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M E M O R A N DUM

To: Missouri Recovery Residence Providers and Interested Entities

From: Law Office of Kim Savage

Re: Fair Housing Law Protections for Recovery Residences and Local Land Use & Zoning Regulations

Date: 10/18/21

Introduction – Overview of Fair Housing Laws

The purpose of this memorandum is to explain how the federal Fair Housing Amendments Act of 1988 applies to local land use and zoning regulations impacting recovery residences. More specifically, this memorandum explains: (1) the legal basis for treating households of unrelated individuals with disabilities in recovery for substance abuse as other single-family households of related individuals and (2) the authority for regulating recovery homes as residential uses, not commercial uses, subject only to the requirements of other single-family dwelling households.

Fair housing laws have a national dual purpose as to individuals with disabilities: prohibit discrimination in housing and housing-related activities against individuals with disabilities AND affirmatively further housing opportunities for members of this protected class. 42 U.S.C. §§ 3601 et seq. The fundamental purpose of the Act is to prohibit practices that "restrict the choices" of people with disabilities to live where they wish or "that discourage or obstruct choices in a community, neighborhood or development." 24 C.F.R. § 100.70(a) (1994).

The Act protects an individual with a physical or mental impairment that substantially limits one or more major life activities; anyone who is regarded as having any such impairment; or anyone who has a record of having such an impairment. 42 U.S.C.§ 3602(h); 24 C.F.R.§ 100.201. Individuals in recovery from drug or alcohol abuse are also covered under the law. 24 C.F.R. § 100.201; United States v. Southern Management Corp., 955 F. 2d 914 (4th Cir. 1992); Oxford House v. Town of Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993). The protections afforded by the Act also extend to those who are associated with them; providers and developers of housing for people with disabilities have "standing" to file a court action alleging a violation under the Act or seek administrative relief from a federal or state agency that enforces fair housing laws. Judy B. v. Borough of Tioga, 889 F. Supp. 792 (M.D. Pa 1995) and Epicenter of Steubenville v. City of Steubenville, 924 F. Supp. 845 (S.D. Ohio 1996).

The federal Act prohibits both intentional discrimination and zoning rules and regulations that have the effect of discriminating against housing for people with disabilities. This two-prong basis is particularly important in land use and zoning because, in many instances, zoning regulations, practices and procedures are facially neutral and do not single out individuals with disabilities, but the rules or practices have an adverse or discriminatory impact which results in the denial of housing opportunities.

To prove discriminatory intent, an individual need only show that disability was one of the factors considered by the city or county in making a land use or zoning decision. Oxford House-C v. City of St. Louis, 843 F.Supp. 1556 (E.D. Mo. 1994); Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285 (D. Md. 1993).

Discrimination may also be established by proving that a particular practice has a discriminatory impact on people with disabilities. Under the standards established by the Eighth Circuit, to prevail on a discriminatory impact theory, plaintiff must first make a prima facie showing that the challenged ordinance has a discriminatory effect. "If the law has such an effect, the burden shifts to the governmental defendant to demonstrate that its conduct was necessary to promote a governmental interest commensurate with the level of scrutiny afforded the class of people affected by the law under the equal protection clause." Oxford House-C v. City of St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994); Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 94 (8th Cir.1991); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974) *cert. denied,* 422 U.S. 1042, 95 S. Ct. 2656, 45 L. Ed. 2d 694 (1975).

In addition to not discriminating against people with disabilities, cities and counties have an affirmative duty to provide reasonable accommodations in land use and zoning rules, policies, practices and procedures where it may be necessary to provide individuals with disabilities equal opportunity in housing. 42 U.S.C. § 3604(f)(3)(B). While the Act intends that all people have equal access to housing, the law also recognizes that people with disabilities may need extra tools to achieve equality. In the land use and zoning context, reasonable accommodation means providing individuals with disabilities, or developers of housing for people with disabilities, flexibility in land use and zoning regulations and procedures, or waiver of certain requirements when it is necessary to achieve equal access to housing. Oxford House-C v City of St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994) ("Clearly the Fair Housing Act and its Amendments apply to the zoning enforcement decision at issue here.")

Land use and zoning regulations that restrict or prohibit housing opportunities for individuals with disabilities violate fair housing laws unless there is a legitimate governmental interest. As set forth below, there is no legal justification to single out and regulate differently recovery residences that function like a family and in doing so comply with neutral occupancy standards. Further, there is no legal justification for imposing heightened health and safety requirements on recovery residences that operate similarly to a family. Land use and zoning impediments that make it infeasible to operate housing for individuals with disabilities effectively deny opportunities to a protected class.

The Federal Fair Housing Act Recognizes That Individuals With Disabilities In A Group Setting Constitute A Family For Purposes of Zoning Regulation.

Fair housing laws protect the right of individuals with disabilities to reside together in group living arrangements and be classified as a "family" under local zoning and land use laws. While local governments have significant authority to regulate zoning, local planning and land use regulations and decision-making must comply with the federal Fair Housing Amendments Act of 1988. Numerous jurisdictions throughout the nation recognize that a group of unrelated individuals with disabilities that reside in single-family dwellings are the functional equivalent of a family. These are households that live together in a cohesive manner and, each with full access to the dwelling, are a "family" for purposes of a zoning use classification. This single-family dwelling remains a residential use and cannot be subject to additional requirements otherwise imposed on households of related individuals. Children's Alliance v City of Bellevue, 950 F. Supp. 1491 (1997) ("The distinction the Ordinance draws between Families and Group Facilities rises to a statutory violation because of the burdens placed on the latter but not on the former. . . [t]hus the Ordinance facially discriminates on the basis of familial status and handicap through its imposition of these requirements.")

The courts have held that restrictive definitions of family illegally limit the development and siting of group homes for individuals with disabilities and not families similarly sized and situated and effectively deny housing opportunities to those who because of their disability live in a group home setting. Oxford House Inc. v. Babylon, 819 F.Supp. 1179 (E.D. N.Y. 1993); Oxford House v. Township of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992); United States v. Schuykill Township, 1991 WL 117394 (E.D. Pa. 1990), reconsideration denied (E.D. Pa. 1991). Group homes are distinguishable from licensed facilities which provide an institutional or clinical setting with a duty of care and supervision and treatment, more akin to a hospital or nursing home. In addition to the foregoing distinctions, residents of licensed facilities do not have full access to the entire premises.

Recovery Homes Are Residential Uses And Providing Incidental Disability Related Services Does Not Constitute A Change Of Use to A Commercial Classification.

Some jurisdictions have a misperception that housing for individuals with disabilities is a commercial use and this interpretation has the effect of denying housing opportunities in violation of fair housing laws. First, some local governments assume that if any management functions take place at a dwelling, it is a business and subject to commercial zoning restrictions. There is an all too common view that, because residents with disabilities in a group living arrangement pay money to live at a home, the dwelling is a commercial use, subject to commercial siting restrictions and, often, a business license. Courts have found that simply because the operation of a dwelling may entail some management functions, such activities do not change the essential character of a single family or multi-family dwelling from a residence to a "business" or commercial use.

> [M]aintaining records, filing accounting reports, managing, supervising, and providing care for individuals in exchange for monetary compensation are collateral to the prime purpose and function of a family housekeeping unit. Hence, these activities do not, in and of themselves, change the character of a residence from private to commercial.

See, Rhodes v. Palmetto Pathway Homes, Inc., 400 S.E. 2d 484 (S.C. 1991) citing Gregory v. State Dept. of Mental Health Retardation and Hospitals, 495 A.2d 997 (R.I. 1985) and JT Hobby & Sons v. Family Homes, 274 S.E.2d 174 (1981).

A practice or regulation that treats housing for individuals with disabilities as a commercial use when the same determination is not applied to similarly situated and functioning families singles out individuals with disabilities in a discriminatory manner. A single family engages in comparable management functions when it employs and pays a housekeeper or gardener and there is an exchange of money. Or, parents may charge rent to an adult child living at home. These activities do not change the residential use of the home, nor do comparable activities that assist with the sound functioning of a home for individuals with disabilities.

Second, some jurisdictions also take the position that where housing for individuals provides some on-site support for its residents, the home loses its residential character and is subject to commercial land use and zoning regulations. Housing for individuals with disabilities where supportive services are provided on site or, there is a peer resident house manager, is increasingly common as these attributes effectuate a nurturing and caring community of likeminded individuals in recovery for substance abuse. It is anticipated that the demand for housing with a range of supportive services will continue to increase as a result of the landmark U.S. Supreme Court ruling that Title II of the Americans With Disabilities Act (ADA) requires that individuals with disabilities be served in the least restrictive setting. The integration mandate requires that individuals who are able to reside in a community setting with supportive services, as opposed to an institution, are required to be provided housing opportunities within the community. Olmstead v. L.C., 527 U.S. 581 (1999).

A jurisdiction that regulates a dwelling based on the provision of supportive services to individuals with disabilities or, the presence of a peer resident house manager, is imposing restrictions based on the residents' personal characteristics in violation of fair housing laws. This type of regulation is discriminatory because it treats housing for individuals with disabilities with supportive services differently from similarly situated families. There is no basis under fair housing laws for distinguishing between the activities and services at a traditional family home and a group living arrangement for individuals with disabilities that provides support for its residents.

Mischaracterization of Housing for Individuals with Disabilities as a "Boarding or Rooming House" or Other Group Living Arrangement Illegally Restricts Housing Opportunities.

Many cities and counties have a practice of treating housing for individuals with disabilities as a boarding or rooming house use that is permitted by right only in high density multi-family residential zones or commercial zones. Local governments have also classified housing for individuals with disabilities in recovery as "Bed and Breakfast" uses or fraternity houses. These use classifications mischaracterize the use of the dwelling and results in

siting restrictions that have the effect of denying housing opportunities for individuals with disabilities in violation of fair housing laws. Tsombanidis v. City of W. Haven, 180 F.Supp. 2d 262 (Conn. 2001).

Generally, boarding and rooming houses provide a temporary housing option for individuals and, in most jurisdictions, this type of use is restricted to high density multi-family residential or commercial zones. This use, albeit residential, is distinguishable from housing for individuals with disabilities which purposefully offers a family like environment on a long term or permanent basis. Further, individuals who reside in boarding or rooming houses do not have full access to the dwelling but are typically limited to their room which has a key-locking door. In contrast, recovery home residents have full access to the home in which they reside and bedroom doors do not have locking mechanisms. "Bed and Breakfast" accommodations are not residential uses but commercial ventures which operate as small-scale hotels for vacation guests who have restricted access to the premises. These are not long-term housing opportunities whereas recovery residences offer a home for lengthy periods of time, often without any occupancy time restrictions. Recovery residences are not analogous to college fraternity houses; there is little, if any, structure to the household, the household is transient and the residents are not members a protected class under the federal Fair Housing Act. When a city or county applies boarding and rooming house, "Bed and Breakfast" or fraternity siting restrictions to congregate living arrangements for people with disabilities, it denies housing opportunities to those protected by fair housing laws and negates its obligation to affirmatively further fair housing.

Cities and counties in their zoning policies, practices and procedures risk violating the federal Fair Housing Act when they erroneously classify congregate living arrangements for people with disabilities as any other use. The consequence of local governments misclassifying the use of housing for individuals with disabilities is that members of the protected class are denied or restricted in their housing opportunities.

Local Government May Not Impose Heightened Health & Safety Requirements On Recovery Residences That Operate As A Family And Are Not Otherwise Imposed On Other Families.

The federal Fair Housing Amendments Act of 1988 recognizes that local health and safety restrictions may have an adverse impact on group living arrangements for individuals with disabilities. These group living arrangements in single-family dwellings provide an important opportunity for individuals with disabilities to reside together in a supportive and affordable home. These living arrangements purposely create a cohesive, family-like environment: the household members share responsibilities for maintaining the home, eat meals together as other families do and, develop strong social bonds as they address substance abuse, mental health concerns or co-occurring health conditions.

> These new subsections [§ 3604(f)] would also apply to state or local land use and health and safety laws, regulations, practices and decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.
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> H.R.Rep. No. 100-711, 100th Cong., 2d Sess. 24, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 2173, 2185 (emphasis added).

Historically and even today, local governments continue to require heightened health and safety requirements, including fire installations, based on a broad presumption that all individuals with disabilities require more protections.

> Another method of making housing unavailable to people with disabilities has been the application of enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities. Such discrimination often results from false or over-protective assumptions about the needs of handicapped people, as well as

unfounded fears about the problems that their tenancies may pose. These and similar practices would be prohibited.

H.R.Rep., No. 711, 100th Cong., 2d sess. 24, reprinted in 1988 U.S. Code Cong. & Admin. News 2173, at 2185 (emphasis added).

Local governments must consider the particular disabilities and needs of the individuals with disabilities when determining the applicable health and safety and fire code requirements of group living arrangements. While reasonable restrictions for safety are permissible, the courts have warned against the imposition of requirements that are unnecessary and financially burdensome to housing for individuals with disabilities.

The ordinance makes no effort, for example, to promulgate one set of safety standards tailored to the needs and abilities of developmentally disabled persons who are hearing impaired, another for those whose vision is impaired, another for those whose conditions impair their mobility, etc. Instead, the ordinance lumps all the requirements together and makes all of them applicable in the instance of every developmental disability. The expense that would result from complying with needless safety requirements amounts to an onerous burden which has the effect of limiting the ability of these handicapped individuals to live in the residence of their choice.

The question then becomes whether other provisions of the zoning code narrow application of the ordinance to only those safety requirements that are directed at the unique and specific needs and abilities of plaintiff's residents.

Marbrunak, Inc. v. City of Stow, 974 F.2d 43, 47-48 (6th Cir. 1992)

The courts have considered health and safety and fire requirements for recovery homes which provide independent living for those who remain clean and sober while addressing their substance abuse in a supportive living environment. The Court, in evaluating an Oxford House, found that the household of those voluntarily in recovery functioned sufficiently similar to a family and were subject only to the same requirements as families living in single-family dwellings.

The Court finds that the residents of Oxford House West Hale exhibit a social structure that mirrors a hierarchy, which would aid the safe evacuation of the structure in the event of a fire. Although the social structure is less formal than the traditional hierarchies found in many homes—for example, parent-child, grandparent-grandchild, or aunt-nephew—a hierarchal structure nonetheless exists among the residents, primarily based on the length of time that a resident has lived in the house.

Further, all of the residents of Oxford House West Hale are adults, and thus they do not require the level of supervision that a head of household otherwise would provide to children in a family.

In sum, the residents of Oxford House West Hale exhibit informal and formal social structures that resemble the hierarchies traditionally displayed by families, and the residents share a close bond with each other that prompts them to aid each other in times of need, as families tend to do. Because of these social structures and tight-knit relationships among the residents, the residents would react in a manner similar to a family in the event of a fire. Therefore, the accommodation that Plaintiffs requested—that the Fire Marshal interpret the term "family" in a manner that would capture the type of relationship shared among the residents of Oxford House West Hale—would not increase the potential danger to the residents that is presented by the risk of fire. Therefore, the requested accommodation is "reasonable" because it does not undermine the basic purpose of the Life Safety Code, nor does it undermine the Fire Marshal's statutory mandate to protect persons in Louisiana from injury due to fire: the residents boast a level of fire safety that is comparable to the level of fire safety typically exhibited by a family.

Oxford House, Inc. V. Browning, 266 F. Supp. 3d 896, 916 (M.D. La. 2017)(emphasis added).

A local government may be enjoined from enforcing a sprinkler requirement against a group home for individuals with disabilities where a request for a fair housing reasonable accommodation requests waiver of the requirement. While a local government may offer sufficient proof of the rational basis for heightened fire safety at a home for individuals with intellectual and developmental disabilities, the Court must examine the motive for imposing the regulation for its discriminatory impact. New Horizons Rehab., Inc. v. Indiana, 400 F. Supp. 3d 751(S.D. Ind. 2019). "On this record, the Court finds that Indiana's facially neutral zoning scheme is being used as a proxy to evade prohibition of intentional discrimination, as proscribed by the Seventh Circuit." Further, the Court considers the appropriateness of a sprinkler requirement based on the residents' capabilities to respond to an emergency. "It [plaintiff nonprofit] asks DHS to waive the requirement of a sprinkler system because people who are capable of living on their own are not subject to that requirement, which results in *de facto* discrimination against people with intellectual and developmental disabilities." Finally, while local government and some neighbors may oppose a group home in a particular single-family residential zone, the response is a reminder of the intent and purpose of the federal Fair Housing Act: "The Court does not agree with the suggestion that it would be easy for these people to find housing, or that they have many options to choose from."

Fair Housing Summary Restatement: Housing For Individuals With Disabilities In Recovery for Substance Abuse Constitute A Family For Purposes of Land Use and Zoning Regulation and Health & Safety Requirements.

The federal Fair Housing Amendments Act protects unrelated individuals with disabilities in recovery for substance abuse who choose to reside together in a single-family dwelling. Local governments are prohibited in their land use and zoning regulations from singling out households of individuals with disabilities that operate in a family-like way and treating them differently than households of related individuals. Further, local government must recognize that recovery residences are residential uses, not commercial uses, and impose only those health and safety restrictions that are imposed on other single-family households. Fair housing compliance requires both the elimination of discriminatory regulations and barriers to housing for individuals with disabilities as well as affirmatively furthering housing opportunities.