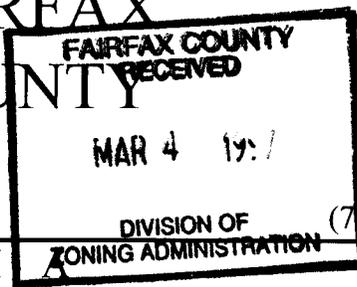




FAIRFAX
COUNTY



2-775
OFFICE OF COMPREHENSIVE PLANNING

Zoning Evaluation Division
12055 Government Center Parkway, Suite 801
Fairfax, Virginia 22035-5505

(703) 324-1290

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V I R G I N I A

March 3, 1997

David R. Lasso
Venable, Baetjer and Howard, L.L.P.
2010 Corporate Ridge, Suite 400
McLean, VA 22102-7847

Re: SEI 9612 0039 Interpretation; for SE 88-V-102 Sunrise Gunston Facility,
Number of Employees

Dear Mr. Lasso:

This is in response to your letter of December 18, 1996, requesting an interpretation of the development conditions imposed in conjunction with the approval of Special Exception SE 88-V-102 by the Board of Supervisors on June 26, 1989. As I understand it, you are seeking an interpretation of Development Condition No. 5 which states that "No more than 8 full-time staff employees shall be on the premises at any one time." A copy of your letter and the Development Conditions are attached.

According to your letter, the State Department of Social Services (DSS), the regulatory agency which issues the license required to operate the assisted living facility, has concerns that staffing requirements for this facility may be in conflict with the limitation on the number of employees contained in the development condition. According to your letter, there are a total of 60 employees who staff the facility seven days per week and there may be up to 15 employees working in the facility at a given time during the day. As I understand it, there are two related questions regarding this development condition which will be answered in turn in this letter.

The first question is whether limiting the number of employees who park on the site at any one time to a maximum of 8 would be in conformance with the development condition which limits the number of full time employees "on the premises at any one time" to 8. According to your letter, there is available parking for employees in the adjacent shopping center and, with a limitation of 8 employees parking on the assisted living facility site, the bulk of the on-site parking spaces (7 spaces) would be available for visitors.

The limitation on the number of employees on the premises at any one time contained in the development condition was based on information provided to staff by the applicant at the time Special Exception application was under review. The number of employees and the number of residents are both limited in the development conditions to the number proposed in the application and, accordingly, reviewed by staff, the Planning Commission, and the Board of Supervisors. In the review of this application there was a concern about the adequacy of parking, and such concern was discussed in the staff report. It was staffs' belief that adequate parking did not exist on the assisted living facility site to accommodate resident's vehicles, employee and visitor parking, and service vehicles. The applicant at that time, who was also the developer of the adjacent shopping center, stated that a limited number of excess parking spaces might exist on the shopping center site; however, a shared parking arrangement was not pursued with DEM. Therefore, a limitation on number of employees on the premises at any one time was incorporated into the development condition.

It is my determination that a limitation of 8 employees who park on the site at any one time instead of the number of employees on the premises at any one time is not in substantial conformance with Development Condition 5 or with Article 11 of the Zoning Ordinance. The term "on the premises" means on the special exception site. I would further reiterate that Par. 1 of Sect. 11-102 of the Zoning Ordinance states that "All required off-street parking spaces shall be located on the same lot as the structure or use to which they are accessory or on a lot contiguous thereto which has the same zoning classification and is either under the same ownership or is subject to agreements or arrangements satisfactory to the Director that will ensure the permanent availability of such spaces". Should such an agreement be approved, submission and approval of a Special Exception Amendment would be required to increase the number of full time employees who would be on-site at any one time, if that number is greater than 8.

The second question, as I understand it, is whether the term "full time" as used in the development condition may be defined as persons regularly scheduled to work 2080 hours in 12 consecutive months. As I understand it, if "full time" is defined this way, the facility would be able to meet all staffing standards of the DSS by employing part time employees, i.e., those working less than 2080 hours in 12 consecutive months, in addition to the 8 full time employees permitted by the development condition. It should be noted that the tabulations contained on the approved SE Plat state the number of employees to be 6.

It is not unusual for development conditions imposed in conjunction with approval of special exception applications to place a limit on the maximum number of employees if parking is an issue. The number of employees is one measure of the level of intensity of a given use and may also be related to the number of required parking spaces. From a land use perspective, the number of hours the employees work is irrelevant. The development condition is specific and allows only 8 full time employees on the premises at any one time. The parking tabulations on the approved site plan for the assisted living facility show 15 parking spaces on the site. The development conditions permit a maximum of 67 residents; as such, while the actual parking requirement for this use is determined by DEM, and even if "full time" were to be defined as you

propose, it appears that adequate parking for more than 8 employees is not provided on the site and that the site may not be able to meet parking requirements without approval of a shared parking agreement with the adjacent shopping center or perhaps a reduction in the maximum number of residents from the 67 approved.

These determinations have been made in my capacity as the duly authorized agent of the Zoning Administrator. If you have any questions regarding the above interpretations, please feel free to contact Mary Ann Godfrey at (703) 324-1290.

Sincerely,



Barbara A. Byron, Director
Zoning Evaluation Division

BAB/MAG/mp/n:zed\godfrey\newinter.wpd

Attachments: A/S

cc: Gerald W. Hyland, Supervisor, Mount Vernon District
John R. Byers, Planning Commissioner, Mount Vernon District
Jane W. Gwinn, Zoning Administrator
Edward J. Jankiewicz, Director, Design Review Division, DEM
Angela Rodeheaver, Branch Chief, Office of Transportation
File: SE 88-V-102



David R. Lasso
(703) 760-1678

December 18, 1996

OFFICE OF THE CLERK OF SUPERIOR COURT
OFFICE OF THE CLERK OF SUPERIOR COURT

DEC 20 1996

Mr. Kevin Guinaw
Branch Chief for Applications and Proffer Interpretations
Fairfax County
12055 Government Center Parkway, Suite 801
Fairfax, VA 22035-5509

ZONING EVALUATION DIVISION

Re: Sunrise Gunston Facility; SE 88-V-102

Dear Mr. Guinaw:

Thank you for taking the time last Wednesday to discuss with me the issues concerning the Gunston Assisted Living facility located at 7665 Lorton Road. Please consider this a request to interpret administratively a condition contained in the special exception for the facility so as to resolve a functional problem that has arisen.

The staffing levels are established by the State Department of Social Services ("DSS") as the regulatory agency which issues the license that is required to operate. DSS has expressed a concern that its staffing requirements may conflict with language used in one of the conditions in the special exception.

If you are not able to reach an interpretation of the pertinent condition in a way that resolves the concerns of DSS, I will then proceed to file an application to amend the special exception so that the condition is either modified or eliminated. Sunrise is committed to full compliance with the health and safety standards issued by DSS as well as compliance with all County codes.

Description of the Assisted Living Facility at Gunston

The facility is an assisted living retirement home which currently houses 57 persons whose average is about 87 years. It operates under a license issued by DSS located at Lorton Road and Route 1, contiguous to the Gunston Shopping Plaza on a

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parcel of about 32,000 square feet and was constructed and occupied after the parcel was rezoned (RZ 89-V-038) from an R-1 designation to a C-3 designation. The retirement facility and the shopping center were developed at the same time and by the same developers.

The use of the parcel for retirement was permitted by special exception approved by the Board of Supervisors concurrently with the rezoning. There was discussion during the approval process of the adequacy of parking; there are 15 parking spaces on site, one handicapped, one loading space and 13 regular spaces. The Department of Environmental Management reviewed the parking needs and apparently found the parking adequate.

The front of the assisted living facility actually faces the shopping center and the layout of the facility was an integral part of the overall design of the shopping center. There are about 60 parking spaces on the shopping center parcel, contiguous to the assisted living facility; they are behind one of two "anchor" buildings in the center but are actually not very convenient to users of the center because they are several hundred feet from any entrance to a store. They are, in fact, much closer to the entrance of the assisted living facility than to any of the stores.

There has never been a "parking" problem at the center or the facility. The availability of these technically "off-site" parking spaces has probably contributed to this situation and their use was likely anticipated when the rezoning and special exception were approved.

The Condition In the Special Exception Pertinent Here

Of the 13 conditions applicable to the special exception only one is pertinent here. That condition is as follows:

"5. No more than 8 full-time staff employees shall be on the premises at any one time." (Emphasis added.)

As will be discussed below, the meaning of "full-time" and "on the premises" require interpretation. We seek a construction that eliminates any ambiguity as to the ability of the facility's operators to comply with DSS staffing standards thereby eliminating any conflict between state regulatory requirements and local zoning regulations. Adopting the interpretation

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suggested in this request will satisfy the concerns of DSS and obviate any need to pursue any application to amend or eliminate the condition.

The Non-Residential Use Permit ("Non-Rup") was issued on July 17, 1991 in the name of "The Manor at Gunston". The Non-Rup includes a reference to "(A)ll conditions stated in above noted Special Exception Variance and Rezoning Case. (No more than 67 residents and no more than 8 full-time staff employees at premises at one time)". The facility operated for many years without any issues relating to operation. In 1995 operators of the facility sought to house more non-ambulatory persons at the facility in response to the changing needs of the frail elderly. This was because the then current residents were aging in place and needed a higher level of services and care, and because there were increasing numbers of non-ambulatory persons among those seeking assisted living arrangements. The operators completed a retrofit of the building to meet current building codes. Following the retrofit, the Non-Rup was reissued to "Sunrise of Gunston" with the following statement: "Maximum of 67 residents and 8 full-time staff employees on site at any one time."

In the course of its annual license review, DSS has questioned the condition in the Non-Rup, saying it may limit proper staffing. Sunrise has agreed to seek this clarification of the meaning of the language in the condition.

DSS is concerned that the language "not more than 8 full-time staff employees shall be on the premises at any time" (i.e., the actual language of the special exception condition number 5) might prevent the facility's operators from complying with the staff level required by DSS. We do not believe the condition was intended to limit the ability of the operators of the facility to provide the appropriate number of staff as required by the standards of DSS. What follows is a discussion of why this is so.

The Operation of the Facility and the Issues of Interpretation

In functional terms there are a total of 60 employees who staff the home seven days a week and 24 hours a day. During periods of the day there may be as many as 15 employees working at the facility. Several employees share rides and some are dropped off and picked up at the facility. Many who drive their cars and who need a parking space park their cars off site in the large (and empty) rear parking lot of the contiguous shopping center. There are never more than 8 employees who park on site at any one time and, in fact, most of the 15 spaces on site are empty and available for visitors. Please note that over the past several years only one resident at any one time has had a car at the facility. At times no residents had cars.

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Assuring the availability of the on-site parking for visitors was the goal of the County when it expressed concerns about parking. That goal has been achieved over the years even as staffing levels have increased.

At least two interpretation issues are presented by the special exception condition. First, what exactly does "shall be on the premises" mean, and second, what is the meaning of "full-time"?

A. *"On the Premises" means Parking in the On-Site Spaces and not Working at the Facility.*

The first interpretation request concerns the precise meaning of "on the premises at any one time." Does it refer to working in the building or does it mean parking in the 15 spaces on the 32,000 square foot site? There is discussion in the Minutes of the special exception hearing that the concern was that 4 or 5 of the parking spaces on-site be kept available for the visitors to the facility and not used by the employees. It is important to note the simultaneous development of the shopping center and the provision of the large number of spaces in the rear area of the center contiguous to the retirement home. It is likely the phrase was meant to keep the employees from using all the on-site parking knowing the employees could easily park in the shopping center.

Given that there is a limit on the number of residents of the facility, it is rather unnecessary and harsh to limit the number of employees providing health care to the residents. It is not likely the County intended to foreclose compliance with State standards realizing that staffing levels would vary in the years to come depending upon variables such as the characteristics of the residents and changes in state standards with or without changes in the residents.

We ask that you interpret the condition in the special exception as not limiting to 8 the number of employees that may be working in the facility at any one time. Rather, we ask that you interpret the condition to mean that no more than 8 employees may park on site at any one time, thereby leaving the bulk of the on-site parking spaces available for visitors. This interpretation would eliminate the need to reach the second issue, but in the event you reach the second issue the following discussion is submitted to you.

Mr. Kevin Guinaw
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B. "Full-Time" Refers Only to Employees Regularly Scheduled to Work 2080 Hours in 12 Consecutive Months.

As to the second issue, the phrase "full-time staff employees" must refer to the status of full-time employees using County government as the reference point. The purpose in using this modifying phrase was to distinguish between full-time employees and part-time employees knowing that increasingly employers use many part-time employees. The County Code in Section 3-1-1, (d), 6, defines full-time employees as persons who are regularly scheduled to work 2080 hours in 12 consecutive months and part-time employees are all persons who are not full-time.

There are 7 to 8 salaried employees at Gunston who meet this full-time definition and only 5 are working at the facility at any one time. The remainder of the employees work less than 8 hours a day, 5 days per week over the course of 12 months (or less than 2080 hours) and thus, are part-time employees under the County Code definition. Assuming the condition was intended to actually limit to 8 the number of "full-time" staff employees working at the facility at any one time, we believe the full compliance is achieved so long as there are no more than 8 employees working at the facility at any time who are regularly scheduled to work at least 2080 hours in 12 consecutive months.

Conclusion

In sum, we ask that you interpret the phrase "on the premises" as a reference to employees parking on site and not working in the facility. In the alternative, we ask that you interpret and clarify that the limitation of 8 staff employees is expressly modified by the words "full-time" such that "full-time" means persons regularly scheduled to work 2080 hours in 12 consecutive months. This would permit Sunrise to meet all staffing standards of the State DSS by employing persons regularly scheduled to work less than 2080 hours in 12 consecutive months.

Thank you very much for your consideration. Sunrise is committed to compliance with all applicable rules and laws. Until I hear further from you I will hold in abeyance proceeding with an amendment to the special exception. As you correctly noted in our discussion this is a functional problem brought on by conflicting rules of the County and State. There is no problem

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with the parking or staffing levels at Gunston and it is operating quite well. Should there be a need to seek a modification of the special exception, I will consult with the staff prior to application.

Sincerely,



David R. Lasso

cc: Catherine Scott Asplen
Tom Newell, Esquire
Alexander C. Mabin
John G. Milliken, Esquire



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030



July 7, 1989

Ms. Marilyn S. DeLuca
6 Pidgeon Hill Drive - Suite 300
Sterling, Virginia 22170

Re: Special Exception
Number SE 88-V-102
(Concurrent with RZ 89-V-038)

Dear Ms. DeLuca:

At a regular meeting of the Board of Supervisors held on June 26, 1989, the Board approved Special Exception Number SE 88-V-102, in the name of Gunston Plaza Associates Limited Partnership, located at Tax Map 108-3 ((2)) 9 for use as an institution providing housing and general care for the elderly pursuant to Section 4-404 of the Fairfax County Zoning Ordinance, by requiring conformance with the following development conditions:

1. This Special Exception is granted for and runs with the land indicated in this application and is not transferable to other land.
2. This Special Exception is granted only for the purpose(s), structure(s) and/or use(s) indicated on the Special Exception Plat approved with the application, as qualified by these development conditions.
3. This Special Exception is subject to the provisions of Article 17, Site Plans. Any plan submitted pursuant to this Special Exception shall be in substantial conformance with the approved Special Exception Plat and these conditions.
4. No more than 67 residents shall reside in the premises at any one time.
5. No more than 8 full-time staff employees shall be on the premises at any one time.

6. Pedestrian access to the shopping center shall be provided via a marked crosswalk. Access to the shopping center shall contain adequate lighting and pedestrian refuge. Signs shall designate the location of this crosswalk in order to warn vehicles of its use.
7. A storm water detention pond shall be provided in conformance with Fairfax County's Public Facilities Manual and the Stormwater Management Branch of the Department of Public Works to protect groundwater quality.
8. The applicant shall provide a drainage study for the property at the time of site plan review and shall construct the facility in accordance with the recommendations, if any, of the Department of Environmental Management (DEM). This study shall demonstrate that the existing detention pond shown on the General Development Plan/Special Exception (GDP/SE) Plat can accommodate stormwater runoff from the shopping center and the proposed facility or the pond shall be modified to accommodate runoff from both the shopping center and this facility.
9. If required by DEM, a geotechnical study shall be provided for approval by DEM and the recommendations of the study shall be implemented.
10. In order to achieve a maximum interior noise level of 45 dBA Ldn in all portions of the proposed structure, the building shall have the following acoustical attributes:
 - a. Exterior walls shall have a laboratory Sound Transmission Class (STC) of at least 39.
 - b. Doors and windows shall have a laboratory STC of at least 28. If windows function as the walls, then they shall have the STC specified for exterior walls.
 - c. Adequate measures to seal and caulk between surfaces shall be provided.
11. In order to achieve a maximum exterior noise level of 65 dBA Ldn in the enclosed porch/solarium areas of the proposed structure the applicant shall conduct an acoustical noise study by a certified acoustical engineer and implement the recommendations of that study.
12. Applicant agrees to the construction of the masonry wall along Route 1 subject to the approval by Virginia Department of Transportation (VDOT) and the County's Department of Transportation to insure that such construction does not obstruct sight distance at the entrance of the center closest to the subject site.

13. If operational problems result from improper use of the right in/right out entrance on Lorton Road as determined by VDOT, the applicant shall close this entrance and re-landscape the area.

This approval, contingent on the above noted conditions, shall not relieve the applicant from compliance with the provisions of any applicable ordinances, regulations, or adopted standards. The applicant shall be himself responsible for obtaining the required Non-Residential Use Permit through established procedures, and this Special Exception shall not be valid until this has been accomplished.

Under Section 9-015 of the Zoning Ordinance, this Special Exception shall automatically expire, without notice, eighteen (18) months after the approval date of the Special Exception unless the activity authorized has been established, or unless construction has commenced, and is diligently pursued, or unless additional time is approved by the Board of Supervisors because of the occurrence of conditions unforeseen at the time of the approval of this Special Exception. A request for additional time shall be justified in writing, and must be filed with the Zoning Administrator prior to the expiration date.

If you have any questions concerning this Special Exception, please give me a call.

Sincerely,



Theodore Austell, III
Clerk to the Board of Supervisors (Acting)

TAIII/ns

cc: Joseph T. Hix
Real Estate Division, Assessments
Gilbert R. Knowlton, Deputy
Zoning Administrator
Donald D. Smith
Permit, Plan Review Branch
Seldon H. Garnet, Chief
Inspection Services Division
Building Plan Review Branch
Barbara A. Byron, Director
Zoning Evaluation Division
Robert Moore, Transportation Planning Division,
Office of Transportation
Kathy Ichter, Transportation Road Bond Division,
Office of Transportation
Department of Environmental Management
A. V. Bailey, Resident Engineer
Virginia Department of Transportation
Richard Jones, Manager, Land Acquisition & Planning Division
Fairfax County Park Authority