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THE MILE HIGH CITY

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# UNLISTED PRIMARY USE DETERMINATION: FHA HOME WITH CHILDREN

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## REQUEST FOR UNLISTED PRIMARY USE DETERMINATION

The Zoning Administrator initiated this “unlisted use determination” to consider whether to permit an unlisted type of primary residential use, where a dwelling unit is occupied by one or more adults, who may or may not be related to each other, and by minor children and young adults who are under the custodial guardianship or other documented responsibility of a third party. At least one adult in this scenario is an employee of and agent for the third-party custodial guardian, who is charged with providing care for the minor children and young adults living in the dwelling. In addition, all the minor children and possibly one or more young adults living in the dwelling unit are protected under the Federal Fair Housing Act (“FHA”) as a “handicapped” population.<sup>1</sup> The proposed use shall be referred to in this document as a “FHA Home with Children” or “FHA Home.”

In this scenario, the group of persons living in the dwelling unit are different in character from a “Household” where the relationship between the occupants of the dwelling unit is described as “foster care,” a permitted type of Household Living use under Denver Zoning Code (“DZC”), Section 11.12.2.1.B.3.ii. In a foster care Household, members all live together as a “single Non-Profit Housekeeping Unit” in the dwelling unit, meeting the definition of that term as defined by the DZC. In contrast, the subject living scenario is distinct from a foster care Household because an outside third party makes the choice of which specific caretaker adult(s) can live in the dwelling unit. As such, this living arrangement falls outside the definition of a single “non-profit housekeeping unit” per the DZC definition in Section 11.12.2.1.B.2., and consequently outside the specific types of “Households” permitted in a primary dwelling unit use under the definition in Section 11.12.2.1.B.3.

This unlisted use determination would allow FHA Homes in all neighborhood contexts and DZC zone districts that allow establishment of any new Household Living use other than a Live/Work Dwelling use.<sup>2</sup> The underlying reason for the determination is because the proposed “FHA Home” does not

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<sup>1</sup>Under the Federal Fair Housing Act, “handicap” means, with respect to a person: (1) a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance. 42 U.S.C. § 3602(h).

<sup>2</sup>All zone districts in all neighborhood contexts currently allow establishment of at least one specific type of new “Household Living” primary use (other than a Live/Work Dwelling), except for the I-A, I-B, DIA, O-1, and OS zone districts. The modifier “new” is an important distinction because certain Household Living uses may continue in the I-A and I-B zones if they existed before July 1, 2004; however, new Household Living use in those zone districts (not including Live/Work Dwellings) are prohibited. References to “Household Living” uses in this document shall

clearly fit any defined specific use type under the more general classification of permitted Residential Primary Uses, but is substantially similar in nature, character and impact to other permitted Households in Denver.

## DESCRIPTION OF PROPOSED FHA HOME USE

The proposed unlisted primary FHA Home use is described as follows (all capitalized land uses, words, terms, and phrases have the meanings stated in the Denver Zoning Code):

Residential Occupancy of a Dwelling Unit where:

1. Residents include one or more minor children (18 years and younger) who are 'handicapped' as defined by the Federal Fair Housing Act.
2. There may be one or more adult residents (18 years and older) who are also "handicapped" as defined by the Federal Fair Housing Act.
3. There is at least one adult resident who lives in the dwelling unit as their primary residence who is not "handicapped" as defined by the Federal Fair Housing Act, and who has legal responsibility for the care and keeping of the "handicapped" residents ("supervising adult").
4. All residents live in the dwelling unit as a single Non-Profit Housekeeping Unit and comprise a Household, except that an outside third party chooses the supervising adult(s) and the handicapped persons who live in the dwelling unit. That same third party has primary legal and documented responsibility for the children and adult residents who are "handicapped."
5. The number of all residents per dwelling unit does not exceed eight (8) residents, including the supervising adult(s).
6. The adult residents who are "handicapped" as defined in Federal Fair Housing Act receive fewer services than those residing in a permitted Residential Care use.

The proposed FHA Home is intended to include, but is not limited to, a pending Laradon School proposal to establish a small group home comprised of current Laradon School students with intellectual or developmental disabilities, and a supervising adult who is an employee of the school. This type of residence is intended to enable growth in the students' life and self-care skills so that they may graduate to a more independent living option (including foster care) after they complete school.

Additional characteristics of the proposed FHA Home and its residents, using the Laradon School home as an example, include:

- All professional treatment, counseling, therapy, and other types of health care services are provided off-site; in the case of the Laradon School home, those services are provided off-site at the school campus.
- Each resident of a FHA Home has open and uninhibited access to use and enjoy the entire home's interior spaces and grounds, the same as the residents of a dwelling unit containing a Household Living use would typically enjoy.

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mean all specific Household Living use types defined in the DZC (e.g., Single-Unit or Two-Unit Dwelling), but not including Live/Work Dwelling.

- Residents typically share all household responsibilities appropriate to their age and abilities, including cleaning and general care of the premises. There is one Full Kitchen in the Dwelling Unit for all residents to use and/or share .

## APPLICABLE DENVER ZONING RULES & REVIEW CRITERIA FOR DETERMINING AN UNLISTED PRIMARY USE

### GENERAL AUTHORITY TO DETERMINE UNLISTED USES - DZC, SECTION 12.4.6

The Denver Zoning Code (“DZC”), Section 12.4.6, *Code Interpretations and Determination of Unlisted Uses*, authorizes the Zoning Administrator to allow an unlisted use and impose limitations on such use after review according to the procedures and criteria therein.

According to DZC, Section 12.4.6.1, the Zoning Administrator may determine whether a specific unlisted use, including unlisted primary uses, “may be permitted in one or more zone districts, and what type of use review is required.”

The Zoning Administrator is directed to:

- “1. Review and evaluate the application in light of this Code, the Comprehensive Plan, established administrative practices and past interpretations, the potential for establishing a precedent with the interpretation, and any other relevant policy and regulatory documents;
2. Review and evaluate the application with consideration of the general rules of interpretation specified in this Section 12.4.6.3.F, as applicable; and
3. Consult with the Manager, City Attorney, other agencies and staff, as necessary.”

DZC, Section 12.4.6.3.D.

In making a use determination, the Zoning Administrator may impose reasonable conditions on such use after consideration of, “at a minimum, the compatibility of the use within the zone districts in which the use may be permitted, the intensity of the use, the amount and configuration of physical space occupied by the use, and the potential for adverse impacts on adjacent properties.” DZC, Section 12.4.6.3.E.2.

As part of the use determination, the Zoning Administrator must also determine which zoning permit use review procedure will apply, such as Informational Notice (“ZPIN”), Special Exception Review (“ZPSE”), or administrative review without notice or hearing (“ZP”). Determining the use review procedure “shall be based on consideration of the zoning procedure(s) applicable to similar land uses or subject matter, and/or the degree to which the zoning procedure may inform mitigation of possible adverse impacts” from the subject use. DZC, Section 12.4.6.3.E.3.

### REVIEW CRITERIA FOR DETERMINING UNLISTED PRIMARY USES

Denver Zoning Code, Section 12.4.6.4, specifies the criteria against which the Zoning Administrator must review all requests for determining whether an unlisted use should be allowed. The Zoning

Administrator must find that the request satisfies all the relevant review criteria before permitting the unlisted use. If the Zoning Administrator cannot find the proposed use satisfies the review criteria, then the only regulatory path for permitting such use is to amend the text of the zoning code to specifically list and allow the use.

In sum, an unlisted use may only be permitted through the process established in DZC Section 12.4.6 if the determination is:

- “1. Consistent with the intent of this Code; and
2. Consistent with the intent of the subject Neighborhood Context and zone district(s), and with the intent of any specific Code provision(s) at issue.” DZC, Section 12.4.6.4.A.

In addition, the Zoning Administrator must find that the “proposed use has a character and impact that are similar in nature, function, and duration to the other uses permitted in the zone district(s)” by assessing all relevant characteristics of the proposed use, including without limitation:

“The type, size, and typical massing of buildings and structures associated with the unlisted use;

“Transportation requirements, including the modal split for people and freight, by volume type and characteristics of traffic generation to and from the site;

“Parking requirements, turnover and generation, ratio of the number of spaces required per unit area or activity;

“The amount and nature of any external effects generated on the premises, including but not limited to noise, smoke, odor, glare, vibration, radiation and fumes;

“The type and extent of impacts on adjacent properties created by the proposed use in comparison to impacts from other uses permitted in the zone district.”

DZC, Section 12.4.6.4.B.1.

## ANALYSIS – FINDINGS REQUIRED TO APPROVE FHA HOMES AS AN UNLISTED PRIMARY USE

### CONSISTENCY WITH DENVER ZONING CODE’S INTENT – DZC §12.4.6.4.A.1

The overarching purpose of the Denver Zoning Code is to “implement Denver’s Comprehensive Plan and guide orderly development of the City that preserves and promotes the public health, safety, prosperity, and welfare of its inhabitants.” DZC, Section 1.1.1, *Purpose*. To achieve its purpose, the intent of the Denver Zoning Code is to strike a balance between conservation and development, to achieve design excellence in the built environment, and to guide Denver toward a prosperous and sustainable future.

More specifically, the Code’s purpose and intent is enabled by the adoption and administration of zoning standards that, among other things, promote “clear regulations and processes that result in predictable, efficient, and coordinated review processes,” and “diverse and affordable housing options.” DZC, Section 1.1.2., *Intent*.

In this case, FHA Homes will provide an alternative, affordable, and supportive housing option to Denver residents, and specifically children and young adults with intellectual and developmental disabilities, seeking to live in lower- to medium-density residentially zoned neighborhoods, which is otherwise not available or allowed under Denver’s current zoning rules governing “Household Living.” Providing a new choice of supportive non-institutional living for persons with disabilities and handicaps promotes and furthers the general safety, health, and welfare of the specific Denver residents who will live in such housing. In addition, benefits accrue to the greater Denver community by housing persons who are otherwise challenged by finding supportive housing in residential Denver, and thereby reducing these residents’ risk of institutionalization.

This determination provides a clear set of regulations and procedures to guide residents and organizations interested in providing this type of housing option. (DZC, §1.1.2.K). Without this determination, prospective residents, administering staff, and interested community members would not know what rules apply or how to proceed to have such a home legally established without risk of violating the zoning code. Finally, as discussed in more detail below, accommodating the proposed FHA Home as a permitted “by-right” residential use, treated similarly to other Household Living uses comprised of adults and children all related to each other, clarifies Denver’s compliance with the Federal Fair Housing Act.

Accordingly, I find that the proposed FHA Home use is consistent with the overall purpose and intent of the Denver Zoning Code, including to promote “diverse and affordable housing options” and providing “clear regulations and processes that result in predictable, efficient, and coordinated review processes.”

#### CONSISTENCY WITH INTENT OF THE SUBJECT NEIGHBORHOOD CONTEXT AND ZONE DISTRICT – DZC §12.4.6.4.A.2

Allowing FHA Homes in all zone districts and in all neighborhood contexts that already allow Household Living uses is consistent with the intent of the applicable contexts and districts. All neighborhood contexts and zone districts subject to this determination are intended to facilitate residential or mixed-use development, and already allow a variety of primary residential uses in Household Living, Residential Care, and/or Congregate Living configurations. Household Living uses in all the subject contexts and zone districts already allow dwelling units occupied by up to 8 unrelated adults, where the adults are “handicapped” as defined in the Federal Fair Housing Act.<sup>3</sup> This use determination fills the gap in the zoning code’s allowance for Household Living: when the persons who are “handicapped” and living in the home include children who are not related to the adult taking care of them in the same

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<sup>3</sup> The Denver Zoning Code expands the definition of “Household” beyond related persons for units occupied by “Up to 8 *adults* of any relationship with a “handicap” according to the definition in the Federal Fair Housing Act, and who do not meet this Code’s definition of a Congregate Living or Residential Care use”. DZC, Section 11.12.2.1.B.3.a.iv. (emphasis added)

home. Therefore, the request to allow FHA Homes will not introduce an entirely new use or intensity of use into any of the affected neighborhood contexts or zone districts.

An FHA Home is essentially a slight variation of a permitted Household Living use, which includes a single dwelling unit occupied by up to 5 unrelated adults and their minor children, including children for whom they have documented responsibility. In this case, the supervising adult has documented responsibility for all the children and young adults living with them, but the children and young adults are not related to the supervising adult. A foster care home fits the code's definition of Household Living, permitted in all zones and contexts, which is very similar to the FHA Home in question. The only difference is that in a foster care home, the adult foster parents who live in the home are there by their own choice and volition (i.e., the State of Colorado, the foster children's custodial guardian, does not control what home the adult foster parents choose to live). In contrast, in the FHA Home, the supervising adult providing the same parenting as foster parents lives in the home at the choice and volition of a third party, who employs the supervising adult as its agent in the home, and who retains documented responsibility for all the handicapped residents. Allowing a slightly new version of already allowed Household Living uses is consistent with the intent of the subject contexts and zone districts to facilitate a variety and mix of residential uses.

Accordingly, I find that the proposed FHA Home use is consistent with the overall purpose and intent of the subject DZC neighborhood contexts and zone districts, including but not limited to the Residential Zone Districts, where similar, primary Household Living and large Group Living uses are already expressly allowed.

## COMPARISON TO OTHER PRIMARY RESIDENTIAL USES

As described above, the Zoning Administrator must find that the proposed primary use "has a character and impact that are similar in nature, function, and duration to the other uses permitted in the zone district(s)" by assessing all relevant characteristics of the proposed use. DZC, Section 12.4.6.4.B.1.

For a primary use determination, the Zoning Administrator must first decide which use classification best fits the proposed use. In this case, as described above, the proposed FHA Home would fall within the general classification of Primary Residential Uses. The next step is to determine into which use category the proposed FHA Home best fits, considering the definitions and salient characteristics of each relevant use category.

Per the Denver Zoning Code, there are three use categories that fall under the more general classification of Primary Residential Uses: (1) Household Living, (2) Residential Care, and (3) Congregate Living.

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### THE HOUSEHOLD LIVING USE CATEGORY

- **"Household Living"** is defined as "residential occupancy of a 'dwelling unit' by a single 'household'. Tenancy is arranged on a month-to-month or longer basis." DZC, Section 11.12.2.1.A.

- A “**Single-Unit Dwelling**” type of Household Living use is defined as “One dwelling unit contained in a single structure.” DZC, Sections 11.12.2.1.C.1.
- A “**Two-Unit Dwelling**” type of Household Living use is defined as “Two dwelling units contained in one structure located on a single zone lot.” DZC, Sections 11.12.2.1.C.2.
- A “**Multi-Unit Dwelling**” type of Household Living use is defined as “Three or more dwelling units contained in a single structure.” DZC, Sections 11.12.2.1.C.3.
- A “**Dwelling Unit**” is defined as “One or more Rooms constituting a unit for permanent occupancy, having but one kitchen together with facilities for sleeping, bathing, and which unit occupies a structure or a portion of a structure.” DZC, Sections 11.12.2.1.B.1.
- A single “**Household**” must occupy the dwelling unit in a Household Living use. A “**Household**” is generally described as a dwelling unit occupied either by a single person, or by multiple persons living as a single “**non-profit housekeeping unit.**” Domestic employees are allowed in addition to members of a household. DZC, Sections 11.12.2.1.B.2 – B.3.
  - A “**Non-Profit Housekeeping Unit**” is defined as: “A household comprised of persons who live together as a family or as the functional equivalent of a family, and who share household activities and responsibilities, such as meals, chores, rent, and expenses. The choice of specific adults comprising the single nonprofit housekeeping unit is determined by the members of such housekeeping unit rather than by a landlord, property manager, or other third party. Members of a single non-profit housekeeping unit are not required to seek services or care of any type as a condition of residency. All members of the non-profit housekeeping unit jointly occupy the entire premises of the dwelling unit.” DZC, Sections 11.12.2.1.B.2
  - A single **Household** may be comprised of any of the following combinations of multiple persons (per DZC, Section 11.12.2.1.B.3.a.):
    - An unlimited number of persons “related to each other by blood, marriage, civil union, committed partnership, adoption, or documented responsibility (such as foster care or guardianship) ...who all occupy a dwelling unit as a single non-profit housekeeping unit.
    - “Up to 5 adults of any relationship, plus any minor children related by blood, adoption or documented responsibility, plus any permitted domestic employees, who all occupy a dwelling unit as a single non-profit housekeeping unit; or
    - “Up to 8 adults of any relationship with a “handicap” according to the definition in the Federal Fair Housing Act, and who do not meet this Code’s definition of a Congregate Living or Residential Care use”.

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## THE “CONGREGATE CARE” USE CATEGORY

- **Congregate Care** uses are defined as: “A structure or structures providing Residential Occupancy for Persons who do not live in a Household according to Section 11.12.2.1.B.3, Household. A Congregate Living use may occur within a self-contained Dwelling Unit. A Congregate Living use may also, such as with a tiny home village, occur within multiple structures where no one or not all structures contain a self-contained Dwelling Unit, but all

structures comprising the use together provide residents with facilities for sleeping, bathing, cooking and preparing food. This use category includes groups of Persons who each have separate contracts or agreements with property owners, who do not jointly occupy the entirety of a dwelling unit, or who jointly occupy the entirety of a dwelling unit but who exceed the maximum number of adults permitted in a household as defined in Section 11.12.2.1.B.3, Household. Tenancy is arranged on a month-to-month or longer basis. Residents of a Congregate Living use may share sleeping units, and may have shared cooking, bathroom and common areas, or some combination of personal and shared facilities. Residents in a Congregate Living use are not required to seek services or care of any type as a condition of residency." DZC, Section 11.12.2.2

- **Examples** of permitted Congregate Care uses include:
  - Rent-by-the-room configurations, such as rooming and boarding houses or student housing.
  - Dormitories that house students of a primary Education use located on or off the same zone lot as the primary Education use, including a building used for members of a fraternity or houses officially recognized by a college/university, or seminary.
  - Permanent tiny home villages.

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## THE "RESIDENTIAL CARE" USE CATEGORY

- The last category of residential uses is the "**Residential Care**" category, which is defined as: "A Residential Structure or structures where guests receive treatment, supervision, emergency shelter, personal care, protective oversight, or other similar care or services, from staff on-site as a condition of the guests' residency. This definition excludes care provided by domestic employees or care workers in a private home that meets this Code's definition of Household Living or Congregate Living. For purposes of this definition, a "guest" is a person who stays overnight, regardless of total length of stay. For purposes of this definition, staff and volunteers who regularly return to another place of primary residence, but who stay overnight while working or volunteering, shall not be considered "guests." Tenancy may range from overnight to 30 days or longer. DZC, Section 11.12.2.3.
- Examples of permitted **Residential Care** uses include:
  - Homeless Shelters
  - Community correction facilities and halfway houses
  - Recovery residences, where a guest's participation in a program of supervision, treatment, or care is required
  - Rehabilitation facilities
  - Assisted living facilities
  - Nursing homes or hospices
- All specific types of Residential Care use include the supervised and programmed provision of services and care for residents, including medical, psychological, custodial, and developmental services and care. See DZC, Section 11.12.2.3.



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## DETERMINATION OF APPLICABLE PRIMARY RESIDENTIAL USE CATEGORY AND SPECIFIC USE TYPE

To determine which Primary Residential Use Category the proposed FHA Home is more comparable to in character and impact, it is critical to delve more deeply into the definition of "Household". As defined above, in a "Household," all persons occupying the dwelling unit live as a "single non-profit housekeeping unit." DZC, Section 11.12.2.1.B.3. The criterial term "non-profit housekeeping unit" is specifically defined in the Denver Zoning Code, which helps in the categorization of the proposed FHA Home. To be a Household and meet the definition of a "non-profit housekeeping unit", we look to see persons residing in the proposed FHA Home to:

1. Act and function substantially the same as a traditional "family" household comprised of parent(s) + minor children.
2. Share household activities and responsibilities (this is targeted primarily at the adult residents).
3. Jointly occupy the entirety of the dwelling unit's space.
4. Not be obligated to seek services or care as a condition of residency.
5. Freely choose with whom they will live with and share the dwelling unit and responsibilities.

The characteristics and description of how residents will live together in a FHA Home are consistent with the characteristics numbered 1 through 4 above. See description of a FHA Home, pp.2-3 above. Regarding the expectation that persons residing in a Household are not obligated to seek services or care as a condition of residency, the FHA Home use presents a nuanced perspective, which I find persuasive. While in the FHA Home, the handicapped residents do not receive any on-site special care, supervision, or treatment/therapy from qualified professionals. All care and treatment of that nature is provided outside the home, either at school or in traditional health care settings. While the residents are expected to stay in school until they are 18 or 21 years old, that expectation and other supervisory and custodial care provided to persons living in the FHA Home are no different from the expectations, supervision and care provided in a traditional family Household where children and young adults, regardless of "handicap" status, live with their biological, adoptive, or foster parent(s).

The only characteristic that differs in the FHA Home compared to other "Households" captured by the zoning code definitions, is that the supervising adults(s) who make their primary residence at the FHA Home are "placed" in the home by a third party, which may be a school, mental health care organization, or a non-profit organization. While the original supervising adult freely chooses to accept the placement at the FHA Home, the placement still originates from a third party's actions, and the third party may place additional (one or more) adult custodians at the home over the first supervising adult's objections or expressed preferences. Nonetheless, once in place, all residents in the home – adults and minors, abled and disabled – function and operate as a non-profit housekeeping unit and the equivalent of a family.

The Denver Zoning Code gets to a similar conclusion in expressly qualifying "Households" that include (1) homes where up to 8 disabled adults (protected as a "handicapped" class under the Federal Fair Housing Act as well) live with a qualified adult caretaker(s), (2) homes where a single adult or up to 5 unrelated adults may live with an unlimited number of minor children of those adults, regardless of ability or disability; and (3) homes where a foster parent(s) live with an unlimited number of unrelated

minor children over which they have legal, documented responsibility. In these types of “nontraditional” family households, while regulated as a “Household”, third parties may be involved in identifying, hiring, and/or qualifying the supervising adult residing in the home. Similarly, the FHA Home, which will be capped at a total of 8 residents (including the supervising adult(s)) should be similarly treated as a “Household Living” use, because its composition, organization, and daily operations align with these other permitted types of nontraditional family “Households” in nature, character and function.

The FHA Home also presents no likelihood of external effects or impacts different from other, permitted Households. The residential structure or dwelling unit occupied by the proposed FHA Home is identical to what Household Living residents would occupy. Transportation requirements and demand are the same for the proposed use and Household Living uses because there is no limit on the number of related adults or the number of minor children who can comprise a “Household.” A property housing a FHA Home has access to the same on-street or off-street vehicle access and parking spaces as would a Household Living use in the same location, and the same access to sidewalks and trails for pedestrian travel. The proposed use and a Household Living use of the same size generate similar or less traffic (some disabled minors will not qualify for driver’s licenses). Because there is no limit on how large a Household may be (when all adults are related by blood or marriage), there is arguably no difference in the amount and nature of any external effects (such as noise), and the type and extent of impacts on adjacent properties created by the proposed use is comparable to potential impacts from other Household and Group Living residential uses permitted in the same zone districts.

The last step is to analyze whether a FHA Home is more similar to either of the other two defined categories of residential uses, Congregate Housing or Residential Care. The FHA Home does not meet the distinctive characteristics of a “Congregate Living” (definition provided above) because, unlike in a Congregate Living use,

1. The developmentally and intellectually disabled residents of the FHA Home are under the custodial guardianship of a third party (with the on-site supervising adult acting as an agent for the third party, exactly like a foster parent is agent for the State) and, as such, those residents live at the home without separate contracts or agreements with the property owners granting them the right to live there;
2. The FHA Home residents all jointly occupy the entirety of the dwelling unit;
3. The FHA Home residents do not exceed the maximum number of adults permitted in a “Household” as defined in DZC, Section 11.12.2.1.B.3; and
4. The residents of the FHA Home are not required to seek services or care of any type as a condition of residency, beyond the expectation that the minor children continue to attend school until they are 18 or 21 years old (the same expectation for minor children in a traditional family household).

Similarly, the FHA Home does not meet the distinctive characteristics of a “Residential Care” use (defined above) because, unlike in a Residential Care use,

1. In a FHA Home, the residents are not “guests who receive treatment, supervision, emergency shelter, personal care, protective oversight, or other similar care or services, from staff on-site

as a condition of the guests' residency." Again, the residents of the FHA Home are not required to seek services or care of any type as a condition of residency, beyond the expectation that the residents continue to attend school until they are 18 or 21 years old (similar to an expectation for youth in a traditional family household). If a resident of a FHA Home is a poor performer at school or quits a job, the resident is not contractually obligated to leave the home. Residents of a FHA Home live together purposefully as a Household, sharing in all aspects of domestic life and none of the residents are treated – formally or informally – as "guests." Instead, the level of care or supervision received by disabled persons living at the FHA Home receive is most comparable to the level of care and supervision provided by the adults in a traditional family or foster family household for their biological, adoptive, or foster children – whether abled or disabled.

Even if the FHA Home arguably displays some of the characteristics of a Congregate Living or Residential Care residence, the Denver Zoning Code already preempts grouping the proposed FHA Home in those use categories by expressly allowing FHA Homes comprised of 8 unrelated adults with developmental or intellectual disabilities as a "Household". It would be fundamentally unfair and irrational to categorize the same exact home when comprised of 7 unrelated minors with developmental or intellectual disabilities as any type of zoning use other than "Household Living."

In conclusion, based on the analysis above, I find that the proposed FHA Home primary residential use:

1. Fits into the general definition of the "Household Living" primary residential use category because the residents of the FHA Home are no larger in number and are substantially similar in size, character, nature, and function to the zoning code's specifically permitted Household Living uses.
2. Does not fall within any of the definitions of the specific use types that comprise a "Household" under the Household Living use category allowed by the Denver Zoning Code.
3. Will not result in external effects and will not cause adverse impacts on adjacent properties substantially different in kind or degree from other permitted Household, Congregate Living, and Residential Care residential uses already allowed in the same zone districts.

Because the proposed FHA Home use falls into an identified "gap" between the zoning code's specified Household Living uses, this use determination will allow it as a specific type of Household Living use, but defined and limited by reasonable conditions to ensure it is most comparable in character and impact with Household Living uses.

## FINAL USE DETERMINATION AND DECISION

Based on the above analysis and according to the review criteria for unlisted use determinations in DZC, Section 12.4.6, I find that the proposed FHA Home use:

1. Is consistent with the intent of the Denver Zoning Code;
2. Is consistent with the intent of the affected neighborhood contexts and the zone districts; and
3. Is substantially similar in character and impact to other permitted primary residential uses in the same zone districts.

I also find that the type and extent of impacts on adjacent properties by a proposed FHA Home use are potentially no different from, and most likely less than other permitted primary uses in the same zone districts.

As part of the unlisted use determination, the Zoning Administrator must also determine the applicable zoning permit use review procedure to apply to the unlisted use. I determine that a Zoning Permit ("ZP") review will be required for all requests to change the use of a structure to a new FHA Home and to establish the first use of a new structure as a FHA Home in the zone districts specified below, according to the review process stated in DZC, Section 12.4.1, Zoning Permit Review. A zoning permit is not required when a structure's use is changing from one type of Household Living use is changed to a different type of Household Living, including to a FHA Home, but remains an optional path.

In conclusion, my final decision is to **ALLOW** the proposed FHA Home use as an "unlisted primary use," according to the following **USE DEFINITION, APPLICABILITY LIMITS, APPLICABLE ZONING REVIEW PROCEDURE,** and **USE & PERMIT LIMITATIONS:**

1. **DEFINITION OF UNLISTED PRIMARY USE:** The use at issue shall be referred to as "FHA Home." FHA Home shall be classified and defined as follows:
  - a. A FHA Home is classified as a primary residential use, and categorized as a specific type of Household Living use.
  - b. A FHA Home is defined as:

Residential Occupancy of a Dwelling Unit where:

1. Residents include one or more minor children (18 years and younger) who are 'handicapped' as defined by the Federal Fair Housing Act.
2. There may be one or more adult residents (18 years and older) who are also "handicapped" as defined by the Federal Fair Housing Act.
3. There is at least one adult resident who lives in the dwelling unit as their primary residence who is not "handicapped" as defined by the Federal Fair Housing Act, and who has legal responsibility for the care and keeping of the "handicapped" residents ("supervising adult").
4. All residents live in the dwelling unit as a single Non-Profit Housekeeping Unit and comprise a Household, except that an outside third party chooses the supervising adult(s) and the handicapped persons who live in the dwelling unit. That same third party has primary legal and documented responsibility for the children and adult residents who are "handicapped."
5. The number of all residents per dwelling unit does not exceed eight (8) residents, including the supervising adult(s).
6. The adult residents who are "handicapped" as defined in Federal Fair Housing Act receive fewer services than those residing in a permitted Residential Care use.

All capitalized words, terms, phrases, and zoning land uses referenced above shall have the meanings stated in the Denver Zoning Code.

2. **APPLICABILITY OF UNLISTED USE DETERMINATION:** This use determination and final decision is applicable in all zone districts in all neighborhood contexts that allow establishment of a new primary “Household Living” specific use type, but not including a Live/Work Dwelling use. Accordingly, this use determination allows a FHA Home in all zone districts except in the I-A, I-B, DIA, O-1, and OS zone districts.
3. **APPLICABLE ZONING USE REVIEW PROCEDURE:** A zoning permit (“ZP”) review will be required for all requests to change the use of an existing structure to a FHA Home, or to establish a FHA Home use as the first primary use in a new structure, according to the procedure and review criteria stated in DZC, Section 12.4.1. A pre-application meeting is voluntary per DZC, Section 12.3.2.
4. **USE & PERMIT LIMITATIONS:** Applications for a zoning permit for a FHA Home shall provide information and evidence showing compliance with all the following limitations:
  - a. The proposed FHA Home meets all the elements of the definition of the use stated in paragraph 1 above.
  - b. The number of residents, including supervising adult(s), in the FHA Home shall not exceed 8 persons.
5. **COMPLIANCE WITH OTHER CITY REGULATIONS.** A FHA Home permitted in compliance with the Denver Zoning Code, per this use determination, is subject to compliance with all other applicable City laws and regulations, including without limitation, the Denver Building and Fire Codes.

## APPEAL

This final use determination may be appealed to the Denver Zoning Board of Adjustments within 15 days from the issuance date of this written decision, according to DZC, Section 12.4.8, Appeal of Administrative Decision.

Approved by:



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Tina Axelrad, Zoning Administrator

Date of Issuance: September 23, 2022