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Director Brad Cazort  
8200 Alvin Lane  
Little Rock, Arkansas 72227

**CITY ATTORNEY OPINION NO. 2012-006**

Dear Director Cazort:

This opinion is in response to the questions raised about the legal restrictions the Board of Directors faces when it determines whether to grant a special use permit (SUP) for a group home to be occupied by persons who are in recovery from alcoholism or substance abuse.<sup>1</sup> The residents of the home have a relationship with Oxford House, Inc.

**QUESTION PRESENTED**

**How does a governing body properly consider an SUP application for a group home to house persons in recovery from alcoholism and substance abuse without violating state or federal laws?**

**SHORT ANSWER**

**State and federal civil rights statutes guarantee housing opportunities to persons who meet the definition of disabled, “repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals.”<sup>2</sup>**

**FACTUAL BACKGROUND**

A residential home at 102 Brookside Drive is currently owned by a person who wishes to associate with Oxford House, Inc. and have as many as seven (7) individuals reside in the home

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<sup>1</sup> The questions you posed are included within the Question Presented, so I restated it to provide a more direct answer. Essentially, you asked what federal and state laws the Board of Directors should consider as it reviews the SUP application; what duties do these laws impose on local government to assure compliance; what considerations or discretion does the local government have when it makes its decision; and, were the comments of Mr. Robert Gminski compelling as to why the Board of Directors is free to overturn the Planning Commission decision to grant the SUP. Director Wright wanted some clarification as to what rights property owners have when a governing body considers such an application. Director Wyrick wanted clarification of whether the fact an SUP is necessary give the Board of Directors greater flexibility on whether to grant or deny it.

<sup>2</sup> The quoted language is taken from the legislative report for the Fair Housing Act Amendments extension of protection to the disabled. *See* H.R. Rep. 100-711, 1988 U.S.C.C.A.N. 2173, 2179.

who are recovering from addiction to alcohol or drugs. The home is located in an area zoned for residential use. The proposed use meets the definition of a group home because recovery from alcoholism or substance abuse is considered a disability under state and federal law. There will be no live-in staff. No other activities, such as counseling or meetings, will be conducted at the site. The applicant anticipates that no more than three (3) individuals would have automobiles. Public transportation is immediately available on West Markham Street via bus service from Central Arkansas Transit Authority (CATA). A bill of assurance for the area states that the area is to be used for single family residences. There is no other group home in the neighborhood, but a nursing home is located nearby.

The Department of Planning & Development supports the application in light of City ordinances. The Little Rock Planning Commission voted to approve the grant of an SUP on February 2, 2012. Mr. Robert P. Gminski, a record objector before the Planning Commission, appealed the grant of an SUP to the Board of Directors. The Board must now make the quasi-judicial, or perhaps administrative, decision of whether to uphold the grant of the SUP.<sup>3</sup>

On April 27, 2012, this office sent a memorandum to the Board of Directors that discussed various legal issues about the Board's authority to grant an SUP. Subsequent to this memorandum, the Board requested this legal opinion as to how a governing body properly considers a request for an SUP and complies with federal and state law.

#### DISCUSSION

Federal civil rights law, as amended in 1988, is the major source of guidance on the restrictions that face the Board as it considers this application. The Fair Housing Act was originally adopted to prohibit discrimination based upon race, color, religion, or national origin. In 1974, discrimination based upon gender was added to the act. The law was extended to prohibit discrimination against individuals with a disability in 1988.<sup>4</sup>

The recovery from alcohol or substance abuse addiction is a disability. 42 U.S.C. § 3602(h); *see also Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251 (8<sup>th</sup> Cir. 1996). The Fair Housing Act provides that "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [an individual with a disability]

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<sup>3</sup> Even though this issue comes as a resolution, it is not a legislative action. It is an appeal from the Planning Commission. The Board is being asked to apply the facts to the existing zoning ordinances to see if a special use permit should be granted. The Arkansas Supreme Court has declared such a review to be a quasi-judicial act. *See King's Ranch of Jonesboro, Inc. v. City of Jonesboro*, 2011 Ark. 123 at \*6 (Ark. Sup. Ct. March 31, 2011). Other jurisdictions have determined that whether to grant a special use permit is an administrative act. *See also, The Anderson Group, LLC v. City of Saratoga Springs*, 557 F.Supp.2d 332, 345 (N.D.N.Y. 2008), *aff'd in relevant part sub nom. The Anderson Group, LLC v. Lenz*, 336 F.Appx. 21 (2<sup>nd</sup> Cir. 2009).

<sup>4</sup> *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728, n.1 (1995).

equal opportunity to use and enjoy a dwelling' constitutes unlawful discrimination. 42 U.S.C. § 3604(f)(3)(B); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728 (1995).<sup>5</sup>

Oxford House has been recognized nationally as a treatment model for persons recovering from alcohol or substance abuse addiction. "[It] is not a treatment facility but a group residence for recovering alcoholics and drug addicts. The self-governing, unsupervised homes enforce a strict alcohol- and drug-free lifestyle to support the residents in their recovery. DOUGLAS E. MILLER, *The Fair Housing Act, Oxford House, and the Limits of Local Control Over the Regulation of Group Homes for Recovering Adults*, 36 Wm. & Mary L. Rev. 1467, 1468 (1995). An Oxford House would be considered a transitional housing facility.

The City enacted ordinances to address placement of transitional housing facilities. In 2004, because concerns were raised, and understanding the need for compliance with federal law requirements, the Board created a Transitional Housing Task Force.<sup>6</sup> The mission of the task force was to review the relevant federal statutes and cases, as well as ordinances from other communities around the country, to determine what discretion was available to a municipality to restrict the placement of such facilities. The result of this task force, and Planning Commission review, was Little Rock, Ark., Ordinance No. 13,395 (September 6, 2005). Consistent with federal law requirements to provide reasonable accommodations for disabled persons<sup>7</sup>, the Board defined the term family as follows:

*Family* means, in addition to customary domestic servants, the following:

- (1) An individual or two (2) or more persons related by blood, marriage, or adoption, maintaining a common household in a dwelling;<sup>8</sup> or
- (2) A group of not more than four (4) persons who are not related by blood, marriage or adoption, living together as a common household in a dwelling unit.

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<sup>5</sup> The ability to use a residence without discrimination because of a disability is a civil right in Arkansas. Ark. Code Ann. § 16-123-203 (West 2004); therefore, the Arkansas Civil Rights Act applies. Ark. Code Ann. §§16-123-101 to 108 (West 2004 & Supp. 2012). In addition, the Arkansas Fair Housing Act is implicated. Ark. Code Ann. 16-123-201 to -210 (West 2004 & Supp. 2012).

<sup>6</sup> Members and staff support for the task force included Housing Director Andre Bernard, Zoning & Subdivision Manager Dana Carney, Dino Davis, Deputy City Attorney Cindy Dawson, David Guntharp, Ray Lopez, Chief Deputy City Attorney Bill Mann, Chris Porter, Emmanuel Thompson, Assistant City Manager Bob Turner, Kathy Wells, Doris Wright, and Victor Wynn.

<sup>7</sup> The various statutes and ordinances typically use the term "handicap" or "handicapped," but the generally accepted term is now "individual with a disability." See JODY FEDER, *The Fair Housing Act: A Legal Overview at 14*, n.91 Congressional Research Service (May 6, 2003).

<sup>8</sup> It should be noted there is no zoning limitation on the number of persons who can live in a residence if part of a traditional family, i.e., one related by blood, marriage, or adoption.

This definition of *family* is established for the purpose of preserving the character of residential neighborhoods by controlling population density, noise disturbance and traffic congestion, and shall not be applied so as to prevent the city from making reasonable accommodation where the city determines it necessary to afford handicapped persons living together in a household equal access to housing pursuant to the federal Fair Housing Amendments Act of 1988.

Little Rock, Ark., Rev. Code § 36-2 (1988). As a part of this ordinance, the City also established a definition of group home:

*Group home* means a facility that does not fall within another defined facility category within Sec. 36-3 and which provides housing in a family-like environment to more than four (4) handicapped individuals. This use is permitted only as a special use as designated in this Chapter.

Little Rock, Ark., Rev. Code § 36-3 (1988). In addition, the City created a legislative presumption that a group home of up to eight (8) persons with a disability would receive a requested SUP.<sup>9</sup>

There shall be a presumption that a special use permit for a group home of 5, 6, 7, or 8 handicapped persons will be granted if all ordinance requirements are met, except that individuals who 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 shall not be allowed in such a home.

Little Rock, Ark., Rev. Code § 36-54 (e)(4)(b) (1988).

The various factors the governing body should consider in deciding to grant an SUP include, but are not limited to:

1. Spacing of existing similar facilities.
2. Existing zoning and land use patterns.

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<sup>9</sup> This number was not randomly selected. When the Transition Housing Task Force met, it determined that this type of accommodation had been upheld as rational by a number of federal courts, most importantly the U.S. Court of Appeals for the Eighth Circuit in which Arkansas sits. In drafting the City of Little Rock's group home ordinance, it was determined that we should model it after a city located within the jurisdiction of the Eighth Circuit. See *Oxford House-C v. City of St. Louis*, 77 F.3d 249 at 252; see also, *Bryant Woods Inn, Inc. v. Howard Cty, Md.*, 124 F.3d 597, 600 (4<sup>th</sup> Cir. 1997).

3. The maximum number of individuals proposed to be served, the number of employees proposed and the type of services being proposed.
4. The need and provision for readily accessible public or quasi-public transportation.
5. Access to needed support services such as social services agencies, employment agencies and medical services providers.
6. Availability of adequate on-site parking.

Little Rock, Ark., Rev. Code § 36-54 (e)(4)(c) (1988).

In deciding whether to grant an SUP for a group home, the Board must not discriminate against the applicant because the persons who will live in the home are recovering from alcoholism or substance abuse addictions. Congress expressly noted that the 1988 amendments to the Fair Housing Act were intended to eliminate discriminatory housing practices:

While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished through such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. *Since these requirements are not imposed on families . . . these requirements have the effect of discriminating against persons with disabilities.*

See H.R. Rep. 100-711, 1988 U.S.C.C.A.N. 2173, 2185 (emphasis added). To assure there is no discrimination, any factor the Board considers in its evaluation of the SUP application in question must be consistent with LRC §35-54 cited above and with factors used to evaluate applications for exceptions to zoning laws by traditional families – i.e., one related by blood, marriage or adoption.<sup>10</sup> A decision to deny this SUP in light of the presumption that a group

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<sup>10</sup> For example, the maximum number of persons to be permitted under this SUP application is seven (7). If the Board can deny residential use of a home to a traditional family of seven (7) because of parking concerns, then it can also deny this SUP for that reason. However, the City has no legal basis to deny a traditional family residential use in such circumstances, so the City cannot consider parking example as a basis to deny an SUP without suffering the sanctions provided for in federal and state housing law. In short, if the answer is no to the question “can the City consider a particular reason as the basis to deny use to a traditional family,” then it is also no as to whether the City can consider the same reason as the basis to deny use to a group home for the disabled within the presumed number the City has set for a reasonable accommodation. This prohibition against discrimination does not require the City to ignore neutral zoning standards. For example, the City prohibits parking in yards. A traditional family of seven (7) members could not vehicles in the front yard. Little Rock, Ark., Ordinance No. 20,540 (February 7, 2012). To apply this same ordinance to a group home for persons with a disability does not violate the Fair Housing Act. See also, *City of Edmonds v. Oxford House*, 514 U.S. 725 (1994).

home for seven (7) disabled persons will receive a permit shifts to the City the burden to prove that an SUP is unreasonable.

In order to ‘establish that the accommodation proffered by [the applicant] was not reasonable, [the municipality] [i]s required to prove that it could not have granted the variance without:” (1) “imposing undue financial and administrative burdens;” (2) “imposing an ‘undue hardship’ upon the Township;” or (3) “requiring a fundamental alteration in the nature of the [zoning] program.

*King’s Ranch of Jonesboro, Inc. v. City of Jonesboro*, 2011 WL 1544697 at \*3 (Opinion and Order), quoting with approval, *Hovson’s, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3<sup>rd</sup> Cir. 1996).

Does the grant of this SUP impose an undue financial or administrative burden against the City? There is no evidence to support this contention. Mr. Robert Gminski noted that an ambulance had been called to the address to deal with a person in the recovery program. But, the City has established its emergency services system between the Little Rock Fire Department and MEMS.<sup>11</sup> There is no evidence that this one call, where treatment was provided, created any financial burden to the City. There was also testimony about other emergency services and police calls to the address, including for automobile accidents, but there is nothing to suggest that other addresses in the City do not also get credited with a number of calls over a period of time.

Similarly, there is no evidence that the grant of an SUP would create any undue hardship on the City. Traffic concerns have been expressed because of the high volume of traffic already in the area. Yet, there is nothing in the record to suggest that any additional automobiles at this address would create an undue hardship; this fact becomes particularly obvious when it is remembered that if a traditional family wished to use this home, this inquiry would not even be made.

Finally, the grant of an SUP would not create a fundamental alteration of the City’s zoning code. In fact, the City has a legislative presumption that the grant is in total compliance with the zoning code.

#### CONCLUSION

**The Board cannot deny an SUP to a group home for the disabled based upon factors that would not prohibit a traditional family – i.e., one related by blood, marriage or adoption – from using the residence as a family home. So, the discretion of the Board to deny the SUP or**

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<sup>11</sup> MEMS is the acronym for the Metropolitan Emergency Medical Services, which is the business name of the Little Rock Ambulance Authority.

**impose additional restrictions, or to consider various factors, is quite limited under federal law.**

Sincerely,



Thomas M. Carpenter  
City Attorney

- cc. Mayor and Members of the Board of Directors  
Bruce T. Moore, City Manager  
Chair and Members of the Little Rock Planning Commission  
Tony Bozynski, Director of Planning & Development  
Dana Carney, Zoning & Subdivision Manager  
William C. Mann, III, Chief Deputy City Attorney  
Bonnie Engster, Law Office Coordinator