League of Wisconsin Municipalities
Legal Captions – Zoning – Accommodations for the Disabled

431. In the companion cases of Vincent Z. by his Guardian, et al. v. Village of Greendale, City of Greenfield, State of Wisconsin and Wisconsin Dept. of Health & Family Services (U.S. Eastern District Case No. 96-C-1101) and Oconomowoc Residential Programs v. City of Greenfield and Village of Greendale (U.S. Eastern District Case No. 96-C-1112) (each decided on September 30, 1998) the federal district court found that the 2,500 foot community living arrangement spacing requirement under sec. 62.23(7)(i), Stats., has been preempted by the federal Americans with Disabilities Act of 1990, 42 U.S.C. secs.12101-12213 (ADA) and the Federal Fair Housing Amendment Act of 1988, 42 U.S.C. secs.3601-3631 (FFHA). 10/30/98.

446. Concludes that village board's practice of holding a public hearing whenever a group home facility applies for an exception from the 2,500 foot spacing requirement or the 1% of population limit on the number of group homes within a community under sec. 62.23(7)(i)1 and 2, Stats., is legal and an appropriate way for the board to gather information to help it decide whether the request constitutes a reasonable accommodation and should be granted. *Discusses Oconomowoc Residential Programs, Inc. v. City of Greenfield,* 23 F. Supp.2d 941 (E.D. Wis. 1998). 7/31/00.

454. Discusses Fair Housing Act (FHA) and Fair Housing Amendments Act (FHAA) impact on municipal land use policies and practices affecting group homes and community living arrangements and makes some recommendations for improving compliance with FHA and FHAA. 6/30/01.

464. A group home or community living arrangement (CLA) is subject to a public hearing requirement associated with rezoning, variance, conditional use or reasonable accommodation relief from a general land use regulation but a public hearing for purposes of determining whether a proposed exception to the CLA spacing or density restriction of Wis. Stat. sec. 62.23(7)(i) qualifies as a reasonable accommodation is inadvisable and probably contrary to the Fair Housing Amendment Act. 7/31/02.

465. For purposes of reasonable accommodation under the Fair Housing Amendments Act (FHAA) and Americans with Disabilities Act (ADA), party seeking accommodation from municipal group home spacing ordinance need only make an initial showing that proposed accommodation is reasonable and, upon that showing, burden shifts to municipality to "come forward to demonstrate unreasonableness or undue hardship in the particular circumstances" and municipality must adequately establish "the nature or quantity" of alleged financial and administrative burdens imposed by group home facility. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee,* No. 01-1002 (7th Cir. Aug. 8, 2002). 8/31/02.

487. Application of a conditional use permit requirement to a family day care home by a municipality is contrary to the plain language of Wis. Stat. 66.1017(2) since such a requirement is not a zoning regulation that applies to a "dwelling" and a municipality is not authorized to impose conditions on a family day care home dwelling on a case-by-case basis since such conditions are unique to each family day care home and not "applicable" to other dwellings as required by 66.1017(2). 10/31/06.

Zoning / ZONING # 431 Group Homes and the 2,500 Foot Spacing Requirement October 30, 1998

ZONING # 431
Group Homes and the 2,500 Foot Spacing Requirement
October 30, 1998

Summary - ZONING # 431.
In the companion cases of Vincent Z. by his Guardian, et al. v. Village of Greendale, City of Greenfield, State of Wisconsin and Wisconsin Dept. of Health & Family Services (U.S. Eastern District Case No. 96-C-1101) and Oconomowoc Residential Programs v. City of Greenfield and Village of Greendale (U.S. Eastern District Case No. 96-C-1112) (each decided on September 30, 1998) the federal district court found that the 2,500 foot community living arrangement spacing requirement under sec. 62.23(7)(i), Stats., has been preempted by the federal Americans with Disabilities Act of 1990, 42 U.S.C. secs.12101-12213 (ADA) and the Federal Fair Housing Amendment Act of 1988, 42 U.S.C. secs.3601-3631 (FFHA). 10/30/98.

Recent decisions by the U.S. District Court for the Eastern District of Wisconsin have found that Wisconsin's 2,500 foot spacing requirement for community living arrangements, such as community-based residential facilities (CBRFs), is preempted by the federal Fair Housing Act and the federal Americans with Disabilities Act.

Section 62.23(7)(i), Stats.,**1** provides that no community living arrangement may be established within 2,500 feet of any other community living arrangement unless an exception is granted at the discretion of the municipality. The purpose of the 2,500 foot spacing requirement is to disperse group homes throughout the community and to avoid locating such homes exclusively within a limited geographical area. The policy is designed to preserve the established character of residential neighborhoods and allow for the rehabilitation potential which could be created by locating group home facilities intermittently throughout a community.

The 2,500 foot spacing requirement has been challenged in litigation and in threatened litigation throughout the state as unenforceable, unconstitutional, inconsistent with the Americans with Disabilities Act of 1990, 42 U.S.C. secs.12101-12213 (ADA), and in violation of the Federal Fair Housing Amendment Act of 1988, 42 U.S.C. secs.3601-3631 (FFHA). The legal effect of these challenges and threatened challenges has now been directly decided in two decisions issued by the United States District Court for the Eastern District of Wisconsin. In the companion cases of Vincent Z. by his Guardian, et al. v. Village of Greendale, City of

Greenfield, State of Wisconsin and Wisconsin Dept. of Health & Family Services (U.S. Eastern District Case No. 96-C-1101) and Oconomowoc Residential Programs v. City of Greenfield and Village of Greendale (U.S. Eastern District Case No. 96-C-1112) (each decided on September 30, 1998) the federal district court found that the 2,500 foot spacing requirement under sec. 62.23(7)(i) has been preempted by federal law.

The court considered evidence in the related cases showing that both Greenfield and Greendale had existing CBRFs within their communities (three in Greendale and twelve in Greenfield). The court noted that the new community-based residential facilities requested in each of the communities would have been in technical violation of the 2,500 foot spacing requirement in the absence of a variance. The court acknowledged that the statute allows a municipality the opportunity for a hearing and the exercise of discretion in deciding whether or not to issue a variance. Yet, the court went on to note that the spacing requirement and the variance procedure was inconsistent with the legislative histories of both the FHAA and the ADA and, as a result, were preempted by both laws. Although the court noted that the record in the hearings in Greenfield and Greendale which led to the denial of the variances relied on criteria in addition to a strict application of the 2,500 foot requirement, the court found that the record leading to denial was insufficient to meet the requirement of a "reasonable accommodation" for disabled people as required under the FHAA and the ADA.

As a result of this analysis, the court declared the 2,500 foot spacing law invalid as preempted by the FHAA and the ADA. The court further found that the municipalities' reliance upon it, even though authorized by state law, violated federal law leaving the municipalities liable for compensatory damages under the federal laws.

This litigation is ongoing. The court is now considering three additional issues. First, the court is considering whether the 2,500 foot spacing requirement may be severed from the remainder of sec. 62.23(7)(i). Any municipality currently facing the issue of whether to allow the siting of a group home in a residential district should consider the fact that other provisions contained within sec. 62.23(7)(i) may be found invalid in concert with the 2,500 foot spacing requirement.

Second, with the potential that portions of sec. 62.23(7)(i) may remain intact, a municipality should create a complete record of the grounds for making any decisions which may impact upon the location of community living arrangements or community based residential facilities. In finding the municipalities liable in this case, the court put equal weight on its decision to preempt the 2,500 foot spacing requirement as upon its finding that the municipality's decision did not have sufficient criteria to show that it had provided a "reasonable accommodation" as that term is used within the federal law.

Third, the court has left the issue of damages open, both compensatory damages in the

Oconomowoc Residential Programs case and attorneys fees damages in both the Oconomowoc Residential Programs and Vincent Z. cases. These matters continue to be litigated.

1. Section 62.23(7)(i), Stats., is made applicable to villages by sec. 61.35, Stats.

Zoning / ZONING # 446 Group Home Regulations; The Federal Fair Housing Act Amendments and the Americans with Disabilities Act July 31, 2000

ZONING # 446
Group Home Regulations; The Federal Fair Housing Act Amendments and the Americans with Disabilities Act
July 31, 2000

Summary - ZONING # 446
Concludes that village board's practice of holding a public hearing whenever a group home facility applies for an exception from the 2,500 foot spacing requirement or the 1% of population limit on the number of group homes within a community under sec. 62.23(7)(i)1 and 2, Stats., is legal and an appropriate way for the board to gather information to help it decide whether the request constitutes a reasonable accommodation and should be granted. Discusses *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F. Supp.2d 941 (E.D. Wis. 1998).

Earlier this year you requested our opinion on a question involving the interplay between the Federal Fair Housing Act Amendments (FHAA)[1] and the Americans with Disabilities Act (ADA)[2] on the one hand and the state's 2,500 foot group home spacing requirement and 1% of population group home limit in sec. 62.23(7)(i)(1) and (2), Stats.,[3] on the other.

Your specific question relates to the legality of your village's practice of holding public hearings on applications by community living arrangements for exceptions to the spacing requirement and the 1% of population limit.

Your village, like many other municipalities around the state, is struggling with how to deal with requests from group home facilities for exceptions to the group home spacing requirement and the 1% of population limit in the wake of recent decisions by the United States District Court for the Eastern District of Wisconsin[4] holding that the FHAA and the ADA preempt the 2,500 foot spacing requirement in sec. 62.23(7)(i)1, Stats. You explain that since these decisions were reported, the village board has routinely granted requests from group homes for exceptions from both the spacing requirement and the 1% of population limit. The village board has also, on

advice of counsel, instituted the practice of conducting a public hearing on every request for a zoning exception under sec. 62.23(7)(i), Stats.

The purpose of the public hearing is to obtain information from the applicant and the public to aid the board in determining whether to grant or deny the application for an exception. A resolution that the village board enacts when scheduling a public hearing on an application for the zoning exception under sec. 62.23(7)(i), Stats., states that the board seeks to obtain the following information from such a hearing:

- Whether the persons who will benefit from the granting of the exception are members of a federally protected class (e.g., persons with a disability).

- Whether granting of the request will require a fundamental alteration in the nature of the village's zoning plans.

- Whether granting the request will impose an undue financial or administrative burden on the village.

- Whether there is a necessity that the village provide reasonable 4accommodations, and in the absence of granting the request, no reasonable accommodations can be made for the persons who will benefit from the exception within suitable locations elsewhere in the village.

- Whether in the absence of granting the exception, the protected class will not have the opportunity to live in single family residential neighborhood or other suitable location.

- Whether the facility seeking the exemption has been licensed, or has applied for a license under sec. 50.03, Stats., and whether the nature of the license granted or to be granted has been declared.

You explain that some members of the village board oppose holding hearings on requests for exceptions from the spacing requirement or the 1% of population limit. In their view, holding a public hearing is unnecessary and the village should allow group homes to locate in any residential zoning district they desire without qualification. An attorney for the Wisconsin Coalition for Advocacy has written a letter, dated January 28, 2000 to a trustee arguing that a reasonable extension of the recent City of Greenfield decision is that any public hearing on an application for an exception to the spacing requirement or the 1% of population limitation in sec. 62.23(7)(i), Stats., is discriminatory, even if the final decision is to grant the exception and approve the location of the group home.

In response to the letter from the attorney for the Wisconsin Coalition for Advocacy, your village attorney wrote a letter to the village president dated February 1, 2000. In his letter, the village attorney pointed out that the City of Greenfield court also held that persons with disabilities claiming relief from municipal zoning decisions under the FHAA or the ADA have the burden of seeking a reasonable accommodation from the municipality before seeking relief in a judicial forum and that requesting the zoning exception under sec. 62.23(7)(i)1, Stats., meets this requirement. 23 F. Supp.2d at 955.

He also pointed out in his letter that according to the City of Greenfield decision, the FHAA requires municipalities to make an accommodation for persons with disabilities if the accommodation is (1) reasonable, and (2) necessary, (3) to afford disabled people equal opportunity to use and enjoy housing. 23 F. Supp.2d at 956, citing 42 U.S.C. sec. 3604(f)(3). He further explained in his letter that the City of Greenfield court discussed a number of factors to consider when determining whether a requested accommodation should be granted. These factors involve a weighing of the cost to the municipality with the benefit to the applicant, and by and large consist of the factors listed above which are set forth in the resolution the village uses when scheduling a public hearing on applications for exceptions to the spacing requirement and 1% of population limitation.

The village attorney believes that holding a public hearing on applications for the zoning exception under sec. 62.23(7)(i)1 and 2, Stats., is legal and an appropriate way to allow the board to gather information relating to the factors listed above and help it decide whether an exception request by a particular applicant qualifies as a reasonable accommodation.

You seek our opinion on the legality and appropriateness of the village board holding a public hearing whenever a group home facility applies for a zoning exception under 62.23(7)(i), Stats.

I agree with your village attorney that it is legal and appropriate for the village board to hold a public hearing whenever a group home applies for an exception to the spacing requirement or the 1% of population limit to help it decide whether the application should be granted or denied.

While I understand the argument made by the attorney for the Wisconsin Coalition for Advocacy that since the City of Greenfield court held that the 2,500 foot spacing requirement in sec. 62.23(7)(i)(1), Stats., was preempted by the FHAA and the ADA, it is unnecessary for a group home to apply for an exception from the spacing requirement and go through the process of a public hearing, that is not what the court held. Rather, as your village attorney explained, the City of Greenfield court also concluded that "FHAA or ADA plaintiffs have the burden of seeking accommodation before seeking relief in a judicial forum and that requesting the zoning exception under subsection 62.23(7)(i)(1) meets this requirement." 23 F. Supp.2d at 955 (citing

Oxford House, Inc. v. City of Virginia Beach, 825 F.Supp. 1251 (E.D. Va. 1993)).

Thus, the court held that a group home seeking relief under the FHAA and ADA from the 2,500 foot spacing requirement must first request the zoning exception under sec. 62.23(7)(i)1, Stats., before proceeding with litigation even though the court also held that the 2,500 foot spacing requirement in sec. 62.23(7)(i)1 was preempted by the FHAA and the ADA and therefore invalid.

In essence, the City of Greenfield case stands for the proposition that a municipality cannot blindly adhere to the 2,500 foot spacing requirement as the sole basis for denying a group home permission to locate in a single-family residential neighborhood. A group home facility must still request a reasonable accommodation by applying for an exception from the 2,500 foot spacing requirement.

I agree with the village attorney that the village board's practice of holding a public hearing on all requests for exceptions to the group home spacing requirement and the 1% of population limit is a valid and appropriate method of obtaining the necessary information to decide whether the requested accommodation is reasonable. Undoubtedly, the request for an accommodation/exception will be deemed reasonable most of the time. However, on rare occasions the governing body may have a legitimate basis for denying the request for the accommodation/exception. The public hearing provides a way for the governing body to obtain the facts it needs to make an informed decision.

Finally, as one federal district court has stated in a recent decision touching on this issue: "a public hearing requirement does not of itself establish an actionable violation of the ADA." Smith-Berch, Inc. v. Baltimore County, MD, 68 F. Supp.2d 602, 623 (D.Md. 1999) (citing Oxford House v. City of Virginia Beach, 825 F. Supp. 1251 (E.D. Va. 1993). The key, as both the Smith-Berch court and your village attorney point out, is to treat each group home applying for an exception from the spacing requirement or the 1% of population limit under sec. 62.23(7)(i), Stats., in the same manner. Thus, the public hearing requirement must apply to every request for an exception and the village board's decision to grant or deny each request must be based on the factors set forth in the City of Greenfield case for determining whether a request for an accommodation is reasonable.

Endnotes

1. 42 U.S.C. secs. 3601-3631, The Federal Fair Housing Act Amendments of 1988 expanded the Fair Housing Act by extending the principle of equal housing opportunity to handicapped persons.

2. 42 U.S.C. secs. 12101-12213. Title II of the ADA prohibits a public entity from discriminating against an individual on the basis of disability or from excluding such an individual from public services, programs or activities.

3. Sec. 62.23(7)(i)1 provides in relevant part as follows: "No community living arrangement may be established after March 28, 1978 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." Sec. 62.23(7)(i)2, Stats., provides in relevant part as follows: "Community living arrangements shall be permitted in each city without restriction to the number of facilities, so long as the total capacity of such community living arrangements does not exceed 25 or one percent of the city's population, whichever is greater. When the capacity of the community living arrangements in the city reaches that total, the city may prohibit additional community living arrangements from locating in the city. In any city of the first, second, third or fourth class, when the capacity of the 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 locating in the district. Agents of a facility may apply for an exception to the requirements of this subdivision, and such exceptions may be granted at the discretion of the city"

4. Oconomowoc Residential Programs, Inc. v. City of Greenfield, 23 F. Supp.2d 941 (E.D. Wis. 1998); Oconomowoc Residential Programs, Inc. v. City of Milwaukee, Case No. 97-C-0251, (E.D.Wis. Jan. 27, 1999).

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001

Zoning # 454
Congregate Living: Municipal Policies, Practices and the Fair Housing Act
June 30, 2001

Summary - Zoning # 454.
Discusses Fair Housing Act (FHA) and Fair Housing Amendments Act (FHAA) impact on municipal land use policies and practices affecting group homes and community living arrangements and makes some recommendations for improving compliance with FHA and

FHAA.

A group home or other form of congregate living arrangement (CLA) is rarely afforded the same status as a traditional single family home in a municipal land use code.

This may be the result of state mandates**1** or other reasons. This different treatment disproportionately affects handicapped persons or at-risk children for whom such housing may be the only non-institutional choice. While constitutionally permissible, such treatment is subject to the constraints imposed by the Fair Housing Act (FHA) and the Fair Housing Amendments Act (FHAA). This law and policy intersection is of concern to many local officials. Accordingly, this comment is intended to clarify the limits imposed by the FHA**2** on municipal land use policies and practices that affect CLAs. It will explore relevant case law and the judicial response to some typical policies as well as provide some recommendations that may improve local government compliance with the FHA.

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001 / I. THE FAIR HOUSING ACT

I. THE FAIR HOUSING ACT

The FHA was originally enacted as Title VIII of the Civil Rights Act of 1968 and prohibited discrimination based on race, color, religion, or national origin. Congress amended the FHA in 1974 to prohibit discrimination based on gender. In 1988, Congress amended the FHA again, extending its protections and prohibiting discrimination based on disability or familial status-the two classifications most commonly implicated by CLA policies and practices.

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001 / "HANDICAPPED" UNDER THE FHA

"HANDICAPPED" UNDER THE FHA

The FHA defines "handicap" as: "(1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment."**3** While recovering drug addicts and alcoholics are "handicapped" within the meaning of the FHA**4** "handicapped" does not include current, illegal use of or addiction to a controlled substance.**5** Nor does it include persons who claim to be disabled solely on the basis of having been adjudicated a juvenile delinquent, having a criminal record, or being a sex offender.**6**

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001 / "FAMILIAL STATUS" UNDER THE FHA

"FAMILIAL STATUS" UNDER THE FHA

The FHA defines "familial status" as: "one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person."**7** This definition encompasses residents of youth group homes.**8** However, where no staff resides with youth group home residents, residents do not qualify for "familial status" protection since they are not "domiciled" with a qualified person.**9**

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001 / FHA EXEMPTIONS

FHA EXEMPTIONS

The FHA includes several exemptions that relate to CLAs. As noted above, "handicap" does not include current illegal use of or addiction to a controlled substance. However, this exception should not be invoked to deny a proposed CLA facility where a small percentage of its residents have relapsed since some failure is inevitable in drug and alcohol treatment programs.**10**

The FHA also does not require "that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."**11** However, a municipality must be able to provide objective evidence of the behavior that threatens safety; unsubstantiated speculation is insufficient.**12** Therefore, in light of the narrow construction afforded the FHA exemptions, municipal officials should be wary of relying on the safety or other exemptions to limit or deny CLA development.

Finally, the FHA does not limit "the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."**13** This exemption will be discussed in more detail in part II of this comment.

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001 / PROHIBITED CONDUCT UNDER FHA

PROHIBITED CONDUCT UNDER FHA

The FHA specifies that it is unlawful to "otherwise make unavailable or deny, a dwelling to any person because of . . . familial status"**14** or "otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of (A) that person; or (B) a person residing in or intending to reside in that dwelling after it is sold, rented or made available; or (C) any person associated with that person."**15** It is also a discriminatory housing practice to refuse "to make reasonable accommodations in rules, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."**16** These provisions provide the basis for three types of discrimination claims under the FHA-disparate treatment (intentional discrimination), disparate impact, or a failure to provide reasonable accommodation.

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001 / DISPARATE TREATMENT

DISPARATE TREATMENT

Disparate treatment claims come in two forms. Either a particular municipal policy is alleged to be facially discriminatory**17** or a decision is alleged to be discriminatory.**18**

A municipal ordinance that expressly treats members of a protected group differently than others who are similarly situated is sufficient to establish a *prima facie* claim of disparate treatment.**19** Additional evidence of discriminatory animus is not required.**20** Moreover, a facially discriminatory policy need not explicitly identify a protected group; language that serves as a proxy for a protected group may be sufficient to find facial discrimination.**21** And, evidence of deliberate attempts to sanitize an ordinance will not remove its facial discrimination.**22**

Once a plaintiff establishes a *prima facie* claim of disparate treatment by proving the subject ordinance is facially discriminatory, the burden shifts to the municipality to show that it is either (1) a reasonable restriction on the terms or conditions of housing that is justified by a legitimate safety concern for the residents or the community and tailored to particularized concerns of individual residents or (2) a narrowly tailored restriction yielding a housing opportunity benefit that clearly outweighs the burden imposed on the affected group.**23** A municipality thus bears a substantial burden to justify a facially discriminatory CLA policy.

A *prima facie* discriminatory decision claim is established by showing that a "discriminatory purpose was a motivating factor" in the municipality's decision.**24** However, proof that a

discriminatory purpose was the sole factor is not required.**25**

A number of factors have been identified for consideration in evaluating a claim of discriminatory decision-making. They include: "(1) the discriminatory impact of the governmental decision; (2) the decision's historical background; (3) the specific sequence of events leading up to the challenged decision; (4) departures from normal procedural sequences; and (5) departures from normal substantive criteria."**26** The FHA is therefore violated when the municipal decision is based on a strained interpretation of its zoning ordinance,**27** municipal officials bow to political pressure of opponents to a proposed facility,**28** or a zoning board of appeals provides no credible justification for an adverse zoning decision.**29**

If a plaintiff establishes that the municipality's decision was motivated in part by a discriminatory purpose, the municipality must prove that "the same decision would have resulted even had the impermissible purpose not been considered."**30** In this context, a municipality will likely find its ability to rebut a discriminatory decision claim constrained by an inadequately developed record.

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001 / DISPARATE IMPACT

DISPARATE IMPACT

The FHA does not prohibit only overt or intentional discrimination. A municipality may violate the act through adoption and implementation of neutral CLA policies that disparately impact persons because of their handicap or familial status. Disparate impact claims are analyzed by courts through examination of four factors: (1) how strong is the showing of discriminatory effect; (2) whether there is some evidence of discriminatory intent; (3) what is the defendant's interest in taking the action; and (4) whether the plaintiff seeks to compel the defendant to provide housing or whether the plaintiff merely wants to restrain the defendant from interfering with the efforts of others to actually supply housing.**31**

A *prima facie* disparate impact claim "is established by showing that the challenged conduct actually or predictably results in discrimination; in other words that it has a discriminatory effect."**32** Although evidence of discriminatory intent is one factor in the analysis, it is the least important,**33** and proof of discriminatory intent is not required.**34** A municipality may therefore violate the FHA even if its CLA policies are neutral.

If a *prima facie* disparate impact claim is established, then the burden shifts to the municipality to "demonstrate some legitimate, nondiscriminatory reason for [its] action and that no less

discriminatory alternatives are available."**35** While proof of a legitimate, nondiscriminatory reason may be available in most instances, it is unlikely that a less discriminatory alternative does not exist. Accordingly, once a *prima facie* disparate impact claim is proved, municipalities will find it difficult to sustain their burden on rebuttal and avoid liability.

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001 / REFUSAL TO MAKE REASONABLE ACCOMMODATION

REFUSAL TO MAKE REASONABLE ACCOMMODATION

A municipality violates the FHA if it refuses "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."**36** However, the reasonable accommodation duty is confined to rules, policies, practices, or services "that hurt handicapped people *by reason of their handicap*, rather than that hurt them solely by what they have in common with other people, such as a limited amount of money to spend on housing."**37**

"[D]etermining whether a requested accommodation is reasonable requires, among other things, balancing the needs of the parties involved."**38** However, the reasonable accommodation requirement "does not entail an obligation to do everything humanly possible to accommodate a disabled person; cost (to the defendant) and benefit (to plaintiff) merit consideration as well."**39** Consequently, "[a]n accommodation is unreasonable if it either imposes 'undue financial and administrative burdens' or requires a fundamental alteration in the nature of a program."**40**

However, every accommodation request will likely create some administrative or financial burden or involve some alteration of a local land use program. The key is whether the burden is "undue" or the alteration "fundamental" for the request to be deemed unreasonable. Accordingly, the administrative and financial burden must be significantly greater than the burden imposed by similar types of development allowed in the community,**41** or the program alteration must directly undermine the purposes of the land use regulation rather than simply deviate from it.**42**

Accommodation requests must also be necessary to afford equal opportunity. Necessity is proved by showing "that the desired accommodation will affirmatively enhance the disabled plaintiff's quality of life by ameliorating effects of the disability."**43** This is a virtual given for CLA residents since it has been recognized that congregate living is "essential" for groups of handicapped persons who seek to live together, either for mutual support or to permit full-time care by staff.**44** If a reasonable accommodation is not made, then they have been denied an equal opportunity to live in the dwelling of their choice. However, a municipality is not required to grant an accommodation request that would afford the disabled greater opportunity than the

non-disabled.**45**

Finally, it is well established that a party must seek a reasonable accommodation before they may obtain judicial relief pursuant to a reasonable accommodation claim.**46** However, a request is not required where it would be "manifestly" futile.**47** In addition, it is unlikely that a proponent would have to or should be required to seek relief from an invalid regulation since "[t]he thrust of a reasonable accommodation claim is that a defendant must make an affirmative change in an otherwise *valid* law or policy."**48**

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001 / II. THE JUDICIAL RESPONSE TO SPECIFIC POLICIES

II. THE JUDICIAL RESPONSE TO SPECIFIC POLICIES

The FHA declares, "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid."**49** Moreover, the majority of courts employ a non-deferential, heightened scrutiny standard when reviewing municipal policies and actions under the FHA.**50** It is therefore worthwhile to review the judicial response to some of the more significant municipal policies that affect CLA facilities and the possible consequences of those judicial determinations.

A familiar component of municipal land use codes is a minimum separation or dispersal requirement for CLAs.**51** These requirements are typically justified by proponents as necessary to prevent clustering and promote integration. These justifications have however been rejected and minimum separation or dispersal requirements for CLAs have been struck down in a number of jurisdictions.**52** Such provisions are therefore of questionable validity under the FHA and relying on them to prohibit development of a CLA facility should be avoided.

Another common municipal land use provision that affects CLA facilities is an occupancy limit for unrelated persons. These limitations are typically incorporated as part of the definition of "family" in the code. Although the FHA does not "limit the applicability of any reasonable restriction regarding the maximum number of occupants permitted to occupy a dwelling,"**53** the typical family composition limitation is outside the scope of this exemption since it "removes from the FHA's scope only total occupancy limits, *i.e.*, numerical ceilings that serve to prevent overcrowding in living quarters," not "provisions designed to foster the family character of a neighborhood."**54** Consequently, family composition occupancy restrictions are subject to reasonable accommodation requests that include consideration of their impact on the economic viability of the facility.**55**

Municipal ordinances that impose occupancy limits based on square footage standards are within the FHA maximum occupancy exemption however where they "apply uniformly to all residents of all dwellings" and "were enacted 'to protect the health and safety by preventing dwelling overcrowding,' not to impermissibly limit the family composition of dwellings."[56] Moreover, such limitations are not unreasonable simply because they are more restrictive than model occupancy standards developed by a national organization of building officials and code administrators.[57] Furthermore, judicial review of a municipality's exercise of discretion in such matters should be limited since such determinations are "a legislative, not a judicial function."[58] Accordingly, municipalities should enjoy considerable flexibility in setting occupancy limits, so long as they are reasonable and, being outside the scope of the FHA, should not be subject to reasonable accommodation consideration.

Building code requirements affect the development of all housing choices, including CLA facilities. Nonetheless, a municipality may impose special safety standards for the protection of developmentally disabled persons that are different from those imposed on the general population without violating the FHA "so long as that protection is demonstrated to be warranted by the unique and specific needs and abilities of those handicapped persons."[59] Such policies may however require substantial resource investment since FHA compliance would probably require sets of standards individualized to particular disabilities (e.g., one set for the hearing disabled, another for the blind, etc.). Moreover, consideration of the financial impact of such regulations would still be within the scope of a reasonable accommodation request since the economic burden of such requirements would be directly related to a person's handicap status.[60]

A number of other traditional municipal land use development policies that affect CLA facility development have been challenged in the courts. Public hearing requirements were found to not violate the FHA even though "such a meeting would serve to focus neighborhood scrutiny on the residence. . . ."[61] Nor does the FHA permit disabled persons to circumvent zoning variance[62] or rezoning[63] procedures. The FHA also does not prohibit reasonable permit conditions.[64] However, discriminatory.[65] unnecessary,[66] or impossible[67] conditions violate the FHA. Likewise, a one-year moratorium imposed on the development of new adult care facilities violates the FHA when it is based on invidious motives or is not narrowly tailored to address specific concerns.[68]

The foregoing suggests that the judicial response to municipal policies that affect CLA facilities is generally consistent with the proposition that "the FHA does not provide a blanket waiver of all facially neutral zoning laws and rules, regardless of facts, which would give disabled carte blanche to determine where and how they would live regardless of zoning ordinances to the contrary."[69] However, non-neutral land use policies, while not invalid per se under the FHA, will be subject to a careful examination of the proffered justifications and must be justified by more

than simple rational basis.

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001 / III. RECOMMENDATIONS

III. RECOMMENDATIONS

FHA violations can be very expensive for municipalities. Moreover, unlawful policies and practices by cities and villages erode public confidence in local government. There are, however, some actions that municipalities can take to reduce the risk of these negative outcomes.

First, policies and practices that treat protected classes differently than others should be thoroughly reviewed and questioned. Do they address legitimate safety concerns for the residents or community? Does the benefit to the affected group clearly outweigh the burden? Are they narrowly tailored to individual characteristics of the affected residents? If not, then the policy or practice should be modified if possible or eliminated.

Second, all policies and practices should be reviewed and evaluated for their potential impact on protected classes. If the policy or practice imposes a disproportionately negative impact on a protected class, then the existence of less discriminatory methods should be determined. If available, they should be implemented or the policy or practice eliminated.

Third, a reasonable accommodation procedure should be established independently from other traditional land use procedures. The separation from variance or conditional use processes will ensure application of appropriate standards to the request. A specific procedure will also facilitate consistency and fairness in the application of those standards. Moreover, such procedure should promote the development of expertise with the FHA in the official or board designated to decide such requests.

Finally, municipalities should conduct periodic FHA training for its employees and officials. FHA violations flow not only from adoption of particular policies but from their implementation as well. FHA training should not only enhance awareness of FHA issues for municipal employees and officials but also improve their ability to respond to them.

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001 / IV. CONCLUSION

IV. CONCLUSION

Municipalities enjoy substantial authority to regulate land use development within their borders. However, the FHA is a powerful tool available to the courts and persons protected by those laws for nullifying discriminatory housing policies and practices and compensating its victims. Moreover, the limits imposed by the FHA on municipal CLA policies and practices are still being defined. Effective management of this intersection of law and policy therefore requires not only the attention of municipal officials but also an understanding of these limits.

Zoning / Zoning # 454 Congregate Living: Municipal Policies, Practices and the Fair Housing Act June 30, 2001 / Endnotes

Endnotes

1. *See e.g.*, Wis. Stat. §62.23(7)(i)1 (1999-2000) (2500 foot separation requirement between community living arrangements unless a lesser distance is set by local ordinance).

2. All references hereafter to the FHA are inclusive of the FHAA.

3. 42 U.S.C. §3602(h).

4. *U.S. v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992).

5. 42 U.S.C. §3602(h).

6. Joint Statement of the Department of Justice and Department of Housing and Urban Development, *Group Homes, Local Land Use, and the Fair Housing Act*, August 18, 1999. *See also Talley v. Lane*, 13 F.3d 1031 (7th Cir. 1994).

7. 42 U.S.C. §3602(k)

8. *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491 (W.D. Wa. 1997).

9. *Keys Youth Services, Inc. v. City of Olathe*, Nos. 99-3387, 99-3388, 2001 WL 502433 (10th Cir. 2001).

10. *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2nd Cir. 1997).

11. 42 U.S.C. §3604(f)(9).

12. *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991).

13. 42 U.S.C. §3607(b)(1).

14. 42 U.S.C. §3604(a).

15. 42 U.S.C. §3604(f)(2).

16. 42 U.S.C. 3604(f)(3)(B).

17. *See e.g., Bangerter v. Orem City Corporation*, 46 F.3d 1491 (10th Cir. 1995).

18. *See e.g., Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Comm'n of the Town of Fairfield*, 790 F. Supp. 1197 (D. Conn. 1992).

19. *Bangerter,* 46 F.3d at 1501.

20. *Id*.

21. *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491 (W.D. Wa. 1997) (the term "staff" is proxy for a classification based on the presence of individuals under eighteen and the handicapped since both groups require supervision and assistance).

22. *See Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992).

23. *Bangerter,* 46 F.3d at 1503-1504.

24. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp*., 429 U.S. 252, 270 (1977).

25. *Village of Arlington Heights*, 429 U.S. at 265.

26. *Village of Arlington Heights*, 429 U.S. at 266-268.

27. *See Stewart B. McKinney Foundation, Inc., id*.

28. *See Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, (N.D.N.Y. 1992).

29. *See Innovative Health Systems, Inc. v. City of White Plains, id*.

30. *Village of* Arlington Heights, 429 U.S. at 270 n.21.

31. *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied* 434 U.S. 1025 (1979).

32. *Stewart B. McKinney Foundation, Inc.,* 790 F. Supp. at 1219.

33. *Metropolitan Housing Development Corp*., 558 F.2d at 1292.

34. *Stewart B. McKinney Foundation, Inc., id.*

35. *North Shore Chicago Rehabilitation, Inc. v. Village of Skokie*, 827 F. Supp. 497, 500 (N.D. Ill. 1993).

36. *Erdman v. City of Ft. Atkinson*, 84 F.3d 960, 962 (7th Cir. 1996).

37. *Hemisphere Building Co., Inc. v. Village of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999).

38. *U.S. v. Village of Palatine*, 37 F.3d 1230, 1234 (7th Cir. 1994).

39. *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

40. *Erdman*, 84 F.3d at 962.

41. *See Hovson's, Inc. v. Township of Brick*, 89 F.3d 1096 (3rd Cir. 1996).

42. *See U.S. v. Village of Marshall*, 787 F. Supp. 872 (W.D. Wis. 1991).

43. *Bronk*, 54 F.3d at 429.

44. *Brandt v. Village of Chebanse*, 82 F.3d 172, 174 (7th Cir. 1996).

45. *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144 (2nd Cir. 1999) (town did not fail to provide reasonable accommodation by refusing to grant building permit for residential facility in commercial district since a building permit would not have been granted for traditional residences).

46. *U.S. v. Village of Palatine*, 37 F.3d at 1233.

47. *Id*. at 1234.

48. *Bangerter*, 46 F.3d at 1501-1502.

49. 42 U.S.C. §3615.

50. *See Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F.Supp.2d 941, 953 (E.D. Wis. 1998) ("A rational basis will no longer support a law which burdens the disabled.")

51. *See e.g.*, Wis. Stat. §62.23(7)(i)1.(1999-2000).

52. *See e.g., Larkin v. Mich. Dept. of Social and Rehabilitation Services*, 89 F.3d 285 (6th Cir. 1996), *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F.Supp.2d 941 (E.D. Wis. 1998), *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491 (W.D. Wa. 1997) and *Horizon House v. Twp. Of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd without opinion*, 995 F.2d 217 (3rd Cir. 1993). *But see Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991) (separation requirement upheld on application of rational basis test).

53. 42 U.S.C. 3607(b)(1).

54. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728 (1995).

55. *See e.g., Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597 (4th Cir. 1997).

56. *Fair Housing Advocates Ass'n., Inc. v. City of Richmond Heights*, 209 F.3d 626, 636 (6th Cir. 2000) (quoting *City of Edmonds,* 514 U.S. at 733).

57. *Fair Housing Advocates Ass'n*., 209 F.3d at 636.

58. *Fair Housing Advocates Ass'n*., 209 F.3d at 637.

59. *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43, 47 (6th Cir. 1992).

60. *See Hemisphere, id*.

61. *Village of Palatine*, 37 F.3d at 1234.

62. *See Robinson v. City of Friendswood*, 890 F. Supp. 616 (S.D. Tex. 1995).

63. *See Smith & Lee Associates v. City of Taylor*, 13 F.3d 920 (6th Cir. 1993).

64. *Means v. City of Dayton*, 111 F. Supp.2d 969 (S.D. Ohio 2000).

65. *U.S. v. City of Chicago Heights*, No. 99 C 4461, 2001 WL 290420 (N.D. Ill. 2001) (one person per room, pre-occupancy inspection, detached single-family dwelling and non-profit provider requirements which applied only to group home residents and were not narrowly tailored to specific needs and abilities of persons to whom they applied violated FHA).

66. *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996) (annual review requirement unnecessary since concerns to be addressed by requirement could be adequately addressed under ordinary nuisance law).

67. *North Shore-Chicago Rehabilitation, Inc. v. Village of Skokie*, 827 F. Supp. 497 (N.D. Ill. 1995) (justification for proof of licensing requirement based on welfare and safety concerns is inadequate where the subject group living facility is not licensed by the state).

68. *Epicenter of Steubenville, Inc. v. City of Steubenville*, 924 F. Supp. 845 (S.D. Ohio).

69. Bryant Woods Inn, Inc., 124 F.3d at 603.

Zoning / Zoning # 464 Should Public Hearings Be Held to Allow Group Homes? July 31, 2002

Zoning # 464
Should Public Hearings Be Held to Allow Group Homes?
July 31, 2002

Summary - Zoning # 464
A group home or community living arrangement (CLA) is subject to a public hearing requirement associated with rezoning, variance, conditional use or reasonable accommodation relief from a general land use regulation but a public hearing for purposes of determining whether a proposed exception to the CLA spacing or density restriction of Wis. Stat. sec. 62.23(7)(i) qualifies as a reasonable accommodation is inadvisable and probably contrary to the Fair Housing Amendment Act.

You seek, on behalf of your village board, clarification of an earlier opinion[1] provided to your

community on public hearings for group home approvals in light of the legal comment in the August 2001 Municipality magazine regarding group homes. You state your question as follows: "Should public hearings be held to allow group homes to be established in a community and if so, what criteria should be used for the hearing?"

Our prior opinion to your community addressed the propriety of holding public hearings on applications by community living arrangements (hereafter CLA)[2] for exceptions to the density and 2500-foot spacing restrictions of Wis. Stat. §62.23(7)(i). Your question is somewhat broader this time, so I will expand the analysis to include public hearing requirements in association with the available methods for obtaining relief from general land use restrictions as well as the special limitations of 62.23(7)(i).

In my opinion, a CLA is subject to a public hearing requirement associated with rezoning, variance, conditional use or reasonable accommodation relief from a general land use regulation but a public hearing for purposes of determining whether a proposed exception to the CLA spacing or density restrictions of Wis. Stat. §62.23(7)(i) qualifies as a reasonable accommodation is inadvisable and probably contrary to the Fair Housing Amendment Act (FHAA). I will address each context separately and include some comments about criteria or standards.

There are several procedures available to a CLA to obtain relief from a general land use restriction. These include traditional relief such as rezonings, variances and conditional use permits.[3] The FHAA also requires municipalities to make reasonable accommodations in their "rules, policies, practices or services" when the accommodations are necessary to give people with disabilities equal housing opportunities.

Rezonings, variances and conditional use approvals include a public hearing component. Public hearings are required for rezonings and variances by Wis. Stat. §§62.23(7)(d)2. and (7)(e)6. Unless the power to grant conditional use approvals (special exceptions) is vested in the Board of Appeals under Wis. Stat. §62.23(7)(e)1., public hearings for conditional use approvals are not statutorily required. They are however a common feature of such zoning actions imposed by local ordinance whether granted by plan commissions, common councils or village boards.

Although the precise question has not been addressed by any Wisconsin state court, the Seventh Circuit Court of Appeals, a court with jurisdiction and authority over federal cases arising in Wisconsin, found in *U.S. v. Village of Palatine, Ill*., 37 F.3d 1230 (7th Cir. 1994) that a municipality's decision to not relieve a CLA facility from a non-discriminatory public hearing requirement associated with a conditional use permit procedure did not violate the FHAA. This opinion is persuasive not binding authority in Wisconsin state courts. It is nonetheless consistent with results reached by other federal courts and the general consensus that municipalities are not

required to provide blanket waivers to CLAs from public hearing requirements associated with land use regulation relief mechanisms. Accordingly, I think Wisconsin municipalities may require that CLAs comply with the statutory requirements for public hearings on rezonings or variances and local requirements for public hearings on conditional use applications as long as they are not administered in a discriminatory manner or for a discriminatory purpose against persons protected by the FHAA.

As I noted above, under the FHAA provision 42 U.S.C. §3604(f)(3), a municipality must make reasonable accommodations in its "rules, policies, practices or services" when the accommodations are necessary to give people with disabilities equal housing opportunities. Frequently, the reasonable accommodation request will be subsumed within a proposed rezoning, variance, or conditional use request.

It is important however to recognize that the legal standards or criteria for a reasonable accommodation differ from those for a rezoning, variance or conditional use. For example, it is clear under federal decisions such as *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995) that the party seeking a reasonable accommodation of a local regulation must show that the desired accommodation will affirmatively enhance his quality of life by ameliorating the effects of a disability. A variance applicant on the other hand has the burden of demonstrating that the local regulation to be varied is causing an unnecessary hardship (*i.e.*, no reasonable use) due to conditions of his property (*e.g.*, steep slope, wetlands, etc.) that are unique. Unlike a reasonable accommodation applicant, the personal circumstances of a variance applicant are not and cannot be the basis for granting relief. Only those matters relating to the property are proper considerations.

The different standards applicable to reasonable accommodation requests compared to more familiar land use regulation relief provisions suggest a need for municipalities to be attentive to requests for relief from local regulations by persons with disabilities to ensure the correct standard is applied. Since application of the wrong standard may result in an improper denial of an FHAA or ADA reasonable accommodation and expose the municipality to liability for such action, officials may wish to consider developing a specific procedure for identifying and addressing these types of requests.

The FHAA does not prescribe a reasonable accommodation procedure. Nor does it directly address the propriety of a public hearing on such relief. There are also no statutorily prescribed procedures for handling a reasonable accommodation request. This leaves municipalities free to develop their own procedures for such relief within the limits of the FHAA.

Public hearings are a logical means for receiving relevant information about a proposed accommodation and an important method for educating the public. Moreover, a CLA reasonable

accommodation public hearing is legally indistinguishable from a CLA rezoning, variance or conditional use hearing. While there are legitimate concerns over the use and abuse of public hearings for CLAs, there are remedies for these abuses in the FHAA. Accordingly, I think a municipality may require a public hearing in association with a proposed reasonable accommodation of a general land use regulation as long as it is not administered in a discriminatory manner or for a discriminatory purpose against persons protected by the FHAA.

In Wisconsin, CLAs are also subject to the special spacing and density restrictions of Wis. Stat. §62.23(7)(i). The statutory relief from these restrictions is an "exception" granted by the enforcing municipality upon application by the CLA agent under Wis. Stat. §§62.23(7)(i)1., 2., 2m., and 2r.a. Significantly, these sections do not expressly require that a municipality hold a public hearing before granting an exception. They only indicate that a facility may apply for an exception and it may be granted by the municipality at its discretion. Since public hearing requirements for relief from general land use regulations are valid under the FHAA, it would be simple enough to conclude that a public hearing may be part of the procedure established by a municipality to address 62.23(7)(i) spacing or density limit "exception" requests. The courts complicated this simple conclusion though four years ago.

In 1998, the U.S. District Court for the Eastern District of Wisconsin rendered its decision in *Oconomowoc Residential Programs v. City of Greenfield*, 23 F. Supp.2d 941 (E.D. Wis. 1998). In that case, the court ruled that the 2500-foot spacing and density requirements of Wis. Stat. §§62.23(7)(i)1. and 2r. are in conflict with and therefore preempted by the FHAA. This decision raised concerns by some members of your village board regarding public hearings on requests for exceptions from the spacing or density limitations of 62.23(7)(i) which led to a request for an opinion from our office.

Agreeing with your municipal attorney, we issued an opinion that concluded a CLA must still request a reasonable accommodation (before seeking judicial relief) by applying for an exception from the 62.23(7)(i) density or 2,500 foot spacing requirements. League counsel and your village attorney also concluded that holding a public hearing on a proposed spacing or density exception (a reasonable accommodation request) is a valid and appropriate method of obtaining information to decide whether it is reasonable.

These conclusions were primarily based on the general requirement that a person or party claiming a violation of the FHAA or ADA must show that they sought a reasonable accommodation before they file a lawsuit. In *Oconomowoc*, the court acknowledged this rule when it stated, "FHAA and ADA plaintiffs have the burden of seeking accommodation before seeking relief in a judicial forum . . . and . . . that requesting the zoning exception under subsection 62.23(7)(i) meets this requirement."

We and your village attorney interpreted this statement to mean a CLA must still apply for a 62.23(7)(i) spacing or density exception to meet its pre-litigation reasonable accommodation request burden even though the restrictions were declared invalid by the court. We now think that conclusion is mistaken.

The principal concern is the ambiguous nature of the court's statement. It does not clearly state that a CLA facility must apply for a 62.23(7)(i) spacing or density restriction exception before filing a lawsuit. It appears to answer a much different question. It is therefore important and necessary to consider the context of the statement to ascertain its true meaning.

In *Oconomowoc*, the municipality argued that the CLA facility did not seek a reasonable accommodation before filing suit. The facts however indicated the CLA facility applied for a 62.23(7)(i) exception and the court found the application constituted a reasonable accommodation request under the FHAA and ADA.

There was no argument to the *Oconomowoc* court that a CLA facility must apply for a 62.23(7)(i) exception before filing suit because such application had been made by the CLA. This means the court did not need to render any ruling on this issue and the referenced statement was not made in a context necessitating such a determination.

Since the referenced statement of the court is not a clear determination of whether a CLA facility must apply for an exception to 62.23(7)(i) before seeking judicial relief under the FHAA or ADA and the *Oconomowoc* court did not need to decide this issue, it is incorrect to conclude that it did. This also means the *Oconomowoc* decision does not provide support for the use of public hearings to determine whether a proposed 62.23(7)(i) exception qualifies as a reasonable accommodation. In fact, there are substantial reasons to question the appropriateness and validity of such practice.

First, the *Oconomowoc* rulings leave municipalities in the U.S. District Court for the Eastern District of Wisconsin jurisdiction with no real decision to make regarding a proposed deviation from the 62.23(7)(i) density or spacing limits by a CLA facility. Unless a municipality in that jurisdiction intends to enforce a law that has been declared invalid, it must grant a 62.23(7)(i) spacing or density limit exception request. If there is no real decision to make, holding a public hearing to "assist" in such an endeavor is likely to create an incorrect perception that public input will affect the outcome. The typical pressures exerted by the public at such events also increase the risk that decision-makers may be pushed to a choice that they cannot legally defend.

Second, assuming arguendo that the FHAA reasonable accommodation standards still apply to the invalidated spacing and density restrictions of 62.23(7)(i), I do not doubt the ability of a CLA within the jurisdiction of the U.S. District Court for the Eastern District of Wisconsin to satisfy

their burden to show that a proposed deviation from a law that discriminates against the handicapped is necessary to afford the handicapped an equal opportunity to use and enjoy a dwelling of their choice. To deny the accommodation, this leaves the municipality with the burden to show that the proposed accommodation is unreasonable. Being invalid, the 62.23(7)(i) spacing and density restrictions for CLAs are however unreasonable in municipalities like yours that lie within the jurisdiction of the U.S. District Court for the Eastern District of Wisconsin. It is therefore questionable whether any information could establish that a proposed deviation from an unreasonable restriction is unreasonable. Moreover, if public hearings are held for that purpose, a court might well find the practice discriminatory and in violation of the FHAA.

For the foregoing reasons, I think a CLA is subject to a public hearing requirement associated with rezoning, variance, conditional use or reasonable accommodation relief from a general land use regulation. However, a public hearing requirement is inadvisable and probably contrary to the FHAA if imposed by a municipality in the jurisdiction of the U.S. District Court for the Eastern District of Wisconsin for the purpose of determining whether a proposed exception to the 62.23(7)(i) density or 2500-foot separation restriction qualifies as a reasonable accommodation.

Zoning / Zoning # 464 Should Public Hearings Be Held to Allow Group Homes? July 31, 2002 / Endnotes

Endnotes

1. *Group Home Regulations: The Federal Fair Housing Act Amendments and the Americans with Disabilities Act.* Published in the September 2000 edition of the Municipality.

2. For purposes of this opinion, community living facility or CLA will include foster homes, treatment foster homes and adult family homes subject to the spacing requirement and/or density limits of Wis. Stat. §§62.23(7)(i)1., 2. or 2r.a.

3. Technically, a conditional use permit is not "relief" from a land use provision but a means of obtaining approval of a land use that may not be established "by right" under a community's land use code.

Zoning / Zoning # 465 Court Upholds $232,841 Group Home Judgment Against City August 31, 2002

Zoning # 465

Court Upholds $232,841 Group Home Judgment Against City
August 31, 2002

Summary - Zoning # 465
For purposes of reasonable accommodation under the Fair Housing Amendments Act (FHAA) and Americans with Disabilities Act (ADA), party seeking accommodation from municipal group home spacing ordinance need only make an initial showing that proposed accommodation is reasonable and, upon that showing, burden shifts to municipality to "come forward to demonstrate unreasonableness or undue hardship in the particular circumstances" and municipality must adequately establish "the nature or quantity" of alleged financial and administrative burdens imposed by group home facility. Oconomowoc Residential Programs, Inc. v. City of Milwaukee, No. 01-1002 (7th Cir. Aug. 8, 2002). 8/31/02.

The Seventh Circuit Court of Appeals recently issued a long-awaited decision in a group home siting case from the City of Milwaukee. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, No. 01-1002 (7th Cir. Aug. 8, 2002). Although the court did not weigh in on the lingering issue in Wisconsin of whether group home spacing restrictions violate the Fair Housing Amendments Act (FHAA) or Americans with Disabilities Act (ADA), the decision provides a useful reminder about the risks associated with group home siting denials and municipal obligations to accommodate housing for the disabled under the FHAA and ADA.

The case arose over an application by Oconomowoc Residential Programs, Inc. (ORP) to operate a community living facility for six disabled adults in the City of Milwaukee. The city has a local zoning ordinance that parallels the 2500-foot group home spacing requirements found in Wis. Stat. §62.23(7)(i).

After locating and purchasing a site for its proposed facility, ORP applied for an occupancy permit from the city. The city refused to issue the permit because the proposed facility was too close to existing facilities and would violate the 2500-foot spacing requirement but informed ORP that it could seek a variance by appealing to the Board of Zoning Appeals (BOZA).

ORP applied for the variance and the BOZA denied the request in a written decision. ORP sued the city in federal district court alleging a violation of the FHAA.

The district court assigned the case to a magistrate who filed a recommendation supporting the plaintiffs claim with the court. The district court adopted the magistrate's recommendation in full including the magistrate's finding that the "City failed to reasonably accommodate the plaintiffs."

After a trial on damages, the court awarded compensatory damages to ORP in the amount of

$207,841 and $12,500 each to two facility residents. The court did not however enjoin the city from enforcing the spacing ordinance. The city appealed the judgment to the Seventh Circuit Court of Appeals.

After reviewing the basic legal framework for reasonable accommodations under the FHAA,[1] the court initially rejected the city's argument that the plaintiffs bore the burden of proof on the issue of reasonable accommodation. Noting its prior description of the process in *Vande Zande v. Wisconsin Dep't of Admin*., 44 F.3d 538 (7th Cir. 1995) and the recent Supreme Court holdings on the issue in *USAirways, Inc. v. Barnett*, ___ U.S. ___, 122 S. Ct. 1516 (2002), the court firmly adopted the position that a plaintiff need only make an initial showing that an accommodation is reasonable and, upon that showing, the burden shifts to the defendant municipality to "come forward to demonstrate unreasonableness or undue hardship in the particular circumstances."

Focusing on the three key elements of a reasonable accommodation, "reasonable," "necessary," and "equal opportunity," the court found the plaintiffs had met their burden of demonstrating the requested variance was necessary to provide them with an equal opportunity to use and enjoy a dwelling because the residents of the facility "are unable to live in residential communities without the resources of a group home facility."

On the other hand, the court concluded the city failed to show ORP's proposed variance was not reasonable. The court stated the city did not adequately establish "the nature or quantity" of the alleged financial and administrative burdens imposed by ORP's history of group home operating problems, high traffic volumes on an adjacent street, lack of sidewalks for pedestrian travel and potential flooding in the facility area.

The court explained the city "fail[ed] to link [its] laundry list of problems in other [ORP] facilities [client over-medication, sexual abuse, neglect, physical abuse, client outbursts and fighting, police calls and the drowning death of an elderly resident] with any financial or administrative burdens it might bear with this particular facility." Noting the city's own arguments were presented in terms indicating uncertainty, the court stated, "this type of speculation fails to support the City's claim of unreasonableness."

The court next observed the majority of the city's evidence regarding dangers imposed by the group home's geographic proximity to the river and the busy street came from anecdotal testimony of neighbors. This effort fell short since "[t]he City, cannot, however, rely on anecdotal evidence of neighbors opposing the group home as evidence of unreasonableness." Moreover, the court noted "the City's own engineer testified that the proposed group home would not have a significant adverse impact on traffic."

Finally, as to the potential flood dangers, the court stated "the City . . . failed to provide any

evidence that the group home would pose any higher burden on the City's emergency services than would any other residences in the flood-prone area." The court explained "[t]he mere fact that residents of the group home 'will at times require the assistance of the local police and other emergency services does not rise to the level of imposing a cognizable administrative burden upon the community.'"

The Seventh Circuit thus affirmed the district court and, having decided the case on the basis of the reasonable accommodation issue, declined to decide the issue of whether the city's group home spacing ordinance was preempted by the FHAA and ADA.

Zoning / Zoning # 465 Court Upholds $232,841 Group Home Judgment Against City August 31, 2002 / Endnotes

Endnotes

1. For a summary of this framework see "Congregate Living: Municipal Policies, Practices and the Fair Housing Act" in the August 2001 edition of *the Municipality* (League opinion Zoning 454).

Zoning / Zoning # 487 Application of Conditional Use Permit Requirement to Family Day Care Home is Contrary to Statutes October 31, 2006

Zoning # 487
Application of Conditional Use Permit Requirement to Family Day Care Home is Contrary to Statutes
October 31, 2006

Summary - Zoning 487
Application of a conditional use permit requirement to a family day care home by a municipality is contrary to the plain language of Wis. Stat. 66.1017(2) since such a requirement is not a zoning regulation that applies to a "dwelling" and a municipality is not authorized to impose conditions on a family day care home dwelling on a case-by-case basis since such conditions are unique to each family day care home and not "applicable" to other dwellings as required by 66.1017(2). 10/31/06.

Slightly modified for clarity, you asked us to consider two questions related to family day care

homes:

1. Does Wis. Stat. sec. 66.017(2) mean that a municipality is always prohibited from denying a conditional use permit for a family day care home in a zoned district in which a single family residence is a permitted use?

2. If a municipality is always prohibited from denying a conditional use permit for a family day care home in a zoned district in which a single family residence is a permitted use, may a municipality still place conditions on a family day care home on a case-by-case basis?

It is my opinion that the answer to the first question is yes and the answer to the second question is no.

Zoning / Zoning # 487 Application of Conditional Use Permit Requirement to Family Day Care Home is Contrary to Statutes October 31, 2006 / Question #1

Question #1

Wis. Stat. 66.1017(2) limits the authority of Wisconsin municipalities to regulate family day care homes. It states:

> No municipality may prevent a family day care home from being located in a zoned district in which a single family residence is a permitted use. No municipality may establish standards or requirements for family day care homes different from the licensing standards established under s. 48.65. This subsection does not prevent a municipality from applying to a family day care home the zoning regulations applicable to other dwellings in the zoning district in which it is located.

Your first question asks whether 66.1017(2) always prohibits a municipality from denying a conditional use permit for a family day care home in a zoned district in which a single family residence is a permitted use. The answer to this question requires an interpretation of 66.1017(2).

The Wisconsin Supreme Court clarified the framework for Wisconsin statutory interpretation in *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110. The court explained that clarification was needed to "refocus the primary statutory interpretation inquiry on intrinsic, textual sources of statutory meaning and reiterate the rule that extrinsic sources of interpretation are generally not consulted unless there is a need to resolve an

ambiguity in the statute." *Kalal*, 2004 WI 58 at fn. 8.

In this effort, the court noted the value of context and structure to a plain-meaning interpretation:

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. 'If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.' Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. 'In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute.'

Kalal at ¶46 (citations omitted). In other words, a statute's context and structure are part of a plain-meaning analysis as long as they are "ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history." *Id.* at ¶48.

The court also emphasized that ambiguity analysis is focused on the statutory language. *Id.* at ¶47. It explained that "[i]t is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute 'to determine whether 'well-informed persons *should* have become confused,' that is, whether the statutory language *reasonably* gives rise to different meanings.'" *Id.* (citations omitted) (emphasis in original).

Together, these statutory interpretation principles indicate that to give full effect to the court's instruction to limit the use of extrinsic legislative history sources, an ambiguity determination should only be made after concluding the intrinsic context and structure of the particular statutory language fail to provide a plain and reasonable meaning. Thus, the interpretation of 66.1017(2) must start with the plain language.

The plain language of the first sentence of 66.1017(2) states: No municipality may prevent a family day care home (FDH) from being located in a zoned district in which a single family residence is a permitted use. This language imposes a clear general restriction on the ability of a municipality to keep a FDH from operating in certain zoning districts.

However, the third sentence of 66.1017(2) permits a municipality to apply "to a family day care home the zoning regulations applicable to other dwellings in the zoning district in which it is located." In some instances, application of such regulations would certainly "prevent a family day care home from being located in a zoned district in which a single family residence is a permitted use." For example, setback requirements applied to all residential dwellings in a residential district could conceivably preclude a family day care home on a small residential lot by either preventing construction of a suitably sized dwelling or preventing expansion of an existing undersized dwelling. Therefore, the plain language of the third sentence of 66.1017(2) creates an exception to the general prohibition in the first sentence of that law.

The plain language of the third sentence of 66.1017(2) limits the scope of its exception to the general rule in the first sentence to "*zoning* regulations." A conditional use permit requirement in a Wisconsin city or village is a zoning regulation adopted pursuant to the authority set forth in 62.23. Therefore, such a requirement for a FDH in a residentially zoned district satisfies the "zoning regulation" criteria for the third sentence exception.

However, the plain language of 66.1017(2) also limits the zoning regulations a municipality may apply to a FDH to those which apply to "dwellings." Therefore, municipal zoning requirements that regulate land *uses* rather than dwellings cannot be used to prevent a FDH in a zoning district where single family residence is a permitted use.

This limitation on the scope of municipal zoning regulations applicable to a family day care home was recognized in a 1989 Department of Health and Human Services (DHSS) legal opinion which interpreted Wis. Stat. 66.304(2), now 66.1017(2), in response to questions about the application of a conditional use permit procedure to a FDH. In the opinion, the attorney observed:

> On the other hand, the third sentence permits municipalities to apply to family day care homes "the zoning regulations applicable to other dwellings in the zoning district." *Examples of these kinds of zoning regulations include architectural review, lot size and front, side and rear setback requirements, sidewalk and driveway standards, the uniform dwelling code, elevation limitations, and a multitude of other types of restrictions commonly found in municipal subdivision ordinances regulating residentially zoned districts* [emphasis added].

Opinion, Department of Health and Social Services, Robert Paul, Assistant Legal Counsel, May 4, 1989, pp. 9-10. The referenced examples in the opinion have a direct relationship to the

dwelling in which a FDH is conducted, not the FDH use itself.

The DHSS attorney recognized this limitation a second time in the opinion when he stated:

> [F]amily day care facilities within residentially zoned districts may be subjected to the same conditional use process that other residential facilities in the zoned district are subjected to like architectural design or setback requirements as referred to above, and *which do not bear on the operation of the facility as a family day care* [emphasis added].

Opinion, *supra*, p. 10. The exclusion of requirements that relate to the operation of a facility as a FDH is simply another way of stating that requirements that relate to the FDH land use are not within the scope of the third sentence of 66.1017(2).

These observations in the DHSS opinion, to the extent they relate to the distinction between regulations that are applicable to dwellings and those applicable to uses, are consistent with the plain language of 66.1017(2). The plain language of the statute provides that the class of permissible municipal zoning regulations that may be applied to a FDH in a zoning district where single-family residence is a permitted use are limited to those that apply to dwellings. However, I think the conclusion in that opinion that a conditional use process is consistent with this distinction and the plain language of 66.1017(2) fails to recognize the true nature of the conditional use requirement and is erroneous.

Conditional use is a term without a standard source, and is used variously. However, there are important authorities that demonstrate convincingly that a conditional use requirement is a regulation principally designed to control the land use conducted on a property not the structures on it.

In *State ex rel. Skelly Oil Co. v. Common Council*, 58 Wis. 2d 695, 700-701, 207 N.W.2d 585 (1973), the Wisconsin Supreme Court described conditional uses as follows:

> "Conditional uses or as they are sometimes referred to, special exception uses, enjoy acceptance as a valid and successful tool of municipal planning on virtually a universal scale. Conditional uses have been used in zoning ordinances as flexibility devices, which are designed to cope with situations where a particular *use*, although not inherently inconsistent with the *use* classification of a particular zone, may well create special problems and hazards if allowed to develop and locate as a matter of right in a particular

> zone. The Supreme Court of Minnesota in the case of *Zilka v. Crystal*, (1969) 283 Minn. 192, 195, 167 N.W.2d 45, most aptly described this flexibility:
>
> '. . .By this devise, certain *uses*, e.g., gasoline service stations, electric substations, hospitals, schools, churches, country clubs and the like which may be considered essentially desirable to the community, but which should not be authorized generally in a particular zone because of consideration such as current and anticipated traffic congestion, population density, noise, effect on adjoining land values, or other considerations involving public health, safety or general welfare, may be permitted upon a proposed site, depending upon the facts and circumstances of the particular case.'
>
> While a variance authorizes a particular property owner to use his property in a manner which is prohibited by the ordinance when not to be able to do so would be a hardship . . . a conditional use allows him to put his property to a *use* which the ordinance expressly permits' when certain conditions have been met." [Emphasis added, citation omitted, footnotes omitted].

Thus, the Wisconsin Supreme Court has recognized the dominant feature of a conditional use requirement: controlling the impacts of a proposed land use.

A leading commentator on zoning law states in regard to the purpose of special uses which are also commonly referred to as conditional uses that:

> The special use device provides municipalities with the flexibility and broad latitude to meet changing problems of land use control, by allowing zoning authorities to permit these *uses* when beneficial to the general community while, at the same time, imposing conditions that are tailored to meet the threat to nearby property owners [emphasis added].

Patrick J. Rohan, *Zoning and Land use Controls*, sec. 44.01(4), p. 44-22 (2002) citing *Kotrich v. County of DuPage*, 19 Ill. 2d 181, 166 N.E.2d 601, 603-604 (1960) wherein the court stated:

> [T]he special use technique developed as a means of providing for infrequent types of land use which are necessary and desirable but

> which are potentially incompatible with uses usually allowed in residential, commercial and industrial zones. Such uses generally occupy a large tract of land. They cannot be categorized in any given use zone without the danger of excluding beneficial uses or including dangerous ones. . . .

Instead of excluding such uses entirely from certain zones because of the harm they might cause, or, despite the potential harm, including them because of the benefits they will bring, the special use technique allows a more flexible approach. It contemplates that the county board may permit these uses when desirable and, if necessary, imposes conditions designed to protect nearby property owners.

Therefore, this authority, like the court in *Skelly Oil*, indicates that the focus of a conditional use requirement is on the proposed land use.

Another leading commentator on zoning law states:

> The term "conditional use" was developed to permit the inclusion into the zoning pattern (either in all zones or in certain particular zones) of *uses* considered by the legislative body to be essentially desirable, necessary, or convenient to the community, its citizenry, or to substantial segments thereof, but which by their nature or in their operation have (1) a tendency to generate excessive traffic, (2) a potential for a large number of persons to be attracted to the area of the use, thus creating noise or other pollutants, (3) a detrimental effect upon the value or potential development of other properties in the neighborhood, or (4) an extraordinary potential for accidents or danger to public health or safety. Any one of these alone, or in combination with others, would militate against the establishment of the *use* at every location in the district or at any location therein without restrictions or conditions-tailored to fit the special problems which the *use* might present-being imposed thereon [emphasis added].

Arden H. Rathkopf and Daren A. Rathkopf, *The Law of Planning and Zoning*, vol. 3, sec. 61:4, p. 61-12.

Finally, I note that the City of Green Bay Zoning Code does not deviate from these authorities. In section 13-302 of that Code, it defines "conditional use" as:

> Conditional use: *Uses* which, because of their unique characteristics, cannot be properly classified in a particular district or districts without consideration in each case of the impact of those *uses* upon neighboring land and of the public need for the particular *use* at the particular location [emphasis added].

This definition, like the authorities cited, instructs that the focus of a conditional use regulation is the land use, not the structure it is conducted in such as a single-family dwelling for a FDH.

An example may help clarify this point. If a zoning code identified "churches" as a conditional use, a zoning official could not reasonably apply this requirement to a structure that looked exactly like a church on the outside but was otherwise designed and used exclusively for single-family residence purposes. Conversely, a zoning official would be mistaken if she failed to apply such a requirement to a structure that looked exactly like a single-family home on the outside but was otherwise designed and used as a church. In this example, the proper action of the zoning official in the two circumstances that relate to a conditional use requirement for a church are dictated by the land use, not the structure in which the use will take place.

These authorities establish that a conditional use permit requirement is not a zoning regulation generally applicable to structures, such as a dwelling. Rather, a conditional use requirement is a zoning regulation that applies to a land *use* to be conducted in a particular dwelling or structure or upon specific property.

The plain language of the third sentence of 66.1017(2) limits the scope of the municipal regulatory exception it provides to the general prohibition on municipal power to prevent FDHs in residential districts to zoning regulations that apply to dwellings. It does not extend to zoning regulations that apply to land uses. Therefore, it is my opinion that applying a conditional use permit requirement to a FDH is contrary to the plain language of 66.1017(2) and, it necessarily follows that denying such a permit for a proposed FDH would violate 66.1017(2).

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Question #2

Your second question asks: If a municipality is always prohibited from denying a conditional use permit for a family day care home in a zoned district in which a single family residence is a permitted use, may a municipality still place conditions on a family day care home on a case-by-case basis? The answer to this question also depends on an interpretation of the meaning

of the third sentence of 66.1017(2). However, this time the focus is on a different portion of it.

Assuming that some zoning regulation other than a conditional use requirement might be available to impose case-by-case conditions on a proposed FDH dwelling,[1] the question presented by your second inquiry is whether such conditions are "zoning regulations *applicable* to other dwellings" as required by the plain language of the sentence. It is my opinion that they are not.

The term "applicable" is not defined in 66.1017(2). However, it is not a technical word. Therefore, we may consult a standard dictionary to ascertain its meaning.

The Random House Dictionary of the English Language, Second Edition, defines "applicable" as:

> Applying or capable of being applied; relevant; suitable; appropriate.

Thus, the zoning regulations that a municipality may permissibly apply to a FDH dwelling even if they might prevent a FDH from being established are those that are capable of being applied or are relevant, suitable or appropriate to the other dwellings in the zoning district.

A condition or regulation imposed on a FDH dwelling on a case-by-case basis is imposed as a consequence of the particular circumstances of a particular FDH dwelling. It is inherently unique to that FDH dwelling and, accordingly, it is not a condition or regulation with any applicability, relevance, suitability or appropriateness to any other FDH dwelling much less a non-FDH dwelling in that zoning district. Therefore, it is my conclusion that 66.1017(2) does not authorize a municipality to impose conditions on a FDH dwelling on a case-by-case basis.

Endnotes

1. The plain language of the third sentence of 66.1017(2) establishes that such conditions cannot relate to the FDH use but must relate to the FDH dwelling.