CITY OF MILWAUKEE

Form CA-43

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October 15, 2003

Honorable John O. Norquist
Mayor of the City of Milwaukee
Room 201 – City Hall

To the Honorable Members of the
Common Council of the City of Milwaukee
Room 205 – City Hall

Craig Zetley, Chairman
Board of Zoning Appeals
809 North Broadway, 1st Floor
Milwaukee, WI 53202

Re: FHAA/ADA/Rehabilitation Act

Dear Ladies and Gentlemen:

This opinion is in response to a September 16, 2002 request from the Board of Zoning Appeals seeking legal advice as to the manner in which to proceed in cases involving application of the "2500 foot rule" to group living facilities. The opinion was initially requested in light of the decision rendered by the Federal District Court in *Oconomowoc Residential Programs v. City of Milwaukee*, which was subsequently affirmed by the United States Court of Appeals for the Seventh Circuit, 300 F.3d 775 (7th Cir. 2002).

The Fair Housing Act Amendments, ("FHAA"), the Americans with Disabilities Act, (ADA); and the Rehabilitation Act all require municipalities to consider the grant of a "reasonable accommodation" in the consideration of zoning approved for facilities which provide services to the "handicapped" and the "disabled." In all cases where zoning approvals, such as a special exception or a variance are required and an applicant requests a "reasonable accommodation" under the FHAA, the ADA or the Rehabilitation Act, the City is required by those acts to evaluate such approvals not only under traditional zoning code criteria but also in the context of

the pertinent federal statutes, regulations and the federal court cases setting forth standards for granting a "reasonable accommodation."

This opinion will address the zoning cases in which the City has been sued for failing to provide a "reasonable accommodation", the law and standards applicable to considering requests for a "reasonable accommodation" in zoning under the FHAA, the ADA and the Rehabilitation Act and will then continue to discuss various policy options available to the Mayor, the Common Council and the Board for establishing procedures to consider and act upon such requests in order to assure compliance with federal law.

I.

THE CITY CASES

Oconomowoc Residential Programs, Inc. et al. v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002) involved allegations that the City violated the FHAA in two ways. The City first applied a state statute and City ordinance to require Oconomowoc Residential Programs, Inc. ("ORP") to seek a variance for a proposed group home because it was within 2,500 feet of a similar facility. Next, the Board refused to grant the requested variance. The FHAA and the ADA apply in instances where the prospective residents of a community based residential facility are within the definition of "handicapped" and require municipalities to provide equal housing opportunities to handicapped persons by making "reasonable accommodations" to rules, policies, practices or services when necessary to afford equal housing opportunities to such persons.

The Seventh Circuit Court of Appeals did not determine whether the FHAA and the ADA preempt Milwaukee's 2,500 foot spacing ordinance because it determined that the City failed to reasonably accommodate ORP by refusing to grant the requested variance. Holding that the Board's consideration of whether the application met the ordinance criteria for a zoning variance did not provide a "reasonable accommodation", the court analyzed the application and the Board's denial based on federal case law applicable to consideration of a request for a "reasonable accommodation." That analysis was very different from the traditional certiorari review of Board decisions undertaken by Wisconsin state courts. The decision focused upon whether the request was "reasonable" and "necessary" to afford an "equal opportunity" to access housing under federal law rather than a review of the record before the Board.

In such instances, initially the burden is on the applicant to demonstrate that the accommodation sought meets the federal criteria. Once the applicant has made a *prima facie* showing, the City must demonstrate that the requested accommodation is unreasonable or creates an undue hardship for the City itself in order to justify a denial of the request. As the factors to be considered are different from the factors normally considered by the Board with respect to a

special use or a variance, different procedures must be utilized by the City in making a decision in order to comply with federal law.

Wisconsin Correctional Service, et al. v. City of Milwaukee, 173 F.Supp.2d 842 (2001), involved an application for a special use permit by Wisconsin Correctional Service ("WCS") to permit the relocation of a mental health clinic from 2023 West Wisconsin Avenue to 3716 West Wisconsin Avenue. The WCS application involved a request for a "reasonable accommodation" under the ADA and the Rehabilitation Act because the mental health clinic proposed was not a residential facility subject to the terms of the FHAA. The Board denied the WCS special use application and WCS initiated a federal court action contending that it had been denied a "reasonable accommodation."

The analysis undertaken by Chief Judge Stadtmueller in the WCS case was somewhat different from that undertaken by the Seventh Circuit in the ORP case. Rather than reviewing the Board's decision as a determination with respect to a "reasonable accommodation", Judge Stadtmueller held that the procedures followed by the Board in the conduct of its hearing were deficient because they were based on the wrong criteria, those applicable to a special use. Judge Stadtmueller held that the Board has the inherent power under state and federal law to consider requests for "reasonable accommodations" and that it must consider more extensive testimony as well as reasonable modifications to its normal special use criteria when deciding whether to grant a permit in instances where there has been a request for a "reasonable accommodation." 173 F. Supp. 852-853.

The court determined that the ADA and the Rehabilitation Act supercede local laws and require the Board to consider different factors and testimony in the context of a request for a "reasonable accommodation." The Board's failure to analyze the WCS application under the federal criteria was thus, in and of itself, a violation of the ADA and the Rehabilitation Act. The decision comprehensively outlined the procedures and testimony which the Board is required to take in analyzing such a request.

Remanding the WCS application to the Board, Judge Stadtmueller directed the Board to consider modifications to the special use criteria, stressing that the Board has an obligation to develop a complete record which addresses the criteria outlined in federal case law when considering such a request. On remand, the Board conducted extensive hearings to address the WCS application in light of the testimony and criteria held applicable to a "reasonable accommodation." It then found once again that the WCS application should be denied. The case currently remains pending in federal court for review of the Board's second denial.

The decision in the WCS case mandates extensive hearings by the Board to analyze requests for a "reasonable accommodation." Absent further action by the Common Council to clarify the procedures to be utilized in such situations, this office must advise the Board to continue to

conduct such extensive hearings in instances where there has been a request for a "reasonable accommodation" under the FHAA, the ADA or the Rehabilitation Act. This is the case even though the Chair of the Board has expressed concerns with respect to the administrative burdens upon the Board created by Judge Stadtmueller's mandate as well as the consequent necessity for the Board to take testimony and make determinations in areas well outside its area of expertise. We believe that it is necessary and appropriate for the Common Council and the Mayor to clarify the specific procedures which the City will utilize to consider such requests in the future.

II.

THE LAW

Section 62.23(7)(i), Stats. addresses community and other living arrangements, and provides the basis for creation of the "2500 foot rule" in the Zoning Code. The statute authorizes municipalities to ordain that such facilities may not be established within 2500 feet, or any lesser distance established by ordinance, of any other such facility. The Zoning Code defines various types of group homes, group foster homes and community living arrangements and currently classifies those facilities which are more than 2500 feet from another similar facility as a limited use. Where the distance between such facilities is less than 2500 feet, such uses are currently classified as a special use. Prior to the recodification of the Zoning Code in 2002, facilities located less than 2500 feet from similar facilities required a zoning variance.

We must note that the terms of Section 62.23(7)(i), Stats. providing for creation of the "2500 foot rule" are currently subject to challenge in pending Federal Court litigation. *Vincent Z., et al. v. State of Wisconsin*, Eastern District Case No. 96-CV-01101 remains pending before Judge Curran. In an earlier decision in that case, the court indicated that the state's 2500 foot rule may be invalidated, although the precise scope of the invalidation was not determined. A decision in this case striking down the statutory authority for creation of the 2500 foot spacing requirement in the Zoning Code could have a major impact both on the Zoning Code and the ability of the City to regulate the siting of group homes.

While Section 62.23(7)(i) authorizes municipalities to establish spacing requirements for community and other living arrangements, it does not mandate a particular distance requirement or indeed any distance requirement. Thus the City may legislatively determine whether any spacing requirement is to be imposed upon community and group living facilities which serve handicapped and disabled individuals. Group living facilities for individuals who are not handicapped or disabled are not subject to the FHAA, the ADA or the Rehabilitation Act and thus are not addressed by this opinion.

Significantly, Section 62.23(7)(i)(9), Stats., also provides that the Common Council may undertake an annual review of community and other living arrangements and, in cases where

such a facility "poses a threat to the health, safety or welfare of the residents of the City", the Common Council may order such facility to cease operation. However, to our knowledge, this procedure has never been invoked in Milwaukee.

Non-residential facilities, such as the mental health clinic proposed by WCS, are variously classified as permitted, special and limited uses or wholly prohibited by the Zoning Code, depending upon the location and nature of the facility. When a nonresidential facility serves handicapped and disabled individuals it may be subject to the ADA and Rehabilitation Act and thus also require special review when a "reasonable accommodation" is requested.

The FHAA, 32 USC § 3601 *et seq.*, forbids housing discrimination based on handicap or disability. The ADA, 42 USC § 12101 *et. seq.*, forbids discrimination against individuals with disabilities in the provision of public services, programs and activities. While the ADA does not specifically address housing and is broader in scope than the FHAA, it forbids discrimination against people with disabilities in the provision of public services, programs and activities. Zoning is considered a public activity and is covered by both the FHAA and the ADA. *Oconomowoc Residential Programs v. City of Greenfield*, 23 F.Supp.2d 941, 951 (E.D. Wis. 1998). The Rehabilitation Act, 29 U.S.C. §794, parallels the ADA and is applicable to entities receiving federal funding; thus it applies to the City of Milwaukee and to the exercise of zoning authority by the City.

The requirements for "reasonable accommodation" under the FHAA, the ADA, and the Rehabilitation Act are the same. *Oconomowoc*, 300 F.3d 783.

> "The FHAA requires accommodation if such accommodation (1) is reasonable, and (2) necessary, (3) to afford a handicapped person the equal opportunity to use and enjoy a dwelling. 42 U.S.C. §3604(f)(3)(b)."

As noted above, initially, the burden is on the applicant to demonstrate that the accommodation sought meets the foregoing requirements. Once the applicant has made a *prima facie* showing, the City must demonstrate that the requested accommodation is unreasonable or creates an undue hardship for the City, not just the surrounding neighbors, in order to justify a denial of the relief sought.

The factors to be considered with respect to the grant of a "reasonable accommodation" include three key elements: "reasonable," "necessary," and "equal opportunity," which were defined in the ORP decision, at 300 F.3d 784, as follows:

1) "Reasonable"
   "An accommodation is reasonable if it is both efficious and proportional to the costs to implement it." (Citation omitted).

2) "Necessary"
An accommodation is necessary if it "will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability."
"In other words, . . . without the required accommodation they will be denied the equal opportunity to live in a residential neighborhood."

3) "Equal Opportunity"
"In this context, 'equal opportunity' means the opportunity to choose to live in a residential neighborhood. . .. Often, a community-based residential facility provides the only means by which disabled persons can live in a residential neighborhood, either because they need more supportive services, for financial reasons, or both." (Citations omitted).

These somewhat vague criteria have been liberally construed by the federal courts to favor the grant of requested accommodations.

One example of the difference between the federal requirements and traditional zoning criteria arose in the context of the ORP case relative to safety. Even though the safety of both residents and the neighborhood in general was addressed in general terms in testimony before the Board, the court held that the Board cannot ". . . rely on the anecdotal evidence of neighbors opposing the group home as evidence of unreasonableness." 300 F.3d 775. The City was held to have presented no valid evidence that the actual residents of the Oconomowoc facility would present a threat to their own safety or that of others. "A denial of a variance due to public safety concerns cannot be based on blanket stereotypes about disabled persons rather than particularized concerns about individual residents." (Citations omitted). Thus, generalized concerns about how some disabled individuals might act could not even be considered in that case and cannot be considered in other cases. Only testimony concerning the actual residents of a facility, who may or may not be identifiable, can be considered in such instances.

POLICY OPTIONS

I. Requests for a "reasonable accommodation".

The City is only required to consider making a "reasonable accommodation" to its policies following a specific request for a "reasonable accommodation." Notwithstanding the procedure which is ultimately identified by the Common Council for the review of such requests, we believe that it is important to immediately implement a procedure for requesting a "reasonable accommodation" along the lines set forth in our February, 2002 legal opinion.

II. Procedures for the consideration of requests.

There are a number of alternatives open to the City with respect to the establishment of a formal procedure for the review of requests for a "reasonable accommodation."

1. The Common Council has the power to identify the Board as the entity responsible for consideration of requests for a "reasonable accommodation." The authority for the exercise of such responsibility by the Board can be derived either from the specific directives set forth by Judge Stadtmueller in the WCS case or created, pursuant to Zoning Code amendments which would expressly confer the power and authority for such determinations upon the Board.

   Our research indicates that in most jurisdictions around the country, such determinations are made by bodies serving the same functions as boards of zoning appeals in Wisconsin. However, the Council may also wish to consider the time and administrative burdens involved in the allocation of such responsibilities to the Board and the fact that the Board does not currently possess any particular expertise in this area. The allocation of responsibility for conducting extensive "reasonable accommodation" hearings to the Board will require supplemental hearings and thus could have an impact upon the overall conduct of business by the Board as well as the time required for the Board to consider and act upon other requests which do not involve a "reasonable accommodation."

2. Rather than allocating responsibility for consideration of request for a "reasonable accommodation" to the Board the Common Council could allocate such responsibility to an existing board or commission, for example the Administrative Review Appeals Board.

3. The Common Council also has the power to adopt ordinance provisions creating a new board or commission, which could be modeled after the Board, which would have as one function the review of and action upon requests for a "reasonable accommodation". Such a body could also have broader functions, such as the review of City projects for compliance with the ADA as well as overall coordination of ADA issues.

4. Another alternative is adoption of an ordinance designating a specific city officer or official, such as the Commissioner of City Development or the Commissioner of Neighborhood Services, to conduct necessary hearings and act upon requests for a "reasonable accommodation." Such an ordinance should also create procedures for the appeal of such determination; for example, the Board or some other municipal administrative tribunal such as the Administrative Review Appeals Board could act to review such decisions on appeal.

5. A fifth alternative is provision for a third-party hearing examiner, to be retained by the City and assigned responsibility for conducting hearings and reaching decisions.

Any ordinance adopted by the Common Council creating procedures to be used by the City in considering requests for a "reasonable accommodation" should also set forth standards for review of such requests consistent with the requirements of the *Oconomowoc* and *WCS* cases as well as emerging federal case law generally.

III. Comprehensive Plan element.

The preparation of a Comprehensive Plan element by the City's Plan Commission reviewing the availability of and demand for facilities to serve the disabled could assist the Common Council in considering Zoning Ordinance amendments and also aid in the determination as to whether particular requests for a "reasonable accommodation" meet the requisite standards. This Comprehensive Plan element could be modeled after the Transmission Tower Policy, which was adopted by the Plan Commission and approved by the Common Council and which set forth overall planning objectives relative to such towers.

The Plan Commission could assess all geographic areas of the City to determine the numbers and types of community-based residential facilities and social service facilities which are currently located within the City, whether there is a need for additional facilities in particular areas, the level of utilization of existing facilities and the unused capacity for the provision of such services. The focus of the Plan Commission's assessment could either be limited to only facilities which serve the disabled or expanded to cover all group living and social service facilities.

The planning division of the Department of City Development currently maintains an Inventory of Community Living Arrangements, Adult Family Homes and Group Shelter Care Facilities in Milwaukee County. A similar inventory for non-residential facilities which provide services to the disabled was prepared in July of 2000 for the Social Services Task Force and is also attached. Those inventories could serve as a starting point for the preparation of a Comprehensive Plan element.

IV. Zoning Code amendments.

In addition to addressing a procedure for the review of a requests for a "reasonable accommodation" the Common Council may also wish to consider amendments to the Zoning Code in order to permit certain types of facilities as a mater of right, to encourage the location of facilities in areas where a need for additional services exists and to reduce the overall number of requests for zoning approvals.

One option, relative to group living facilities, would be for the Common Council to adopt Zoning Ordinance amendments which would allow certain types of group living facilities to be established either as permitted uses or as limited uses by relaxing or removing the 2,500 foot spacing requirement. For example, small group residential facilities, such as those serving eight or fewer disabled individuals, could be permitted as a matter of right so long as the nature of the prospective residents disabilities and the operation of the facility do not present public health, safety, and welfare concerns and as long as appropriate staffing security and supervision is in place pursuant to the regulations utilized by the State of Wisconsin in granting licenses for the operation of such facilities. Classifying some residential facilities as permitted would significantly reduce the number of required hearings to address requests for a special use or a "reasonable accommodation." Current Zoning Ordinance provisions applicable to group living facilities serving non-disabled individuals, such as juvenile residential facilities and various correctional facilities, could be maintained and applications for the establishment of such facilities would remain subject to the 2,500 foot spacing requirement.

An alternative would be to simply modify the definition of the term "family" to more broadly encompass the disabled. The Zoning Code defines "family" in sec. 295-201-181 as:

> "FAMILY means a single person or group of persons who are related by blood, marriage, adoption or affinity and live together in a stable family relationship."

The Local Officials Guide published by the National league of Cities, a copy of which is attached, indicates on page 7 that, according to the League, the addition of the following sentence would be consistent with the requirements of the FHAA.

> "In addition, up to eight persons, including six or fewer persons with a disability or handicap and not to exceed two staff residents in a dwelling shall be considered a family."

Such an amendment would allow small group living facilities to be established as a matter of right under the Zoning Code.

The Common Council could also consider ordinance amendments which would further enhance the ability of social service facilities to provide needed services within the City as a permitted use. The preparation of a Comprehensive Plan element detailing the location, existing availability and unmet needs for such social service facilities could assist the Council in amending the Zoning Ordinance in order to enhance the ability of essential social service facilities to fulfill identified needs without formal Board action.

We recognize that this opinion raises significant policy issues for Milwaukee and we look forward to working with City policy makers and departments to address such issues. Please feel free to rely upon this office in the event that more detailed information is necessary or if there are questions concerning this opinion or the City's obligations under federal law.

Very truly yours,

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