

November 6, 2019

Mr. Steve Briglia  
Vienna Town Attorney  
Town Hall  
Vienna, Va. 22180

In re: The authority of the BZA to grant conditional use permits to Family Day Homes

Dear Steve:

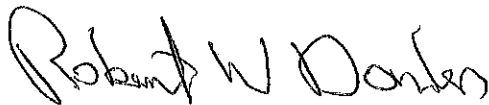
The Board of Zoning Appeals requests a legal opinion as to whether it has authority to grant conditional use permits to Family Day Homes. It is the feeling among the members of the Board that it may not have this authority under Vienna Code Sections 18-209 and 18-210. This is for the reason that Code Section 18-209 gives authority to the BZA to issue conditional use permits only for uses enumerated in Code Section 18-210. The use of property as a Family Day Home is not enumerated in Code Section 18-210.

In a Memorandum written on June 19, 2013, the Zoning Administrator determined that it would be necessary for Family Day Homes with 7 or more children to receive a conditional use permit from the BZA. However, we are wondering if there is a code section, state law, town council action or some other source that supports the referral of these cases to the BZA pursuant to the June 19<sup>th</sup> Memorandum.

The BZA is interested in resolving this issue in expectation of increased applications for Family Day Homes of up to 12 children in residential areas; we also expect increased opposition to these applications. Perhaps the matter could be resolved if Vienna Code Section 18-210 is amended to specifically include Family Day Homes as an enumerated use.

I have attached a Memorandum prepared by the Town Zoning Staff which further details the issue and provides relevant documents. We look forward to your counsel.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert W. Dowler". The signature is written in a cursive, flowing style.

Robert W. Dowler

Chairman, Board of Zoning Appeals

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**BOARD OF ZONING APPEALS MEMORANDUM**

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**TO:** STEVE BRIGLIA, TOWN ATTORNEY

**FROM:** BOARD OF ZONING APPEALS

**SUBJECT:** FAMILY DAY HOME

**DATE:** 11/05/2019

**CC:** MAYOR, TOWN COUNCIL, BOARD OF ZONING APPEALS, TOWN  
MANAGER, DIRECTOR OF PLANNING AND ZONING, AND ZONING  
ADMINSTRATOR

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This memo has been created due to questions surrounding the 2013 memo, from the previous zoning administrator, Family Day Homes (see attached). Board members discussed whether the Board has the authority to make decisions on Family Day Homes based on Vienna Town Code Sec. 18-210 – Use Permits\*.

The Board decided at the October 16, 2019 BZA meeting that it would no longer hear any new Family Day Home requests for a Conditional Use Permits for the following reasons:

- The Board issues Conditional Use Permits based on Sec. 18-210\* of the Town Code.
- Family Day Homes are allowed 4 children as a residential occupancy based on Sec. 15.2-2292.A ( <https://law.lis.virginia.gov/vacode/title15.2/chapter22/section15.2-2292/>) of the Virginia state code
- Family Day Homes are allowed 5 to 12 children if a local governing body has allowed, by ordinance, the zoning administrator to issue zoning permits based on Sec. 15.2-2292.B (<https://law.lis.virginia.gov/vacode/title15.2/chapter22/section15.2-2292/>) of the Virginia state code.
- The local governing body has not given the zoning administrator authority for zoning permits in reference to Family Day Homes regarding an increase up to 12 children.
- The Board of Zoning Appeals does not have the authority to make decisions on Family Day Homes regarding and increase up to 12 children.
- Town Council needs to clarify use and needs an update to the zoning code.

**\*Sec. 18-210. - Use permits required.**

A use permit is required for any of the following uses (see regulations for zone in which the use is proposed to be located):

A. Amusement enterprises, if conducted wholly within an enclosed building, provided that the existence and location of the same shall not impose a deleterious effect upon the Town and that permits therefor shall ensure compatibility with land use policies embodied in this chapter.

B. Auditoriums and halls.

- C. Auto sales.
  - D. Bowling alley.
  - E. Carpenter or general woodworking shop (excluding outdoor storage).
  - F. Cemeteries.
  - G. Colleges and schools (private, elementary and high) of a noncommercial nature.
  - H. Concrete mixing plants.
  - I. Consumption of meals on a roof garden of an enclosed building in which a restaurant is located, or at sidewalk tables directly adjoining such building.
  - J. Contractor's equipment storage yard or plant, or rental of equipment commonly used by contractors
  - K. Draying, freighting, or trucking yard or terminal.
  - L. Farm or gardening implement, sales and service.
  - M. Feed and fuel yard.
  - N. Funeral homes.
  - O. 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).
  - P. Hospitals, sanitariums and clinics which are an integral part of such hospitals and clinics providing treatment for mental or behavioral disorders as out-patient counseling or therapeutic facilities only; and provided that such clinics, if not an integral part of a hospital or sanitarium, are formally affiliated with such hospital or sanitarium or such other governmentally sponsored organization that provides counseling for mental or behavioral disorders.
- Notwithstanding any of the above, all clinics and facilities not an integral part of a hospital or sanitarium and treating contagious diseases, drug or alcohol addicts or abusers, sex offenders, felons, or persons suffering from psychosis, anti-social personality disorders or explosive personality disorders are not permitted, regardless of whether such facility operates an in-patient or out-patient facility, counseling or therapeutic facility or otherwise.
- Animal hospitals not providing boarding facilities other than for hospitalization to provide medical and/or surgical care for the patient are likewise subject to procurement of a use permit. However, animal hospitals providing boarding facilities not directly associated with immediate medical and/or surgical care for the patient are not permitted.
- Q. Hotel and motel.
  - R. Institutional home and institutions of an educational or philanthropic nature, except those of a correctional nature or for mental cases.

S. Live entertainment and patron dancing in restaurants.

T. Manufacture, compounding, processing, packaging, or treatment of such products as bakery goods, candy, cosmetics, dairy products, drugs, perfumes, pharmaceuticals, perfumed toilet soap, toiletries and food products, except fish and meat products, sauerkraut, vinegar, yeast and the rendering or refining of fats and oils.

U. Massage therapists.

V. Minute car wash stations.

W. Nursery and kindergarten schools (private).

X. Reserved.

Y. Outdoor amusement enterprises.

Z. Pet shop.

AA. Plumbing yard or storage.

BB. Public buildings and uses.

CC. Public parking area in transitional use.

DD. Public parks, playgrounds, and other recreational uses.

EE. Public utilities, as defined and regulated in [section 18-13](#).

FF. Taxi stand (only private property).

GG. Theater, indoor or outdoor.

HH. Transitional parking lots.

II. Drive-through facility, with the following submittal requirements and evaluation criteria:

1. Application submittal requirements:

A. A written statement describing the proposed use and providing all information pertinent to the review of the application. Such information would include, but not be limited to: the type of product or service to be offered; the proposed hours of operation and employee staffing; plans for the control of litter and the disposal and recycling of waste material; effects on air quality at the site and in adjacent areas; and estimates of sound levels that would be generated by the proposed use at site boundary lines.

B. A traffic analysis providing information that would include, but not be limited to: estimates of the number of vehicle trips and the amount of vehicular stacking that would occur daily and during a.m./p.m. peak hours; trip generation by use type; estimated internal and external traffic flows; parking and vehicular stacking spaces that would be provided on-site; and data on existing traffic conditions and the traffic-handling capacity of roads fronted by the proposed use. In addition, the

analysis would discuss sight distances at points of ingress and egress, pedestrian and bicycle traffic, and any other site-specific traffic factors or public safety issues associated with the application.

2. Applications for drive-through facilities will be evaluated on the basis of the following criteria, with emphasis given to potential adverse effects on adjoining or nearby properties:

A. Location and arrangement of any drive-through window in relation to adjoining properties and public rights-of-way.

B. Appropriateness of proposed hours of operation.

C. Traffic circulation patterns, including safe ingress and egress, and a clear designation of drive-through aisles through the use of paving materials, pavement markings or landscaping.

D. Pedestrian circulation and safety.

E. Adequacy of screening of vehicle use and parking areas.

F. Noise impact associated with, but not limited to, exterior speakers and motor vehicles.

G. Compliance with federal, commonwealth and local pollution standards.

H. Other factors, as deemed appropriate, that affect the health, safety, and general welfare of the community.

3. Drive-through facilities adjacent to residentially-zoned properties shall meet the following applicable criteria:


A. A drive-through facility operating later than 10:00 p.m. shall not have any portion of its operation (including, but not limited to, the stacking lane, menu boards or speaker boxes) located closer than 75 feet from any residentially-zoned property.

B. No speaker box or other audio mechanism, regardless of operating hours, shall be located closer than 35 feet from any residentially-zoned property.

# TOWN OF VIENNA

## MEMORANDUM

TO: Town Staff and All Interested Parties

FROM: Gregory M. Hembree, AICP, Director of Planning & Zoning and Zoning Administrator 

DATE: June 19, 2013

SUBJECT: Zoning Administrator's Determination Regarding Family Day Homes – Updated

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This memorandum was originally created in response to an extraordinary amount of confusion that has recently developed with respect to home day care or – as the Code of Virginia calls them – “family day homes.”

The Commonwealth of Virginia Department of Social Services established an administrative change effective July 1, 2012, requiring providers renewing their State license or seeking their first State license for a Family Day Home (home child care facility) to have the local Zoning Administrator sign a form acknowledging the provider's plan to seek a child care license. Because I have been signing these forms while also noting the Town's current limitations, this change has highlighted an apparent inconsistency between the provisions of the Town's zoning ordinance with respect to family day homes and those administrative regulations now used at the state level.

**Please be aware that the Town's regulations have not changed and we operate in accord with the current zoning provisions for family day homes as set out in § 15.2-2292 of the Code of Virginia (see attachment).** Those provisions state, in part, that providers with five (5) or fewer unrelated children – and exclusive of the provider's own children – can operate under the same zoning provisions as that of a single-family home. Because many of these same providers also have school-aged children at their homes, Fairfax County has allowed – and continues to allow, even with changes to its family day care provisions as of June 19, 2013 – **a maximum of seven (7) such children within a single-family home, five (5) children within a townhouse and has determined such use to be accessory to that of its primary use as a dwelling. Anyone desiring to establish a family day home with a greater number of children is required to obtain a special permit (referred to as a conditional use permit here in Vienna).** The Town has chosen to follow this current interpretation from Fairfax County, Virginia, just as we have for many years in the past.

Because a family day home is also a business, the **home occupation** provisions as set forth in § 18-173 of the Vienna Town Code have been and remain applicable to their operation within the Town.

Many have also asked if their current home occupancy permits are valid even if the permit refers to a different number of children than that in the preceding paragraph. If the conditions remain the same as when the occupancy permit was issued, the answer is, clearly, yes.



**TOWN OF VIENNA, VIRGINIA  
FAMILY DAY HOME CHECKLIST  
(FOR USE WITH CONDITIONAL USE PERMIT APPLICATIONS ONLY)**

**NOTE: FOR SEVEN (7) OR FEWER UNRELATED CHILDREN NO CONDITIONAL USE PERMIT IS REQUIRED BY THE TOWN OF VIENNA.**

"Family Day Homes," day care centers, a day care house, or home care facilities are allowed only in the following zoning districts after the issuance of a conditional use permit in accordance with § 18-209 of the Code of the Town of Vienna and appropriate County and Commonwealth of Virginia permits:

RS-16	Single Family Residential (16,000 sq. ft.)
RS-12.5	Single Family Residential (12,500 sq. ft.)
RS-10	Single Family Residential (10,000 sq. ft.)
RM-2	Multi-Family Residential

The following information shall be provided for review with the conditional use application. All information must be submitted simultaneously. The applicant must be present at all hearings to answer any questions which may be raised by the Planning Commission or Board of Zoning Appeals relative to the request.

CONTACT PERSON: \_\_\_\_\_

E-MAIL (for "Contact Person"): \_\_\_\_\_

PHONE NUMBER: \_\_\_\_\_

DAY CARE OWNER: \_\_\_\_\_

PROPOSED SITE ADDRESS: \_\_\_\_\_

ZONING DISTRICT: \_\_\_\_\_ NO. OF NON-RESIDENT CHILDREN: \_\_\_\_\_

NUMBER OF RESIDENT CHILDREN: \_\_\_\_\_ NUMBER OF FULL TIME CENTER

ATTENDANTS: \_\_\_\_\_ NO. OF PART-TIME CENTER ATTENDANTS: \_\_\_\_\_

FAIRFAX COUNTY PERMITS APPLICATIONS AND DATES:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

COMMONWEALTH OF VIRGINIA PERMITS APPLICATIONS AND DATES:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

#### SUBMITTAL REQUIREMENTS

- A. 19 folded copies of SITE PLAN of property including the following information:
- building footprint
  - building setbacks
  - outside play areas with total square footage
  - proposed improvements
  - fences
  - parking
  - on-site traffic circulation
  - adjoining property owners
  - street names
- B. 19 copies of INTERIOR STRUCTURE showing the following information (all plans larger than page size should be folded):
- rooms for day care area with doors, windows and square footage
  - kitchen area (if applicable) indicating food preparation area, care of perishable foods, water, garbage, etc
  - location and number of toilet facilities including steps, washing facilities and towels
  - all entrances and exits to and from the building
- C. A STATEMENT shall be included addressing the following issues:
- how the house will be heated in the winter
  - how the building is being serviced for water and sewer (municipal or well/septic)
  - fire prevention measures
  - if there is a connected and working telephone
  - if there is to be no kitchen, how will drinking water be made available to the children, including drinking cups
  - status of Fire Marshal's and other inspections

Revised August 2, 2013



## FAMILY DAY HOMES – BACKGROUND INFORMATION

### Applicable provisions from the Code of Virginia:

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 five 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 six through twelve 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 thirty 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 may issue the permit sought. 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](#). 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](#).)

*Family Day Home definition within § 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 six 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 grandchildren of the provider shall not be required to be licensed.

## Background Information—Applicable Legislation for Family Day Homes

February 28, 2013

Page 2 of 2

§ 15.2-914. Regulation of child-care services and facilities in certain counties and cities.

Any (i) county that has adopted the urban county executive form of government, (ii) city adjacent to a county that has adopted the urban county executive form of government, or (iii) city which is completely surrounded by such county may by ordinance provide for the regulation and licensing of persons who provide child-care services for compensation and for the regulation and licensing of child-care facilities. "Child-care services" means provision of regular care, protection and guidance to one or more children not related by blood or marriage while such children are separated from their parent, guardian or legal custodian in a dwelling not the residence of the child during a part of the day for at least four days of a calendar week. "Child-care facilities" includes any commercial or residential structure which is used to provide child-care services.

Such local ordinance shall not require the regulation or licensing of any child-care facility that is licensed by the Commonwealth and such ordinance shall not require the regulation or licensing of any facility operated by a religious institution as exempted from licensure by § [63.2-1716](#).

Such local ordinances shall not be more extensive in scope than comparable state regulations applicable to family day homes. Such local ordinances may regulate the possession and storage of firearms, ammunition, or components or combination thereof at child-care facilities so long as such regulation remains no more extensive in scope than comparable state regulations applicable to family day homes. Local regulations shall not affect the manner of construction or materials to be used in the erection, alteration, repair or use of a residential dwelling.

Such local ordinances may require that persons who provide child-care services shall provide certification from the Central Criminal Records Exchange and a national criminal background check, in accordance with §§ [19.2-389](#) and [19.2-392.02](#), that such persons have not been convicted of any offense involving the sexual molestation of children, the physical or sexual abuse or rape of a child or any offense identified in § [63.2-1719](#), and such ordinances may require that persons who provide child-care services shall provide certification from the central registry of the Department of Social Services that such persons have not been the subject of a founded complaint of abuse or neglect. If an applicant is denied licensure because of any adverse information appearing on a record obtained from the Central Criminal Records Exchange, the national criminal background check, or the Department of Social Services, the applicant shall be provided a copy of the information upon which that denial was based.

(1990, cc. 605, 609, § 15.1-37.3:12; 1997, c. [587](#); 2010, c. [649](#); 2011, c. [251](#).)

2/28/2013 9:38:45 AM





# County of Fairfax, Virginia

To protect and enrich the quality of life for the people, neighborhoods and diverse communities of Fairfax County

## *Home Child Care Facilities in Fairfax County (Current Regulations and Proposed Changes)*

### **Current Zoning Ordinance Regulations**

“Home child care” is permitted as an **accessory use** in a residence:

- Care for up to **7 children** is permitted in a single family home;  
Care for up to **5 children** is permitted in a townhome, apartment, or mobile home  
(*Providers’ own children do not count*)
- One non-resident assistant is permitted
- Additional children up to a maximum of **10** and/or additional non-resident assistants may  
be allowed with special permit approval from the Board of Zoning Appeals (BZA)

### **Current State Regulations**

The State allows care for up to 12 children pursuant to a State license; however, local jurisdictions may be more limiting as is the case in Fairfax County.

### **What Change Has Happened at the State Level?**

The Virginia Department of Social Services has established an administrative change effective July 1, 2012, requiring providers renewing their State license or seeking their first State license for a Family Day Home (home child care facility) to have the local Zoning Administrator sign a form acknowledging the provider’s plan to seek a child care license.

The change has highlighted the inconsistency between the County and State regulations given that existing providers may currently have a state license to care for 12 children. The Fairfax County Board of Supervisors (Board) will be considering a possible amendment to the Zoning Ordinance to allow for up to 12 children with a special permit, which may take several months. In the meantime, the following procedures will temporarily be in place:

- The State will continue to issue renewal licenses for the existing number of children

- Any “Contact with Local Zoning Administrator” forms submitted to the zoning office for signature will note the County limitations/requirements on the form
- There will be no enforcement of County limits unless it is determined that there are health and safety risks present
- Zoning staff will work with providers who may have more children in care than allowed by the Zoning Ordinance to help bring them into compliance or providing them with guidance and assistance regarding how to navigate the special permit process
- Applicants for new licenses are expected to comply with County regulations

### **Amendment to the Zoning Ordinance Being Considered**

The Board of Supervisors has requested that staff prepare an amendment to consider:

- Increasing the maximum number of children with approval of a special permit from 10 to 12
- Reducing the special permit application filing fee (which is currently \$1,100)
- Reviewing the standards by which special permit requests are considered
- Staff is expected to present an amendment to the Board for authorization to advertise and schedule public hearings sometime in November, 2012
- The Planning Commission (PC) public hearing is expected to be held sometime in December, 2012, and the PC will make a recommendation to the Board
- The Board public hearing will be scheduled sometime in January or February, 2013

### **Special Permit Process**

Staff is in the process of creating a more simplified specific special permit application package for home child care applications.

- Submission requirements include:
  - ✓ Application Form
  - ✓ House Location Plat (with all current structures and their heights and distances from property lines)
  - ✓ Zoning Map (available online or in our office)
  - ✓ Photos of the property
  - ✓ Written Statement of Justification (explain what you are requesting and why)
  - ✓ Affidavit Form
  - ✓ Ownership Statement (who owns the property and permission to file if provider is renting)
  - ✓ Filing Fee (currently \$1,100)

- Optional Pre-Application Meeting available -you may request to discuss your specific property with staff and ask questions about the application before filing
- Application Acceptance -you will be notified if materials need to be corrected or if anything is missing from your application
- Staff Review (you will have a staff person assigned to your application)
- Notification (includes letters to adjacent properties, newspaper ad, sign on property)
- Public Hearing will be scheduled within 90 days of the date of acceptance of your application

### **Special Permit Criteria**

“Additional Standards” for Special Permits for Home Child Care Facilities:

- The BZA may allow applicant to exceed the number of children permitted by right, but may not allow more than **10** (*currently*), and/or increase the number of assistants
- Existing/proposed parking will be reviewed
- The BZA may require landscaping to screen adjacent properties if appropriate
- Plats must include location/size of outdoor recreation space available
- The BZA may impose other conditions based on the specific issues identified with each property and request
- Must also meet applicable County and State licensing requirements for home child care

### **Contact Information**

For Questions About Submitting “Contact With Local Zoning Administrator” Forms;  
Information on Proposed Changes to the Zoning Ordinance:

Zoning Administration Division

703-324-1314

For Questions About Special Permit Applications (Filing Requirements, Process, etc.):

Zoning Evaluation Division

703-324-1290