CITY OF MILWAUKEE

Form CA-43

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

Re: Proposed Amendment to the 2,500 Distance Requirement for Group Living Facilities and Settlement of *Options for Community Growth, Inc., et al. v. City of Milwaukee*, Case No. 03-C-1275

Dear Members of the Committee:

You have asked for our formal opinion concerning the proposed amendment of the City's ordinances relating to the 2,500 foot spacing requirement for group living facilities, proposed as a part of the settlement of the above-noted lawsuit. The Committee and, in fact, the entire Common Council should be aware that we have given substantial and detailed consideration to the question of the continuing validity and enforceability of the City's distance requirement, as it relates to those residences serving the disabled. It is our opinion that it is in the best interests of the City to repeal that requirement in so far as it relates only to group living facilities for the disabled. The proposal will preserve the City's ability to regulate the distances among facilities serving the non-disabled, and allow the City to take into account the location of those serving the disabled. Under terms of the proposed settlement, the City is also free to seek change in the pertinent State legislation in order to preclude the clustering of group living facilities for both the disabled and non-disabled in any neighborhood.

By way of necessary background, this is not the first lawsuit in which the validity and enforceability of the City's 2,500 foot regulation has been the subject of attack under the Federal Fair Housing Act Amendments. In the earlier litigation, *Oconomowoc Residential Programs, Inc. et al. v. City of Milwaukee*, No. 97-C-251, the plaintiffs also sought to invalidate both the City's ordinance and the State's connected statute, Wis. Stat. § 62.23(7)(i). While the federal court of appeals in *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 787-8 (7th Cir. 2002) explicitly refused to consider whether federal fair housing law preempted the City's 2,500 foot regulation, it did consider whether the City had to grant an

accommodation to that regulation to the group home and residents who had brought the action. It found that such an accommodation was "reasonable and necessary," even where the City had presented substantial evidence of: 1) numerous prior complaints about the group home operator in its management of other residences, 2) the home's proximity to a nearby river with a history of flooding, 3) the high volume of traffic along the road running in front of the group home, and 4) the lack of sidewalks alongside that road. *Oconomowoc,* 300 F.3d at 785-7. The appellate court unequivocally concluded that such evidence was insufficient for the City to deny the request for the accommodation. *Id.*, 300 F.3d at 785-7.

It is our understanding that as a consequence of this decision, the Board of Zoning Appeals has approved virtually all requests for an accommodation from providers of group residential facilities. We are aware of only one recent denial, and that was for an operator which had not yet obtained licensing from the State and refused or was unable to identify whether the residents to be served would be disabled.

It is important to note, furthermore, the following conclusion by the federal appellate court: "[b]ecause the spacing ordinance draws a nearly half mile circle around each existing group home, it currently precludes new group homes from opening in most of the City of Milwaukee, thus preventing disabled adults who cannot live without some support from residing in almost all residential neighborhoods within the City." *Oconomowoc,* 300 F.3d at 787. Milwaukee has thus virtually "zoned out" group homes from the City by virtue of this spacing ordinance. Such an action would certainly result in intense scrutiny from the federal courts.

The lawsuit brought by Options for Community Growth, Inc. and other group living facility operators seeks to address directly the issue that was not resolved in the *Oconomowoc Residential Programs* case. The plaintiffs seek to invalidate both the City's ordinance and the State's statute. While they have all obtained accommodations to the 2,500 foot regulation, they seek substantial damages for lost income from either having to obtain such relief or from the delay in obtaining it. In addition, as permitted by federal law, they seek their reasonable attorney fees and costs.

This kind of legal attack against state or local spacing laws has been mounted on a number of prior occasions. The great weight of the decisions addressing this question stands on the side of invalidating such regulations. One federal court of appeals has invalidated such legislation. *Larkin v. State of Mich. Dept. of Social Services*, 89 F.3d 285, 289-90 (6th Cir. 1996). In addition, three federal district courts have also invalidated such legislation. *Horizon House Developmental Servs., Inc. v. Township of Upper Southampton*, 804 F.Supp. 683, 693-4 (E.D. Penn. 1992), aff'd. without opinion 995 F.2d 217 (3rd Cir. 1993)(Table); *Arc of New Jersey, Inc. v. State of New Jersey*, 950 F.Supp. 637, 644-6 (D. N.J. 1996) and *Oconomowoc Res. Programs,*

Inc. v. City of Greenfield, 23 F.Supp.2d 941, 954 (E.D. Wis. 1998). Perhaps most significant of these cases is Judge Curran's decision in *Greenfield, supra*. He has found that the specific Wisconsin statute at issue is preempted by the Federal Fair Housing law because the provisions of the State law "are an obstacle to the accomplishment and exclusion of the full purposes and objectives of Congress and to that extent they are preempted." *Id.* He reached this conclusion after noting that spacing requirement "substantially limits the meaningful access to housing for the developmentally disabled." *Id.*. As noted above, that is virtually the same analysis as applied by the appellate court in the case involving Milwaukee, *Oconomowoc Res. Progs., Inc. v. City of Milwaukee*, 300 F.3d at 787.

Judge Curran was also concerned that there was not any evidence "in the record [to establish] that the Wisconsin spacing provision qualifies as an exemption under either law and there is nothing in the record to establish a justification for the law." *Greenfield*, 23 F.Supp.2d at 954. With regard to the issue of justification, Judge Curran noted that there was not "a scintilla of evidence that disabled people present a public health or safety threat to other residents of a community." *Id.*.

We can represent to the Council that in pretrial proceedings in the *Options* litigation, the plaintiffs have presented substantial evidence that reinforces Judge Curran's conclusions about public health and safety. We have not been able to find anything but very insubstantial evidence to rebut this contention.

There is only one federal court that has upheld a spacing requirement. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 98 (8th Cir. 1991). The particular circumstances of *Familystyle*, however, are quite different from a spacing requirement imposing almost a one-half mile distance between group homes. The operator of *Familystyle* was seeking to add three new group homes to a group of 18 existing ones located on a single campus, which would have resulted in a total of 21 group homes having 130 people with mental illness within an area of one and one-half blocks. Just as significantly, the analysis employed by the *Familystyle* court to uphold the 1,500 foot spacing requirement at issue there has been rejected by two subsequent federal courts of appeals (*Bangerter v. Orem City Corporation*, 46 F.3d 1491, 1503 (10th Cir. 1995) and *Larkin*, 89 F.3d at 290). *Familystyle* rested its analysis upon an aim of protecting the disabled from re-institutionalization within a neighborhood setting, but the Supreme Court has specifically rejected a similar argument grounded on a claimed interest in protecting those individuals subject to federal legal protection in the context of a claim of employment discrimination. *See International Union, United Automobile Aerospace* and *Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*., 449 U.S. 187, 197, 200 (1991).

Furthermore, it has been our experience from numerous informal contacts by attorneys representing other municipalities within this state that other Wisconsin municipalities have either abrogated their spacing distance ordinances or have refused to contest any request for an accommodation under those distance ordinances. Just as importantly, it is our understanding that the State of Wisconsin is not willing to undertake a determined effort to support the validity of the State statute or any municipal ordinance imposing any spacing requirement as authorized under State law.

As a consequence of all of the aforementioned circumstances, it is our considered opinion that it is in the best interests of the City of Milwaukee to enter into a settlement agreement in the above-noted case that includes an ordinance withdrawing the 2,500 foot spacing requirement as applied only to community living facilities for the disabled. Although there is some chance that the federal courts may uphold a legal challenge to the ordinance, in reality, with the decision in *Oconomowoc Res. Programs, Inc. v. City of Milwaukee, supra*, there is little or no basis for refusing any request for an accommodation under the law.

Just as importantly, by passing the ordinance presently before the Committee, the City would preserve its power to regulate the placement of community living facilities for individuals who are not disabled, something that it may not be able to do in the event that a federal court invalidates the entire Wisconsin statute. There is no guarantee that the state would enact legislation continuing a distance requirement of up to 2,500 feet even for such facilities, or that it would allow cities to take facilities serving the disabled into account in imposing any such requirement.

Lastly, and perhaps most importantly, the proposed settlement provides Milwaukee and other Wisconsin municipalities with the opportunity to advocate to the State Legislature for a change in the law that would address meaningfully what may be the greatest concern about the proliferation of community living arrangements. We have engaged in lengthy and difficult settlement discussions in this matter, seeking in part an agreement by the plaintiffs as to legal provisions that would prevent clustering of group homes within a very small area. We have been unable to reach a stipulation on this issue, but the plaintiffs are willing to enter into the proposed settlement, even with the knowledge that Milwaukee and other municipalities may seek legislation to precluding clustering. One of the obvious concerns, as expressed by various members of the Common Council itself, is that such a clustering would effectively change the character of a residential neighborhood, and the City has a serious interest in preventing such a turn of events. That interest was evident in the *Familystyle* case, and it remains the most compelling legal argument for upholding some type of regulation in this area.

On balance, therefore, we recommend that the Committee and the Common Council adopt the proposed ordinance as a part of the settlement agreement in this litigation. We look forward to answering any further questions that the members of the Council or this Committee may have regarding this matter.

Very truly yours,

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