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## MEMORANDUM

TO: All PDS Stakeholders

FROM: Timothy B. Theissen, Esq., attorney for Planning & Development Services of Kenton County (PDS)

RE: Zoning of Residential Care Facilities, Group Homes and Sober Living Homes

DATE: October 8, 2021

### PURPOSE

The purpose of this memorandum is to provide a summary of the current law relating to zoning regulation of sober living homes, group homes and residential care facilities, and to discuss some approaches that may be employed relating to them.

This is the assessment of the current state of the law as determined by PDS counsel, but may not reflect the position of any stakeholder's legal counsel. Detailed information is supplied with this memorandum to allow independent assessment by your organization.

### INTRODUCTION

Many varieties of group homes, residential care facilities and sober living homes operate in Kenton County, Kentucky, many preferring to operate in houses in traditional single family zones. Recently, Oxford House, Inc. has proposed to open a new sober living home in Lakeside Park, Kentucky, which is believed to be the third such home in that City. Oxford House, Inc. operates many sober living homes in both Kenton County Kentucky, and throughout the United States. While Oxford Houses, and other forms of group homes and residential care facilities, provide an important housing opportunity for recovering addicts or other disabled or disadvantaged members of our society, the homes are viewed by some as inconsistent with the planned attributes of the neighborhood in which they exist. As a result, there has been an interest in assessing what regulation opportunities exist with regard to these homes within the constraints of applicable law.

## SUMMARY OF THE FACTS AND LEGAL PRINCIPLES

There are both federal and state law protections for many such homes that prevent a city from prohibiting such homes or adopting overly restrictive zoning regulations of them. The federal laws come from the Fair Housing Act and the Americans with Disabilities Act, and many court decisions interpreting them. The state law primarily relates to statutes protecting Residential Care Facilities. Each will be discussed below, using primarily Oxford Houses as an example of how these federal and state laws affect a city's ability to regulate such homes in a zoning context or otherwise.

Oxford house operates sober living homes in single-family homes throughout the country, typically operating in single-family-homes in good neighborhoods. They operate as a "family" under a nontraditional definition thereof. (For a detailed description of how an Oxford House operates, see **APPENDIX A**). Their homes are for recovering addicts, not active drug users. The occupants enjoy peer support in their home, but they do not have paid staff or treatment in the homes. Occupants run the homes as they choose, manage their own finances, and operate in a cooperative atmosphere. They support each other emotionally and in other ways as a functional equivalent to a "family." Occupants do not receive personal care or treatment in their home; those services are provided elsewhere. This is their home.

Federal law, which is superior to both state and local law and regulation, protects sober living homes from most zoning regulation, by virtue of the federal Fair Housing Act and Americans with Disabilities Act. (For a detailed analysis of applicable law on the legal protections afforded such homes as provided by Oxford House, Inc., see **APPENDIX B** and **APPENDIX C**). Organizations other than Oxford House have articulated similar positions. (See House of God's Grace letter attached as **APPENDIX D**). There have been many court decisions interpreting the federal laws applicable to these homes. (See a summary of some of the pertinent court decisions in **APPENDIX E**).

While not conforming to the traditional "single-family" concept in their homes, these operations are deemed to be "single-family" operations by definition and interpretation, and are thus permitted under zoning law. Because the applicable federal law is superior to state and local law, no amendment or modification of any state or local zoning law or regulation will be given the legal viability to deny the status granted to these homes by the federal law. The two federal statutes were adopted subsequent to many of the local zoning ordinances adopted in Kenton County, so the zoning ordinances must be read and enforced only after consideration of the subsequent superseding federal laws.

Federal Law. Persons who are non-abusing, recovering alcohols and drug addicts are covered by the Fair Housing Act of 1968, as amended by the Fair Housing Amendments Act of 1988, and by the Americans with Disabilities Act. The federal Fair Housing Act defines handicaps, which include "drug addiction" by

regulation, but specifically excludes persons with a “current, illegal use of or addiction to a controlled substance.” (A collection of pertinent federal statutes is attached as **APPENDIX F.**)

The Fair Housing Act includes a provision that says: “Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.” However, the occupancy limits on sober living homes may not be more restrictive than traditional family homes.

Pertinent federal court decisions (see **APPENDIX E**) relating to interpretation of these laws provide the following insights: (a) a 1,000 foot spacing requirement between such homes was held unlawful under the Fair Housing Act, because it creates an explicit classification based on handicap with no rational basis or legitimate government interest, and because it violates the FHAA because it has a disparate impact or "effect" on the housing choices of people with handicaps (*Horizon House*); (b) actions taken by city officials must not be motivated in part by a discriminatory purpose; zoning laws may not impose family composition rules designed to preserve the family character of a neighborhood based on the composition of a household rather than the total number of occupants living quarters can contain (*Tsombanidis*); (c) a regulation of 8-9 occupants was upheld to protect against increasing congestion, traffic, and noise in residential areas (*St. Louis*); (d) occupancy of 12 persons may be justified if supported by evidence to warrant such an accommodation (*Smith & Lee*); (e) traffic concerns and property devaluation may warrant occupancy limits but animus toward the occupants status will be considered to assess the city’s true motivation for regulating the home (*Hamm*); (f) increased expense of operating home is not alone a basis for setting aside a regulation (*Means*).

In conclusion, Federal Law prohibits a city prohibiting or significantly regulating these homes. There are some exceptions to the protections relating to reasonable occupancy limits, assurances of occupants sobriety, and other reasonable and justified controls to protect the neighborhood. However, regulation of these homes may not be more restrictive than traditional family homes.

State Law: Kentucky has zoning statutes providing for special rules for “Residential care facilities”, which are all of the types of homes operated to provide services in a home-like setting for disabled persons. The law permits such homes to operate in any residential zone, but subject to the same rules as other residences about “limitations upon area, height, yard, screening, parking, number of dwelling units, and number of occupants”. (Selected state statutes are attached in **APPENDIX G.**) So, under state law, occupancy limits for such homes only apply if they apply to all residences.

Moreover, the state law provides that “No conditional use permit not otherwise required for other residences within a zone or land use category shall be required for the operation of a residential care facility.” Therefore, in Kentucky, it is prohibited to

implement a program in a zoning ordinance addressing these homes using the “conditional use” process, due to this provision.

It has been suggested that perhaps a “Variance” is an option for regulating occupancy limits, by setting a maximum number of occupants and requiring owners to apply for a variance to increase that number if justified, whereby the city’s board of adjustment can grant or deny a variance with conditions as needed on a home-by-home basis. However, the definition of “variance” in state law says it only applies to “the height, width, length, or location of structures, and the size of yards and open spaces”. This definition precludes the use of the variance process to address occupancy limits.

International Property Maintenance Code. Most, if not all, of our cities in Kenton County have adopted this Code. This Code Section has occupancy limits for dwelling units. (See its Section 404 as **APPENDIX H**). Generally, for higher occupancy dwellings with 6 or more occupants, the IPMC requires only 150 square feet for a living room, 100 square feet for a dining room, and then bedrooms as low as 50 square feet per occupant. That means that in a house with 1,250 square feet, as many as 20 occupants would be permitted. So the only applicable occupancy limits in an applicable safety code is ineffective to restrict higher occupancy of residents in a residential care facility.

The Building Code of the Commonwealth of Kentucky. The official Building Code is the only building code that can apply in Kentucky, and it does in Kenton County. The Code has its own separate definition of “Residential Care Facilities” different than Kentucky’s zoning statute. (For pertinent section, see **APPENDIX I**). Most significant in the Building Code is whether sprinklers are required for fire suppression in the house. The Building Code says that if the facility provides supervision, and provides personal care service, then it is a facility requiring sprinklers. Many group homes, and other residential care facilities, provide supervision and personal care, so sprinklers may be required. Many such facilities provide supervision or care in the homes, thus may be required to provide for sprinklers. Oxford Houses specifically do not provide either supervision or treatment on site, so are not subject to the sprinkler requirement.

Existing local zoning provisions: Few Kenton County cities have specific provisions addressing these homes. For most cities, various sections of their zoning code must be interpreted to determine their application to these homes. These homes usually seek to operate in single family zones.

A key provision in a city’s zoning code is how it defines “family” for purposes of residential zones, particularly for “single family” zones. (As the reader compares the definitions below, make note of occupancy limits included, or not, in the definitions.)

At the time of this writing, Lakeside Park and 11 other Kenton County cities, namely Bromley, Crestview Hills, Edgewood, Elsmere, Fairview, Fort Mitchell, Kenton Vale, Ludlow, Park Hills, Ryland Heights and Taylor Mill, have similar zoning

ordinances, which predate the FHA and ADA, as relates to their traditional definition of Family as (with a restrictive occupancy limit):

*“FAMILY: An individual or two (2) or more persons related by blood or marriage, or group of not more than three (3) persons (excluding servants) who need not be related by blood or marriage, living together in a single housekeeping unit as their common home for the time, as distinguished from a group occupying a boarding house, lodging house, hotel, club, fraternity or sorority house.” (See Article 7.0, Lakeside Park Zoning Ordinance).*

Five (5) cities, namely, Fort Wright, Crescent Springs, Erlanger, Independence, and Kenton County, use the following definition (with no occupancy limit):

*“FAMILY: Shall consist of one individual, or any number of individuals related by genetics, adoption, marriage, or personal affinity, or any number of unrelated individuals occupying a dwelling unit as a single housekeeping unit. The term shall include individuals residing in a residential care facility as defined in KRS 100.984, state licensed adult family homes, homes for the disabled, and foster homes. The term shall not include group homes licensed for juvenile offenders, or other facilities, whether or not licensed by the state, where individuals are incarcerated or otherwise required to reside pursuant to court order under the supervision of paid staff and personnel.”*

Villa Hills’ ordinance defines family as (with no occupancy limit):

*“FAMILY – One or more persons occupying a premises and living together as a single housekeeping unit.”*

Covington does not define “family” but has the following definitions used in its zoning ordinance (which address occupancy limits):

*“SOBER LIVING HOME means a use within a single-family dwelling where no more than six unrelated individuals recovering from a drug and/or alcohol addiction reside, either voluntarily or by court order. A sober living home shall not provide on-site supportive services to residents, including, but not limited to, the following: mental health services; clinical rehabilitation services; social services; medical, dental, nutritional or other health care services; financial management services; legal services; vocational services; and other similar supportive services. This definition does not include a Sober Living Facility use. SOBER LIVING FACILITY means a dwelling where seven or more unrelated individuals recovering from a drug and/or alcohol addiction reside, either voluntarily or by court order. A sober living facility shall not provide on-site supportive services to residents, including, but not limited*

*to, the following: mental health services; clinical rehabilitation services; social services; medical, dental, nutritional or other health care services; financial management services; legal services; vocational services; and other similar supportive services. This definition does not include the Sober Living Home use.”*

In the Covington ordinance, Sober Living Homes are a permitted use in several residential and mixed use zones. Sober Living Facilities are listed as conditional uses only in a two mixed use zones and one commercial zone.

Occupancy limits are a significant distinction in these various definitions of “family”. The definition used by twelve cities contain a 3 person limit for unrelated persons, Covington uses 6 as the limit, and the others have no limit. Reasonable, justified occupancy limits are permitted by federal law. Precedents seem to clearly indicate that 3 is too low. The 12 cities’ zoning regulations limiting occupancy of unrelated persons to 3 were all adopted prior to the FHA and ADA, and so must be interpreted and enforced with consideration of the subsequent but superior federal laws.

Covington has set a limit of 6 occupants in Sober Living Homes, which are permitted uses in every residential zone and three of its Mixed Use zones. Covington then has provided alternatives for larger occupancy (7 or more occupants) defined as Sober Living Facilities, which are categorized as Social Services, and provided for as Conditional Uses only in two Mixed Use zones and one Commercial zone. Classification of these sober living homes and facilities based on occupancy of six or less, versus six or more, may not protect the City from challenge under the FHA and ADA, which remains untested to date. The Covington ordinance’s employment of the conditional use process for “Sober Living Facilities” with an occupancy exceeding 6 is suspect in light of the provision in state statute prohibiting the conditional use process for Residential Care Facilities.

Some have expressed concerns about a parking issue at such homes, especially if there are several adults living in the home. It appears that in reality excessive parking is not a problem as many occupants do not own cars or do not have valid unsuspended driver licenses. Moreover, mandating additional parking for such homes in excess of those required of a tradition family home would be prohibited.

## **DISCUSSION OF THE IMPLICATIONS OF THE LAW**

Different legislative bodies may seek to take different approaches, as one community may differ from another in how they balance the perceived positives/benefits and negatives/harms associated with certain such homes, and their community’s risk tolerance for possible litigation that may result from restrictions that they choose to impose on the homes proposed in their community.

Generally, federal law prohibits treating homes for these disabled persons differently than a home for a traditional family. Similarly state law says that residential care facilities are permitted in any residential zone.

While reasonable occupancy limits are permitted by both federal and state laws, the occupancy limits must equally apply to all houses, including those containing a traditional family. Because a traditional family may be large, and no one would suggest that a home could not be occupied by a large family, even one with two parents and over ten children, occupancy limits as a means for limiting or controlling the perceived effects of sober living homes, group homes and residential care facilities is highly problematic. Such a provision may be both legally and politically untenable.

Because there is precedence that limiting occupancy of unrelated persons in a home to 3 is overly restrictive, the zoning ordinances in 12 of our cities, if enforced, could bring a successful federal challenge. These rules predate the FHA and ADA. Those cities should consider amending the definition of family to remove an occupancy limit, as it may be inviting a federal challenge.

There is nothing in the law that limits a city's authority to treat these homes like any other rental operation in terms of requiring an occupational license, landlord license or the like.

Legal Counsel for the Kentucky League of Cities (KLC) has provided a legal memorandum (see **APPENDIX J**) which effectively summarizes the federal law and addresses efforts to regulate such homes. KLC's legal staff is very cautious on this subject due to the legal protections of the occupants and the risks associated with an unconstitutional infringement.

Density Restrictions. Excessive proliferation of these homes in a neighborhood could have the impact of changing the traditional nature of the atmosphere from that planned. Different from the usual concept of density (which involves a number of units per acre), this concept of density is about distancing the perceived negative impacts of such homes from each other. It has been suggested that a city might impose a restriction requiring that such homes must be spaced out a certain distance from each other. For example, a new facility might be prohibited from locating within 1,000 feet of another residential care facility. Argument could be made that such a provision is designed to reasonably limit, but not exclude such homes. Evidence could be assembled to justify that sort of provision, as a basis of neighborhood planning, including noise, traffic, safety, and the like. Adverse argument could be made that such restrictions, if not imposed on traditional houses, cannot be imposed on these facilities without a successful discrimination claim by the owners and occupants. There is a 1992 Pennsylvania case (Horizon House) that held that a 1000' spacing requirement was unconstitutional.

Risk of litigation is high if a city opts to impose restrictions on these homes. A city may be sued under the Civil Right Act in land use cases if the zoning law

unconstitutionally restricts the owner's use of its property, and the law allows a prevailing party to recover their attorney fees from the city.

Legal Challenge to Pending Home. It has been suggested that a cause of action may exist by neighbors claiming that an Oxford House home in a city that has a 3-person occupancy limit in its zoning ordinance is in violation of city ordinance. The legal challenge might be brought against its owner, or the city, or both. The legal theory is that an Oxford House with 4 or more occupants in a city with that zoning code is illegally operating in excess of the 3-person occupancy limit. A legal challenge by a neighbor seeking enforcement of a zoning ordinance provision is generally permitted. However, the city would seemingly have a defensible position because the 3-person occupancy limit predates the FHA and ADA, and is clearly illegal under federal law. Similarly, the owner would be well-positioned, as the neighbor's action is clearly on the basis of an unenforceable ordinance. The 3-person occupancy ordinance language predates the adoption of the FHA and ADA and so was clearly not drafted with its doctrines in mind.

#### A LESS RESTRICTIVE APPROACH

A city may decide that the risk of expensive litigation outweighs the benefits, if any, of restricting such homes. The societal benefits of the homes' operation could far outweigh any perceived effects of the homes on the neighborhood. There is much legal support for the position that these homes cannot be discriminated against, and so trying to limit of control them is unwarranted.

PDS Counsel supports this position. There is clear legal precedence that supports the adverse legal consequences of cities endeavoring to impose regulations on these homes that are any more restrictive than traditional family homes.

#### A MORE RESTRICTIVE APPROACH

A city may want to do all it can within the confines of applicable law to minimize the effects of these homes on the neighborhood. If a city purports to undertake such efforts, great attention must be given to avoid the city's liability to the property owner and occupants, as they have the stated legal rights that may not be infringed.

For these reasons, the options for regulation of these homes are significantly limited, and generally any such regulation comes from safety regulations, like building maintenance codes, fire codes, building codes, or the like, and not from zoning regulation.

Attempts to regulate sober living homes by zoning laws or their enforcement face significantly higher risk than many other activities by a municipality because of the fact that violation of a federal law by a city of the rights of these individuals can result in a federal civil rights case, obviating complex, and thus expensive, federal court litigation, which if unsuccessful increases the risk of financial penalty by virtue of not only damages that may be awarded, but the right of the affected party to collect their

attorney fees under Section 1988 of the federal civil rights law. Therefore, municipalities seeking to challenge the rights of homes like Oxford Houses face enhanced risk, and therefore must be undertaken with heightened caution.

Nuisance ordinances, enforced by complaints as a result of repeated violations, are generally unsuccessful, because revocation of authority to operate these homes cannot be handled differently than any other home in which a municipality have may have multiple calls, but not result in ejection of the owners.

The International Property Maintenance Code, which has been adopted by most of not all cities, at its Section 404, imposes "Occupancy Limitations, which are largely unhelpful as an enforcement method, because it only requires a minimal 50 square feet of bedroom floor area per occupant, which is met by all observed Oxford House homes to date. By these standards a smaller 10' x 10' bedroom may accommodate 2 occupants. (See **APPENDIX H**)

It has been suggested that perhaps an occupancy rule could distinguish between adults and minors, like in a traditional family, providing for example, a requirement of 500 square feet for an adult and 250 square feet for each minor. (See letter from local attorney, Chris Wieste, attached as **APPENDIX K**). However, the *Tsombanidis v. City of W. Haven* case clearly prohibits consideration of "family composition rules" to such homes, recognizing that pure occupancy rules are permitted by the Fair Housing Act.

Opportunities for regulation of these homes typically come within the realm of necessitating a certain distance between them within a community, and perhaps some maximum limit on the number of individuals who can reside in one of the single-family homes that operate as such a home, and a little more. However, there is the Horizon House case that has held that a 1000' spacing requirement is unconstitutional.

The City of Newport, in Campbell County, Kentucky, adopted a detailed ordinance in 2016, amended in 2017 (copy provided as **APPENDIX L**) which purports to limit occupancy and spacing, while providing a process for accommodation and appeal. While this Newport ordinance, and the ordinance adopted by Covington, seek to regulate these homes, it is undetermined whether these two methods of regulation, if challenged, will be held by the federal courts to meet constitutional standards. The ordinances are provided for information to the readers for independent consideration by each stakeholder depending on their own goals and risk tolerance.

## **CONCLUSION**

Regulation in zoning ordinances of residential care facilities, group homes and sober living homes is limited. Recovering addicts are "disabled" and therefore no discrimination of them may be employed in a zoning ordinance. A group of recovering addicts living in a home together can be entitled to legal treatment as a "family", thus permitted in a residential zone. Employing the variance and the conditional-use processes in a zoning code are prohibited by state law. Occupancy limits are legally

permitted but problematic, because any occupancy limit on such homes must apply across the board to other traditional family residences, which may be untenable. Other applicable codes, including the International Property Maintenance Code and the Kentucky Building Code, are not particularly helpful. Current zoning codes that define family to limit occupancy to 3 unrelated persons are inconsistent with federal law, and should be amended to comply. These homes may not be subjected to regulation that is different or more restrictive than traditional family homes.