. 22 If you want to appeal, it won't -- it</p>
<p style="text-align: right;">Page 289</p> <p>1 correct in both cases and we would ask you to 2 affirm. 3 THE COURT: Well, I -- I'm trying to 4 balance everything involved in the whole thing. But 5 it comes down to making a call. And that's the 6 verdict. You draft that order for me. 7 MR. WILBURN: I will show it to opposing 8 counsel. 9 THE COURT: I can't think of a case with 10 more loaded appeal issues, though, because it was so 11 well done and so well argued and there's attractive 12 merit for everybody in this case. And another Court 13 may say a different thing. 14 But I've -- you've taught me -- this is, I 15 think, our fourth appearance going over and over 16 this. 17 MR. WILBURN: I think it would be our 18 sixth. But, yes, Your Honor, it has been a few. 19 THE COURT: Ironically, my sister owned 20 1,100 acres between -- halfway, in Middleburg, and 21 McLean. And she died a few weeks ago. And she was 22 a broker in Leesburg -- in Middleburg, rather,</p>	<p style="text-align: right;">Page 291</p> <p>1 won't offend me if another Court says we disagree. 2 That's up to them. 3 MR. WILBURN: Understand. 4 THE COURT: A writ of certiorari puts me 5 in a different position than I would be as a normal 6 trial court judge. 7 I have been blessed by enthusiastic and 8 intelligent counsel trying to help me get it right. 9 By the way, that property can't be 10 subdivided. 11 MR. WILBURN: The 650 acres can't be 12 subdivided? 13 THE COURT: Right. Before she died she 14 did things to get in the way of it. 15 MR. WILBURN: Oh. I see. But it in a 16 conservation easement or something to that effect. 17 THE COURT: She has got a wrap-around with 18 two neighbors with way more land, so it can't be 19 subdivided. You can't change that. 20 MR. WILBURN: It's nice to have that in 21 perpetuity, undisturbed. 22 Do you guys have the case numbers? We're</p>

1	Page 292	just double checking the case numbers.
2		THE CLERK: Did you say something to me or
3		just --
4		MR. WILBURN: I'm sorry, Your Honor.
5		We're just double checking the case numbers.
6		THE CLERK: CL22-238 and CL23-1194.
7		MR. WILBURN: That's correct. Thank you.
8		THE COURT: I'm going to recess and sign
9		these in Chambers. Stick around.
10		MR. WILBURN: Yes, Your Honor. Thank you.
11		THE COURT: The Clerks will come out and
12		give you copies, if they can do that at t his time
13		of day. I don't know.
14		But for the moment, I thank everybody
15		involved. You attorneys were trying as hard as you
16		could to get me to try to get it right. A lot of
17		people think I got it wrong, but that's where we
18		are.
19		MR. HAMPSHIRE: Thank you.
20		(The matter was concluded at 4:55 p.m.)
21		
22		
1	Page 293	CERTIFICATE OF REPORTER
2		I, Linda M. Kia, the Verbatim Court
3		Reporter who was duly sworn to well and truly report
4		the foregoing proceedings, do hereby certify that
5		they are true and correct to the best of my
6		knowledge and ability; and that I have no interest
7		in said proceedings, financial or otherwise, nor
8		through relationship with any of the parties in
9		interest or their counsel.
10		IN WITNESS WHEREOF, I have hereunto set my
11		hand this 5th day of May 2023.
12		
13		
14		
15		
16		_____
17		Linda Marie Kia
18		Verbatim Court Reporter
19		
20		
21		
22		

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