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September 18, 2006

To the Honorable Members of Committee on
Zoning, Neighborhoods and Development
Common Council of the City of Milwaukee
Room 205 – City Hall

Re: Proposed Ordinance Relating to Regulations for Transitional Living Facilities

Dear Members of the Committee:

You have requested our opinion on the issue of whether the proposed ordinance relating to regulations for transitional living facilities may run afoul of federal fair housing law. Upon review, it appears that disabled occupants or owners of such facilities which serve disabled individuals could indeed mount a meritorious claim of such discrimination.

The proposed ordinance provides the following definition of a “transitional living facility:” it is “a premises, other than a community living arrangement or an adult family home, in which 3 or more adult residents are provided with personal care, treatment or services above the level of room and board but less than nursing care, including but not limited to supervision, monitoring, counseling, transportation or ongoing assistance with personal finances or medications, by a person who provides any of these services under a contractual arrangement.” File Number 051609, Part 6. The explicit language of this provision would certainly encompass residential facilities providing “treatment” and residential services to disabled individuals. In addition, we have confirmed with a representative of the Department of City Development that there are indeed facilities serving the disabled that are presently categorized as “transitional living facilities” although not all “transitional living facilities” serve the disabled.

The proposed ordinance also explicitly provides a definition for a “rooming house” that does not include any description of personal care, treatment or services. File Number 051609, Part 2. It then further provides that a “transitional living facility” that “fits both [the ordinance description of a transitional living facility] and the definition of a rooming house...shall be classified as a rooming house.” File Number 051609, Part 6. In other words, the ordinance treats at least some portion of transitional living facilities as the equivalent of a rooming house.

The proposed ordinance then would impose certain “additional regulations” that would apply to a “transitional living facility” but not to a “rooming house.” File Number 051609, Part 7. This includes: 1) on premises, 24-hour security guard surveillance; 2) security cameras at various locations on any such property; and, 3) “at least 50 square feet of outdoor recreation space for each person that may reside in the facility...located entirely on the premises...and...landscaped and fully enclosed by a fence or wall of...” a prescribed maximum height. *Id.*

The Federal Fair Housing Act Amendments (FHAA) provides in pertinent part that it is unlawful:

To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of...(B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available...

42 U.S.C. §3604(f)(2). The phrase “in the provision of services” has been authoritatively interpreted to apply to municipal zoning laws and regulations. See *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002); *Hemisphere Bldg. Co. v. Village of Richton Park*, 171 F.3d 436, 438 (7th Cir. 1999) (“the cases hold or assume...that the [FHAA] applies to municipalities, and specifically to their zoning decisions”); *Larkin v. Michigan Dep’t. of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996). One method of proving discrimination under this statute is to show intentional discrimination. This does not require, however, a showing of malice or discriminatory intent. A “plaintiff makes out a *prima facie* case of intentional discrimination under the FHAA merely by showing that a protected group has been subjected to explicitly differential-i.e. discriminatory-treatment.” *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir. 1995).

With regard to the proposed ordinance, therefore, a disabled person seeking to reside in a transitional living facility could argue quite strongly that the proposed ordinance is discriminatory because it explicitly treats such a facility quite differently from one that is declared by the ordinance to be its equivalent—a rooming house. We submit that whatever benevolent intentions may underlay the desire for further protections for only

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those residents of transitional living facilities, such differential treatment, no matter how well-intended, results in the proposed ordinance running afoul of the FHAA.

The proposed ordinance may fall to the mandates of the FHAA for a second reason. The statute also precludes discrimination against any individual "because of handicap" by "otherwise mak[ing] unavailable... a dwelling... ." 42 U.S.C. §3604(f)(1). This provision has been interpreted to mean that a municipality may not apply "land use regulations in a manner that will exclude people with disabilities entirely from zoning neighborhoods, particularly residential neighborhoods, or that will give disabled people less opportunity to live in certain neighborhoods than people without disabilities." *Howard v. City of Beavercreek*, 276 F.3d 802, 807 (6th Cir. 2002), quoting *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996).

The proposed ordinance contains a provision for outdoor recreation space of a certain dimension. If it turns out that certain residential neighborhoods do not contain that much space connected to individual houses in the neighborhood, the proposed ordinance would effectively exclude disabled people from living in transitional living facilities in those areas. If it does this, it also falls under the provisions of 42 U.S.C. §3604(f)(1).

For the foregoing reasons, we cannot opine that this proposed ordinance would meet the mandates of the FHAA. We are of course ready to answer any further questions you may have concerning these issues.

Very truly yours,



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