



MEMORANDUM

TO: Chairman Robert W. Dowler, Board of Zoning Appeals
Members of Board of Zoning Appeals

CC: Director of Planning and Zoning

FROM: Steven D. Briglia, Town Attorney

RE: Question regarding granting of a Conditional Use Permit to "Family Day Homes"

REFERENCES: Prior Zoning Administrator's Opinion – June 19, 2013
Virginia Code Sections 15.2-2292, 63.2-100
Town Code Sections 18-12, 18-13, 18-173, 18-217, 18-232

DATE: December 16, 2019

The Chair of the Board of Zoning Appeals ("BZA") has asked for a legal opinion as to the use of a Conditional Use Permit ("CUP") for a "Family Day Home". It should be noted that in June of 2013, the prior Director of Planning and Zoning/Zoning Administrator gave a Zoning Administrator's opinion that a CUP would be required for a Family Day Home with seven (7) or more children.

Zoning Administrator's Opinion

Under Virginia law and the Town Code, the Zoning Administrator is charged with administering and enforcing Chapter 18 of the Town Code:

Sec. 18-217. - Administrative official.

Except as otherwise provided in this chapter, the zoning administrator shall administer and enforce this chapter, including the receiving of applications, the inspection of premises, the issuing of building and occupancy permits and the determining of precise zone boundaries according to section 18-6. No building permit or certificate of occupancy shall be issued by him except where the provisions of this chapter have been complied with. In case any building is erected, constructed, reconstructed, altered, repaired or converted, or any land is used in violation of this chapter, the zoning administrator is authorized and directed to institute appropriate action to put an end to such violation.

Additionally, the Zoning Administrator is permitted to make interpretations of the Zoning Ordinance and may issue Zoning Administrator determinations, which may be appealed to the BZA pursuant to Town Code Section 18-232:

Sec. 18-232. - Appeals.

The board of appeals is authorized to hear and decide appeals from any order, requirement, decision or determination made by the zoning administrator or other administrative officer in the administration or enforcement of this chapter.

In 2013, the then Director of Planning & Zoning and Zoning Administrator, Greg Hembree, issued an opinion regarding the state code provisions of Virginia Code §15.2-2292, stating that Fairfax County has allowed a maximum of seven (7) children within a single-family home and “(t)he Town has chosen to follow this current interpretation from Fairfax County...” (Memorandum of GMH, June 19, 2013).

State Enabling Statute

The enabling statute for Family Day Homes is set forth below with certain provisions highlighted. It should be noted that this code section has been amended by the General Assembly several times since 2013.

Virginia Code § 15.2-2292. Zoning provisions for family day homes. —

A. Zoning ordinances for all purposes shall consider a family day home as defined in § 63.2-100 serving one through four children, exclusive of the provider's own children and any children who reside in the home as residential occupancy by a single family.

No conditions more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption shall be imposed upon such a home. Nothing in this section shall apply to any county or city which is subject to § 15.2-741 or 15.2-914.

B. A local governing body may by ordinance allow a zoning administrator to use an administrative process to issue zoning permits for a family day home as defined in § 63.2-100 serving five through 12 children, exclusive of the provider's own children and any children who reside in the home. *The ordinance may contain such standards as the local governing body deems appropriate and shall include a requirement that notification be sent by registered or certified letter to the last known address of each adjacent property owner. If the zoning administrator receives no written objection from a person so notified within 30 days of the date of sending the letter and determines that the family day home otherwise complies with the provisions of the ordinance and all other applicable local ordinances, the zoning administrator shall issue the permit sought. If the zoning administrator receives a written objection from a person so notified within 30 days of the date of sending the letter and determines that the family day home otherwise complies with the provisions of the ordinance, the zoning administrator shall consider such objection and may (i) issue or deny the permit sought or (ii) if required by the ordinance, refer the permit to the local governing body for consideration. The ordinance shall provide a process whereby an applicant for a family day home that is denied a permit through the administrative process may request that its application be considered after a hearing following public notice as provided in § 15.2-2204. Upon such hearing, the local governing body may, in its discretion, approve the permit, subject to such conditions as agreed upon by the applicant and the locality, or deny the permit. The provisions of this subsection shall not prohibit a local governing body from exercising its*

authority, if at all, under subdivision A 3 of § 15.2-2286. (1994, cc. 781, 798, § 15.1-486.5; 1997, c. 587; 2014, c. 771; 2015, cc. 758, 770; 2019, cc. 380, 442.)

Virginia Code § 63.2-100 –

"Family day home" means a child day program offered in the residence of the provider or the home of any of the children in care for one through 12 children under the age of 13, exclusive of the provider's own children and any children who reside in the home, when at least one child receives care for compensation. The provider of a licensed or registered family day home shall disclose to the parents or guardians of children in their care the percentage of time per week that persons other than the provider will care for the children. Family day homes serving five through 12 children, exclusive of the provider's own children and any children who reside in the home, shall be licensed. However, no family day home shall care for more than four children under the age of two, including the provider's own children and any children who reside in the home, unless the family day home is licensed or voluntarily registered. However, a family day home where the children in care are all related to the provider by blood or marriage shall not be required to be licensed.

It is the Town Attorney's legal opinion that a Family Day Home, as defined by the Virginia Code § 63.2-100, with four or few children, is a by right use. This has not been an issue in the Town of Vienna and the current question from the BZA relates to Family Day homes with five to twelve children. Virginia Code §15.2-2292(B) states that "A local governing body **may by ordinance** allow a zoning administrator to use an administrative process to issue zoning permits for a family day home as defined in § 63.2-100 serving five through 12 children..."(emphasis added). This state code enabling provision would permit the Zoning Administrator to administratively issue a use permit for a Family Day Home serving 5-12 children. Vienna has not adopted a local ordinance to permit such an administrative process. Accordingly, such a use in a residential zone would either be by right (which it is not) or by Conditional Use Permit under Town Code §18-210 if permitted and listed for in residential zones under Town Code §§18-12 and 18-13. Set forth below, Town Code §§18-12 and 18-13 list the uses that may occur in single-family zones in Vienna and Town Code §18-173 lists the home occupation provisions:

Sec. 18-12. - Permitted uses.

The following uses are permitted in all RS-16 zones:

- (a) Single-family detached dwelling.*
- (b) Accessory buildings, including barns and other bona fide farm buildings, and private garages.*
- (c) Agricultural operations, including floriculture, horticultural and nurseries, provided all structures and buildings used in connection therewith are at least 100 feet from the nearest property line; poultry and dairy farming and horse breeding on parcels of at least ten acres in area, provided all animals and buildings and structures used in connection therewith are located at least 100 feet from the nearest property line.*
- (d) Customary home occupations. (See section 18-173.)*

- (e) *The keeping of horses and/or ponies primarily owned and kept for the personal use of the occupant on the land on which they are maintained on parcels of at least two acres in area, provided:*
 - 1. *All buildings and structures used in connection with the keeping of horses or ponies shall be located at least 100 feet from all of the property lines of the owner or keeper.*
 - 2. *All bulk feed and other supplies, equipment and materials used in connection with the keeping of horses or ponies shall be located in such buildings or structures located at least 100 feet from all of the property lines of the owner or keeper.*
 - 3. *Not more than one pony or horse per acre shall be kept and all such property on which such ponies or horses are kept shall be fenced in a manner which will prevent any or all of them from straying closer than ten feet from any property line of the owner or keeper.*

Sec. 18-13. - Conditional uses.

The following uses may also be permitted in all RS-16 zones subject to securing a use permit as provided in section 18-209:

- (a) *Churches and other places of worship.*
- (b) *Colleges and schools (private, elementary and high) of a noncommercial nature.*
- (c) *Golf courses, country clubs, private clubs, including community buildings and similar recreational uses not owned and/or operated by a public agency (does not include golf driving ranges).*
- (d) *Institutional homes and institutions of an educational or philanthropic nature, except those of a correctional nature or for mental cases.*
- (e) *Certified massage therapists in the RS-16, RS-12.5 and RS-10 zones only, subject to the same restrictions applicable to home occupations as set forth in section 18-173, and who further comply with the application, investigation and training requirements of sections 22-5, 22-6, and 22-7, and the sanitation and hygiene requirements applicable to health clubs as set forth in sections 22-10 and 22-11.*
- (f) *Nursery and kindergarten schools (private).*
- (g) *Public buildings and uses.*
- (h) *Public parks, playgrounds and other recreational uses.*
- (i) *Public utilities and services, including the following: electric utility substations with non-rotating equipment; water and sewage pumping stations; above-ground transmission lines not exceeding 33KV; telephone exchanges (but excluding service and service storage yards); provided that utilities shall be housed in a structure in keeping with the character of the neighborhood in which it is located.*
- (j) *Transitional parking. Where the side or rear yard of any lot or parcel of land located in a C-1, C-1A, or C-2 abuts land in any residential zone, automobile parking required in connection with the particular use of such commercial land may, upon the granting of a use permit pursuant to article 21 of this chapter, be permitted as a transitional parking use on that such land zoned for residential use, provided, however, that such transitional parking:*
 - 1. *Shall not extend more than 200 feet into any such abutting residential zone;*
 - 2. *Shall not extend into the required front yard setbacks or properties on adjacent streets;*
 - 3. *Shall not extend beyond the front and side yard setbacks of the residentially zoned lot or lots on which it is located;*

4. *Shall not provide more than 40 percent of the parking space required by the commercial use for the benefit of which said transitional parking lot is requested, and shall conform with the provisions of article 16 of this chapter, except as otherwise expressly provided;*
5. *Shall not provide any ingress and egress across adjacent residentially zoned property.*

Sec. 18-173. - Home occupation.

In any residential zone a home occupation is permitted, including the use of the home as an office, provided that the occupation complies with all the following conditions:

- A. *Is operated in its entirety within the single unit dwelling and only by the person maintaining a dwelling therein.*
- B. *Does not display or create outside the building any external evidence of the home occupation, including any method of advertisement other than a dwelling nameplate as permitted in section 18-185.*
- C. *Does not utilize more than 25 percent of the gross livable floor area including the basement.*
- D. *No person is employed other than a member of the immediate family residing on the premises. Provided, however, that in the event any such family member so employed in any home occupation dies or becomes physically incapacitated, and such incapacitation is certified by a medical doctor as preventing said family member from performing such employment thereby causing a hardship to the proper conduct of said home occupation, the board of zoning appeals may grant a variance to permit temporary employment of not more than one person for a period not to exceed six months following a public hearing, pursuant to section 18-234.*
- E. *Does not use any internal combustion engine as a power source and does not use more than a total of three horsepower in fractional horsepower electric motors (other than is normally used for domestic use).*
- F. *Will not involve the emission of any sounds, odors, or smoke beyond the property line in excess of normal single unit dwelling use.*
- G. *No commodity will be sold on the premises.*
- H. *Any service involving the presence of customers or clients on the premises will be operated on an appointment basis only.*
- I. *Will not constitute a nuisance because of sidewalk or street traffic.*
- J. *Said use will not tend to affect adversely the use and development of adjoining properties in the immediate neighborhood.*
- K. *No equipment or merchandise shall be stored anywhere on the premises other than inside the principal residential structure itself.*
- L. *No commercial deliveries shall be made either to or from the premises before 8:00 a.m. and after 6:00 p.m.*

A boardinghouse, tourist home, massage therapist or massage therapy establishment, or principal office of a real estate business shall not be deemed a home occupation.

Reconciliation of Prior ZA Opinion and State and Town Codes

The Town Attorney does not recall being consulted by Greg back in 2013 with respect to his Zoning Administrator's Opinion. However, it seems that Greg was perhaps

tying the then “maximum of seven (7) children” provision of the state code and Fairfax County’s practice to the Town’s zoning ordinance provision that permits “customary home occupations” referenced in the permitted use provisions of Town Code §18-12(d). It is safe to say that the expansion of home based day-care was a hot topic at the time and the General Assembly was very active in requiring localities to permit the use in residential zones. The dilemma now is that the General Assembly has further amended Virginia Code §15.2-2292 to permit localities to establish an administrative process to permit Family Day Homes for as many as twelve (12) children. At this time, the Town has not adopted a local ordinance establishing that administrative process. Accordingly, the Zoning Administrator could take the position that a Family Day Home with between 5 to 12 children may qualify as private nursery or kindergarten school CUP use. Such a use would still be bound not only by the restrictions on home occupancy under Town Code §173, but also the Conditional Use conditions imposed by the BZA.

Conclusion

There is no question the Town Zoning Code provisions on uses needs to be updated and in places reconciled with the state code, especially as it relates to home occupations and day-care and community based care facilities (whether for children or adults). The Town Council is actively moving forward on just such a Town Zoning Code review and update and the Town Attorney and Director of Planning & Zoning are in full support of the effort.