LICENSED RESIDENTIAL "GROUP HOME" PERMITTED AS OF RIGHT AND NOT SUBJECT TO CONDITIONAL USE APPROVAL

The Vermont Supreme Court, in *In re Appeal of Bennington School, Inc.,* 2002-67 (Jan. 15, 2004), has held that a state-licensed, residential care facility's use of a residence in a residential district constitutes a "group home" permitted as of right by 24 V.S.A. § 4409 (d) and does not constitute a "dormitory" nor a "school" requiring conditional use approval.

Bennington School, Inc. (BSI) is a state-licensed, residential care facility for adolescent children with learning disabilities, physical and intellectual handicaps, and emotional and social disorders. BSI's students live on the school's two main campuses and in small off-campus residences, located in the Rural Residential and the Village Residential districts of Bennington. The off-campus residences are designed to provide students with family-style living arrangements where they can develop independent living skills to enable them to return to their homes and communities after graduation.

This case arose when BSI applied for a single-family residence permit from the Bennington Zoning Board of Adjustment (ZBA) to operate an additional residence as a group home for the school. BSI asserted that 24 V.S.A. § 4409 (d) prohibits municipalities from excluding group homes from residential areas and that it was entitled to a single-family residence permit. The ZBA denied the permit, concluding that the proposed use was not that of a permitted group home protected by § 4409 (d) and thus required a conditional use permit. BSI appealed the ZBA's decision to the environmental Court, which agreed with the ZBA and ruled that BSI's proposed use required conditional use approval and was not a permitted use under 24 V.S.A. § 4409 (d). Twenty-four V.S.A. § 4409 (d) provides that "[A] state licensed or registered residential care home or group home, serving not more than six persons who are developmentally disabled or physically handicapped, shall be considered by right to constitute a permitted single-family residential use of property, except that no such home shall be so considered if it locates within 1,000 feet of another such home."

BSI uses its off-campus residential facilities as follows: no more than six students reside in each residence; each weekday BSI transports the students from the residences to the main campuses where they attend classes and counseling sessions; and the students return to the off-campus sites each evening where they have dinner, do homework, and work on chores. BSI employees provide supervision at the off-campus sites during the day and night, but do not provide any educational or counseling services at the sites.

In ruling that conditional use approval was required, the Environmental Court determined that, despite the fact that the proposed use met the requirements to be considered a permitted use, "the operation of the residences was so closely involved with the school that they were the functional equivalent of boarding school or college dormitories and thus subject to conditional use approval." The Environmental Court also compared BSI's use of the residences to that of "home occupations," such as auto repair shops and dance studios, and concluded "the statutory protection for group homes for the developmentally or physically disabled entitles such homes to be treated the same as a single-family residence, not to receive more protection than a single-family residence would receive under the same circumstances."

In reversing the Environmental Court's decision, the Vermont Supreme Court relied on the "plain language" of the statute and ruled that BSI's use of the residences met the prerequisites necessary to be considered a permitted residential use under § 4409 (d). Specifically, the Court held BSI was entitled to be considered a single-family residence by right" because 1) BSI is a state licensed group home; 2) it serves no more than six persons who are developmentally disabled or physically handicapped; and 3) the proposed facility was not located within 1,000 feet of another such home. The Court further stated "it is evident that once a proposed land use meets the statutory criteria, it must be considered by right as a permitted single-family residential use..." In addition to looking to the plain language of the statute, the Court also relied on the Legislature's stated policy supporting § 4409 (d), which states "it is the policy of the state of Vermont that developmentally disabled and physically handicapped persons should not be excluded by municipal zoning ordinances from the benefits of normal residential surroundings." 1977, No. 140 (Adj. Sess.), § 1.

The Court went on to state, "once BSI demonstrated its eligibility as a group home, the environmental court was not permitted to look outside those factors for reasons to deny this statutory protection… [I]f we permit zoning boards and the environmental court to rely on evidence beyond the statutory requirements to subject qualifying uses to conditional use review, we will have rendered the statute and the Legislature's intent meaningless." The Town argued that prohibiting local zoning boards and the Environmental Court from considering facts outside the statutory factors is the equivalent to asking them to apply "evidentiary blinders." In refuting the charge that its ruling limits local zoning authorities' and the Environmental Court's ability to look beyond the statutory requirements of § 4409, thus requiring those bodies to "apply evidentiary blinders," the Court responded by stating that parties seeking a permit under § 4409 must present sufficient evidence with respect to each statutory element before being entitled to the statutory protection.

This case is important to municipalities for several reasons. First, it shows that the Court will strictly construe the limitations contained in § 4409 (d) against the exercise of municipal zoning authority when an applicant establishes all of the statutory prerequisites for protection. Second, it sends the clear message that local zoning authorities cannot consider facts beyond the specific statutory requirements when considering whether a proposed use is permitted as a single-family residence by right under § 4409 (d). Third, it shows that if a use is permitted under § 4409 (d), it cannot be made subject to conditional use approval by characterizing the use a home occupation. And, finally, it demonstrates the importance the Legislature and the Court place on ensuring that developmentally disabled and physically handicapped persons are not excluded from "normal residential surroundings."

- Julie Fothergill, Attorney, VLCT Municipal Assistance Center

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