

Town of Newbury, Vermont
Development Review Board
Findings of Fact, Conclusions of Law and Decision

Application #2021-38 by Vermont Permanency Initiative, Inc. (Owner and Applicant). Map # 07-02-30.1/30.2/30.3, Parcel No. 858.

Based upon the evidence received at the Newbury Development Review Board's (DRB) hearing held on October 2, 2021 and continued on October 21, 2021, the Development Review Board makes the following findings:

1. The subject property is owned by Vermont Permanency Initiative Inc., P.O. Box 325, Orford, NH 03777 (Applicant). Vermont Permanency Initiative, Inc. is a Vermont non-profit corporation.
2. The property is located at 487 Stevens Place in Newbury, Vermont. Stevens Place is a 0.4-mile, dead-end class 4 town highway off Fish Pond Road.
3. The parcel contains approximately 278 acres and includes a residential building and out-buildings.
4. The property is located in the Conservation Zone (CD-10) of the Newbury Unified Zoning and Subdivision Regulations, as adopted October 11, 2017 (the "Newbury Zoning Regulations").
5. On December 12, 2013, the Newbury DRB granted conditional use and site plan approval to Connecticut River Academy¹ to operate a school/residential treatment facility at this location. (the "2013 approval").
6. The project was approved as a "Community Facility." A Community Facility was a conditional use allowed in the CD-10 district (formerly the CON-10 district) under the Newbury zoning regulations in effect at the time of the 2013 approval.
7. In the 2013 approval, the DRB found that the project would be used as a "school/residential treatment facility" licensed by the Vermont Agency of Education and the Agency of Human Services.
8. The facility would have no more than twelve residential students between the ages of 13 and 19 and two to four residential staff. In addition, there would be six day staff and one night awake staff.
9. The DRB further found that in the change of use from a bed and breakfast to a school/ residential treatment facility, "[n]o physical changes will be made...other than a down facing light in the parking area for safety...and a directional sign at the end of the driveway."

¹ Connecticut River Academy was a tradename of the Applicant, Vermont Permanency Initiative, Inc.

10. The DRB imposed nine limited conditions consistent with the property's use as an unsecured school/residential treatment facility.
11. One condition imposed under the 2013 approval was that "The Class IV Road will continue to be maintained year-round by the property owner in consultation with the Town of Newbury Highway Department."
12. In the current application, the Applicant proposes to renovate the existing school/residential treatment facility to serve juveniles whose treatment needs require a much higher level of security than the current facility offers.
13. The proposed facility will be leased to the Vermont Department for Children and Families (DCF), which will provide funding for the renovations. The Applicant proposes to enter into a contract with DCF to operate the facility as a replacement for the closed Woodside Juvenile Rehabilitation Center in Essex, Vermont.
14. The Applicant has described the proposed facility as a "secure residential treatment program" and a "secure treatment facility for Vermont boys." It would serve up to six youth, ages 11 to 17, involved with the juvenile justice and child welfare systems and present a behavioral risk level appropriate for secure therapeutic care and treatment.
15. Juveniles served at the proposed facility include youth at risk for harm to self or others and/or a risk to community safety. Juveniles served at the proposed facility will reside there temporarily until another appropriate placement is found. Some of the juveniles served at the facility may have a disability limiting one or more major life activities.
16. Juveniles served at the proposed facility would not be free to leave on their own accord, nor could such juveniles be dismissed from the facility by the Applicant. Under a Letter of Intent between the Applicant and DCF, dated September 15, 2020, "youth admitted to the program are required to stay in the program unless or until their custody case is discharged by the court or DCF had (sic) determined a less restrictive or another appropriate placement can be secured."
17. The Applicant has strongly emphasized the security measures to be employed at the proposed facility, referring to the security measures as "state of the art." Proposed renovations to increase the facility's security include the installation of detention grade windows, high-impact secure walls, and secure locked doors throughout the facility. The proposed facility will have 24-hour infrared video camera monitoring covering the entire facility and a central security control room with video monitors covering the whole facility. A 12-foot high, unclimbable fence will surround the proposed outdoor recreation area. Applicant estimates that these proposed security enhancements will cost \$3 million.
18. The Applicant also proposes to employ a full-time security officer to oversee security at the facility and prevent the "elopement" of juveniles housed there. If an elopement occurs at the proposed facility, staff and the Vermont State Police will be responsible for providing security to the community and returning the youth to the facility.

19. The Town of Newbury does not have a police department. However, some limited law enforcement coverage is provided by the Orange County Sheriff under a contract with the Town.
20. Newbury is one of 26 towns receiving police coverage from the Vermont State Police's St. Johnsbury barracks. The St. Johnsbury barracks are located approximately 23 miles from the location of the proposed project.
21. Four to six Vermont State Police officers provide coverage for this 26-town area. The State Police patrol in Newbury but do not maintain a permanent law enforcement presence in Newbury. Therefore, state Police response time to the proposed facility would depend upon the location of available officers and could be as high as 45 minutes.
22. Numerous Newbury residents, especially those living near the proposed project, strongly believe that the proposed facility would pose a danger to them and the general community.
23. Newbury has a volunteer fire department, served by three stations in Newbury Village, Wells River, and West Newbury. In addition, members of a volunteer fast quad provide first response emergency medical services. Ambulance services are provided by Woodsville Ambulance Service in Woodsville, New Hampshire.

Based upon these findings, the Development Review Board reaches the following conclusions and decision:

1. The proposed facility is not a residential care home or group home.

A. Residential care home. The Applicant asserts that the proposed project is exempt from conditional use review as a residential care home or group home to be operated under State licensing or registration. Under 24 V.S.A. §4412(1)(G), "A residential care home or group home to be operated under State licensing or registration, serving not more than eight persons who have a disability as defined in 9 V.S.A. § 4501, shall be considered by right to constitute a permitted single-family residential use of property."

The Newbury Zoning Regulations implement this statutory requirement by defining a "Single-family Unit Dwelling" to include "a residential care group home serving not more than 8 persons, or a licensed or registered home child care facility serving no more than six full-time and 4 part-time children." Under this limitation, a residential care or group home to be operated under State licensing or registration, serving not more than eight persons who have a disability as defined in 9 V.S.A. § 4501, would be considered a permitted use in the CD-10 District, requiring only a development permit issued by the Zoning Administrator.

"Residential care home" is defined at 33 V.S.A. §7102(10). It includes "a place, however named, excluding a licensed foster home, that provides, for profit or otherwise, room, board, and personal care to three or more residents unrelated to the home operator." Level III residential care homes provide personal care (e.g., assistance with meals, dressing, movement,

bathing, grooming, or other personal needs) or general supervision of physical or mental well-being, including nursing overview and medication management. Level IV residential care homes may provide personal care or general supervision of residents' physical or mental well-being, including medication management but not other nursing care. 33 V.S.A. §7102(10)(A),(B).

Residential care homes are licensed by the Vermont Agency of Human Services, Department of Aging and Disabilities. Regulations promulgated by the Department of Aging and Disabilities describe residential care homes as places that "provide care to persons unable to live wholly independently but not in need of the level of care and services provided in a nursing home. Toward that end, [the Department's] regulations are designed to foster personal independence on the part of residents and a home-like environment in the homes." Agency of Human Services, Department of Aging and Disabilities, Residential Care Home Licensing Regulations, Effective October 3, 2000, Section 1.1.

The Applicant has provided no evidence indicating that the proposed facility will be licensed as a residential care home by the Agency of Human Services. For these reasons, the DRB concludes that the proposed facility is not a residential care home.

B. Group home. A "group home" is not defined in the Newbury Zoning Regulations or Vermont statutes. Generally, a group home is a single housekeeping unit in a residential dwelling in which unrelated residents live together in a family-like setting under supervision consistent with the residents' mental, emotional, and physical requirements. The limited zoning review afforded group homes under 24 V.S.A. §4412(1)(G) and the Newbury Zoning Regulations is clearly intended to ensure that the Regulations do not exclude persons with disabilities from the benefits of residential surroundings. To this end, under 24 V.S.A. §4412(1)(G), the residents of a group home must have a disability as defined in 9 V.S.A. §4501. This includes (A) a physical or mental impairment that limits one or more major life activities; (B) a history or record of such an impairment; or (C) being regarded as having such an impairment. 9 V.S.A. §4501(2)(A)-(C)².

However, the proposed facility, with detention grade windows and doors, 24-hour infrared security surveillance, unclimbable fences, and full-time security personnel, is clearly not of a family-like or residential character, nor would it be similar to residential development in the CD-10 District or elsewhere in Newbury. While some of the juveniles admitted to the facility may have a disability meeting the definition found at 9 V.S.A. §4501, the purpose of the

² A "physical or mental impairment" means: (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; or endocrine. (B) Any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental condition, and specific learning disabilities. (C) The term "physical or mental impairment" includes diseases and conditions such as orthopedic, visual, speech, and deafness or being hard of hearing, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, developmental disability, emotional disturbance, and substance use disorders, including drug addiction and alcoholism. An individual with a disability does not include any individual with a substance use disorder who, by reason of current alcohol or drug use, constitutes a direct threat to property or safety of others. 9 V.S.A. §4501(3)(A)-(C).

proposed facility is not to provide living accommodations for disabled youths in a family-like or residential setting. Instead, the purpose of the proposed facility is to provide a high-security detention facility for youths at risk for harm to themselves or presenting a risk to community safety. While some of these juveniles may have a disability, having a disability is not a requirement of being placed at the proposed facility. For these reasons, the DRB concludes that the proposed facility is not a group home.

2. The proposed facility is not a state or community-owned and operated institution or facility.

Under 24 V.S.A. §4413(a)(1)(A) and Section 1.16(a) of the Newbury Zoning Regulations, a "state or community owned and operated facility" may only be regulated "with respect to location, size, height, building bulk, yards, courts, setbacks, density of buildings, off-street parking, loading facilities, traffic, noise, lighting, landscaping, and screening requirements, and only to the extent that regulations do not have the effect of interfering with the intended functional use." Applicant asserts that these provisions limit the DRB's review of the application.

As set forth above, the proposed facility will be owned by Vermont Permanency Initiative Inc., a Vermont non-profit corporation. It will be leased to the Vermont Department for Children and Families (DCF), which will provide funding for the renovations. The Applicant also proposes to enter into a contract with DCF to operate the facility. While the Applicant may propose to lease the facility to DCF, DCF would only be a tenant of the facility and not the owner. Additionally, Applicant, and not DCF, will operate the facility under the proposed contract.

Under the plain meaning of 24 V.S.A. §4413(a)(1)(A) and Section 1.16(a), the proposed facility is neither State nor community owned and operated. In fact, it will be privately owned and operated. For these reasons, the DRB concludes that the proposed facility is not a state or community-owned and operated institution or facility subject to limited zoning review under 24 V.S.A. §4413(a)(1)(A) and Section 1.16(a) of the Newbury Zoning Regulations.

3. The proposed facility is not a public or private school or other educational institution certified by the Agency of Education.

Under 24 V.S.A. §4413(a)(1)(B) and Section 1.16(b) of the Newbury Zoning Regulations, a public or private school or other educational institution certified by the Agency of Education may only be regulated "with respect to location, size, height, building bulk, yards, courts, setbacks, density of buildings, off-street parking, loading facilities, traffic, noise, lighting, landscaping, and screening requirements, and only to the extent that regulations do not have the effect of interfering with the intended functional use."

Applicant testified that the Agency of Education would license the proposed facility. However, Applicant does not describe the proposed facility as a "school" or "other educational institution," nor has Applicant explained what type of certification might be obtained. In addition, no evidence regarding the presence of teachers or tutors, a proposed curriculum of

study for students, or other characteristics commonly consistent with the operation of a "school" or "educational institution" was offered by the Applicant.

For these reasons, the DRB concludes that the proposed facility is not a "public or private school" or "other educational institution" subject to limited zoning review under 24 V.S.A. §4413(a)(1)(A) and Section 1.16(a) of the Newbury Zoning Regulations.

4. The proposed facility is not of the same or of a more restricted nature than the existing non-conforming use.

As noted in the Findings, in 2013, the Newbury DRB granted conditional use and site plan approval to Connecticut River Academy to operate a school/residential treatment facility at this location. The project was approved as a "Community Facility." A Community Facility was a conditional use allowed in the CD-10 district (formerly the CON-10 district) under the Newbury Zoning Regulations in effect at the time of the 2013 approval.

In October 2017, the Newbury Zoning Regulations were significantly amended. The current regulations do not allow "Community Facilities" in the CD-10 District.³ As such, the existing school/residential treatment facility is a non-conforming use in the CD-10 District. Under Section 7.2 of the Newbury Zoning Regulations, a non-conforming use is defined as, "A use which lawfully occupied a structure or land at the effective date of these zoning regulations or amendments thereto and that does not conform to the use regulations of the District in which it is located." In addition, Section 4.4.2(b) provides, "A non-conforming use shall not be changed to another non-conforming use without first receiving conditional use approval from the DRB, and then only to a use which, in the opinion of the Board, is of the same or of a more restricted nature."

As outlined in the Findings, the Applicant proposes to spend \$3 million to renovate the existing facility with detention grade windows, high-impact secure walls, and secure locked doors throughout. The proposed facility will have 24-hour infrared video camera monitoring covering the entire facility and a central security control room with video monitors covering the full facility. A 12-foot high, unclimbable fence will surround the proposed outdoor recreation area.

This is in stark contrast to the DRB's findings in 2013 that "No physical changes will be made to the facility (then a bed and breakfast) other than a possible down facing light in the parking area for safety between the parking lot and building and a directional sign at the end of the driveway." It is also in stark contrast to the single condition imposed by the DRB: that the school/residential treatment facility have, "one awake staff, ensuring that there will be around the clock supervision."

³ Under the table at Section 3.1 the following uses are presently allowed in the CD-10 District, either by a Development Permit issued by the Zoning Administrator or by Conditional Use approval granted by the DRB: One and Two Unit Dwelling, Accessory Dwelling, Primitive Camp, Home Occupation, Subdivision, Home Business, Public Building, Rural Enterprise, Outdoor Recreation, Earth Resource Extraction, Kennel. These uses are each defined in Section 7.2.

On this basis, the DRB concludes that the proposed facility is not "of the same or of a more restricted nature than the existing non-conforming use" but would be an entirely new facility having a far more intense use of the property. Therefore, the existing non-conforming use cannot be changed to another non-conforming use under Section 4.4.2(b) of the Newbury Zoning Regulations.

5. The proposed facility is not allowed as a Conditional Use in the CD-10 District.

A. The proposed facility is not a Public Building.

The Newbury Zoning Regulations allow "Public Buildings" as conditional uses in the CD-10 District. See table of uses at Section 3.1 A Public Building is a "building or facility meant for general use of the public or government owned, such as school, town office, civic center, recreation building, library, and emergency service station, etc." It also includes "a building or structure owned or leased by a municipality, county, state or federal agency that is used for governmental purposes." Section 7.2, Definitions, Specific.

While the Applicant proposes to lease the proposed facility to a state agency (DCF), it will not be operated by DCF for governmental purposes. Instead, the Applicant will operate the proposed facility itself for commercial gain under a contract with DCF. Thus, the proposed facility stands wholly apart from the examples of other Public Buildings allowed as a Conditional Use in the CD-10 District, each of which would either be available for general use of residents (i.e., school, civic center, recreation, building, library) or government-owned and intended to provide benefit to the community (i.e., town office, emergency service station).

The DRB concludes that the proposed facility, serving youth involved with the juvenile justice and child welfare systems, is not a Public Building as that term is used in the Newbury Zoning Regulations. Moreover, the proposed facility is wholly inconsistent with the purpose of the CD-10 District: "to allow limited low-density development that is primarily agricultural, forestry or residential in nature in a manner that protects forestland and wildlife habitat." Section 2.2.8.

B. Even if the proposed facility is a Public Building, it does not comply with several Conditional Use standards.

1) The proposed facility will create an undue adverse effect on the capacity of existing or planned community services or facilities.

Under Section 4.10(a) of the Newbury Zoning Regulations, the proposed facility may not create an undue adverse effect on:

The capacity of existing or planned community services or facilities. The DRB shall consider the demand for community services and facilities resulting from the proposed development in relation to the available capacity of such services and facilities including, but not limited to, schools, emergency services, transit services and road maintenance. Conditions may be imposed to ensure that demand does not exceed available capacity.

As set forth in the Findings, the Town of Newbury does not have a police department and receives only limited law enforcement coverage through the Orange County Sheriff. Newbury is one of 26 towns receiving police from the Vermont State Police's St. Johnsbury barracks.

State Police response time to the proposed facility would depend upon the location of available 4 to 6 officers covering the area and could be as high as 45 minutes. Likewise, response time to medical and fire calls depends on the availability of Newbury's volunteer EMS and fire department members.

The danger presented to the community by the proposed facility is most clearly reflected in the Applicant's \$3 million in security upgrades. But for the risk presented by the escape of juveniles at this facility, the Applicant would not be proposing to install detention grade windows, high-impact secure walls, secure locked doors, 24-hour infrared video cameras, and unclimbable fences. The proposed facility will also be located in a remote rural area, where fire and emergency medical response services depend upon community volunteers' availability.

The DRB concludes that the demand for emergency response services resulting from the proposed project, particularly law enforcement services, will exceed the available capacity of such services, having an adverse effect on the capacity to provide services to the proposed facility itself and elsewhere in the community. The DRB also concludes that no condition imposed on the proposed project could mitigate this adverse effect; therefore, the adverse effect is undue.

2) The proposed facility will create an undue adverse effect on the character of the area.

Under Section 4.10(b) of the Newbury Zoning Regulations, the proposed facility may not create an undue adverse effect on:

The character of the area as defined by the purposes in applicable zoning districts in these Regulations and specific policies and standards in the Newbury Town Plan.

Section 2.2.8 of the Newbury Zoning Regulations states that the purpose of the CD-10 District "is to allow limited low-density development that is primarily agricultural, forestry or residential in nature in a manner that protects forestland and wildlife habitat."

The Newbury Town Plan provides, "The purpose of the Conservation and Natural Resources area is to allow limited low-density development that is primarily agricultural, forestry or residential in nature." Newbury Town Plan, page 27. The Town Plan goes on to state, "Significant commercial or residential development is not appropriate in Conservation and Natural Resource areas." The Town Plan also states, "It is in the interest of the Town of Newbury to control scattered residential or commercial development in areas now used primarily for traditional forest uses. Development should instead be directed towards established villages and hamlets." Newbury Town Plan, page 28.

The DRB concludes that the proposed project is inconsistent with the purposes of the CD-10 District. The project's location is in a remote area in the CD-10 District, at the end of a 0.40-mile class 4 town highway. To that end, the proposed project is "low density."

However, the proposed project represents the type of "scattered...commercial development" that the Town Plan directs should be located in other areas. Furthermore, the proposed project is not "primarily agricultural, forestry or residential in nature." Instead, the proposed project has the character of a secure detention facility that directly conflicts with the agricultural, forestry, and residential purposes of the CD-10 District. With \$3 million in security upgrades, the proposed facility also represents the type of "significant commercial...development" that is not appropriate for the CD-10 District.

For these reasons, the DRB concludes that the proposed facility will have an adverse effect on the character of the area as defined by the purposes of the CD-10 District and specific policies and standards in the Newbury Town Plan. No condition imposed on the project could mitigate this adverse effect; therefore, the adverse effect is undue.

3) The proposed facility will create an undue adverse effect on traffic on roads and highways in the vicinity.

Under Section 4.10(b) of the Newbury Zoning Regulations, the proposed facility may not create an undue adverse effect on:

Traffic on roads and highways in the vicinity. The Board shall consider the potential impact of traffic projected to result from the proposed development in relation to the condition, capacity, safety, and function of affected roads and associated infrastructure (e.g., bridges, culverts). Conditions may be imposed to ensure that the condition, capacity, safety, and function of roads and associated infrastructure are maintained over the long-term, and that delivery and operations do not create safety hazards.

As noted in the Findings, the proposed facility is located at 487 Stevens Place. Stevens Place is a 0.4-mile Class 4 town highway. According to the Newbury Highway Ordinance, "Class 4 highways are not regularly maintained for motor vehicle travel and are not plowed in the winter by the Town, except as ordered by the Selectboard in an emergency or other circumstance. Maintenance of Class 4 highways, including replacement of culverts and bridges, shall be performed on an 'as needed' basis as staff and financial resources allow. Such work will in no way obligate the Town to perform any additional maintenance or repairs of any nature." Newbury Highway Ordinance, 12(D).

Section 4.10(b) directs the DRB to consider "the potential impact on traffic projected to result from the proposed development in relation to the condition, capacity, safety, and function of affected roads and associated infrastructure (e.g., bridges, culverts)." The DRB notes that as a Class 4 town highway, Stevens Place is not regularly maintained by the Town and not plowed by the Town in the winter. The DRB also notes that the Applicant presently maintains Stevens Place as a condition of the 2013 approval.

As found above, the proposed facility will be located in a remote rural area, at the end of a 0.4-mile dead-end road receiving little or no public maintenance. A secure residential treatment program serving juveniles should reasonably be located on a town or state highway that receives regular public maintenance and winter plowing. In addition, the availability of police, fire, and emergency medical services to the proposed facility could likely be compromised by its location on a Class 4 Town Highway.

While private maintenance of Stevens Road may have been an appropriate condition under the 2013 approval for a school/residential treatment facility, the DRB concludes that it is not appropriate here. The DRB therefore concludes that the proposed facility will create an undue adverse effect on Stevens Road.

Based on the foregoing, the Board concludes that the proposed application fails to meet the requirements of the Newbury Zoning Regulations and is DENIED.

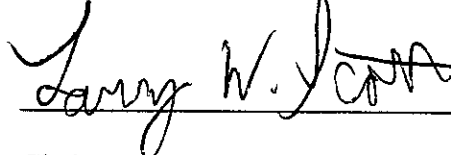
Those in favor of a DENIAL: 7

Those opposed to a DENIAL: 0

Those not participating: 0

Dated at Newbury, Vermont, this 12th day of November 2021.

NEWBURY DEVELOPMENT REVIEW BOARD

A handwritten signature in black ink, appearing to read "Larry W. Jones", is written over a horizontal line.

Chairperson or Designated Representative

This decision may be appealed to the Vermont Environmental Court by an interested person who participated in the proceedings before the Development Review Board. Such appeal must be taken within 30 days of the date of this decision pursuant to 24 V.S.A. § 4471 and Rule 5(b) of the Vermont Rules for Environmental Court Proceedings.