CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511

March 6, 1998

OPINION 98-002

TO: George Carran, Zoning Administrator

FROM: Eunice Gibson, City Attorney

RE: Community Living Arrangements - 3 Susan Circle

BACKGROUND

An application for an occupancy permit for a community living arrangement has been presented to the Zoning Administrator for an eight-bed facility at 3 Susan Circle in the Eighteenth Aldermanic District. Preliminary information indicates that there is an issue as to the number of authorized community living arrangements (CLA) beds currently in the Eighteenth District. The ambiguity in the capacity of CLA occupancy in the Eighteenth District lies in the capacity of the Georgetown CBRF at 1601 Wheeler Road. We are advised that the Georgetown is licensed by the Department of Health and Family Services for a capacity of 73 but is zoned as a Planned Unit Development (PUD) with a requested and authorized capacity of 63.

The population of the Eighteenth District is approximately 9,433 people[1]. One percent of 9,433 is 94. If the capacity of the Georgetown is 73, the proposed CLA at 3 Susan Court will elevate the capacity of the Eighteenth District to 102; and if the capacity of the Georgetown is sixty-three as contained in its PUD, the proposed CLA at 3 Susan Court will bring the capacity of the Eighteenth District to 92, two (2) below the one percent (1%) district capacity.

CLAs are a permitted use in the R1 Single-Family Residence District so long as "the total capacity of all community living arrangements in an aldermanic district has not and will not by the inclusion of a new community living arrangement exceed twenty-five (25) persons or one percent (1%) of the population, whichever is greater, of such district". Sec. 28.08(2)(b)11.d, Madison General Ordinances (MGO).

You have requested our opinion on whether you should withhold the permit for the 3

[1]This population figure is based on the 1990 census and a 1998 Planning Unit estimate that the population of the Eighteenth District has not changed.

Susan Circle CLA pursuant to sec. 28.08(2)(b)11.d, MGO, or whether its enforcement should be withheld because of any federal fair housing regulations. For the reasons stated below, I am of the opinion that you should determine the capacity of CLAs in the Eighteenth District and issue or withhold said permit pursuant to sec. 28.08(2)(b)11.d., MGO, and sec. 62.23(7)(i)2., Wis. Stats.

DISCUSSION

Pertinent to your inquiry, sec. 62.23(7)(i)2., Stats., establishes a twenty-five (25) persons or one percent (1%) of the aldermanic district restriction on the free location of group homes serving five or more unrelated adults or children. In relevant part, sec. 62.23(7)(i)2., Stats., provides:

> *. . . In any city of the . . . 2nd . . . class, where the capacity of community living arrangements in an aldermanic district reaches 25 or one percent of the population, whichever is greater, of the district, the city may prohibit additional community living arrangements from being located within the district. Agents of a facility may apply for an exception to the requirements of this subdivision, and such exception may be granted at the direction of the city.*

The statute implies a right on the part of a community living arrangement to locate without zoning approval, so long as the total capacity of such community living arrangements does not exceed 25 or one percent of the aldermanic district, which ever is greater. This right with respect to community living arrangements with eight or fewer residents is expressly stated in sec. 62.23(7)(i)3., Wis. Stats., except that the establishment of the facility must also satisfy the distance restriction of 2,500 feet found in sec. 62.23(7)(i)1., Stats.

In addition, sec. 46.03(22), Wis. Stats., renders ineffective any deed restriction limiting the use of property to single-family or two-family residences as applied to community living arrangements with a capacity of eight or less.

Secs. 62.23 (7)(i), and 46.03(22), Stats., and 28.08(2)(b)11.d, MGO, are presumed to be constitutional and will be upheld unless shown to be unconstitutional beyond a reasonable doubt. Dog Federation v. City of South Milwaukee, 178 Wis. 2d. 353, 359, __ N.W.2d __ (1993). Therefore, because secs. 62.23(7)(i) and 28.08(2)(b)11.d. apply to CLAs for the handicapped and non-handicapped and the disabled and non-disabled equally, any unconstitutionality must be shown beyond a reasonable doubt. In this situation, Tellurian U.C.A.N. must present evidence and bear the burden of proof if it wishes to assert that the capacity restriction is unconstitutional.

On March 2, 1998, our office spoke with Mitch Vesaas of Tellurian U.C.A.N. Mr. Vesaas indicated that the proposed facility at 3 Susan Circle was to house adolescent boys, 15-18 years of age, with mental health and AODA disabilities. The boys also may be juvenile

offenders. Assuming 3 Susan Circle will be used by persons with disabilities, the amendments to the 1988 Fair Housing Act are implicated.

Under the Fair Housing Act, it is unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of (42 U.S.C. sec. 3604(f)(1)) * * * (b) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available. In addition, discrimination includes a refusal to make reasonable accommodation in rules, policies, practices or services when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. 42 U.S.C. sec. 3604(f)(3)(B).

In U.S. v. Village of Marshall, Wis., 787 F. Supp. 872 (W.D. Wis. 1991), a case reversing the Village's denial of an exception to locate a CLA within 2500 feet of another, the Court indicated that the statutory prohibition against locating community living arrangements within 2500 feet of another are both rules and policies subject to "reasonable accommodation" under the Fair Housing Act. It is our opinion that the population density restriction of 25 or one percent (1%) of the population for the district is likewise a rule or policy subject to the Fair Housing Act.

A reasonable accommodation is one which would not impose an undue hardship or burden upon the entity making the accommodation and would not undermine the basic purpose which the requirement seeks to achieve. (Citations omitted). 787 F. Supp. 878. The Village of Marshall Court made note that no evidence before the Village Board considered that the proposed location of the group home would undermine the purpose of Wisconsin's spacing requirement or that the presence of two relatively small group facilities would create the type of density which the Wisconsin Legislature sought to avoid. 787 F. Supp. 878-79.

Moreover, an accommodation is reasonable if it is "feasible and practical under the circumstances." 24 C.F.R. § 100.204, example (2) 1990. Stated otherwise, an accommodation is unreasonable if it entails undue financial or administrative burdens, or requires "fundamental" or "substantial" modifications. (Citations omitted). Tellurian U.C.A.N. v. Goodrich, 178 Wis. 2d 205, 216, 504 N.W. 2d 342 (1993).

In Goodrich, Id., the Court states:

> *The accommodation provision in 42 U.S.C. § 3604 does not require a municipality to surrender its discretion under sec. 62.23(7)(i)1., Stats., whether to grant an exception to the distance restriction. The federal statute requires only a "reasonable" accommodation. If the requested exception is infeasible or impractical or would impose undue financial or administrative burdens, the municipality need not grant it. The village cites no evidence that such problems would arise were it to grant the exception. In the absence of such problems,*

accommodation by a grant is reasonable.

To date, it is unclear whether the proposed siting of a CLA at 3 Susan Circle will cause the total capacity of all community living arrangements in the Eighteenth Aldermanic District to exceed one percent (1%) of the district population. This issue must be addressed by zoning first.

However, in U.S. v. Village of Palatine, Ill., 37 F. 3d 1230 (7th Cir. 1994), the Court made clear that the Village of Palatine could not be found to have failed to reasonably accommodate Oxford House-Mallard because Oxford House-Mallard never invoked the procedures that would allow the Village to make such an accommodation. Analogizing the Palatine situation to ours, if you determine that 3 Susan Circle's proposed 8 occupants will bring the 18th District's capacity to 92, nothing further needs to be done. But, if you determine that 3 Susan Circle's 8 occupants will elevate the 18th District capacity to 102, Tellurian will be required to apply for an exception to the one percent (1%) capacity limit, and such exception may be granted at the direction for the City.[2] ("the zoning process, including the hearings on applications for conditional use permits, serves [the] purpose" of enabling a city to make a reasonable accommodation in its rules, policies, and practices. The City must be afforded the opportunity to make such an accommodation). Citing Oxford House, Inc. v. City of Virginia Beach, 825 F.Supp. 1251, 1260,1261 (E.D. Va. 1993). Id. At 1233.

Therefore, I am of the opinion that you should determine the capacity of the community living arrangements in the Eighteenth District and issue or withhold said permit pursuant to sec. 28.08(2)(b)11.d., MGO, and sec. 62.23(7)(i)2., Wis. Stats. The withholding of said permit nevertheless enables Tellurian to apply for a conditional use for its proposed facility.

If you have any further questions concerning this matter, please don't hesitate to contact James L. Martin, Assistant City Attorney, of my staff.

Eunice Gibson, City Attorney

cc: Ald. Roberta Kiesow, District Eighteen

[2]Based on sec. 28.08(2)(c)14., MGO, a conditional use must be requested of the Plan Commission since such an exception to the zoning code is not a listed authorized variance under sec. 28.12(8)(d), MGO. I would note that sec. 28.08(2)(c)14. has no capacity limit.