October 28, 2002

The Honorable Common Council
of the City of Milwaukee
Room 205, City Hall

Re: **Payment of Settlement in the Lawsuit Entitled**
Oconomowoc Residential Programs, Inc., et al. v. City of Milwaukee
Case No. 97-C-251; City Attorney No. 97-C-116

Dear Council Members:

Enclosed please find a proposed resolution. We ask that it be introduced and referred to the Committee on Judiciary and Legislation with the following recommendation.

The plaintiffs, a group home operator, two residents of the group home and a state advocacy group filed a lawsuit against the City of Milwaukee. They alleged that the City violated the federal fair housing law and the Americans With Disabilities Act by refusing to make an accommodation under the City's zoning ordinances to allow the operation of a group home at 2850 North Menomonee River Parkway. In the fall of 1996, the operator sought to establish a group home at that location for individuals suffering from developmental disabilities or traumatic brain injuries, some of whom also suffer physical disabilities that make them wheelchair-bound. The two individuals who sued the city sought to reside in this group home and had been placed for some time in a more restrictive setting of a nursing home. The zoning ordinance at issue proscribes the location of a group home if it is less than 2500 feet from another community based residential facility. In this particular instance, there were three such facilities within this area, with one only 358 feet from the proposed group home.

In October 1996, the operator filed an application for a variance with the Board of Zoning Appeals. Their application was heard in January 1997. In March 1997, the Board issued a decision denying the variance request.

The Board explained in its decision that the location posed dangers to the handicapped residents of the proposed facility because of the heavy traffic levels on the parkway at certain times of the week, the lack of sidewalks, the proximity of the river in which a resident of one of the nearby group homes had already drowned, and tendency of the river to flood. The Board also noted evidence that had been presented to it of this group home operator's problems at other locations, which included improper or inadequate treatment of its residents, a basement flooding problem, and police calls for disorderly or abusive actions by residents. The Board also noted that it had granted a number of variances in the past, and that Milwaukee bears a disproportionate burden of accommodating group homes, while surrounding suburbs have not.

In the wake of this decision, the operator and the other plaintiffs filed a federal lawsuit. In November, 1997, while the suit was pending, the City and the plaintiffs agreed to permit the operator to operate the group home for the two individuals named in the lawsuit, pending the outcome of the litigation.

In January 1999, the federal magistrate judge assigned to the case granted partial summary judgment to the plaintiffs and against the City. The City sought to have the federal district judge to reject her recommendation, but the judge in March 1999 adopted them. They concluded that the City, through the Board, had failed to make a reasonable accommodation under its 2500 foot spacing guideline. They determined that the evidence submitted to the Board was insufficient to demonstrate that the City would suffer an undue burden in permitting the group home to operate at the proposed location. All that remained for decision before the trial court was the amount of the plaintiffs' damages.

The court conducted a trial on damages in November, 2000. In the interim, the City had agreed to permit the operator to place the remaining number of proposed residents at the group home in order to limit the amount of any claimed economic damages. At trial, the group home operator sought more than $357,000 in lost profits as damages. The two individuals sought emotional distress and "unjustified institutionalization" damages of just under $1,000,000 each. The district court awarded the group home operator $207,841 in economic damages The judge awarded each of the two plaintiff residents $12,500. Upon petitions for attorneys fees totaling $310,649.73, he also awarded attorney's fees to the plaintiffs in the total of $260,181.31. The total of the amounts awarded is $493,022.31. He at no time, however, enjoined the City from continuing to enforce the spacing guideline in the ordinances.

In December, 2000, the City appealed to the Seventh Circuit Court of Appeals, arguing that the district court should have addressed the validity of the 2500 foot spacing guideline. The city also contended that the trial court should have concluded that the plaintiffs failed to carry their burden of showing that the City would not suffer an undue burden in permitting the operation of this group home at this location. The appellate court heard argument on this appeal in September 2001. It issued its decision on August 8, 2002.

The appellate court concluded that the burden rests on the City, and not the plaintiffs to establish that it will suffer an undue burden in making any requested accommodation to this zoning guideline. It further concluded that the City had not met its burden in this case because it had not shown that the dangers presented to the residents by the particular location or the operator's history of troubles would place an undue burden on the City's emergency services for persons in the house. It also concluded that concerns about the group home residents' safety were at best insufficient because they were only "anecdotal" or were at worst mere "stereotypes" about the disabled. It refused to address the legal issue of whether the 2500 foot spacing guideline was invalid under federal law. It awarded attorney's fees on the appeal of $49,822.70. The total of all the awarded damages, attorney's fees and interest is $590,912.81.

We have given serious and extensive consideration in this matter to filing a petition for certiorari with the United States Supreme Court. We have concluded that it would not be wise to seek further appeal in this case. We believe that it is unlikely that the Supreme Court would grant the petition and that we would not prevail even if the petition were granted.

We also believe that the City must now give further consideration to the manner in which it addresses requests for accommodations under the zoning code. Because it is likely that this process will take some time, and because interest continues to run on the judgment in this case, we believe that those determinations should be made separately.

Because payment of the judgment at this juncture is deemed in the best interests of the City of Milwaukee, we recommend payment of the aforementioned amount and have enclosed an appropriate resolution for your convenience.

Very truly yours,

GRANT F. LANGLEY
City Attorney

JAN A. SMOKOWICZ
Assistant City Attorney

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