

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

February 12, 1999

OPINION 99-03

TO: Madison Plan Commission

FROM: Eunice Gibson, City Attorney

SUBJECT: **Conditional Use Application for 5315 Old Middleton Road**

I. Introduction

On February 1, 1999, the Plan Commission held a public hearing on this application. The applicant, Tellurian UCAN, Inc., proposes to establish an adolescent group home at 5315 Old Middleton Road. An adolescent group home is a community living arrangement within the meaning of Wisconsin statutes and Madison's zoning ordinance.

Under Sec. 28.08(2)(b)11.c. and 28.08(2)(c)14., Madison General Ordinances, (MGO), a conditional use permit is necessary because another community living arrangement is located less than 2,500 feet from the applicant's proposed location. If not for this fact, the proposed adolescent group home would be a permitted use and no application, no public hearing, and no permit would be necessary.

At the conclusion of the public hearing, the Commission asked my opinion on the following two questions:

1. Is the City of Madison required by federal law to make a "reasonable accommodation" in its zoning regulations when it considers granting the permit?
2. If Madison is required to make a "reasonable accommodation" in its zoning regulations, what "accommodation" would be "reasonable"?

The answer to the first question is "yes." Federal law does require that the City of Madison make a "reasonable accommodation" in its zoning regulations when it considers granting the permit.

The answer to the second question is that the permit must be granted if the necessary “accommodation” is “reasonable” and if the granting of a permit does not pose a “direct threat” to public health or safety.

II. Discussion

A. What laws apply?

Sec. 62.23(7)(i)1., Wis. Stats., provides that a community living arrangement is not to be located less than 2,500 feet from another such facility, unless the municipality establishes a lesser distance or grants an exception.

Madison’s zoning ordinance does not establish a lesser distance, but it does establish a procedure for granting an exception. That procedure is the conditional use application, See Sec. 28.12(10), MGO.¹

In 1988, President Reagan signed the Fair Housing Amendments Act (FHAA). This federal law, among other things, forbids housing discrimination based on handicap or disability. 42 U.S.C. Sec. 3601 et seq. The report of the House Banking Committee on the Fair Housing Amendments Act states:

The Act is intended to prohibit the application of special restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of individuals (with disabilities) to live in the residence of their choice in the community.” House Report at 24, 1988 US Code Cong. & Admin. News at 2185.

The Americans with Disabilities Act, (ADA), 42 U.S.C. Sec. 12101 et seq, signed by President Bush in 1990, does not mention housing specifically. Title II of ADA 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 ADA. Innovative Health Systems, Inc. v. City of White Plains, 117 F. 3d 37, 44 (2d Cir. 1997); Oconomowoc Residential Programs v. City of Greenfield, 23 F. Supp. 2d 941, 951 (E.D. Wis. 1998)

Both federal laws define “disability” or “handicap” in substantially the same way. 42 U.S.C. Sec. 3602(h) provides:

“Handicap” means, with respect to a person--

- (1) a physical or mental impairment which substantially limits one or more of such person’s major life activities,
- (2) a record of having such an impairment, or

(3) being regarded as having such an impairment, but such terms does not include current, illegal use of or addition to a controlled substance (as defined in section 802 of Title 21).

This definition is broad and it includes physical, mental, and psychological disabilities. Persons recovering from alcohol and drug addiction are included in the definition, but only if they are not currently using drugs or alcohol. A criminal history or status as an inmate, parolee, or corrections client does not affect an individual's status as a person with a disability.

Evidence offered at the hearing supports a conclusion that the adolescents proposed to be housed in the community living arrangement have histories of drug and alcohol abuse, developmental disabilities and psychological disorders. (William White letter to Plan Commission, Attachment) These conditions are "disabilities" or "handicaps" within the meaning of the Fair Housing Amendments Act and the Americans with Disabilities Act. Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1496 (W.D. Washington 1997). U.S. v. Massachusetts Industrial Finance Agency, 910 F. Supp. 21, 25 (D.C. Mass. 1996).

B. What do the laws require?

Since the residents have disabilities, their housing opportunities are protected by federal law. Oconomowoc Residential Programs, Inc. v. City of Greenfield, 23 F. Supp. 2d (E.D. Wis. 1998).

This protection requires that the City of Madison make a "reasonable accommodation." "K" Care, Inc. v. Town of Lac du Flambeau, 181 Wis. 2d 59, 68, 510 N.W. 2d. 697 (Ct. App. 1993) "... a reasonable accommodation is one that would not impose an undue hardship or burden upon the entity making the accommodation and would not undermine the basic purpose the requirement seeks to achieve." U.S. v. Village of Marshall, 787 F. Supp. 872, 878 (W. D. Wis. 1991).

Another court has said that "reasonable accommodation" means "changing some rule that is generally applicable to everyone so as to make its burden less onerous on the handicapped individual." Alliance for the Mentally Ill v. City of Naperville, 923 F. Supp. 1057, 1078 (N.D. Ill. 1996), citing Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 462, n. 25 (D.C. N.J. 1992); Bangerter v. Orem City Corp., 46 F. 3d 1491, 1502 (10th Cir. 1995); North Shore-Chicago Rehabilitation, Inc. v. Village of Skokie, 827 F. Supp. 497, 499 (N.D. Ill. 1993).

The purpose of the 2,500 foot spacing requirement for community living arrangements was to allow residents of a facility to live in a normal residential setting in a manner similar to other residents of the area rather than in an institutionalized setting. "K" Care, Inc. v. Town of Lac du Flambeau, supra, 181 Wis. 2d at 69, citing Sec. 1, Ch. 205, Laws of 1977.

At the hearing in the instant conditional use application, the Planning Unit report provided statistics on density of community living arrangements in Madison. These statistics establish that granting the requested conditional use would not interfere with the opportunity of the residents of

the facility to “live in a normal residential setting in a manner similar to other residents of the area.” There could be no conclusion that granting the requested conditional use would require residents of the facility to live in an “institutionalized setting” because of the proximity of other community living arrangements.

Therefore, granting an exception to the 2,500 foot distance requirement would not “undermine the basic purpose the requirement seeks to achieve.”

One view of this situation would be that, if waiver of the 2,500 foot distance requirement is reasonable, as I believe it is, then the permit must be granted without any further discussion, since, without the 2,500 foot distance requirement, the proposed use is permitted. This is a reasonable view and a court might adopt it.

I am of the opinion, however, that the Plan Commission may consider other aspects of the “reasonableness” of the accommodation. See Oconomowoc Residential Programs, Inc. v. City of Greenfield, supra, 23 F. Supp. 2d at 953.

C. Is granting the permit a “reasonable accommodation?”

The Plan Commission can determine whether granting the permit is a “reasonable accommodation.” The U.S. Court of Appeals for the 7th Circuit has said:

“... determining whether a requested accommodation is reasonable requires, among other things, balancing the needs of the parties involved.” Brandt v. Village of Chebanse, 82 F. 3d 172, 175 (7th Cir. 1996), cited in Oconomowoc Residential Programs, Inc. v. City of Greenfield, 23 F. Supp. 2d 941, 956 (E.D. Wis. 1998)

The benefit to the potential residents of the adolescent group home is clear. If the conditional use permit is granted, they have the opportunity to live together in the community. Those currently housed in institutions would receive the benefit of a residential setting. See Oconomowoc Residential Programs, Inc. v. City of Greenfield, supra., 23 F. Supp. 2d at 956.

The needs of the community are expressed in the zoning code. The terms of the code are largely conclusory, however. For example, before the Plan Commission could conclude that granting the permit would be “detrimental to or endanger the public health, safety, comfort or general welfare”, Sec. 28.12(10)(g)1., MGO, it would have to make a specific factual finding as to exactly what those dangers and detriments would be. Such findings cannot be based on speculation, conjecture, or generalized fears. Innovative Health Systems, Inc. v. City of White Plains, 117 F. 3d 37, 48 (2d Cir. 1997).

To conclude that, if the permit were granted, “the uses, values and enjoyment of other property in the neighborhood for purposes already established” (would be) “substantially impaired

or diminished,” Sec. 28.12(10)(g)2., MGO, the Plan Commission would have to make specific factual findings to support its conclusion.

The Plan Commission may not support a refusal to grant the permit by a mere recitation of the above-quoted provisions. It would have to find, in the evidence presented at the hearing, some fact which would show that “granting the permit would endanger public safety.”

While the testimony presented at the hearing expressed concern about danger to public safety, the testimony did not include factual support. While there was reference to property values, the record contains no evidence related to that concern. Concern was expressed about traffic and parking, but the evidence did not support a conclusion that traffic and parking would be increased beyond the increase that would accompany a permitted use. The site has served both as a community living arrangement and as a day care center in the recent past, and it was not demonstrated that an adolescent group home would create more traffic and parking concerns than existed previously.

Zoning restrictions may not be based on stereotypes of children² who reside in group homes. Children’s Alliance v. City of Bellevue, 950 F. Supp. 1491, 1497 (W.D. Wash. 1997). In that case, a City of Bellevue restriction on adolescent group homes was challenged. The Bellevue City Attorney argued that public safety was endangered because some of the group home residents had criminal histories. The court rejected the argument, and stated:

“... Bellevue offers no evidence showing that residents of Class II facilities (adolescent group homes) are more dangerous than if they lived with their relatives...Defendant’s public safety rationale does not stand up under scrutiny...it has not demonstrated how any specific individuals...constitute a ‘direct threat’.” 950 F. Supp. at 1498.

While concern was expressed about police calls³, there was no evidence that the applicant’s prior adolescent group home location had any greater number of police calls than would have occurred in private residences housing adolescent boys. The same was true of the testimony about runaways. There was no evidence sufficient to support a conclusion either that (1) more adolescent boys run away from the applicant’s group home than run away from their own residences or other group homes, or (2) that an adolescent boy or boys who run away from applicant’s group home have presented a threat or danger to nearby residents.

Finally, there was extensive testimony related to communication, or lack of it, between the applicant and the residents of various neighborhoods where the applicant operates facilities.⁴ These communication issues are not related to zoning, and cannot be the basis for a zoning decision. See Oconomowoc Residential Programs v. City of Greenfield, 23 F. Supp. at 946, where the court

rejected the City of Greenfield's objections related to patient care, staffing, maintenance and other alleged rule violations, because they were unrelated to zoning.

III. Conclusion

The applicant established that the prospective residents of the adolescent group home are minors with disabilities. As a result, "reasonable accommodation" must be provided. Granting the permit would constitute a "reasonable accommodation" unless granting the permit would constitute a "direct threat" to public health and safety. No "direct threat" was demonstrated at the public hearing.

If the Plan Commission believes that there exists significant additional evidence which should be offered and was not, it may schedule an additional hearing.

Eunice Gibson
City Attorney

eg:cm

CAPTION: Adolescent males who have been diagnosed with developmental disabilities and psychological disorders or have histories of drug and alcohol abuse are people with disabilities under FHAA and ADA, and the Plan Commission is required to provide "reasonable accommodation" in zoning regulations.

cc: Mayor
City Clerk

ENDNOTES

1. Some courts have held that even requiring residences for people with disabilities to seek an exception, waiver, special use or conditional use permit is a violation of FHAA. The U.S. Court of Appeals for the 7th Circuit, which includes Madison, has held that such requirements are permissible.

2. At least one case has held that all minors who live in group homes are also protected by FHAA's prohibition of housing discrimination based on "familial status." Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1494 (W.D. Wash. 1997), citing 42 U.S.C. Secs. 3604(a) and 3604(f)(1). "Familial status" is a separate protected class under FHAA and all minors are protected, not just those with disabilities. Because the analysis is the same, except for the need to establish the

existence of disabilities, this opinion will not discuss the application of prohibited “familial status” discrimination.

3. In Oconomowoc Residential Programs, Inc. v. City of Greenfield, supra, the court indicated that increased police calls, if substantiated by evidence, could be considered. 23 F. Supp. 2d, 941, 960 (E.D. Wis. 1998). The U.S. Court of Appeals for the Third Circuit disagrees, stating:

“ . . . The mere fact that the employees and residents of Holiday Village will at times require the assistance of the local police and other emergency services does not rise the level of imposing a cognizable administrative and financial burden upon the community.” Hovsons, Inc. v. Township of Brick, 89 F. 3d 1096, 1105 (3rd Cir. 1996).

4. In Potomac Group Home Corporation, et al. v. Montgomery County, 823 F. Supp. 1285, 1295 (D.C. Md. 1993) the court held that a requirement that a prospective provider of group home services must notify neighbors of the type of disabilities of the person who will live in a group home and must invite neighbors to comment is not imposed on other residential units and thus is discriminatory on its face. See also Children’s Alliance v. City of Bellevue, supra, 950 F. Supp. at 149 and Larkin v. Michigan Dept. of Social Services, 89 F. 3d 285 (6th Cir. 1996).