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

July 20, 1998

**OPINION 98-005**

TO: City of Madison Plan Commission

FROM: Eunice Gibson, City Attorney

RE: 5301 Kingsbridge Road - Conditional Use

You have asked my opinion on whether or not there has been a regulatory taking regarding the application for a community living arrangement at 5301 Kingsbridge Road based on the Common Council's passage of Ordinance No. 12,132 reinstating in Madison General Ordinances the 2,500 feet distance limitation for community living arrangements found in §62.23(7)(i)1., Wis. Stats. For the reasons stated herein, I do not believe there has been a regulatory taking as it relates to community living arrangements; nor did Georgia's Garden, Inc. acquire a vested right to receive a certificate of occupancy in violation of state statute and absent proof all of the conditions for issuance of a certificate having been met.

## BACKGROUND

Prior to December 17, 1993, Madison General Ordinances tracked state statutes regarding the prerequisites for siting community living arrangements within the City. Pursuant to Sec. 28.08(2)(b)11, Madison General Ordinances (MGO), a community living arrangement for not more than eight (8) persons being served by the program was a permitted use provided: a) that the loss of any state license or permit by a community living arrangement be an automatic revocation of that facility's use permit; b) that the applicant disclose in writing the capacity of the community living arrangement; c) that no other community living arrangement is within two thousand five hundred (2,500) feet of the site of the proposed facility; and d) that 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.

On December 17, 1993, the Common Council repealed §28.08(2)(b)11.c., MGO, which stated:

> *"That no other community living arrangement is within two thousand five hundred (2,500) feet of the site of the proposed facility."* Ordinance No. 10,790.

Nevertheless, § 62.23(7)(i)1., Stats., provides in pertinent part:

> *No community living arrangement may be established after March 28, 1998 within 2,500 feet or any lesser distance established by an ordinance of the City, of any other such facility. Agents of a facility may apply for an exception to this requirement, and such exceptions may be granted at the discretion of the City...(emphasis supplied).*

In the week prior to March 22, 1998, the City of Madison (the "City") through George Carran, Zoning Administrator, received information that Georgia's Garden, Inc. was interested in opening a halfway house in the City. On March 27, 1998, Sarah Groth, on behalf of Georgia's Garden Inc., informed Mr. Carran that "... we have purchased property at 5301 Kingsbridge Road in the City of Madison.[1] We propose to house up to eight adult women for periods from three months to one year... We are in the process of making application for a CBRF license. We are also considering licensure as a nonmedical Alcohol and Drug Abuse treatment facility."

On April 16, 1998, Mr. Carran indicated to Sarah Groth, Georgia's Garden Inc., that "your facility, a community living arrangement by our definition, is permitted." Ms. Groth was advised that she will need to apply for a certificate of occupancy and complete a group Home Registry form after being licensed by the State of Wisconsin, Department of Health and Family Services. (Emphasis supplied).

On May 8, 1998, prior to state licensure, Georgia's Garden, Inc., applied for a certificate of occupancy for a community living arrangement (8 and under) for 5301 Kingsbridge Road. Before Georgia's Garden received a state license and prior to the issuance of an occupancy permit, the Common Council reinstated the state law distance requirement in Madison General Ordinances. Georgia's Garden was notified on May 21, 1998, that a community living arrangement at 5301 Kingsbridge Road would need a conditional use permit. A conditional use permit application to operate a community living arrangement for eight adult women located at 5301 Kingsbridge Road was made to the Plan Commission on June 3, 1998.[2]

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[1]City believes that only an offer to purchase was accepted and that the closing did not occur until May 18, 1998.

[2]To date, no state license for a community living arrangement at 5301 Kingsbridge Road has been presented to the City.

## DISCUSSION

To prevail on a regulatory taking claim, the plaintiff must establish that a lawful restriction has been imposed such that the plaintiff has been permanently prevented from using its property in any way. Madison Landfills, Inc. v. Dane County, 183 Wis.2d 282, 291, 515 N.W.2d 322 (1994).

The state requires cities to allow community living arrangements with a capacity of 8 or fewer persons to locate in any residential zone, without being required to obtain special zoning permission [conditional use permit]. As a kind of quid pro quo, such a facility shall not be closer than 2,500 feet of an existing facility and the population of facilities shall not equal 25, or greater than one per cent of the population of an aldermanic district, whichever is greater. At all times pertinent to the application for a CLA at 5301 Kingsbridge Road, §62.23(7)(i)1., Stats., has restricted the location of a proposed CLA where an established CLA is within 2,500 feet.

In Reginald C. Bruskewitz, v. Tellurian, Inc., Case No 98CV1346, Dane County Circuit Court, a case involving a citizen enforcing § 62.23(7)(i)1., Stats., Judge Ebert interpreted the City's repeal of the 2,500 feet limitation on the siting of a CLA as ineffective at establishing any lesser distance by an ordinances of the City. Judge Ebert stated:

> *...[T]he statute by its very language in my opinion is very clear, and that is that no community living arrangement may be established within 2,500 feet, again emphasizing, or any lesser distance established by an ordinance of the City.*
>
> *I do not believe that the repeal of an ordinance section is the establishment of a lesser distance. Had the City intended to do that, it certainly could have when it repealed the 2,500 foot restriction. The City has to be presumed to be aware of the state statute, and I believe that the state statute is controlling and clear on its face. Had the city decided that the 2,500 foot restriction was too great, it could have set any restriction it cared to, and it did not. It was silent on the issue totally, and by default the state statute controls, and that is that no CLA may be established within 2,500 feet of another existing CLA or facility. Obviously, the statute then says that the agents of a facility may apply for an exception to this requirement which may be granted at the discretion of the City." Excerpts of transcript, pp. 2-3.*

Judge Ebert granted a permanent injunction prohibiting Tellurian, Inc. from siting a CLA at 5315 Old Middleton Road, based on the fact another CLA was within 2,500 feet of said address and the City having not granted an exception [conditional use] in its discretion. Judge Ebert's decision is persuasive on the issue that the City did not establish a lesser distance for

CLAs and that by the repeal of the 2,500 feet distance limitation, the City's ordinance became silent on the issue and the state statute controlled.

No regulatory taking is implicated by the recreation of the 2,500 feet language in Madison General Ordinances. In Zealy v. City of Waukesha, 201 Wis.2d 365, 548 N.W.2d 528 (1995), the property owner sought compensation from the City for zoning a portion of his property conservancy in order to protect wetlands. In rejecting Zealy's taking claim, the court stated:

> *Although phrased in slightly differing terms in the cases, the rule emerging from opinions of our state courts and the United States Supreme Court is that a regulation must deny the landowner all or substantially all practical uses of a property in order to be considered a taking for which compensation is required. See Lucas, 505 U.S. at 1015 (regulatory taking occurs when regulation "denies all economically beneficial or productive use of land"); Dolan v. City of Tigard, 114 S.Ct. 2309, 2316 (1994) (regulatory taking occurs if it denies an owner "economically viable use of his land") (quoting Agins, 447 U.S. at 260); Zinn v. State, 112 Wis. 417, 424, 334 N.W.2d 67 (1983) (regulatory taking occurs "when the government restriction placed on the property "practically or substantially renders the property useless for all reasonable purposes") (quoted sources omitted); Reel Enters. v. City of La Crosse, 146 Wis.2d 662, 674, 431 N.W.2d 743 (Ct. App. 1988), review denied, 147 Wis. 2d 887 (1988) (regulatory taking occurs if it deprives the owner of all, or practically all, of the use). 201 Wis.2d at 374-75.*

The passage of Ordinance No. 12,132 on May 19, 1998 has not deprived Georgia's Garden, Inc. of all, or practically all, of the use of 5301 Kingsbridge Road nor rendered the property useless for all reasonable purposes. The purpose of the R1 single-family residence district is to stabilize and protect the essential characteristics of certain low density residential areas normally located in the outlying urban parts of the City, and to promote and encourage a suitable environment for family life where children are members of most families. 5301 Kingsbridge Road is zoned R1 and all of the uses permitted in the R1 zone remain available to Georgia's Garden, Inc. for the use of their property. No regulatory taking is evident.

Further, because §62.23(7)(i)1., Stats., has been state law since the repeal of §28.08(2)(b)11.c., MGO, I do not believe Georgia's Garden, Inc. acquired a "vested right" in receiving a certificate of occupancy as a permitted use for a CLA within 2,500 feet of an existing CLA. Pursuant to § 62.23(7)(i)1., Stats., no community living arrangement may be established within 2,500 feet of any other such facility, unless an exception is granted at the discretion of the city. The applicant pursued the correct path by applying for a conditional use permit.

The applicant for a conditional use permit should be charged with knowledge of state zoning law. See State ex rel. Markdale Corp. v. Board of Appeals, 27 Wis. 2d 154, 162, 133 N.W.2d 785 (1965). George Carran's letter to Georgia's Garden on April 16, 1998, stating that the applicant's facility is permitted, cannot form the basis for conferring a vested right. To allow such a result would constitute estoppel of the municipality from enforcing the state requirement.

The rule of law in this state is clear that no such estoppel may arise against a municipality for the unauthorized acts of its officers. Snyder v. Waukesha County Zoning Board, 74 Wis. 2d 468, 476-77, 247 N.W.2d 98 (1976). In Snyder, the applicant alleged that the existence of a porch in violation of the zoning ordinances was a result of his reliance on assurances of the building inspector. In rejecting the applicant's argument, the court stated:

> . . . Even if the inspector issued a building permit, such a permit would have been void as issued for a structure which is forbidden by the ordinance. (Citation omitted). A building permit cannot confer the right to violate the ordinance. Jelinski v. Eggers, 34 Wis. 2d 85, 93, 148 N.W.2d 750, 755 (1967). Thus, the mere statement or assurances of the building inspector cannot confer such a right. The appellant is charged with knowledge of the zoning ordinance, (citation omitted), and thus may not successfully contend that the existence of the porch, constructed without first obtaining a variance, is not a self-created hardship.

74 Wis. 2d at 477.

In like fashion, Georgia's Garden should be charged with knowledge of state zoning statutes. Equitable estoppel cannot be asserted against the government when the action asserted to be inequitable is mandated by law. In re Marriage of Krueger v. Krueger, 133 Wis. 2d 269, 276, 395 N.W.2d 783 (1986). George Carran's letter of April 16, 1998 was in error. Said error was pointed out by Judge Ebert's ruling. No vested rights can vest in violation of the law. By requiring Georgia's Garden to seek an exception (conditional use) for its proposed CLA within 2,500 feet of an existing CLA, the City was only requiring the applicant to proceed according to state law and city ordinance.

Moreover, even without the application of the state statute, I do not believe Georgia's Garden, Inc. acquired a vested right in the issuance of a certificate of occupancy because no state license was issued nor the necessary building code approvals obtained prior to re-establishment of the 2,500 feet requirement in the Madison General Ordinances.

The general rule in Wisconsin is that in order for a developer's rights to vest, the developer must submit an application for a building permit which conforms to the zoning or building code requirements in effect at the time of the application. Lake Bluff Housing Partners v. City of South Milwaukee, 197 Wis.2d 157, 177, 540 N.W.2d 189 (1994).

Section 28.03(3), MGO, defines a community living arrangement as "a facility licensed or operated or permitted under the authority of the Department of Health and Family Services of the State of Wisconsin where three (3) or more unrelated persons reside in which care, treatment or services above the level of room and board but less than skilled nursing care is provided to persons residing in the facility."

Prior to June 1, 1998, Georgia's Garden, Inc. had not received a state license to operate a CLA at 5301 Kingsbridge Road. In addition, no inspection of the premises had been requested to verify that the building was capable of receiving a certificate of occupancy for its intended use [It is unknown whether Georgia's Garden has complied with fire code requirements] . No vested interest was acquired by Georgia's Garden to operate a CLA at 5301 Kingsbridge Road by its request for a certificate of occupancy prior to it closing on the property and prior to all of the requirements for issuance of the certificate of occupancy being met.

Eunice Gibson
City Attorney

EG:JLM:jmb

SYNOPSIS: No regulatory taking exists where state law prevents the siting of a community living arrangement due to its proximity to an existing CLA, even though City had repealed distance requirement. Repeal not equal to establishing a lesser distance requirement. No vested rights acquired by request for certificate of occupancy where state law prevented the issuance of certificate and no state license for CLA presented.