

In the Matter of:

Hilary Kozikowski, et al

v.

Monroe RE, LLC, et al

Hearing

September 26, 2022

Casamo

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Videography
Videoconferencing**

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V I R G I N I A:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

- - - - - x

HILARY KOZIKOWSKI, ET AL,

Plaintiffs,

-vs-

Case No. CL22002838

MONROE RE, LLC, ET AL,

Defendants.

- - - - - x

September 26, 2022

The hearing held in the above-captioned matter,
which convened, pursuant to notice, at the Loudoun
County courthouse, 18 East Market Street, Leesburg,
Virginia, commencing at 10:05 a.m., before the HONORABLE
PAUL F. SHERIDAN, retired judge, when there were present
on behalf of the respective parties:

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1	C O N T E N T S
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<p style="text-align: right;">Page 5</p> <p>1 PROCEEDINGS</p> <p>2 (Thereupon, the reporter was sworn.)</p> <p>3 THE COURT: Good morning. Everybody ready to</p> <p>4 go?</p> <p>5 MR. WILBURN: Yes, Your Honor.</p> <p>6 THE COURT: Who starts?</p> <p>7 MR. HAMPSHIRE: Good morning, Your Honor. May</p> <p>8 it please the Court. My name is Gifford Hampshire. I'm</p> <p>9 with the law firm of Blankingship & Keith.</p> <p>10 And with me is Jim Meizanis and Mr.</p> <p>11 Bartolomucci. Mr. Bartolomucci will have some remarks</p> <p>12 at the conclusion of mine.</p> <p>13 Your Honor, we represent the adjoining property</p> <p>14 owners in this case, and they are largely in the</p> <p>15 courtroom.</p> <p>16 This is a case that the Court has called upon to</p> <p>17 exercise its appellate jurisdiction pursuant to Virginia</p> <p>18 Code Section 15.2-2314.</p> <p>19 This is an appeal from a Board of Zoning Appeals</p> <p>20 decision.</p> <p>21 And I say it was a Board of Zoning Appeals</p> <p>22 decision because the Board of Zoning Appeals actually</p>	<p style="text-align: right;">Page 7</p> <p>1 substantive issue that the Board of Zoning Appeals did</p> <p>2 not decide.</p> <p>3 Because if this Court were to agree with us that</p> <p>4 this was an appealable order and that we do have</p> <p>5 standing, then it would go back to the Board of Zoning</p> <p>6 Appeals only to come back to this Court de novo if we</p> <p>7 get a loss there.</p> <p>8 And we think that's not a proper use of judicial</p> <p>9 economy.</p> <p>10 Your Honor, as I indicated, my clients live in</p> <p>11 what's called the AR-1 zone. It's called agricultural</p> <p>12 low density zone here in Leesburg, just south of</p> <p>13 Leesburg on Gleedsville Road. They've lived there for</p> <p>14 many years.</p> <p>15 And every single one of them is an adjoining</p> <p>16 property owner. They live right next door to the</p> <p>17 proposed facility.</p> <p>18 The zoning administrator found in her</p> <p>19 determination that this particular use was something</p> <p>20 called a congregate housing facility precisely because</p> <p>21 of its emphasis on commercial treatment, a use, she</p> <p>22 said -- and this is the deputy zoning administrator --</p>
<p style="text-align: right;">Page 6</p> <p>1 did not decide the merits of the case.</p> <p>2 The Board of Zoning Appeals decided instead that</p> <p>3 the -- largely, that the decision that we appealed was</p> <p>4 not an appealable order. That is nobody could appeal</p> <p>5 it, and also, even if it were appealable, that my</p> <p>6 clients -- our clients did not have standing. So we</p> <p>7 never got to the merits of the case.</p> <p>8 But we do, as we say in our brief, Your Honor,</p> <p>9 ask the Court to exercise its appellate jurisdiction</p> <p>10 pursuant to that code section, Virginia Code Section</p> <p>11 15.2-2314, which allows the Court not only to reverse,</p> <p>12 affirm or affirm in part and reverse in part but also</p> <p>13 significantly to modify the decision of the Board of</p> <p>14 Zoning Appeals.</p> <p>15 That code section is also clear that the circuit</p> <p>16 court, in reviewing a BZA decision pursuant to its</p> <p>17 appellate jurisdiction, decides questions of the law de</p> <p>18 novo.</p> <p>19 And so we think the combination of those two</p> <p>20 factors, the de novo determination and the ability to</p> <p>21 modify the decision, allows this Court to exercise</p> <p>22 principles of judicial economy and decide the</p>	<p style="text-align: right;">Page 8</p> <p>1 that was not allowed in the AR-1 zone.</p> <p>2 But the zoning administrator went further in her</p> <p>3 determination and said notwithstanding that, if you need</p> <p>4 the definition of family in Virginia Code Section</p> <p>5 15.2-2291, then you can be allowed anyway. We</p> <p>6 challenged that suit.</p> <p>7 Interestingly, Newport, the owner of the subject</p> <p>8 properties, who is here today, did not challenge that</p> <p>9 determination.</p> <p>10 If you look at the record, you will see -- and</p> <p>11 if you look at these briefs, you will see there's no</p> <p>12 challenge to that decision, certainly no briefing as to</p> <p>13 why that decision was wrong.</p> <p>14 So we have a paradox. We have a paradox in a</p> <p>15 zoning administrator saying the use is not allowed, but</p> <p>16 it should be allowed anyway if you meet the definition</p> <p>17 of family in Virginia Code Section 15.2-2291.</p> <p>18 THE COURT: Would the wording be exactly should</p> <p>19 be allowed or may be allowed?</p> <p>20 MR. HAMPSHIRE: The wording was may be allowed</p> <p>21 if you meet the definition of family in that code</p> <p>22 section and if you -- some other things happen, namely</p>

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<p style="text-align: right;">Page 9</p> <p>1 you get licensure by the Virginia Department of Health 2 and Behavioral Development Services and you get 3 something called a zoning permit, which I will 4 articulate in a minute. 5 So that is the nature of a zoning determination. 6 And I go further to say, Your Honor, that a 7 zoning determination by its very nature does not 8 necessarily allow the use to commence. 9 As we say in our brief, there are all sorts of 10 other things that often have to happen after a zoning 11 determination is made before the use can actually 12 commence. 13 And we set forth some examples of that in our 14 papers. For example, you might have to get a special 15 use permit. 16 You might have to get a -- if you're a motor 17 vehicle dealership, you might have to get a license from 18 the Virginia Department of Motor Vehicles. 19 If you held a -- if you plan a building onsite, 20 and you're in the historic district, you might have to 21 get approval from the local board of architectural 22 review.</p>	<p style="text-align: right;">Page 11</p> <p>1 THE COURT: I welcome that. 2 MR. HAMPSHIRE: And I have a copy for counsel, 3 of course. 4 So the record is clear that Newport requested a 5 zoning determination. 6 Now, here you see the section -- Section 6-400 7 in the Loudoun County zoning ordinance. It's entitled 8 Administration and Enforcement of Ordinance and Notice 9 of Public Hearings. And it talks about the broad powers 10 that the zoning administrator has. 11 And I submit to you that those powers are 12 legislated by the Board of Supervisors of Loudoun County 13 pursuant to Virginia Code Section 15.2-2280 that says 14 that localities have broad power in the enactment of 15 zoning ordinances and in determining what uses are 16 allowed in what zones. 17 So you see here in Section 6-401, all of the 18 things that zoning administrators are allowed to do -- 19 all of the certain sort of decisions they are entitled 20 to make. And one of those is set forth in Section 21 6-401(C). 22 And you can see that it says there to issue</p>
<p style="text-align: right;">Page 10</p> <p>1 So a zoning determination -- I will show you in 2 a minute where this is set forth right in the code of 3 Loudoun County. A zoning determination is only one 4 step. It's called legal entitlement subject to getting 5 certain other permits. 6 So there's nothing extraordinary, remarkable or 7 unusual about the fact that other things were 8 contemplated to happen in the language of the zoning 9 determination. 10 So the substantive issue that the BZA did not 11 reach is whether notwithstanding the prohibition in the 12 zoning ordinance as determined by the zoning 13 administrator herself of a congregate housing facility 14 in the AR-1 district doesn't have to be allowed anyway 15 because of this state code section. 16 It's interesting as far as the facts go to 17 understand that the zoning determination was requested 18 by Newport pursuant to a code section. 19 And, Your Honor, as matter of housekeeping, I do 20 have several things I'd like to hand up, if that's all 21 right with the Court, to illustrate my argument. 22 They're all within the code.</p>	<p style="text-align: right;">Page 12</p> <p>1 interpretations of this ordinance upon proper 2 application, such interpretation shall be binding as the 3 applicant and as the specific facts presented in the 4 application for interpretation -- interpretation after 5 the completion of the 30-day appeal period. And it goes 6 on to talk about some other things that -- what the 7 zoning administrator can do. 8 And the last sentence is significant. It says 9 that such interpretation shall include notification of 10 appeal procedures and timelines. 11 Now, one of the other things you will see just 12 above it that a zoning administrator is empowered to do 13 is to issue these things called zoning permits, 14 interestingly, where the requirements of this ordinance 15 have been met. 16 So what did -- what did Newport do in this case? 17 Newport, in this case, very prudently, like any 18 other sophisticated purchaser, who's well advised by 19 counsel, requested a zoning determination from the 20 Loudoun County zoning administrator pursuant to Section 21 6-401(C). 22 And you will see in the record -- and I have a</p>

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<p style="text-align: right;">Page 13</p> <p>1 copy of it here for the Court -- at A59 of the record, 2 you will see Newport's request. 3 THE COURT: Thank you. 4 MR. HAMPSHIRE: And you will see that it states 5 September 22, 2021. And it talks -- and counsel for 6 Newport is writing to Alaina Ray, Loudoun County 7 Department, Director of Planning and Zoning. 8 And it goes on to say that Newport is 9 considering buying some property, that the current 10 owners in the middle of the first page are supportive of 11 Newport's proposed use of the property. 12 However, prior to any purchase of the property, 13 Newport seeks a zoning determination that the proposed 14 use of each property will be considered occupancy of, 15 quote, dwelling, single family detached as defined by 16 the zoning ordinance. 17 And over on the next page, you'll see the letter 18 concludes by saying at the last paragraph, accordingly 19 for these reasons, we request that you issue a zoning 20 determination for each of the properties confirming that 21 in the event Newport Academy were to purchase one or 22 more of these properties, it would be permitted by right</p>	<p style="text-align: right;">Page 15</p> <p>1 housing facility carrying over onto the next page, which 2 is a structure other than a single family dwelling where 3 more than four unrelated persons reside under 4 supervision for special care, treatment, training or 5 similar purposes. 6 And then there's a citation of a -- of family, 7 including a group that complies with 15.2-2291 and a -- 8 and repeating that if the use meets the requirements of 9 2291, in which no more than eight individuals with 10 mental illness and intellectual disability or 11 developmental disabilities reside with one or more staff 12 persons, and which the Department of Behavioral Health 13 and Developmental Services as the licensing authority, 14 pursuant to the Code of Virginia, then the use will 15 continue to meet the zoning ordinance definition of 16 family residing in a single family dwelling, a permitted 17 use in the AR-1 zone. And then it goes on to say to 18 establish a use, the issuance of a zoning permit is 19 required. 20 So the point of those two documents, Your Honor, 21 is that pursuant to zoning ordinance Section 6-401, 22 Subsection C, there was a request -- there was an</p>
<p style="text-align: right;">Page 14</p> <p>1 to operate the proposed residential facilities on 2 each upon licensure from the Virginia Department of 3 Behavioral Health and Developmental Services, which we 4 will learn is the entity that licenses all sorts of 5 homes or commercial structures that house people who are 6 mentally or developmentally disabled. 7 And so we see in the zoning determination 8 itself, which is at A72 -- and we see a response dated 9 November 29, 2021, where the zoning -- the deputy zoning 10 administrator responds to the request and says the short 11 answer to your inquiry -- in the first paragraph -- is 12 the proposed use is a congregate housing facility, all 13 caps, a use not permitted in the AR-1 zoning district. 14 However, the proposed use would be permitted as 15 a dwelling, single family detached on each of the 16 subject properties if the use meets the zoning ordinance 17 definition of family and the criteria of Section 18 15.2-2291 of the Code of Virginia. Licensure by the 19 Department of Behavioral Health and Developmental 20 Services is required. 21 And then at the bottom of the page, 22 significantly, we have the definition of congregate</p>	<p style="text-align: right;">Page 16</p> <p>1 application for a zoning determination. And there was a 2 zoning determination issued in response to that request. 3 And the zoning determination contained timelines 4 for appeal of that determination to the Board of Zoning 5 Appeals. 6 Now, our clients found out about that through 7 happenstance -- not really happenstance. But there was 8 no notice from the County about this determination. 9 There was notice from Newport. Newport wrote a 10 letter to our clients. And I have a copy of that which 11 is in the record. 12 And the testimony before the Board of Zoning 13 Appeals was that this was placed in mailboxes. And you 14 can see it's from Lee McGinnis from Newport -- for 15 Newport Institute of Virginia. 16 And she says in the second paragraph on November 17 29, 2021, Loudoun County Deputy Zoning Administrator, 18 Michelle Lohr, issued a zoning determination that the 19 proposed use of the homes is a permitted use in this 20 district -- in this zoning district, provided the 21 Virginia Department of Behavioral Health and 22 Developmental Services issues the requisite state</p>

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<p style="text-align: right;">Page 17</p> <p>1 license.</p> <p>2 So what we have here is a situation where all</p> <p>3 parties are following Virginia code -- zoning ordinance</p> <p>4 Section 6 -- 6-401(C) for the interpretation of zoning</p> <p>5 determinations.</p> <p>6 And as I said a second ago, the zoning</p> <p>7 determinations are not as set forth in this -- in this</p> <p>8 ordinance here are not determinations that the use can</p> <p>9 actually commence.</p> <p>10 Zoning determinations go only as far as they go.</p> <p>11 But that doesn't mean they're not appealable. That does</p> <p>12 not mean that things that are in them are not</p> <p>13 significant. That does not mean that there are certain</p> <p>14 issues that need to be resolved by the Board of Zoning</p> <p>15 Appeals.</p> <p>16 Now, when you compare that to another code</p> <p>17 section upon which the County relies -- and by the way,</p> <p>18 I found out this morning from my friend, Mr. Wilburn,</p> <p>19 for the first time that Newport is going to be joining</p> <p>20 in the County's argument that this order was not</p> <p>21 appealable.</p> <p>22 Up until now, we have not heard that. We have</p>	<p style="text-align: right;">Page 19</p> <p>1 standards for issuance.</p> <p>2 And it says that no zoning permit shall be</p> <p>3 issued where the structure to be constructed or the use</p> <p>4 contemplated would be in violation of provisions of this</p> <p>5 ordinance or any other applicable county law, ordinance</p> <p>6 or regulation.</p> <p>7 And it goes on to say that in addition, no</p> <p>8 permits shall be issued where the proposed use violates</p> <p>9 the terms of the rezoning, subdivision, special</p> <p>10 exception proffers or other approval.</p> <p>11 And the last sentence is significant. The</p> <p>12 issuance of said zoning permit, however, shall not</p> <p>13 afford protection to any owner who is found to be</p> <p>14 violating this or other applicable law or regulation.</p> <p>15 So when you take these two zoning code sections</p> <p>16 together, what do they tell you?</p> <p>17 They tell us that any prudent purchaser is going</p> <p>18 to do what Newport did.</p> <p>19 They're not going to buy -- they're not going to</p> <p>20 pay 3,000 -- excuse me, \$3 million for property and then</p> <p>21 try to get a zoning permit. Because they're going to be</p> <p>22 met, if they find out after they've spent \$3 million and</p>
<p style="text-align: right;">Page 18</p> <p>1 not heard that before the Board of Zoning Appeals, and</p> <p>2 we've not heard that in briefing.</p> <p>3 But here is the section that is referred to in</p> <p>4 Section 6-401, Subsection B, I think I mentioned this a</p> <p>5 second ago, a separate duty of the zoning administrator,</p> <p>6 which is to issue zoning permits where the requirements</p> <p>7 of the ordinance have been met.</p> <p>8 So when you look at Section 6-101, application</p> <p>9 for zoning permit, you see a number of things that have</p> <p>10 to happen before a zoning permit can be issued.</p> <p>11 Items A through H -- going over to the next</p> <p>12 page. Statements from the health department, a grading</p> <p>13 permit, the intended use, the number of families, a site</p> <p>14 plan, locational clearance of property number and size,</p> <p>15 lighting, number and size, location of off-street</p> <p>16 parking spaces.</p> <p>17 But I urge the Court to look at the next</p> <p>18 section, Section 6-1002 on the second page. And it's</p> <p>19 consistent with the language of Section 6-401(C) that</p> <p>20 says zoning permits can be issued only where the</p> <p>21 requirements of the ordinance are met.</p> <p>22 So in line with that, Section 6-1002 is entitled</p>	<p style="text-align: right;">Page 20</p> <p>1 gotten the property and applied for a zoning permit --</p> <p>2 they're going to be -- they could be told by the zoning</p> <p>3 administrator at that time guess what, you can't use</p> <p>4 this property for what you bought it for.</p> <p>5 And all of a sudden, they've got a bunch of</p> <p>6 investors mad at them, and they're probably going to be</p> <p>7 mad at themselves.</p> <p>8 So instead of doing that, what they did -- what</p> <p>9 they do -- what a purchaser does and what Newport did in</p> <p>10 this case is say before we buy that property, we're</p> <p>11 going to go under Section 6-401(C). We're going to find</p> <p>12 out from the zoning administrator if the use is allowed.</p> <p>13 And then we're going to have a comfort level that we can</p> <p>14 actually close on the property, pay all that money and</p> <p>15 make a good report to our investors.</p> <p>16 There's one little catch, that that</p> <p>17 determination is appealable to the Board of Zoning</p> <p>18 Appeals within 30 days, and just like any other</p> <p>19 determination is appealable to the Board of Zoning</p> <p>20 Appeals.</p> <p>21 And again, the fact that other things have to</p> <p>22 happen is not relevant.</p>

Hearing

<p style="text-align: right;">Page 21</p> <p>1 And for that, Your Honor, I did not bring 2 copies. But I'm sure you have a copy of the Virginia 3 Code, perhaps, at the desk or at your disposal. If not, 4 I can make copies. 5 But what I cite to the Court is Virginia Code 6 Section 23 -- 2311 which talks about the appeals to 7 boards of zoning appeals. 8 And that's Section 15.2- 2311, Subsection A says 9 an appeal to the board -- meaning the Board of Zoning 10 Appeals -- may be taken by any person aggrieved or by 11 any officer, department, board, bureau or locality 12 affected by the decision of the zoning administrator or 13 from any order, requirement, decision or determination 14 made by any other administrative officer in the 15 administration and enforcement of this article, et 16 cetera. 17 I cite to the Court the last line in the very 18 first sentence. An appeal may be taken by any person 19 aggrieved by any other officer -- second sentence, 20 excuse me, affected by any decision -- any decision by a 21 zoning administrator or administrator, officer in the 22 administration of the zoning ordinance, not just some</p>	<p style="text-align: right;">Page 23</p> <p>1 the property owner, are they really aggrieved by the 2 decision, not whether or not the decision is appealable. 3 So this is an unusual case in that regard. 4 I'd like to mention for the Court a decision 5 that just came down. And it's Anders Larsen Trust 6 versus Board of County Supervisors of Fairfax County. I 7 have a copy for the Court, if you'd like it. 8 And this is a case, interestingly enough, 9 involving Newport, the same entity in Fairfax County, 10 same set of -- same virtual set of facts in McLean, 11 proposal to set up a treatment center in a residential 12 zone. 13 Fairfax County residents, adjoining property 14 owners appealed to the Board of Zoning Appeals. They 15 lost. 16 They appealed to circuit court under a petition 17 just like we're here on today. And Judge Bugg 18 sitting -- Judge Bugg -- Dontae Bugg ruled sue sponte 19 that these people, the adjoining property owners didn't 20 have standing, citing the Friends of Rappahannock case. 21 Then it was appealed to the Virginia Supreme 22 Court.</p>
<p style="text-align: right;">Page 22</p> <p>1 decisions, not just zoning permit decisions under 2 6-401(C) but also zoning determinations under Section 3 6-401(B). 4 Let me make sure I got those right. 5 Not just zoning -- not just zoning permits under 6 Section 6-401(B) but zoning determinations also under 7 Section 6-401(C). 8 And the reason we know that is because that 9 section has appeal deadlines notifying and -- and this 10 letter -- the zoning determination had an appeal 11 deadline. Here's what you need to do to appeal to the 12 Board of Zoning Appeals. 13 Now, the catch here is that the landowner is not 14 the only person -- the person receiving this letter, 15 Newport, is not the only person that gets to appeal it. 16 According to the first sentence of 15.2-2311, an 17 appeal may be taken not just by the property owner but 18 any person aggrieved by -- or any -- by a decision by 19 any zoning administrator or officer. So that's -- 20 that's where these fights usually come down. 21 As the Court knows, Virginia jurisprudence is 22 are the people who have appealed this -- if they're not</p>	<p style="text-align: right;">Page 24</p> <p>1 And that's the opinion of which you have in your 2 hand. 3 And the Virginia Supreme Court found in the 4 last -- the last page that it's highlighted -- in 5 comparing and distinguishing Friends of Rappahannock, it 6 says here, in contrast, we are dealing with a commercial 7 establishment in a residential neighborhood. And the 8 complaining parties live in or own single family homes 9 immediately next to the proposed treatment center. 10 Their allegations of diminished property values and 11 increased traffic to and from the residence rise beyond 12 mere speculation and -- and suffice to allege standing. 13 So what it is -- what is it anyway that we think 14 of when we think of standing? 15 And for that, the Virginia Supreme Court -- I 16 believe in the Larsen court -- certainly another case 17 out of Alexandria called the Historic Alexandria 18 Foundation that was decided just last year cited the 19 seminal case on standing of Cupp versus Board of 20 Supervisors of Fairfax County at 227 Virginia, 580, a 21 1984 case, which really explained what it is that we 22 mean by standing in a zoning context.</p>

Hearing

<p style="text-align: right;">Page 25</p> <p>1 And remember, in this case, the Board of Zoning 2 Appeals decided not only that the order was not 3 appealable, because it wasn't a zoning permit, but also 4 that our clients did not have standing. 5 So we have both issues that were decided by the 6 Board of Zoning Appeals. 7 And the Supreme Court says the point of standing 8 is to ensure that the person who asserts a position has 9 a substantial legal right to do so and that his rights 10 will be affected by the disposition of the case. 11 In essence -- excuse me -- in asking whether a 12 person has standing we ask, in essence, whether he has a 13 sufficient interest in the subject matter of the case so 14 that the parties will be actual adversaries and the 15 issues will be fully and faithfully developed. 16 The United States Supreme Court has described 17 standing in the following terms: The essence of 18 standing, the standing inquiry -- excuse me, the essence 19 of the standing inquiry is whether the parties seeking 20 to invoke the court's jurisdiction have, quote, alleged 21 such a personal stake in the outcome of the controversy 22 as to assure that the concrete adverseness with</p>	<p style="text-align: right;">Page 27</p> <p>1 tourist industry and interconnection with a rural 2 economy, promote consistency from residential 3 development and rural economy uses. 4 None of these uses involve a commercial 5 treatment center in a -- in that zone. 6 And if you -- for more detail on that, I have 7 for Your Honor a copy of the use table that is 8 referenced in the AR-1 zone, which talks about what uses 9 are allowed in the AR-1 zone. And this is Table 2-102 10 of the zoning ordinance. 11 And I'm not going to go through all of them. 12 But I -- but if you thumb through those uses, you will 13 not see in there congregate housing facilities. 14 And a principle in Virginia zoning is that if a 15 use is not -- under Virginia zoning ordinances in 16 Virginia's jurisprudence, if a use is not specified in 17 the zoning district, it is not allowed. It's what's 18 called an exclusive zoning district. 19 So we see here, in addition to the general 20 intent that the AR-1 zone be rural, low density 21 residential with commercial use only to the extent it is 22 agricultural and rural economy.</p>
<p style="text-align: right;">Page 26</p> <p>1 sharpness presentations of the issues upon which the 2 court so largely depends for illumination of difficult 3 constitutional questions. 4 We're not dealing really with difficult 5 constitutional questions here. 6 But we are dealing with issues that are very 7 important to people who live right next door, who have 8 invested their life savings in homes in a residential 9 neighborhood in reliance upon the AR-1 zoning district. 10 And it's interesting to learn a little bit about 11 the AR-1 zoning district, because that's the whole 12 regulatory background against which we are discussing 13 this case. 14 And so I have a section from the zoning 15 ordinance here which is entitled The Purpose and Intent 16 of the AR-1, Agricultural Rural 1 District. 17 And you can see there, Your Honor, that the 18 purpose and intent is to A, support the use of land for 19 rural economy uses where the residential uses allow the 20 densities consistent with a general open and rural 21 character of rural economy uses, allowed for a broad 22 range of rural economy uses, recognize the economist</p>	<p style="text-align: right;">Page 28</p> <p>1 We do not see a congregate housing facility that 2 the zoning -- excuse me, the zoning administrator 3 herself found the use as described by Newport to be -- 4 Newport described this use in its request that I handed 5 to you. 6 The zoning administrator looked at that request 7 and said you know what, this is a congregate housing 8 facility not allowed in the AR-1 zone. 9 And so for the definition of congregate housing 10 facility, we go to the zoning ordinance. 11 And this is from Article A of the zoning 12 ordinance and has a definition of what is a congregate 13 housing facility. 14 Again, the zoning administrator found this use 15 to be this use. Newport has not challenged that use. 16 And therefore, her determination is kind of thing 17 decided as to that determination. 18 A congregate housing facility is a structure 19 other than a single family dwelling -- that's a critical 20 point -- where more than four unrelated persons reside 21 under supervision for special care, treatment, training 22 or similar purposes on a temporary or permanent basis.</p>

Hearing

<p style="text-align: right;">Page 29</p> <p>1 So this is a use that -- putting Virginia Code 2 Section 2291 aside for one second. Certainly, it's not 3 allowed. And the zoning administrator herself found it 4 not to be allowed. 5 So we have here another definition that is 6 significant to this case. 7 And that is -- because the zoning administrator 8 herself found -- found this use not to be a single 9 family dwelling but a congregate housing facility unless 10 it complied with 2291. 11 We look to the definition of dwelling single 12 family attached -- excuse me, dwelling single family 13 detached, which is defined by the Loudoun County Board 14 of Supervisors in its zoning ordinance as a residential 15 dwelling other than a portable dwelling designed and 16 occupied for one family only and not structurally 17 connected or attached to any other dwelling. 18 So that is what's -- that is the relevant use 19 category that Newport, as you may recall from its 20 request, was shooting for. 21 It wanted its description of this commercial 22 treatment center to fall within this residential</p>	<p style="text-align: right;">Page 31</p> <p>1 have a copy of the Virginia code, you will see that, 2 number one, it is not some foreign statute. It's not 3 some statute that comes out of some other part of the 4 code that is competing against the zoning enabling 5 statutes. 6 It's part of Article 7 of Title 15.2 that is the 7 enabling authority for local governments like Loudoun 8 County to have a zoning ordinance. 9 So it does not conflict with the zoning 10 ordinance. 11 Indeed, it is the enabling authority -- part of 12 the enabling authority for the zoning ordinance. And so 13 it's important to understand what it does and what it 14 doesn't do. 15 Sometimes in looking at the statute, it is good 16 to think about what it does not say. 17 And I think in that regard, if Your Honor would 18 look at the last sentence -- first of all, you have two 19 subsections. 20 And the first one we are dealing with Subsection 21 A, because we are dealing with in this case mental 22 illness, intellectual disability.</p>
<p style="text-align: right;">Page 30</p> <p>1 dwelling unit that is -- that is allowed in the AR-1 2 pursuant to Table 1 -- 2-102. 3 So significant in that definition is the term 4 residential. 5 And Loudoun County zoning ordinance has a 6 definition of that as well, which I'm handing up. 7 So the Loudoun County zoning ordinance defines a 8 residential use in Article 8 structures which are built 9 for and occupied by private households, any activity of 10 a private household conducted in a private dwelling. 11 So but for 15.2-2291, the zoning administrator 12 found the use to be a congregate housing facility, not a 13 single family dwelling, not allowed -- not that of a 14 private household because it wasn't residential in 15 nature and, therefore, not allowed in the zoning 16 district but for Virginia Code Section 15.2-2291. 17 So then we need to get to this famous Virginia 18 Code Section 15.2-2291. 19 And I have copies for the Court -- a copy for 20 the Court. 21 So I think it's significant, Your Honor, when 22 looking at this code section to understand -- and if you</p>	<p style="text-align: right;">Page 32</p> <p>1 We're not dealing with Subsection 2, infirm or 2 disabled persons. We're dealing with Subsection A. 3 So if you look at the last section -- excuse me, 4 the last sentence of Subsection A -- we all think about 5 our time in law school. We had a contrast class. We 6 may have had a commercial paper class, certainly, a 7 statutory construction class. 8 The first thing the professor tells us is let's 9 look for a definition. Is there a definition that we 10 can look to to help us understand what this statute 11 means? 12 And a lot of times, you have to go to 13 definitions in some other -- some other definitional 14 section. 15 But the definition is right here in this code 16 section. It's in quotes. It says for the purpose of 17 this subsection, quote, residential facility means any 18 group home or other residential facility for which the 19 Department of Behavioral Health or Developmental 20 Services is the licensing authority pursuant to the 21 code. 22 So residential facility in quotes has to be,</p>

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<p style="text-align: right;">Page 33</p> <p>1 number one, a residential facility, a group home or 2 residential facility.</p> <p>3 And this is significant in Newport's argument 4 that you're going to hear in a minute that somehow the 5 Virginia General Assembly has codified commercial use in 6 a residential zone.</p> <p>7 They've done just the opposite here. They've 8 said if you have a residential facility that is 9 licensed, a group home or residential facility that is 10 licensed, then you have to treat it as any other single 11 family residential home. But it has to be a residential 12 home. It can't be a commercial home.</p> <p>13 And I'm going to tell you about some case law in 14 a minute that backs that up.</p> <p>15 So when you look at that definition and you say 16 it has to be a residential facility that is licensed, 17 not a commercial facility that's licensed -- because 18 keep in mind, the Virginia Department of Behavioral 19 Health licenses all sorts of facilities.</p> <p>20 And often, they go into commercial zones. They 21 go into office buildings. They go into other 22 residential zones that actually allow the use perhaps.</p>	<p style="text-align: right;">Page 35</p> <p>1 have to do, according to the first sentences of the 2 statute, is you have -- you shall consider a residential 3 facility as defined to be residential occupancy by a 4 single family.</p> <p>5 And if you go down a little further, it says -- 6 and this is significant -- no condition is more 7 restrictive than those imposed on residences occupied by 8 persons related by blood, marriage or adoption shall be 9 imposed upon such a facility.</p> <p>10 So as backed up by the case law I'm going to 11 discuss -- and I don't think it's disputed here at all 12 in the briefs -- is that what the General Assembly did 13 in enacting 15.2-2291 is to respond to the congressional 14 act called The Fair Housing Act and its amendments in 15 1988 that was responding to discrimination against 16 mentally disabled persons, developmentally disabled 17 persons in housing.</p> <p>18 Localities were imposing special requirements, 19 special use permit requirements, other source of 20 requirements on houses that proposed to have unrelated 21 mentally disabled persons living there to make it more 22 difficult for them to do so.</p>
<p style="text-align: right;">Page 34</p> <p>1 But in Loudoun County in AR-1 zone, the use is 2 not allowed. So --</p> <p>3 THE COURT: Say that again.</p> <p>4 MR. HAMPSHIRE: In Loudoun County, a commercial 5 use like this, a commercial treatment use is not allowed 6 in the AR-1 zone.</p> <p>7 That table that I presented to you, Table 2-102 8 doesn't contain a commercial housing facility which is 9 defined as a facility that is based in treatment.</p> <p>10 And the facts here show that what is going on is 11 the young women are coming here for treatment. They are 12 coming here to be treated for mental illnesses. And 13 then they're going back home. They're not residing 14 there for -- as contemplated by a single family home in 15 Loudoun County.</p> <p>16 So what it says here is if you have a facility 17 that is licensed that happens to be a residential 18 facility -- and keep in mind that Virginia Code 19 15.2-2280 gives localities the authority to define what 20 is residential. And that's why I handed you up that 21 definition of what is residential.</p> <p>22 If it's a residential facility, then what you</p>	<p style="text-align: right;">Page 36</p> <p>1 That's what this code section says. If you have 2 a residential facility where people want to live and 3 they are -- and it is licensed, and it contains mentally 4 impaired persons who are unrelated, then you can impose 5 special requirements on them.</p> <p>6 You can't say this facility over here needs a 7 special use permit, but the same use occupied by a 8 traditional family does not. That's what this tends to 9 address.</p> <p>10 There is no indication in this language that the 11 General Assembly or even the Congress in enacting the 12 Federal Housing Acts -- amendments of 1988 intended to 13 say local governments, you can no longer separate 14 residential from commercial uses.</p> <p>15 All it says is that once you make a 16 determination of what is an appropriate use in a 17 residential zone, you can't impose special requirements 18 on mentally ill people. You can't do it.</p> <p>19 That's not what's going on here.</p> <p>20 Because as the zoning administrator herself has 21 said, a congregate housing facility which is treatment 22 focused isn't allowed in the AR-1 zone for anybody,</p>

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<p style="text-align: right;">Page 37</p> <p>1 nobody. It's completely neutral. 2 A traditional family, for example, could not -- 3 and I've been trying to think of a good example for the 4 Court. 5 But let's say that we have a traditional family, 6 mother, father, children. But the two parents happen to 7 be psychotherapists. And they say we want to have 8 people in here, four or more people, which is the 9 definition -- four or more unrelated people in here to 10 reside for a short period of time to come and stay with 11 us for a short period of time, and we're going to treat 12 them. They couldn't do that. 13 Likewise, physical therapy, which falls into 14 a -- into the definition of a congregate housing 15 facility. You couldn't have a couple physical 16 therapists who happen to be married, have a bunch of 17 people in and engage in physical therapy in the AR-1 18 zone. 19 So nobody can do what Newport is -- wants to do. 20 So the effect of the zoning determination is not 21 to give equal rights but to give a superior right of an 22 entity like Newport to induce something that a</p>	<p style="text-align: right;">Page 39</p> <p>1 residential uses. 2 And in this case, it's interesting to note if 3 you turn over to the next page, what happened here is 4 that the town of Westmoreland, I believe it was -- I may 5 have the town wrong. I'll get to it in a minute. But 6 anyway, the town actually gave more rights to the -- to 7 the group home than the statute mandated. 8 And in that context, the court said localities 9 are free to be more permissive in giving -- giving more 10 rights, but they don't have to be. And all that is 11 required is that they give the same rights. 12 And that's exactly what's happened in this case. 13 The town of West Point, I believe it was, Your 14 Honor. 15 So the point I'm trying to make through the 16 citation of Tribble versus Bland is that the General 17 Assembly in enacting 15.2-2291 in no way intended to 18 usurp local zoning authority to separate commercial from 19 residential uses. 20 All that it says in that statute is that 21 traditional families and group home families, if you 22 will, mentally ill families needed to be treated the</p>
<p style="text-align: right;">Page 38</p> <p>1 traditional family can't. 2 And that is to have a treatment center in a 3 residential zone in contradiction to the zoning 4 ordinance. 5 Now, it is true under Tribble versus Bland that 6 localities have raw discretion. 7 And this is Tribble versus Bland. And it's 250 8 Virginia, 20. It's cited in the briefs. And I have a 9 copy for the Court. 10 THE COURT: Thank you. 11 MR. HAMPSHIRE: So we'll hear more about this 12 case. 13 But this case -- the highlighted section on page 14 2 under headnote 24 recognizes that the General Assembly 15 has granted broad -- the General Assembly has granted 16 localities broad authority to adopt a zoning ordinance 17 pursuant to -- and this is the predecessor of Virginia 18 Code 15.2-2280, which is Section 15.1-486. 19 As pertinent here, the statute provides that a 20 municipality may by ordinance classify the territory of 21 its jurisdiction in the districts, and in each district, 22 determine the utilization of the premises for</p>	<p style="text-align: right;">Page 40</p> <p>1 same. 2 That's exactly what's going on here by 3 prohibition of congregate housing facilities in the AR-1 4 zone for everybody. 5 And so the zoning determination was plainly 6 wrong in concluding that only a Newport style treatment 7 facility was allowed in the AR-1 zone. 8 And this will have a -- as Mr. Bartolomucci will 9 say, this will have a devastating effect upon the 10 neighborhood. 11 Now, we know about this term NIMBY, not in my 12 backyard. And it's pejorative term often. But we have 13 zoning ordinances because of backyards. 14 We have zoning ordinances to separate the 15 slaughterhouse, if you will, from the parlor. We 16 have -- to separate the asphalt plan from the parlor, to 17 separate commercial uses from the parlor. 18 That's what Euclid was all about way back in the 19 1920s. 20 So while people don't want things in their 21 backyard, they have a right to rely upon the plain 22 language of the zoning ordinance unless it's somehow</p>

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<p>1 superseded by Virginia Code or the United States 2 Congress. And in this case, it is not. 3 So Newport is just wrong when it says that 4 somehow 15.2-2291 has codified its use in contradiction 5 of the zoning ordinance. 6 There are a couple cases that are cited by 7 Newport that back this up. 8 And the first one I'd like to mention is the 9 Connecticut Hospital versus City of New London. And 10 this is a case out of Connecticut. It's a federal case 11 out of the district court of Connecticut, a 2001 case, 12 129 F. Supp 2d, 123, cited by Newport. 13 The reason we're talking about federal cases, 14 Your Honor, is because there's no issue in this case 15 that the Virginia Code Section 15.2-2291 was enacted, as 16 I said a second ago, in response to the congressional 17 action under the Fair Housing Act amendments in 1988 due 18 to the things that I talked about before. 19 So it's significant what federal courts have 20 said about -- about the rights and then what the intent 21 was. 22 And in this case, it's significant to note that</p>	<p>1 free time. 2 So in this -- in this case, it was clear that 3 the courts were not confronting the situation where 4 treatment was going on onsite. 5 It was a residence where folks lived and went 6 offsite for treatment. 7 And that's the intent of the Federal Fair 8 Housing Acts of 1988 and also Virginia Code Section 9 15.2-2291. 10 THE COURT: But that judge itemized the daily 11 activity of the people involved. He went into the van. 12 He went into what they're doing, where they're getting 13 their treatment. 14 MR. HAMPSHIRE: Right. 15 THE COURT: Do I have any of that before me? 16 MR. HAMPSHIRE: You have undisputed evidence 17 before you in the record below that Newport proposes to 18 treat people onsite. 19 THE COURT: In the houses in question? 20 MR. HAMPSHIRE: Yes, sir. 21 THE COURT: Go ahead. 22 MR. HAMPSHIRE: So it's a completely different</p>
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<p>1 the residents, as highlighted here, received no 2 treatment onsite. 3 They were recovering substance abuse people, 4 abusers -- substance and alcohol abusers who were 5 recovering in a place called Stonington Institute 6 Treatment Program. But Stonington Institute wasn't on 7 the subject property. Stonington Institute was an 8 institute. 9 It was -- and it was a place to which these 10 folks went and returned at the end -- and returned to 11 their home at the end of the day. 12 It says residents of these group homes received 13 therapy and treatment on an outpatient basis from 14 Stonington Institute but received no treatment or 15 therapy at the OH -- OCH, which is offsite center. 16 Let's see. What's the definition of that? Off 17 campus housing is what it's defined as. 18 Down at the bottom of page 2, each morning, OCH 19 residents take a van to the Stonington Institute for 20 treatment, which lasts until the afternoon. The 21 residents then take the van back to the group home where 22 they are able to have lunch, followed by a few hours of</p>	<p>1 situation here. 2 In the case citation Schwarz versus City of 3 Treasure Island, which is also cited by Newport, you 4 will see -- and this is a case -- this is out of 5 Pennsylvania. Excuse me. No, it's not. It's out of 6 Florida. It's a Florida case. And it's 544 F. 3d, 7 1201, 11th Circuit, 2008. 8 And you will see in the highlighted section 9 there on page 5 that the Gulf Coast recovery is licensed 10 by Florida Department of Children and Families to 11 provide outpatient rehabilitation services to recovering 12 drug and alcohol abusers at its treatment facility at 13 Treasure Island. 14 Notably, the company's license does not allow it 15 to provide inpatient or residential treatment. 16 As a result, clients must find other 17 accommodations while receiving treatment, exactly the 18 opposite. 19 The record is undisputed below. 20 You will have pages and pages of it that Newport 21 is advertising to treat people onsite for all kinds of 22 things, including substance abuse.</p>

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<p style="text-align: right;">Page 45</p> <p>1 But they're treating them for mental illness, 2 anxiety onsite, different. Not intended by the Federal 3 Fair Housing Act, not intended by 15.2-2291 and not set 4 forth in the case law. 5 The last case I'd like to mention, Your Honor, 6 is a case also relied upon by Newport. And that is 7 Lakeside Resort Enterprises versus Board of Supervisors 8 of Palmyra Township. 9 And that's -- this is the Pennsylvania case that 10 I was thinking of. And this is at 455 F. 3d, 154. And 11 it's a Third Circuit Court -- Third Circuit case. 12 Now, what is significant about this case -- now, 13 grant it, these -- these residents were there for a 14 short period of time. 15 However, if you look at the very first paragraph 16 there under factual background, procedural history, you 17 will see that this property was zoned commercial. 18 The Lakeside property zoned as commercial sits 19 on Lake Wallenpaupack, Palmyra Township, which includes 20 a hotel restaurant complex. 21 And what happened was that the Palmyra Board of 22 Supervisors enacted a zoning ordinance to prohibit --</p>	<p style="text-align: right;">Page 47</p> <p>1 it's not allowed. But 15.2-2291 says it has to be 2 allowed anyway. That is a plainly wrong decision. 3 Now, the -- as we know, the localities -- it's 4 also backed up by evidence in the record. 5 And for this, I want to mention tab 5, page A153 6 of the record. 7 And you will find there a letter from Jae Benz, 8 who is the licensing director of the Virginia Department 9 of Behavioral Health and Developmental Services, who 10 says that that department has no role in zoning 11 determinations, has absolutely nothing to do with them. 12 Its only role is to licensed facilities once they have 13 been determined to be compliant with local zoning in the 14 context of 15.2-2291. 15 And, of course, Your Honor -- 16 THE COURT: Just a second. To what extent can 17 one interpret from the record or the facts in this case 18 that the decision by local government said it may be 19 subject to that board you've just described -- the 20 statewide board as to whether this is finalized? 21 MR. HAMPSHIRE: Yes, sir. Well, what I would 22 say to that, Your Honor, is that it's a zoning</p>
<p style="text-align: right;">Page 46</p> <p>1 not to change it from commercial to residential, but to 2 prohibit this particular use in a -- in a hotel 3 conference center -- hotel restaurant complex. 4 So I submit, Your Honor, that this case has 5 absolutely no application here to a residential zone. 6 It was already zoned commercial. 7 And it may be that the Pennsylvania statutes -- 8 state statutes are somewhat different from what we have 9 in Virginia. 10 But the point I'm trying to make with these 11 cases, Your Honor, is that there is no legislative 12 history in 15.2-2291 that says that a commercial 13 treatment use is -- must be allowed in an AR-1 zone 14 where it wouldn't be allowed otherwise. And there's no 15 case law that says it has to be. 16 And at the same time, we have Virginia Code 17 Section 15.2-2280 as backed up by the Tribble versus 18 Bland case that gives localities broad authority in the 19 enactment of zoning ordinances and a decision about what 20 should be allowed in the AR-1 zone. 21 And that, therefore, the zoning administrator -- 22 the zoning determination was plainly wrong in saying</p>	<p style="text-align: right;">Page 48</p> <p>1 determination. 2 THE COURT: Well, you just said that that 3 statewide agency won't do zoning. 4 MR. HAMPSHIRE: That's right. Has nothing to do 5 with zoning. 6 And so that's -- that's my point. 7 The zoning determination is a zoning 8 determination. It's made under a separate statutory 9 scheme with a separate purpose. 10 And therefore, much like the Virginia Department 11 of Vehicles, if you're talking about an automobile 12 dealership has to issue a license, there are always 13 things that have to come along. 14 But as far as it being a zoning determination 15 that is appealable, it's appealable as far as it goes, 16 like any other determination. 17 The determination was significant. Otherwise, 18 Newport wouldn't have asked for it. Otherwise, Newport 19 would not have trumpeted it to its neighbors. 20 We have this neat zoning determination, which 21 means we can move forward to purchase these properties. 22 And we want to be good neighbors. And --</p>

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<p style="text-align: right;">Page 49</p> <p>1 THE COURT: But not just purchase it. You want 2 to modify or build them or do something else with them. 3 MR. HAMPSHIRE: Yes, sir. You want to spend a 4 lot of money on buying them and you want to renovate 5 them for this commercial use. 6 No willing purchaser is going to do that without 7 a zoning determination. 8 Because the other things are administerial. You 9 can get a building permit. You just have to comply with 10 the code. 11 You can get a zoning permit. You just have to 12 get those -- do those administerial things, like a 13 grading plan, that sort of thing. 14 And you can get probably get a license if you 15 comply with those requirements. 16 THE COURT: From the state agency. 17 MR. HAMPSHIRE: Yes, sir. 18 But a zoning permit -- excuse me, a zoning 19 determination is something different. It involves the 20 discretion of the zoning administrator under that code 21 section that I mentioned to you, 6-401. It's a 22 discretionary determination.</p>	<p style="text-align: right;">Page 51</p> <p>1 come back and try to attack it when a zoning permit was 2 issued. Because by then, it would be too late. 3 If you recall that statutory structure, you have 4 zoning permits up here. You have determinations down 5 here. 6 If they didn't appeal this, they would be met 7 with the well established case law and the language in 8 the code that says this determination that this use is 9 allowed subject to licensure has become a thing decided. 10 It's final. You're estopped from collaterally attacking 11 it. That's the finality. 12 And so we -- we had to appeal it. Because if we 13 didn't, we'd be estopped. 14 THE COURT: Let me take you back to an earlier 15 question. 16 MR. HAMPSHIRE: Yes, sir. 17 THE COURT: The concept may in the determination 18 letter is different than it does. Does that make sense 19 -- the question? 20 MR. HAMPSHIRE: It does. And it's -- I think 21 what was -- 22 THE COURT: Is that a final opinion?</p>
<p style="text-align: right;">Page 50</p> <p>1 And so one better not purchase a property with 2 the idea you're going to spend even more money 3 renovating it until you know that the local zoning 4 administrator has determined it to be in compliance with 5 the zoning ordinance. 6 Now, here's the other part that's very 7 significant. 8 And I know the Court is aware of this line of 9 cases. 10 And you will see in Section 4 -- 6-401, 11 Subsection C, there's language about -- it becomes final 12 and unappealable if not appealed within 30 days. 13 That is consistent with case law such as Dick 14 Kelly Enterprises, Gwinn versus Alward, Ranker versus 15 City of Fairfax, a well established line of cases that 16 says that the zoning determination issues, you find out 17 about it because you're the property owner or you live 18 next door. And you let 30 days go by and you don't 19 appeal it, it becomes what's called a thing decided. 20 You're stuck with it. 21 And so that's why my clients couldn't sit on 22 their thumbs here, wait for 30 days to go by and then</p>	<p style="text-align: right;">Page 52</p> <p>1 MR. HAMPSHIRE: It is. 2 THE COURT: Why is the word may in there? 3 MR. HAMPSHIRE: The word is -- may in there to 4 suggest that if certain things happen, it will be 5 allowed. 6 It's much like saying it may be allowed if you 7 meet the -- and here's the other issue. It's also to 8 allow for the compliance with other code requirements 9 that may or may not apply. 10 For example, you know, the zoning ordinance has 11 all kinds of requirements in it. They have setback 12 requirements. 13 When you submit a site plan, you may or may not 14 be able to build that canopy you want to build. You 15 might not be able to enlarge a swimming pool. You might 16 not be able to do any number of things. 17 So the zoning administrator is going to use the 18 word may to guard against compliance with those other 19 codes and in order to get those other licenses. 20 But it's still a determination that it may be 21 allowed. 22 And if we don't appeal it, we're stuck with</p>

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<p style="text-align: right;">Page 53</p> <p>1 that. This is why we did appeal it.</p> <p>2 THE COURT: Thank you. Okay.</p> <p>3 MR. HAMPSHIRE: Your Honor, I believe that's --</p> <p>4 that's what I have.</p> <p>5 I've tried to address the standing issue.</p> <p>6 But -- and also the lack of appealability or ripeness</p> <p>7 issue, if you will, but also the substantive issue that</p> <p>8 the Board of Zoning Appeals did not address.</p> <p>9 THE COURT: What are you asking this Court to</p> <p>10 rule?</p> <p>11 MR. HAMPSHIRE: Your Honor, I'm asking the Court</p> <p>12 to rule, number one, that the Board of Zoning Appeals</p> <p>13 erred in dismissing this case without deciding it based</p> <p>14 on the idea that the determination at issue was an</p> <p>15 advisory opinion that was -- or that it was not</p> <p>16 accompanied by an application.</p> <p>17 We think that is fundamentally wrong and in</p> <p>18 contradiction of the County's own ordinance and case law</p> <p>19 as we've cited.</p> <p>20 So therefore, the BZA was wrong and made an</p> <p>21 error of law in ruling that way.</p> <p>22 We're also asking the Court to go further than</p>	<p style="text-align: right;">Page 55</p> <p>1 same as Mr. Hampshire's, as you would expect.</p> <p>2 So there are two issues before the Court,</p> <p>3 standing and the merits or the construction of the 2291</p> <p>4 statute.</p> <p>5 I don't think much has to be said about the</p> <p>6 standing issue.</p> <p>7 To me, the standing of the plaintiff landowners</p> <p>8 is virtually self-evident.</p> <p>9 But fortunately, I've got much better than that</p> <p>10 for the Court.</p> <p>11 I've got a unanimous May 22 decision of the</p> <p>12 Virginia Supreme Court in a case that's virtually on all</p> <p>13 fours with this one.</p> <p>14 And the Supreme Court held, in reversing a</p> <p>15 circuit court decision, that the landowners in that case</p> <p>16 did have standing, and the Court cited three reasons.</p> <p>17 They are owners of adjacent property. That's</p> <p>18 true here.</p> <p>19 They allege that the Newport facility would</p> <p>20 result in a diminution of their property values. That's</p> <p>21 true here. The BZA hearing is replete with that</p> <p>22 testimony.</p>
<p style="text-align: right;">Page 54</p> <p>1 that, since there are no disputes of fact and since the</p> <p>2 record is full, to determine the substantive issue that</p> <p>3 the zoning determination was plainly wrong.</p> <p>4 This is another legal determination in</p> <p>5 concluding that a congregate housing facility must --</p> <p>6 may be allowed by Virginia Code Section 15.2-2291, even</p> <p>7 though prohibited by the zoning ordinance.</p> <p>8 Those two things we're asking the Court to do.</p> <p>9 THE COURT: Thank you.</p> <p>10 MR. HAMPSHIRE: Thank you, sir.</p> <p>11 Mr. Bartolomucci has a few points.</p> <p>12 MR. BARTOLOMUCCI: May it please the Court.</p> <p>13 Chris Bartolomucci for the plaintiff and with the</p> <p>14 Schaerr Jaffe law firm.</p> <p>15 And I want to thank the Court for allowing me to</p> <p>16 just briefly -- I promise I won't take up much of the</p> <p>17 Court's time. And I'll do my best not to really repeat</p> <p>18 something that my friend, Mr. Hampshire, has said.</p> <p>19 And let me stipulate at the outset that, unlike</p> <p>20 Mr. Hampshire, I'm not a zoning law expert. So I bring</p> <p>21 the perspective of a general litigator.</p> <p>22 And the outcome that I arrive at is exactly the</p>	<p style="text-align: right;">Page 56</p> <p>1 And third, the Virginia Supreme Court cited the</p> <p>2 fact that the property owners allege that there would be</p> <p>3 a loss of enjoyment of their property. And that also is</p> <p>4 true here.</p> <p>5 So all three factors cited in the Anders Larsen</p> <p>6 case line up here with the result that the property</p> <p>7 owners -- your plaintiffs do have standing.</p> <p>8 And once that is recognized, then their right to</p> <p>9 an appeal easily follows.</p> <p>10 Under the 2314 statute, any person aggrieved by</p> <p>11 a zoning decision may seek review.</p> <p>12 And in that context, the word aggrieved is</p> <p>13 simply shorthand for someone who has standing, because</p> <p>14 they've been adversely affected by the -- by the</p> <p>15 decision at issue.</p> <p>16 So on the merits, this is a question of law that</p> <p>17 all parties in this case urge Your Honor to reach rather</p> <p>18 than sending us back to the administrative agency for a</p> <p>19 decision in the first instance.</p> <p>20 And the question comes down to the proper</p> <p>21 construction of the 2291 statute.</p> <p>22 And the key words are as follows: 2291 applies</p>

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<p style="text-align: right;">Page 57</p> <p>1 to a residential facility in which no more than eight 2 individuals with mental illness reside.</p> <p>3 So the key terms are residential facility and 4 reside.</p> <p>5 Now, quite simply, Your Honor, our submission is 6 that Newport's treatment centers are not residential 7 facilities. They are commercial, nonresidential 8 treatment centers for short-term patients or guests.</p> <p>9 A Newport treatment center is like a hospital or 10 a hotel. It actually has aspects of both.</p> <p>11 Newport's visitors or patients come for a few 12 weeks to receive treatment. And when their insurance 13 runs out, they go home.</p> <p>14 So these are not residential facilities. And 15 Newport's patients are not residents. They have homes 16 elsewhere that they came from and that they will go back 17 to when their treatment is over.</p> <p>18 Now, I keep in my office the old Black's Law 19 Dictionary that I bought when I was a law school student 20 and looked up the word resident. And there's a long 21 definition -- you don't have to intend to live in a 22 place forever to be a resident.</p>	<p style="text-align: right;">Page 59</p> <p>1 not residents in the -- in the hotel. They may not -- 2 may not have a residence at that point.</p> <p>3 But I think the record here is clear that these 4 are people who have health insurance or are related to 5 someone who has health insurance.</p> <p>6 And so they come here for a period of weeks, and 7 then they leave.</p> <p>8 So I urge the Court not to lose track of the big 9 picture.</p> <p>10 And again, I'm not a zoning expert. But what 11 we're talking about here is a residential neighborhood 12 in Leesburg in which a commercial enterprise has 13 purchased three adjacent properties in order to run a 14 commercial treatment center for folks with mental 15 illness and substance abuse problems.</p> <p>16 And they will have full-time staff at each of 17 these facilities.</p> <p>18 I hope I'm not misstating the record. But my 19 understanding is that each house will have up to eight 20 patients or visitors and up to 24 full-time staff 21 members so that each can have an 8-hour shift. And you 22 would have an equal number of staff to patients or</p>
<p style="text-align: right;">Page 58</p> <p>1 On the other hand, the Black's Law Dictionary -- 2 this is from the Fifth Edition, 1979. It explained that 3 a resident is someone whose presence within the state is 4 something other than merely transitory in nature. So 5 something other than merely transitory in nature.</p> <p>6 And by that definition, Newport's patients or 7 visitors are not residents. Their presence here is 8 merely transitory. They're like a hotel guest or a 9 hospital patient. They come for a short while, and then 10 they go back home.</p> <p>11 THE COURT: What if they have no other 12 residence?</p> <p>13 MR. BARTOLOMUCCI: Well, if they literally have 14 no other residence, then I think you'd have a question 15 of intent about where they plan to stay.</p> <p>16 But, of course, they can't stay forever at a 17 Newport facility, because they're all here on health 18 insurance. And the health insurance runs out. The 19 health insurance doesn't let them stay at Newport 20 forever.</p> <p>21 So that would be akin to someone who has checked 22 into a hotel and they are otherwise homeless. They're</p>	<p style="text-align: right;">Page 60</p> <p>1 visitors.</p> <p>2 THE COURT: But the staff members are not 3 residents.</p> <p>4 MR. BARTOLOMUCCI: They are not, no. 5 But this underscores this is the commercial 6 nature of the enterprise and certainly goes to why the 7 neighbors feel aggrieved and why they have standing.</p> <p>8 So unless the Court has any questions, I am 9 done.</p> <p>10 THE COURT: I'm going to ask your teammate or 11 you who is better at telling me the nature of the 12 realty, the size of the lots, the nature of the 13 driveways, the nature of the connecting streets?</p> <p>14 Give me a picture of the environment surrounding 15 this.</p> <p>16 MR. BARTOLOMUCCI: I will let Mr. Hampshire 17 address that, Your Honor.</p> <p>18 THE COURT: Give me a real estate description.</p> <p>19 MR. HAMPSHIRE: I want to see if I can't get to 20 it in the record.</p> <p>21 The staff report is set forth on tab 5. 22 But generally, we have three houses that are</p>

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<p style="text-align: right;">Page 61</p> <p>1 accessible through a pipe stem. They're large houses. 2 THE COURT: What's the per acre -- what's the 3 house lot size? 4 Are we looking at equally sized subdivided 5 houses? Are we looking at differing sizes? What's the 6 size of the typical house in there? 7 MR. HAMPSHIRE: Well, I think it's around 3 8 acres or so. I'm not confident in that answer. 9 THE COURT: Well, that helps me. 10 MR. HAMPSHIRE: But it's rural -- AR rural 11 residential. 12 THE COURT: To what extent is the housing part 13 of the real estate looking at more rural or farm like 14 real estate? 15 MR. HAMPSHIRE: Well, there is a farm right next 16 door. 17 THE COURT: How big is the farm? 18 MR. HAMPSHIRE: The farm is, I think, 17 acres 19 next door. 20 And it's a farm, the record will show, Your 21 Honor, that is for -- that is being leased for disabled 22 children to participate in farming activities. And it's</p>	<p style="text-align: right;">Page 63</p> <p>1 a rural -- I guess you would characterize it as a rural, 2 low density development with farmland -- with 3 surrounding farmland and farmland right adjacent to the 4 property as well. 5 THE COURT: Thank you. 6 MR. HAMPSHIRE: Thank you. 7 MR. WILBURN: May it please the Court, Your 8 Honor. My name is John Wilburn. I'm with McGuire 9 Woods. I'm here on behalf of Respondent Newport. With 10 me is my colleague, Brooks Spears. 11 Your Honor, I want to address a couple of 12 misconceptions on the part of my colleagues on the other 13 side of the bar here have made. 14 The first is this notion that 2291 is limited to 15 noncommercial or not for profit uses. 16 And I suggest, Your Honor, that there is not a 17 single case that they can cite that says that, because 18 that's simply not -- not the law. 19 THE COURT: Say that again. 20 MR. WILBURN: There is no case that has held 21 that 15.2-2291 is limited to not for profit, as they 22 suggest.</p>
<p style="text-align: right;">Page 62</p> <p>1 called A Farm Less Ordinary. And it's right next door. 2 But that area of Gleedsville Road is a rural 3 area. It does have low density residential homes on it. 4 But it is by no means -- and this is our point -- a 5 commercial -- commercial enterprise in there. 6 There's not -- they are a low density of farm 7 like properties with some residential with a significant 8 farm right next door. 9 THE COURT: All right. I'm kind of familiar 10 with a lot of adjacent county's real estate. My sister 11 is a real estate broker who sells big plots of land. 12 And I just want to know the nature of what I'm 13 looking at. 14 Am I looking at the Mars family property south 15 of Middleburg or am I looking at houses that actually 16 see each other? 17 MR. HAMPSHIRE: Well, I can't say -- 18 THE COURT: I don't know that. I haven't read 19 that. 20 MR. HAMPSHIRE: Well, the houses don't see each 21 other. 22 However, they are spaced far apart. They are in</p>	<p style="text-align: right;">Page 64</p> <p>1 In fact, Your Honor has -- may I pass up a copy 2 -- this was submitted, I think, by both parties with 3 their filings. It's a filing -- amicus brief. It's an 4 exhibit -- 5 (Thereupon, counsel conferred with Mr. 6 Hampshire.) 7 MR. WILBURN: It's attached to the filings. 8 I'll give you one. 9 MR. HAMPSHIRE: Thank you. 10 MR. WILBURN: Your Honor, this is a -- it comes 11 out of Fairfax, a case from November, 2020. And it is 12 another of our facilities that is being litigated. 13 They are -- like here, the petitioners argued 14 that the facility didn't qualify under 2291 because it 15 was for profit rather than not for profit, the same 16 argument that the petitioners make here. 17 But that -- there was a substantial filing by 18 the Attorney General's Office that rejected that 19 approach. 20 At page 1 of this document, at the bottom, the 21 AG pointed out that restricting this to nonprofit only 22 would run afoul of the purpose of the statute and</p>

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<p style="text-align: right;">Page 65</p> <p>1 violate the Fair Housing Act.</p> <p>2 But perhaps more importantly, if Your Honor</p> <p>3 looks at page 6 of this filing, the Attorney General's</p> <p>4 Office explained that the General Assembly in Virginia</p> <p>5 specifically considered whether to limit this to not for</p> <p>6 profit organizations.</p> <p>7 There was a bill proposed in 2000 -- Senate Bill</p> <p>8 449 that specifically said that this provision be</p> <p>9 limited to nonprofit group homes. And the bill failed.</p> <p>10 In fact, it was tabled.</p> <p>11 And what the -- what the Attorney General's</p> <p>12 Office wrote is the only categories to consider are how</p> <p>13 many reside at the facility, whether they have</p> <p>14 disabilities and whether there's at least one staff</p> <p>15 person at the facility.</p> <p>16 Contrary to petitioner's argument, nothing in</p> <p>17 this section nor the Fair Housing Law distinguishes</p> <p>18 between nonprofit and for profit group home or</p> <p>19 residential facility, despite that very distinction</p> <p>20 having been considered and rejected by the legislature</p> <p>21 in the 2000 General Assembly session.</p> <p>22 Counsel said there was no legislative history on</p>	<p style="text-align: right;">Page 67</p> <p>1 statute. And that's simply not true either.</p> <p>2 In fact, counsel has cited in their own brief a</p> <p>3 decision by Judge Bach in 1997 out of Fairfax dealing</p> <p>4 with the identical statute. It's called the</p> <p>5 Kaleidoscope case. And in that case, the Court noted</p> <p>6 that -- these were adolescents that were treated at the</p> <p>7 facility.</p> <p>8 This is a for profit enterprise where they're</p> <p>9 treated at the facility.</p> <p>10 And there's nothing in the statute nor the</p> <p>11 legislative history nor any case law that suggests that</p> <p>12 they should be treated offsite. It's just simply not</p> <p>13 the law.</p> <p>14 Mr. Hampshire and I have talked about this case</p> <p>15 an awful lot. I do consider him a friend. And we've</p> <p>16 had good discussions about this.</p> <p>17 But I am surprised by his citation to the</p> <p>18 Connecticut Hospital case and the Schwarz case.</p> <p>19 And he offered those cases to Your Honor -- also</p> <p>20 the Lakeside Resort case. One's in Connecticut and</p> <p>21 one's in Florida, and one's in Pennsylvania, federal</p> <p>22 cases applying the Fair Housing Act, not this particular</p>
<p style="text-align: right;">Page 66</p> <p>1 this and that you should infer somehow that this was --</p> <p>2 this excluded for profit facilities. There is a</p> <p>3 legislative history.</p> <p>4 If you read on, the Bill 449 proposed to limit</p> <p>5 this section to nonprofit group homes.</p> <p>6 The Attorney General opined then to incorporate</p> <p>7 such a distinction into 15.2-2291 which seeks to</p> <p>8 implement the Fair Housing law would result in a direct</p> <p>9 conflict with the legislative intent of the law.</p> <p>10 As a result, the bill was left in committee and</p> <p>11 died on unanimous vote.</p> <p>12 So when counsel argues to you that we don't</p> <p>13 qualify under 2291 because it's a for profit enterprise,</p> <p>14 please keep in mind they don't cite a single case that</p> <p>15 says that. The statute does not say that. And the</p> <p>16 Virginia General Assembly specifically considered that</p> <p>17 requirement and rejected it, as the Court should here.</p> <p>18 The second argument -- there are only two that</p> <p>19 actually went to the applicability of 2291.</p> <p>20 The second argument that counsel made is that --</p> <p>21 that because the patients will be treated at the</p> <p>22 facility, it somehow falls outside the purview of the</p>	<p style="text-align: right;">Page 68</p> <p>1 statute.</p> <p>2 And he pointed out that in those cases that the</p> <p>3 patients were treated offsite, and the suggestion, if</p> <p>4 not the argument, to the Court is that means the</p> <p>5 Virginia statute only allows offsite treatment. And</p> <p>6 that's simply not true either.</p> <p>7 There are a number of cases that we cite, both</p> <p>8 onsite treatment and offsite treatment.</p> <p>9 The Kaleidoscope case, again, the Virginia</p> <p>10 decision by Judge Bach dealing with this statute</p> <p>11 involved onsite treatment.</p> <p>12 The reason we cited these cases is to address an</p> <p>13 argument made in their opening brief that somehow our</p> <p>14 patients don't reside there.</p> <p>15 And these cases provide guidance on the</p> <p>16 definition of -- definition of reside.</p> <p>17 But what is clear, Your Honor, is that the</p> <p>18 Virginia Department of Behavioral Health is the entity</p> <p>19 responsible for answering those questions that you</p> <p>20 asked. I think they're good probative questions, what's</p> <p>21 the size of the lot, what's the nearest house, what are</p> <p>22 the facilities we're looking out on?</p>

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<p style="text-align: right;">Page 69</p> <p>1 That's an issue that's decided exclusively in 2 the first instance by the Virginia Department of Health. 3 And it makes that pretty clear in the statute. 4 15.2-2291 makes clear that our facility requires 5 licensure by the Department of Behavioral Health. 6 And that's further governed by the Virginia 7 administrative code. The Virginia administrative code 8 says the Department of Behavioral Health will license us 9 or not. 10 In deciding on that issue, if they grant a 11 license, they'll attach an addendum to it. And here's 12 what they'll -- here's what they review. The 13 disabilities of the individuals who can be served there, 14 the specific location where services are to be provided 15 or administered. 16 So that's something the General Assembly has 17 delegated to the Department of Behavioral Health. 18 Where will the services take place? It's not 19 something that's decided in the first instance by this 20 Court. 21 The terms and conditions for service. The 22 license will identify the number of individuals at each</p>	<p style="text-align: right;">Page 71</p> <p>1 It's heard through the administrative process 2 backed by the agency. 3 Thereafter, if they're disappointed or we're 4 disappointed with whatever the outcome is, then there's 5 an appeal to the circuit court with particular 6 limitations and the type of record and review that will 7 take place. 8 It's simply -- it's simply beyond the Court's 9 authority at this point to accept their invitation to 10 find that we -- that we are either operating on 11 commercial or not allowed -- that our individuals don't 12 qualify as residents or who are to be treated in some 13 manner different. 14 The only issue that the zoning administrator 15 decided -- and Your Honor is correct, he used the 16 qualifying word may. The only issue that she decided is 17 if we're licensed, then we may be able to operate in the 18 residential area. And she was a hundred percent correct 19 on that. 20 But that -- that issue really isn't ripe yet. 21 It's not ripe, because we haven't obtained a license. 22 THE COURT: Why not?</p>
<p style="text-align: right;">Page 70</p> <p>1 residential location. 2 My point, Your Honor, on this is that I think 3 the petitioners are asking -- I know the petitioners are 4 asking you to exceed your jurisdictional limits here. 5 You're sitting in an appellate function, as the 6 BZA was. And you're not entitled -- you're not 7 authorized to decide questions of fact. 8 For example, is this a good location, is it 9 proximate or not proximate to a neighbor, will it be too 10 loud, what type of disabilities do they have, do they 11 reside or not reside. 12 Those are all factual issues that will be 13 decided in the first instance by the Board of Health. 14 From there, a license will issue or not issue. 15 If anybody is disappointed in that 16 determination, us or the neighbors, they have an 17 exclusive right of appeal to the administrative process 18 of that. 19 So their complaint about whether we qualify as a 20 residential treatment facility is not heard in the first 21 instance either by the zoning administrator, the BZA or 22 on appeal in this court.</p>	<p style="text-align: right;">Page 72</p> <p>1 MR. WILBURN: We've applied for a license. A 2 license is -- 3 THE COURT: When did you do that? 4 MR. WILBURN: I don't know the exact date. It 5 was at least a couple months ago. 6 But there's a review process. What staff does 7 is they -- 8 THE COURT: What's your best guess as to when 9 that comes out? 10 MR. WILBURN: I think we -- I think we'll have a 11 license within two or three weeks. That's our best 12 guess. 13 And that's based upon the fact that staff has 14 gone out to the site and done a site inspection. 15 So they've done the type of workup that's not in 16 the record that's not before the Court to make a 17 recommendation to the board whether we should get a 18 license or not. 19 If they grant the license, then the petitioners 20 here could be appellants -- theoretically, appellants in 21 an APA action. 22 THE COURT: Say that again.</p>

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<p style="text-align: right;">Page 73</p> <p>1 MR. WILBURN: If somebody is disappointed -- for 2 example, the petitioners in this case, they do not 3 believe we should or do qualify as a residential 4 treatment facility. That's clear. 5 But the entity that makes that decision in the 6 first instance is the Board of Behavioral Health. 7 After that decision is made, if anybody is 8 disappointed, there is a remedy under the Virginia 9 Administrative Processes Act. So we appeal to the 10 agency. 11 THE COURT: You're arguing that the timeliness 12 in awaiting such a decision does not foreclose them time 13 wise from seeking a judicial cure? 14 MR. WILBURN: No. I don't -- I'm not arguing 15 that. You're correct, Your Honor. 16 What I'm saying is that they're asking for a 17 judicial determination in this forum is premature. The 18 issue is not ripe. The venue is not appropriate for 19 this. 20 THE COURT: So you're saying that the bureau has 21 to issue its ruling, and then there's a maturity for a 22 court considering issues?</p>	<p style="text-align: right;">Page 75</p> <p>1 But I don't know the venue for that -- I don't 2 know what venue it would be. 3 THE COURT: Is it the board that would have a 4 hearing? 5 MR. WILBURN: The board would have a hearing 6 under the Administrative Processes Act. They should 7 have the initial hearing. 8 And thereafter, there'd be an appeal to the 9 circuit court. 10 THE COURT: So you're arguing prematurity 11 because that board has not yet reached a decision which 12 might be favorable to the other side? 13 MR. WILBURN: That's correct. It's simply not 14 ripe. I think the zoning administrator recognized that. 15 Now, to be fair -- to be fair, I think there are 16 -- I think there are legal questions that the Court has 17 discretion. 18 So the jurisdiction is to review the decision 19 below. 20 There was no decision below other than the BZA 21 saying they weren't going to make a decision pending 22 licensing and permitting.</p>
<p style="text-align: right;">Page 74</p> <p>1 MR. WILBURN: Eventually. So once the board 2 issues or denies a license, there is an administrative 3 appeal that can take place. 4 The agency would review the appeal and make a 5 decision. 6 And if somebody is disappointed in that, then 7 you appeal that to the circuit court. 8 At that point, there would be a record before a 9 circuit court judge of the staff decision -- all of 10 these issues, whether the staff recommended a license or 11 not a license, whether we qualified or didn't qualify. 12 And that's what the -- that's what the 13 petitioners here are asking the Court to leap ahead and 14 do, to say judge, we think that they don't qualify, we 15 don't think it should be at this location, we don't 16 think that they're going to treat the right amount of 17 people because they're not residents. 18 THE COURT: Where would they get that hearing? 19 MR. WILBURN: I'm sorry? 20 THE COURT: Where would they get such a hearing? 21 MR. WILBURN: I'm not sure, Your Honor. I 22 assume it would be Richmond.</p>	<p style="text-align: right;">Page 76</p> <p>1 So they recognize that there was an 2 administrative process that would take place first. 3 I think that the petitioners are asking you to 4 go beyond that and decide in the first instance that we 5 don't qualify as a residential treatment facility. 6 I think that's beyond the Court's authority in 7 this particular action. 8 Having said that, they're also wrong for the 9 reasons that I've given. 10 The General Assembly did not limit this type of 11 facility to nonprofit only. It's very clear that they 12 considered that and rejected it. So they're wrong on 13 that point. 14 The only other argument they make is that we 15 can't treat people at the facility. And that's simply 16 wrong too. There's no case that says that. 17 They're citing to these out of state cases that 18 are cited for different purpose. 19 One thing that I think the petitioners would 20 recognize is that the Board of Behavioral Development 21 can issue an inpatient or an outpatient license. 22 That's part of the reason I'm saying it's not</p>

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<p style="text-align: right;">Page 77</p> <p>1 mature at this point.</p> <p>2 We expect -- we've applied for and expect that</p> <p>3 they will issue to us an inpatient license, meaning we</p> <p>4 treat these individuals at the facility in the same way</p> <p>5 that was done in the Kaleidoscope case.</p> <p>6 THE COURT: Why have you -- if you can say, why</p> <p>7 have you not asked for an outpatient license also?</p> <p>8 MR. WILBURN: I don't know, Your Honor. I</p> <p>9 think -- I don't know. I think it's part -- just the</p> <p>10 model.</p> <p>11 And I think that there is some record on this --</p> <p>12 that people tend to -- and I'm no expert on it, but</p> <p>13 we've submitted an expert report to the BZA that's part</p> <p>14 of the record here -- that people tend to perform better</p> <p>15 -- you have better results when you're in a less</p> <p>16 institutionalized environment.</p> <p>17 So people that are in a facility -- a small</p> <p>18 group facility that looks more like a home where you</p> <p>19 live and eat and sleep and socialize -- that the</p> <p>20 treatment is -- has better outcomes than if you shift</p> <p>21 somebody to a 400-person facility down in Richmond or</p> <p>22 Norfolk.</p>	<p style="text-align: right;">Page 79</p> <p>1 outpatient.</p> <p>2 And the Kaleidoscope case was inpatient and</p> <p>3 involves the same statute.</p> <p>4 And there's no case in Virginia where a court</p> <p>5 has found that inpatient services are disallowed under</p> <p>6 this statute.</p> <p>7 So they're asking you to make a series of</p> <p>8 findings that have never been found by any court ever</p> <p>9 and that are inconsistent not only with the plain</p> <p>10 language of the statute but the legislative history and</p> <p>11 available case law.</p> <p>12 But turning to -- to the merits, Your Honor.</p> <p>13 Mr. Hampshire spent much of his argument on the</p> <p>14 ordinance and sort of walking us through the definitions</p> <p>15 of that.</p> <p>16 I think he referenced that there's a paradox --</p> <p>17 that we have a paradox. There is no paradox, Your</p> <p>18 Honor.</p> <p>19 The starting point is 15.2-2291, which you have</p> <p>20 in front of you. And it says zoning ordinances for all</p> <p>21 purposes shall -- not may -- shall consider a</p> <p>22 residential facility in which no more than eight</p>
<p style="text-align: right;">Page 78</p> <p>1 THE COURT: Residential versus institutional</p> <p>2 comes into play?</p> <p>3 MR. WILBURN: That's right. Residential versus</p> <p>4 institutional. I think the studies show that</p> <p>5 residential, you have better outcomes.</p> <p>6 That's the model that we use, and we believe we</p> <p>7 use it successfully.</p> <p>8 But that's sort of my opening -- I won't say</p> <p>9 objection but concern about counsel's argument that --</p> <p>10 asking you to find we don't qualify as a residential</p> <p>11 treatment facility.</p> <p>12 One, it's beyond the scope of the Court's</p> <p>13 authority, given the sort of limited appellate nature of</p> <p>14 this action, and two, it's substantively wrong.</p> <p>15 It would be an error of law to find that this</p> <p>16 statute is limited to nonprofit only when, A, it doesn't</p> <p>17 say that and, B, no case has ever held that and, C, that</p> <p>18 there is a legislative history where it specifically</p> <p>19 rejected it.</p> <p>20 It would be equally wrong to find that only</p> <p>21 inpatient services are allowed when the Board of</p> <p>22 Behavioral Health licenses inpatient as opposed to just</p>	<p style="text-align: right;">Page 80</p> <p>1 individuals with mental illness, intellectual disability</p> <p>2 or developmental disabilities reside with one or more</p> <p>3 resident or nonresident staff person as a residential</p> <p>4 occupancy by a single family. That's mandatory under</p> <p>5 the statute.</p> <p>6 And so I mean the fundamental question -- the</p> <p>7 original question to the zoning administrator is can we</p> <p>8 operate in a residential district, AR-1. And the</p> <p>9 statute says we can, as a residential occupancy by a</p> <p>10 single family.</p> <p>11 There is not a paradox. Because the Virginia</p> <p>12 code makes clear Title 1, Section 248, supremacy of the</p> <p>13 federal and state law. And it provides that the laws of</p> <p>14 the commonwealth shall be supreme. Any ordinance or</p> <p>15 order of any governing body shall not be inconsistent.</p> <p>16 And so to the extent there is any</p> <p>17 inconsistency -- we don't think there is -- this statute</p> <p>18 means what it plainly states.</p> <p>19 But there really is not an inconsistency, Your</p> <p>20 Honor.</p> <p>21 Because 20 years ago, Loudoun County amended</p> <p>22 their zoning ordinance to specifically incorporate the</p>

Hearing

<p style="text-align: right;">Page 81</p> <p>1 statute.</p> <p>2 And the zoning administrator, when she issued</p> <p>3 her opinion, recognized that.</p> <p>4 Mr. Hampshire argued that the zoning</p> <p>5 administrator found that it was congregate housing. But</p> <p>6 that's only reading half of the determination, Your</p> <p>7 Honor.</p> <p>8 What she found is that the use could meet the</p> <p>9 definition of congregate housing, but that it does not</p> <p>10 because of the statute. That's the rest of the story.</p> <p>11 The rest of the story is the statute says that</p> <p>12 these individuals are treated as a single family and</p> <p>13 residential use.</p> <p>14 So when you look at the definition of congregate</p> <p>15 housing, it fails for a couple of obvious reasons.</p> <p>16 One, congregate housing includes a structure</p> <p>17 other than a single family dwelling. This is a single</p> <p>18 family dwelling. So it fails. It says where more than</p> <p>19 four unrelated persons reside.</p> <p>20 By statute, they're treated as related persons.</p> <p>21 They're treated as family.</p> <p>22 And so congregate housing isn't the right</p>	<p style="text-align: right;">Page 83</p> <p>1 straightforward analysis when you -- when you step back</p> <p>2 from the statements of law that simply aren't correct.</p> <p>3 The statute says will be treated as a single</p> <p>4 family residence for all purposes, and it's mandatory.</p> <p>5 The Loudoun County Code -- the zoning ordinance</p> <p>6 recognizes -- specifically incorporates that definition,</p> <p>7 15.2-2291 in its definition of family.</p> <p>8 And the zoning administrator was correct to</p> <p>9 conclude if you get a license, under the statute, you</p> <p>10 are treated as a single family residence.</p> <p>11 The law on this is, I'd submit to Your Honor,</p> <p>12 very clear. It's not just the plain reading of the</p> <p>13 statute.</p> <p>14 Judge Bach looked at an identical case in 1997.</p> <p>15 Let me back off from identical.</p> <p>16 The difference between that case and this case</p> <p>17 is that case was brought post-licensing, post-operation</p> <p>18 on an enforcement action.</p> <p>19 There, the petitioners did it correctly. The</p> <p>20 Kaleidoscope facility got a license. They began</p> <p>21 operating. The neighbors were concerned about certain</p> <p>22 aspects of the operations. And they complained about</p>
<p style="text-align: right;">Page 82</p> <p>1 determination.</p> <p>2 And the zoning administrator correctly reached</p> <p>3 that conclusion. Because the rest of the story as she</p> <p>4 told in this determination is she said however, the</p> <p>5 proposed use may be permitted -- again, may is</p> <p>6 important, because she's recognized we don't have a</p> <p>7 license and we don't have a permit -- may be permitted</p> <p>8 as a single family dwelling if it meets the definition</p> <p>9 of family defined in Article 8 of the zoning ordinance.</p> <p>10 And one section that was not read was Article 8,</p> <p>11 the definition of family.</p> <p>12 Family is -- there's a list that the County has</p> <p>13 by subpart C, any group identified in Section 15.2-2291</p> <p>14 of the Code of Virginia.</p> <p>15 So there is no paradox. There is no paradox.</p> <p>16 The Virginia code controls. It states plainly</p> <p>17 that shall be treated as occupancy by a single family</p> <p>18 residential.</p> <p>19 The zoning ordinance recognizes that any group</p> <p>20 that qualifies under 2291 is deemed a family for</p> <p>21 residential purposes.</p> <p>22 So Your Honor, I'd submit that it's a relatively</p>	<p style="text-align: right;">Page 84</p> <p>1 it.</p> <p>2 An enforcement action was brought to determine</p> <p>3 whether it was in compliance.</p> <p>4 That's very different than the fact pattern here</p> <p>5 where the petitioners -- and it's not a criticism. I</p> <p>6 understand that people are concerned, and they'd like to</p> <p>7 get a solution on this as soon as possible.</p> <p>8 But the fact of the matter is that bringing this</p> <p>9 action before the facility is open, before anybody has</p> <p>10 determined whether it can open, under what conditions it</p> <p>11 can open, what sort of treatment they can provide,</p> <p>12 whether inpatient, outpatient, how many people will be</p> <p>13 there, where it will be located, those are all matters</p> <p>14 that under the Virginia Administrative Code are decided</p> <p>15 by the board. And those haven't taken place yet.</p> <p>16 But looking at the --</p> <p>17 THE COURT: When you say the board, you don't</p> <p>18 mean the county board? You mean the state board?</p> <p>19 MR. WILBURN: Yes, Your Honor. I apologize.</p> <p>20 The Board of Behavioral Health.</p> <p>21 THE COURT: I just wanted the record to be</p> <p>22 clear.</p>

Hearing

<p style="text-align: right;">Page 85</p> <p>1 MR. WILBURN: Thank you. But in that case, it 2 was brought properly as an enforcement action after they 3 were open. 4 And Judge Bach -- Judge Bach's opinion, I think, 5 is very helpful on this point. 6 There are a few things that he said that I think 7 bear on our arguments. 8 One, he wrote since the record reflects that 9 Kaleidoscope received the appropriate licensing from the 10 DMH -- it was then called the Department of Mental 11 Health -- they argued this is dispositive and the issue 12 should not have been considered by the BZA. 13 The court said the petitioners' interpretation 14 is in harmony with the legislature's intention. He 15 agreed with them. This is not something that was 16 decided by the BZA. It was decided by -- in that case, 17 the Board of Mental Health. 18 He goes on to say logic dictates that the 19 administrative body with the most qualified personnel 20 determine whether or not facilities are eligible for 21 group home status. 22 He went on to say this is attributed to the fact</p>	<p style="text-align: right;">Page 87</p> <p>1 is absolutely in conflict with the statutory scheme 2 established by the General Assembly. 3 This issue is not ripe is another way of 4 expressing that. 5 The Attorney General in 2020, as part of the 6 same amicus brief that I mentioned earlier, pointed out 7 that 2291 makes categorically clear that zoning 8 ordinances must treat homes occupied by those with 9 disabilities as they would homes occupied by single 10 families. In other words, a qualifying group home shall 11 be treated like a single family home and no additional 12 special use requirements. 13 This is the preemption issue. The General 14 Assembly intended the statute to operate as a state 15 zoning preemption statute to prohibit discrimination 16 against people with disabilities by making small 17 licensed group homes by right. That's what -- and 18 that's what this is. 19 The issue, Your Honor, turns on do we get a 20 license. 21 And if they appeal the license, does the license 22 hold up on appeal? If we do, it's dispositive of the</p>
<p style="text-align: right;">Page 86</p> <p>1 that a trained DMH staff oversees the application 2 process, conducts regular inspections to determine if a 3 facility meets the statutory requirements. 4 They're asking you to find that we don't meet 5 the statutory requirements. 6 That's something Judge Bach recognized is within 7 the purview of the Board of Behavioral Health. 8 The Court went on to say Kaleidoscope is a 9 licensed facility that provides mental health services 10 and, therefore, should be considered a facility for the 11 mentally ill. 12 Kaleidoscope's establishment of mental health 13 treatment programs is satisfactory to DMH is prima facie 14 evidence that Kaleidoscope has fulfilled the statutory 15 demands entitlement to locate in a residential district. 16 That's what this ultimately is about, can we 17 locate in a residential district or not. The statute 18 says we can. But it's dependent upon our getting a 19 license. It says so right in the statute. 20 That license application is pending. 21 The petitioners request that Your Honor find 22 that we don't qualify to operate a residential facility</p>	<p style="text-align: right;">Page 88</p> <p>1 issue. 2 The practical effect is to ensure that group 3 homes for the mentally disabled will be able to cite by 4 right. 5 And there's much more language like this, Your 6 Honor. At the end of the brief, it concludes that the 7 Department of Behavioral Health and Developmental 8 Services, at the end, if we have our license, in 9 accepting an application for license to assess whether 10 residents qualify as people with disabilities and 11 whether the proposed services will meet their needs -- 12 if it satisfies that -- if it obtains a license, then 13 the use is by right. 14 There is a role -- there is a role for the 15 zoning administrator, but it's to interpret the 16 ordinance. 17 So for example, you couldn't have more than 18 eight -- you couldn't have more than eight people. And 19 that's recognized by the statute. 20 But much is made of Section 6-401 by counsel. 21 And that's the zoning administrator's authority. But 22 all it says is the zoning administrator is responsible</p>

Hearing

<p style="text-align: right;">Page 89</p> <p>1 for interpreting and enforcing the zoning ordinance. 2 The zoning administrator does not have the 3 authority to determine whether we qualify under 2291. 4 That's decided by a separate agency, nor does the BZA 5 have that authority. And they recognize that 6 appropriately, Your Honor. 7 THE COURT: But they wrote an opinion 8 distinguishing the two types of residence. So they did 9 undertake somewhat of a decision. 10 MR. WILBURN: But that was not an enforcement 11 action, Your Honor. You're correct. 12 In the Kaleidoscope case, there was an 13 enforcement action about whether they reside. 14 Again, we're not at that stage. 15 But there, what the court -- or what Judge Bach 16 found is they did reside. 17 And the law on this, I think, is very 18 straightforward. There is basically two components to 19 it. One is there has to be a sufficiently substantial 20 length of stay. 21 And the second is that the patients have to 22 intend to return home to the facility during the period</p>	<p style="text-align: right;">Page 91</p> <p>1 to homeless people, which it does not. 2 And that argument has been rejected specifically 3 by several cases that we cited in our brief. I can talk 4 about those. 5 Villegas v. Sandy Farms, that was one where the 6 court specifically rejected the notion you can't have a 7 primary residence. 8 Cohen versus the Township of Cheltenham. Again, 9 the court rejected the notion that you can't have a 10 primary home. 11 The idea is it's not a hotel. Are you going to 12 be there for some substantial period of time? 13 The courts have found that as little as 14.8 14 days on average is sufficient. 15 Here, the average is going to be 45 days, we 16 anticipate, maybe as long as 90. 17 And second, during the period of their 18 treatment, would they return home to the premises? 19 Well, here, they're going to be living in the 20 premises. They're not being treated -- 21 THE COURT: Return home to another residence or 22 return home to this?</p>
<p style="text-align: right;">Page 90</p> <p>1 of their treatment. Those are the two arguments. 2 Counsel was suggesting something more in the 3 domicile, which courts have clearly rejected. 4 And I'll -- the cases that have been cited are 5 very clear. 6 Lakeside Resort, the Court found that an average 7 stay of 14.8 days is sufficient time to constitute 8 residence where they're returning back to the home after 9 treatment. 10 THE COURT: Does such a person need an alternate 11 residence? 12 MR. WILBURN: You do not need a -- you can have 13 one or cannot have one. 14 The test is not whether you have an alternative 15 residence. 16 The test is during the period of treatment, do 17 you view this as a place you go home to during the 18 period of treatment. That's the test. 19 There is an argument in counsel's papers that as 20 a matter of law, you can't have a primary home. And 21 that's simply not true. 22 That would limit the application of this statute</p>	<p style="text-align: right;">Page 92</p> <p>1 MR. WILBURN: To this. They would have a place 2 that they reside during the period of their treatment. 3 That's the test. 4 And again, I'd suggest to the Court there's 5 ample evidence of that in the record. We've cited -- 6 we've provided an affidavit. 7 We've got the testimonial evidence on the 8 intentions there. 9 But I suggest that's not -- that's not the fact 10 issue that the Court can decide. 11 I do think that what the evidence does show is 12 that they will live there, they will eat there. They 13 won't go to some other residence during the period of 14 their treatment. They intend to have treatment in the 15 facility. They're going to sleep there and socialize 16 there during the period of their treatment. 17 The courts have looked at those factors and 18 concluded that those are sufficient to establish 19 residence. 20 But again, Your Honor, that's an issue under the 21 Virginia Administrative Code that the Board of 22 Behavioral Health decides in the first instance.</p>

Hearing

<p style="text-align: right;">Page 93</p> <p>1 We think it's easily satisfied.</p> <p>2 THE COURT: The number 8 looks like something it</p> <p>3 could be judicially reviewable.</p> <p>4 MR. WILBURN: I'm sorry?</p> <p>5 THE COURT: The number 8 --</p> <p>6 MR. WILBURN: The number --</p> <p>7 THE COURT: -- might be judicially reviewable.</p> <p>8 MR. WILBURN: Your Honor, I agree.</p> <p>9 It's interesting in the zoning -- I'm sorry, the</p> <p>10 HE opinion -- in the amicus brief, they point that out.</p> <p>11 There is a role for the zoning administrator</p> <p>12 that if we have ten people out there or we have nine</p> <p>13 people out there, that's simply a numeric issue. And</p> <p>14 they can -- they can cite us for that. That would be an</p> <p>15 enforcement action.</p> <p>16 What the zoning administrator doesn't do is</p> <p>17 determine whether our operation can be inpatient or</p> <p>18 outpatient or whether we can be inpatient or outpatient</p> <p>19 or the type of services we provide.</p> <p>20 The zoning administrator doesn't make a decision</p> <p>21 on whether we're profit or not for profit.</p> <p>22 And that's not as a result -- Your Honor, that's</p>	<p style="text-align: right;">Page 95</p> <p>1 You're not asking me to talk about what decision</p> <p>2 the Department of Behavioral Health is going to make.</p> <p>3 That's beyond judicial reach. That awaits their</p> <p>4 decision, right?</p> <p>5 MR. WILBURN: Correct.</p> <p>6 THE COURT: The decision you were just</p> <p>7 describing that is available to the Court today, tell me</p> <p>8 what you mean by that.</p> <p>9 MR. WILBURN: Well, the one that's available</p> <p>10 today -- again, the way the appellate statute is set up</p> <p>11 is you review the BZA's decision.</p> <p>12 Mr. Hampshire is correct that you have authority</p> <p>13 to affirm, deny or modify the decision as you see fit,</p> <p>14 and you can decide questions of law de novo.</p> <p>15 There is no question of fact, though. There's</p> <p>16 no decision involving facts for the Court to modify or</p> <p>17 affirm or reject, because there was no decision decided</p> <p>18 below. It simply said we don't think this is</p> <p>19 appealable.</p> <p>20 So all of these issues about whether we reside</p> <p>21 and whether we should be at this location and for profit</p> <p>22 versus not for profit, I think that we are correct. And</p>
<p style="text-align: right;">Page 94</p> <p>1 not something that the BZA should decide and not</p> <p>2 something the Court today should decide.</p> <p>3 I do think there are two legal questions the</p> <p>4 Court can decide today.</p> <p>5 One is was the zoning administrator's decision</p> <p>6 appealable. That's a pure legal question. It's a</p> <p>7 Virginia process question that Mr. Hampshire quickly</p> <p>8 laid out, and the County will respond to.</p> <p>9 And then the second one, the Court has</p> <p>10 discretion on Mr. Hampshire -- and I hope that the Court</p> <p>11 would decide this. But the Court has discretion,</p> <p>12 because I'm not sure the appeal is properly before it --</p> <p>13 and that is if we qualify under 15.2-2291. If we</p> <p>14 qualify, then we operate in a residential zoning</p> <p>15 district.</p> <p>16 Then I don't know that the Court needs to decide</p> <p>17 that today. The County might say that's advisory. I</p> <p>18 think it's helpful that the Court decide it. I think</p> <p>19 it's easily decided. Because the statute says so and</p> <p>20 the case law says so.</p> <p>21 THE COURT: Let me restate what I think I just</p> <p>22 heard.</p>	<p style="text-align: right;">Page 96</p> <p>1 I think case law supports us.</p> <p>2 But in fairness to the Court, I don't think we</p> <p>3 can invite error and ask you to decide something that</p> <p>4 will be decided by the Department relatively soon, and</p> <p>5 there will be a separate proceeding thereafter.</p> <p>6 I do think that the most basic question that the</p> <p>7 zoning administrator had that she answered is if you</p> <p>8 qualify under 15.2-2291 -- if, can you operate in a</p> <p>9 residential district. I think the answer is yes.</p> <p>10 I think it says so in the statute. I think the</p> <p>11 zoning ordinance says that. And that's a pure question</p> <p>12 of law.</p> <p>13 So Your Honor, I think, has discretion to decide</p> <p>14 that. You can go beyond that first question.</p> <p>15 THE COURT: The determination letter in question</p> <p>16 said that the decision by the state board was needed.</p> <p>17 MR. WILBURN: That's right.</p> <p>18 THE COURT: So doesn't that -- that letter did</p> <p>19 not have a finality to it.</p> <p>20 MR. WILBURN: Ultimately, Your Honor, in</p> <p>21 fairness, I'd like to have that -- I'd like to have the</p> <p>22 imprint of the Court saying what I want it to say.</p>

Hearing

<p style="text-align: right;">Page 97</p> <p>1 But in fairness to the Court, these are issues 2 that are decided exclusively at this stage by the board, 3 and you're correct, by the Board of Behavioral Health. 4 The General Assembly delegated that analysis and 5 decision making to the Board of Behavioral Health and 6 then established a mechanism for appeal, an appeal to 7 the agency under the APA and then an appeal to the 8 circuit court. 9 None of that is a zoning decision. 10 And you'll wrap it up as a zoning decision, 11 because we're here on a zoning appeal. 12 But the reality is let's hypothetically accept 13 Mr. Hampshire's argument, and you decide today I don't 14 think you qualify because -- you know, because you're 15 going to be treating people who aren't residents there. 16 How can we possibly reconcile that with what the 17 licensing body will do and they're not a party to this 18 case at all? 19 Moreover, you don't have information on which to 20 make that decision. 21 We don't even have particular patients to talk 22 about, as they did in the Kaleidoscope case.</p>	<p style="text-align: right;">Page 99</p> <p>1 particular issue, whether this inquiry is appropriate. 2 So I think I've been open about that. 3 I'm not taking a position on standing, Your 4 Honor, which is the County's motion. 5 I am taking a position on the jurisdiction of 6 the Court in this instance to make the determination 7 they're asking for. 8 THE COURT: I believe the judge does have 9 jurisdiction. Justiciability arises from a variety of 10 things. 11 The one is that all the ones that have been 12 decided here as potentially inviting justiciability are 13 overridden by others. 14 I have an opinion as to what I can do and what I 15 can't do here today. 16 MR. WILBURN: Do you have any questions for me, 17 Your Honor? 18 THE COURT: No. The briefs, the arguments have 19 been highly educational. 20 MR. WILBURN: Thank you. 21 THE COURT: Anything else? 22 MR. HAMPSHIRE: Yes, sir. I don't know whether</p>
<p style="text-align: right;">Page 98</p> <p>1 But the fact of the matter is the state is not 2 before the Court today either to defend a license they 3 granted or defend a decision of the denial access. 4 That's simply not where we are. And I don't think this 5 issue is ripe. 6 Your Honor, do you have any questions about my 7 argument or any open issue about these? 8 I'm happy to talk about the cases that we cited. 9 I think the case law is very clear that -- 10 THE COURT: No. No. I've had a good education 11 from both sides. 12 MR. WILBURN: Well, yeah. Your Honor, I know my 13 client is here today. And we would like -- we would 14 love for the conclusion today for the Court to decide 15 the ultimate issue, whether we qualify under 15.2-2291, 16 and, therefore, we can operate in residential. 17 But in fairness, and having thought about it, I 18 just don't think that the issue is ripe. And that's our 19 position. 20 Mr. Hampshire said I sort of surprised him about 21 joining the County's motion. 22 We've had multiple discussions on this</p>	<p style="text-align: right;">Page 100</p> <p>1 the County has something to say. 2 THE COURT: I didn't want to leave you out. 3 MR. LAWRENCE: Your Honor, the Board knows my 4 position on it. 5 THE COURT: You worry me bringing two notebooks. 6 MR. LAWRENCE: Well, just in case I need to 7 reference something, Your Honor. 8 I'm glad that you had an opportunity to look at 9 the briefs, Judge. 10 You know, I'd always thought there was an 11 unwritten rule that when you -- 12 THE COURT: I understand the briefs. I have not 13 seen what you have there. 14 MR. LAWRENCE: What I've got, Your Honor, is 15 I've got the zoning ordinance. I've got the code. 16 THE COURT: Oh, that's -- that's why the 17 volumes? Okay. 18 MR. LAWRENCE: Yes, sir. And then I've got the 19 cases that I relied on. So basically, this is if I need 20 to reference something. Your Honor, would you like -- 21 THE COURT: Yes, sir. Keep them for the moment. 22 I'll tell you if I need them.</p>

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<p style="text-align: right;">Page 101</p> <p>1 MR. LAWRENCE: He was just asking me what I 2 have. 3 So Your Honor, on behalf of the Board of 4 Supervisors, I'm Nicholas Lawrence. 5 As Your Honor understands, our position is that 6 the decision by the Board of Zoning Appeals was correct, 7 that the administrator has not yet made the decision as 8 to whether this proposed use will be allowed. 9 And the Board of Zoning Appeals correctly 10 recognized that and did not address questions that were 11 not properly before it. 12 There is some confusion, frankly, in the law. 13 Mr. Hampshire was citing you to part 6 of our 14 zoning ordinance, particularly Section 401 of that 15 ordinance. And he was discussing with you how the 16 zoning ordinance adopted by the Board authorizes the 17 zoning administrator to issue what it calls 18 interpretations. The word determination is used once in 19 that section. 20 But it calls what the zoning administrator is 21 authorized to do is like you have here, the issuance of 22 interpretation.</p>	<p style="text-align: right;">Page 103</p> <p>1 appealable just because the administrator issues them. 2 THE COURT: You used the word may, and they're 3 awaiting a decision from the state board -- 4 MR. LAWRENCE: Well -- 5 THE COURT: -- you're talking about finality, 6 right? 7 MR. LAWRENCE: Not only the decision by the 8 state board but also additional decisions by the zoning 9 administrator. 10 So I take issue with Mr. Hampshire that any -- 11 as he emphasizes both in his brief and his presentation 12 today, that any decision by the administrator is 13 appealable. That's clearly not correct. 14 The Court has made that abundantly clear in case 15 after case after case. 16 THE COURT: I'm focused on the determination 17 letter. 18 MR. LAWRENCE: Your Honor, it's our position 19 that it's not a determination as the Supreme Court has 20 defined that term. It's not a determination because 21 it's not final. 22 THE COURT: I said that to myself when I was</p>
<p style="text-align: right;">Page 102</p> <p>1 And we've cited the Court to a number of cases, 2 starting with the Vulcan Materials case and running 3 through to the Rhoads case, which was decided in 2017, 4 where the Supreme Court has advised us that there's a 5 difference between an interpretation and a 6 determination. 7 And when you step through the body of case law, 8 which we've -- we've referenced in our briefs, the 9 essence of a determination is that it is final, that it 10 then becomes appealable. 11 And it is akin, I would suggest, to decisions by 12 this Court. 13 Your Honor makes hundreds of decisions during 14 the course of this case. There are hundreds of 15 individuals rulings. But they don't become appealable 16 until the decision is final. And that's what we have 17 here. 18 Now, the zoning administrator as an 19 administrative officer is authorized to issue 20 interpretations. 21 But the Supreme Court has made clear -- again, 22 starting with the Vulcan case, that they don't become</p>	<p style="text-align: right;">Page 104</p> <p>1 reading it. 2 MR. LAWRENCE: Okay. 3 THE COURT: The determination does not 4 determine. 5 MR. LAWRENCE: That's right. There's more for 6 the administrator to do. Okay. 7 And there, I have to take issue with Mr. 8 Wilburn. Because he suggests -- and I would make the 9 same argument if I were in his shoes -- that if the 10 state board grants the license, there is nothing more 11 for the administrator to do. And I, respectfully, don't 12 agree with him. 13 Because in the code, before the administrator 14 can issue a zoning permit, we have standards that are 15 set out in the ordinance as to what he has to do. 16 One of the things that he has to do is to first 17 ensure that the proposal that's set out in the 18 application that has not yet been filed is in compliance 19 with other applicable ordinances and regulations. And 20 that's Section 6, Act 1002 of the code. 21 No zoning permit shall be issued where the 22 structure to be constructed for the use contemplated</p>

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<p style="text-align: right;">Page 105</p> <p>1 would be in violation of the provisions of this 2 ordinance or any other applicable county law, ordinance 3 or regulation. 4 And so certainly, the decision by the State 5 Board of Behavioral Health is critical. 6 Without that, they probably cannot successfully 7 apply. I mean it's -- 8 THE COURT: That seems logical. 9 MR. LAWRENCE: Very difficult to see how they 10 could. 11 THE COURT: The determination letter used the 12 word may for that very reason. 13 MR. LAWRENCE: Correct. 14 THE COURT: You may have a state board say you 15 can't do this. 16 MR. LAWRENCE: They may very well say that or 17 they may say you can do it. 18 But that doesn't end the administrator's 19 responsibilities. He still has a responsibility to see 20 that they're in compliance with the other applicable 21 rules and regulations. 22 So for example, there was a question raised</p>	<p style="text-align: right;">Page 107</p> <p>1 THE COURT: Unlike this. Go ahead. 2 MR. LAWRENCE: The point is that -- Mr. Wilburn, 3 I'm glad to hear, thinks I'm correct, that this is 4 premature. 5 Because the administrator under the code is the 6 individual who is empowered and directed to make the 7 decision as to whether the use is permitted. 8 He has not made that decision. He has issued an 9 advisory opinion. 10 Counsel argues persuasively that it ought to be 11 viewed as final. But it is -- it is not final. 12 It can't be final under the Vulcan Materials 13 case and the other series of cases that we've cited 14 ending with Rhoads. 15 It's certainly within the Court's jurisdiction 16 to review the decision by the Board of Zoning Appeals. 17 But the Board of Zoning Appeals was correct. 18 That appeal was premature. 19 And the reason I think why there is so much 20 confusion on this point is if you look, Judge -- this is 21 the 1993 revised zoning ordinance. That's when it was 22 enacted in 1993.</p>
<p style="text-align: right;">Page 106</p> <p>1 recently. This is not in the record. But it came to 2 the County's attention that there's a concern about 3 sewer capacity. 4 THE COURT: About what? 5 MR. LAWRENCE: Sewer capacity. That is 6 something that would be addressed in the context of a 7 permit application. 8 That's where that would be referred to the 9 appropriate authorities here in Loudoun County. It 10 would go to the Department of Health. 11 And depending on other -- other factors that may 12 or may not apply to this site, it might go, you know, 13 for other agencies to refer. 14 THE COURT: Ironically, having nothing to do 15 with this case within the last year, I've had to deal 16 with the flooding of new houses in Loudoun County under 17 -- it was -- 18 MR. LAWRENCE: I am familiar with that, Judge. 19 THE COURT: -- with government agencies involved 20 and so forth. 21 MR. LAWRENCE: I'm -- I'm very familiar with 22 that.</p>	<p style="text-align: right;">Page 108</p> <p>1 And if you look at the cases that we believe 2 control, starting with Vulcan and running through to the 3 Rhoads case in 2017, none of them were decided at the 4 time that this ordinance was enacted. 5 And so the board in 1993 enacted this, not being 6 aware of the distinction that the Supreme Court would 7 later highlight for us between an interpretation and a 8 determination. 9 One being something the administrator was 10 authorized to do, which may very well be of use to the 11 party who asks for it. 12 The other, the determination, being binding and 13 appealable. 14 And Mr. Hampshire makes a fair point. Why has 15 the County put us in this position with appeal language 16 in this letter that they say is merely advisory? 17 And the answer is because we may have an opinion 18 as to whether it's appealable or not. But other parties 19 may disagree with us. 20 And ultimately, it would be the Board of Zoning 21 Appeals or a court who would make the decision as to 22 whether it's properly appealable.</p>

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<p style="text-align: right;">Page 109</p> <p>1 And so it's our position that it's not 2 appealable because it's not final. There is more work 3 for the administrator to do on an application that has 4 not yet been filed before any use could be authorized. 5 These folks back here who are concerned about 6 the consequences that this may have for their 7 properties, the County is not taking the position that 8 they don't have standing under the Friends of 9 Rappahannock. That's a completely and totally separate 10 issue. 11 THE COURT: Standing is the easy issue here? 12 MR. LAWRENCE: I'm sorry, Your Honor? 13 THE COURT: Standing is an easy issue. 14 MR. LAWRENCE: That's -- under the Friends of 15 Rappahannock case -- 16 THE COURT: I agree with you. 17 MR. LAWRENCE: Right. 18 THE COURT: That's one of many issues. 19 MR. LAWRENCE: Right. The question here is 20 whether they are aggrieved. 21 When we look at 2314 -- 15.2-2314, which gives 22 the Court the authority to hear appeals from the Board</p>	<p style="text-align: right;">Page 111</p> <p>1 So if we want to talk about supremacy, the 2 supremacy here is the state enabling legislation that 3 says that any decision is appealable for the Board of 4 Zoning Appeals. 5 You can -- and Loudoun County doesn't get to say 6 it's not appealable by calling it an interpretation. 7 It's -- an interpretation of the ordinance are 8 the zoning administrator's broad authority under 9 15.2-2280. 10 With respect to the word may -- this is 11 critical, because I know the Court is focused on that 12 word in this determination. The significance of the 13 word may is phenomenal. Because what the zoning 14 ordinance says is it may not. It may not be allowed. 15 The congregate housing facility may not be allowed under 16 any circumstances, no circumstances in the AR-1 zone. 17 So for a zoning determination to say it may be 18 allowed under certain circumstances, that is a big deal. 19 That is a significant decision. 20 That's why Newport asked for it. That's why 21 we're all here today. 22 Because all that Newport now has to do is go out</p>
<p style="text-align: right;">Page 110</p> <p>1 of Zoning Appeals, the two -- the two words that are at 2 issue from our perspective are aggrieved and 3 determination. 4 We don't think they're aggrieved, because we 5 don't think it's a determination. We don't think it can 6 be a determination because it's not final. 7 The administrator may very well grant their 8 application once it's filed. But he could deny it. He 9 has to make that assessment. And we would ask that the 10 Court allow him to do that. 11 THE COURT: Thank you. 12 MR. HAMPSHIRE: Your Honor, I have to take issue 13 with this discussion. 14 If one looks at the state enabling legislation 15 for zoning ordinances, again, Loudoun County does not 16 get to enact an ordinance, label something as an 17 interpretation and then say it's not a determination or 18 a decision under the state enabling legislation. 19 Loudoun County does not get to do that, 20 especially when Loudoun County has in this ordinance 21 appeal language, that if you don't appeal this within 30 22 days, it's a thing decided. That is the finality.</p>	<p style="text-align: right;">Page 112</p> <p>1 and do those other things; whereas but for the zoning 2 determination, it wouldn't have even the opportunity to 3 ask for those other things. 4 And, Your Honor, you've had a -- you had a 5 question about properties. 6 I was able -- if you're still interested, I have 7 a picture from the record which shows the properties and 8 the location. And I can just hand it up to the Court. 9 THE COURT: I'd like to see that. 10 MR. HAMPSHIRE: And you will see -- and I don't 11 have copies. I'm sorry. It's in the record. Here's 12 another one. I'm sorry. 13 MR. WILBURN: I've seen it. Thank you. 14 MR. HAMPSHIRE: You will see in yellow is the -- 15 basically, it's what used to be a family compound and 16 there are three houses there together. 17 And you will see a reference to a farm that's 18 ordinary that is nearby. You will see the other houses. 19 You will see it's a low density residential -- 20 THE COURT: The initial impact is immediately 21 triggering the word rural. 22 MR. HAMPSHIRE: Yes, sir.</p>

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<p style="text-align: right;">Page 113</p> <p>1 THE COURT: That's why I wanted to know. You 2 can have this back.</p> <p>3 MR. HAMPSHIRE: I do want to emphasize here that 4 may -- the word may is critical. Because but for this 5 determination, it is may not. You can't do it under any 6 circumstances.</p> <p>7 The other thing I want to emphasize is that we 8 are dealing with a zoning determination. We're dealing 9 with a determination under the code of Loudoun County 10 enacted pursuant to enabling legislation.</p> <p>11 We're not dealing with a determination by the 12 Virginia Department of Behavioral Health. That's under 13 a completely different regulatory regime, a completely 14 different purpose.</p> <p>15 And, indeed, I have for the record -- I don't 16 have a copy of this either, but it is in the record. 17 I'd just like to show the Court what I was referring to 18 earlier. It's from A53 of the staff report.</p> <p>19 And this is a letter from Jae Benz, who is the 20 department licensing director of the Virginia Department 21 of Behavioral Health. And I've highlighted the language 22 there.</p>	<p style="text-align: right;">Page 115</p> <p>1 not deal with the issue that we have here today. And 2 that is does 15.2-2291 allow something to happen and 3 other things to fall into place?</p> <p>4 Does it usurp a total ban on congregate housing 5 facilities -- commercial treatment facilities in the 6 AR-1 zone, even if the word may is used? Because again, 7 it's may not.</p> <p>8 Under those tables that I gave you, Table 2-102, 9 congregate housing is not allowed. The zoning 10 administrator says it's not allowed but for 2291 if 11 certain things happen. That's the issue before the 12 Court.</p> <p>13 The Court is well qualified and has jurisdiction 14 to resolve that today.</p> <p>15 Certainly, the BZA had jurisdiction resolved. 16 But it is a ripe question.</p> <p>17 Because the zoning determinations only go as far 18 as they go. They only go as far as what they say.</p> <p>19 But what they say is significant. And it's 20 significant because it says it may happen in this case, 21 whereas otherwise, it just cannot.</p> <p>22 Thank you, Your Honor.</p>
<p style="text-align: right;">Page 114</p> <p>1 She wants to make clear consistent that she -- 2 that that department has absolutely nothing to do with 3 state zoning issues.</p> <p>4 You get your zoning issues resolved. Then you 5 can get your license. But they're two completely 6 separate issues.</p> <p>7 So to say that we have a remedy with the 8 Virginia Department of Behavioral Health with respect to 9 zoning issues is completely contrary to the statutory 10 scheme and contrary to the record in this case.</p> <p>11 We don't. They have a completely different 12 mission.</p> <p>13 And that's what the Alternative House -- Judge 14 Bach in the Alternative House, that's what he was 15 referring to. The context of that case is that there 16 was a dispute about whether these children were mentally 17 ill.</p> <p>18 And the language that Mr. Wilburn was referring 19 to was that that department is in the best position to 20 know whether these children are mentally ill. That's 21 the relevance of that.</p> <p>22 But that court -- that decision did not -- did</p>	<p style="text-align: right;">Page 116</p> <p>1 THE COURT: Thank you, counsel, for both the 2 written materials and for thoroughly giving me what I 3 need to know to make a decision.</p> <p>4 The decision is probably going to disappoint 5 both sides.</p> <p>6 The concept of standing was clearly put to rest. 7 The concept of appealability to this Court to 8 step in and do certain things empowered by the law of 9 Virginia is affected by the contents of the letter 10 itself, which I concentrated on at all times with 11 counsel.</p> <p>12 The decision letter, called the determination 13 letter, passes the decision making capacity in the eyes 14 of appealable issues to the Behavioral Health and 15 Developmental Services Department.</p> <p>16 They have a decision that might prove favorable 17 to the homeowner plaintiffs. They have a decision yet 18 to be made.</p> <p>19 That particular concept that the Behavioral 20 Health and Developmental Services are going to issue 21 authority to go forward or authority to say no, you 22 don't -- you don't qualify under the state law -- is a</p>

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<p style="text-align: right;">Page 117</p> <p>1 part of the partial decision made by the County 2 officials.</p> <p>3 By writing the determination agreement, they did 4 disagree with what your side would say they should have 5 done. They should not have stepped up and created a 6 residential alternative.</p> <p>7 I take that under advisement. I do not rule on 8 that. I'm keeping it before the Court, awaiting the 9 decision of the Behavioral Health and Developmental 10 Services, which may or may not be a very important 11 decision. It may leave us right where we are now. But 12 it is not yet done.</p> <p>13 And therefore, that particular -- that 14 particular decision procedurally is necessary for this 15 judge to take over the judicial -- the valid functioning 16 that a judge can do in such a case.</p> <p>17 In terms of what we're doing, I was worried when 18 I was reading things would the time that the Department 19 of -- it's hard to say their whole title. It raises 20 their initials all the time -- the Department of 21 Behavioral Health and all that. Was there a forfeiture 22 of timeliness issues? I'm not aware of that.</p>	<p style="text-align: right;">Page 119</p> <p>1 state agency has to make its decision, it will determine 2 a lot of things from how aggrieved the homeowners are to 3 what other impact it has within the -- everything else 4 done in local government.</p> <p>5 I don't think either side really won, so I don't 6 know who to assign the verdict to to writing an opinion.</p> <p>7 MR. WILBURN: I can take a stab at it and share 8 it with Mr. Hampshire.</p> <p>9 THE COURT: Say again.</p> <p>10 MR. WILBURN: We're happy to take an initial 11 draft and work with Mr. Hampshire in drawing that.</p> <p>12 THE COURT: Counsel, take that and translate it.</p> <p>13 I trust I gave you enough to write a meaningful 14 order as to what I did.</p> <p>15 MR. HAMPSHIRE: Do I understand correctly, Your 16 Honor, you've taken the matter under advisement pending 17 the resolution of the state licensure matter?</p> <p>18 THE COURT: I am finding on the issue of 19 appealability, I'm not going to decide that today. It's 20 too harsh.</p> <p>21 Number 2, I'm finding that we need a decision by 22 an agency government to have a complete record that's</p>
<p style="text-align: right;">Page 118</p> <p>1 The Court has the jurisdiction over this. The 2 Court's powers to make decisions exist.</p> <p>3 The Court can come back and look at that opinion 4 of the County's -- the County's opinion as to what the 5 availability is to the buyer as to if they can go 6 forward with their plan or not. I do not endorse or 7 deny that today. We await the outcome of that statewide 8 agency's decision.</p> <p>9 If it is just that they'll go ahead -- that 10 they're free to go ahead, then I'll reach a decision on 11 your other issues.</p> <p>12 One reason I assume this would happen so we 13 don't have people waiting for six months or a year or 14 something like that.</p> <p>15 But I think the extraordinary step of a judge 16 overruling county government or the zoning process and 17 everything else should be done only when it's clear-cut 18 that I have the power to do it and the facts before me 19 and the need to do it.</p> <p>20 Therefore, the -- that's the ruling.</p> <p>21 The issue of non-decisions, it turns out the 22 fact that there is an unresolved important issue that</p>	<p style="text-align: right;">Page 120</p> <p>1 fair to both sides and to the Court.</p> <p>2 MR. WILBURN: May I ask for one point of 3 clarification, Your Honor?</p> <p>4 The County points out, I think correctly, that 5 there's really a two-step process. There is the 6 license, which, hopefully, we obtain. And thereafter, 7 there's a permit process through the County itself.</p> <p>8 Is your opinion tended to address just that 9 first piece or did you want us to get through both of 10 those administrative --</p> <p>11 THE COURT: The first piece is the statewide 12 bureau.</p> <p>13 MR. WILBURN: Yes.</p> <p>14 THE COURT: The second piece is, at this point, 15 vague. What's going to happen then? And I don't have 16 that before me in precise form.</p> <p>17 MR. WILBURN: Fair point, Your Honor. 18 Understood.</p> <p>19 THE COURT: But I am saying this Court has 20 jurisdiction to participate and to keep an open mind as 21 to where we are and where we might go with this.</p> <p>22 MR. WILBURN: Yes. Thank you, Your Honor.</p>

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<p style="text-align: right;">Page 121</p> <p>1 THE COURT: Anything else for today?</p> <p>2 MR. WILBURN: Yes. May we work on the order and</p> <p>3 then submit it to you later as opposed to right now?</p> <p>4 THE COURT: You have to work through this court</p> <p>5 to get to me, because I am not a record member of this</p> <p>6 court.</p> <p>7 MR. WILBURN: Okay.</p> <p>8 THE COURT: But they do that all the time.</p> <p>9 MR. WILBURN: Will do.</p> <p>10 THE COURT: The staff here will effectively make</p> <p>11 sure I get it, and then I'll get my job done too,</p> <p>12 because they help me with it.</p> <p>13 Anything else for today?</p> <p>14 MR. WILBURN: Nothing else for today.</p> <p>15 MR. HAMPSHIRE: Just for clarity, did I</p> <p>16 understand the Court to say that standing was put to</p> <p>17 rest -- the issue of standing? It's the question of</p> <p>18 appealability that's being taken under advisement?</p> <p>19 THE COURT: The citizens complaining have</p> <p>20 standing.</p> <p>21 MR. HAMPSHIRE: Okay.</p> <p>22 THE COURT: The issue was not mature for</p>	<p style="text-align: right;">Page 123</p> <p>1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:</p> <p>2</p> <p>3 I, Robin Creswell, Notary Public in and for</p> <p>4 the Commonwealth of Virginia at Large, and whose</p> <p>5 commission expires April 30, 2023, do certify that the</p> <p>6 proceedings were held before me and that the foregoing</p> <p>7 is a true, correct and full transcript of the</p> <p>8 proceedings adduced.</p> <p>9 I further certify that I am neither related to</p> <p>10 nor associated with any counsel or party to this</p> <p>11 proceeding, nor otherwise interested in the event</p> <p>12 thereof.</p> <p>13 Given under my hand and notarial seal this</p> <p>14 28th day of September, 2022. </p> <p>15</p> <p>16 Notary Public Registration No. 139100</p> <p>17</p> <p>18 Commonwealth of Virginia at Large</p> <p>19 Job No. 92537</p> <p>20</p> <p>21</p> <p>22</p>
<p style="text-align: right;">Page 122</p> <p>1 procedural court activity.</p> <p>2 MR. HAMPSHIRE: All right.</p> <p>3 THE COURT: And, therefore, the Court is keeping</p> <p>4 it under advisement. I'm not allowing, if you will, the</p> <p>5 issue.</p> <p>6 MR. HAMPSHIRE: Okay. Thank you, sir.</p> <p>7 THE COURT: Okay. Anything else?</p> <p>8 MR. WILBURN: No, Your Honor.</p> <p>9 THE COURT: Thank you. Everybody is free to go.</p> <p>10 (Thereupon, the proceedings were concluded</p> <p>11 at 12:14 p.m.)</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	

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