Community Residence

Current Zoning Ordinance language

2.3. Definitions: **Community Residence.** A residence licensed, certified, or accredited for specialized residential care home by the appropriate state or federal agencies, that functions as a single housekeeping unit for the housing of unrelated persons with functional disabilities who share responsibilities, meals, recreation, social activities, and other aspects of residential living. The use matrix in Table 8-1 distinguishes sizes of community residents by number of residents; this number includes any caretakers that live on-site.

8.3 Use Restrictions (Table 8-1):

Use	R-1	R-2	R-3 -50 & -35	R-4	R-5	R-6	R-7	DT[1]	HS	GC	MS[1]	NA	NC[1]	RR[1]	OS	I	H	Use Standard § = Section
Residential																		
Community Residence – Small (6 or Fewer Residents)	P	P	P	P	P	P	P											§8.4.E
Community Residence – Large (7 or More Residents)						S	S											§8.4.E

8.4 Principal Use Standards:

E. Community Residence

1. Community residences must meet all federal, state, and local requirements including, but not limited to, licensing, health, safety, and building code requirements.

2. The facility must retain a residential character, which is compatible with the surrounding residential neighborhood.

3. All applicants are required to submit a statement of the exact nature of the community residence, the qualifications of the agency that will operate the community residence, the number and type of personnel who will be employed, and the number and nature of the residents who will live in the community residence. No certificate of occupancy will be issued until such statement is submitted.

ISSUE:

1. No definition of "Family" in Zoning Ordinance.
2. Number of permitted occupants should be dependent on definition of family.
3. Distance Requirement if more than # allowed by family definition. (660 feet?)
4. If within distance requirement, then Special Use required.
5. Parking spaces relevant to structure type.

ZONING PRACTICE JUNE 2016

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 6

PRACTICE GROUP HOUSING

6

Become a Group Home Guru

By Dwight H. Merriam, FAICP

Group homes are *sui generis*, truly a class unto themselves in terms of planning and regulation.

They present nearly intractable challenges for planners, regulators, neighbors, advocates, developers, and many other stakeholders, chief among them the residents. Largely because of misperceptions by many people and a lack of understanding, group homes are among the most disfavored land uses. One study in 1998 found that people felt that group homes were wanted even less in their communities than industrial uses, landfills, and waste disposal sites (Takahashi and Gaber).

One of the problems exacerbating the resistance to the orderly siting of group homes is the lack of proper planning and regulation. This brief treatment of the issues is a basic primer in planning and regulating group homes.

Unquestionably, and facilitated by good planning and regulation, the appropriate siting of group homes will help a community become a richer and more diverse place, and facilitate the ends of social justice. Social justice is the watchword here. People with disabilities, particularly those with developmental disabilities and suffering from mental health issues, have been treated despicably and only in recent times have come, in large measure though not universally, to be protected and respected.

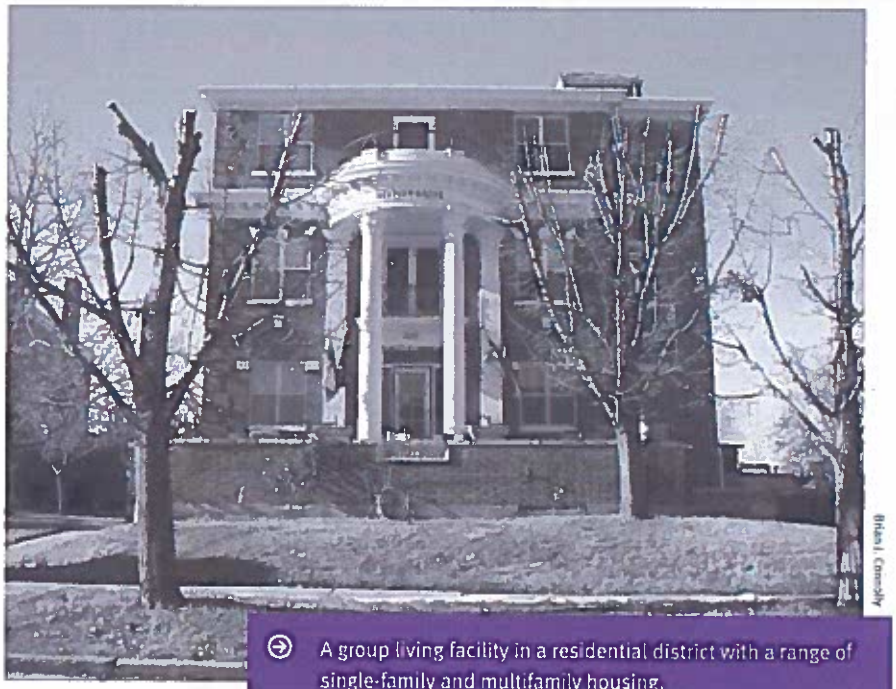
Historically, those most fortunate were cared for at home (Hogan 1987). When government fails to provide adequate housing for people with disabilities, they are usually rendered homeless and left on the streets, where they are often victims of crime and prone to drug addiction (Apfel 1995). That homelessness among those with disabilities is a continuing problem is evidence that adequate housing is still not always available.

'GROUP HOME' DEFINED

The term "group home" generally refers to any congregate housing arrangement for a group of unrelated people. Typically the residents share a condition, characteristic, or status not typical of the general population. These congregate living arrangements include community residential facilities, group living facilities, community care homes, nursing homes, assisted living facilities, and many others. They may be permanent or transitional, for-profit or nonprofit, professionally managed or self-managed.

How a group home is defined ultimately delimits the reach of planning and regulation, and guides public policy making. The U.S. Department of Justice has defined the term (2015). Many state and local governments have their own definitions as well. It is worthwhile to consider the broadest range of definitions from many sources and pare that down to those types of living arrangements needing local attention.

But before we go further, consider how local planning and regulation is sometimes inextricably linked with federal laws requiring that local regulations conform to federal mandates.



Brian J. Connolly

A group living facility in a residential district with a range of single-family and multifamily housing.

FEDERAL ZONING

Of course, the U.S. government does not zone land, but there are many federal laws that have such an impact on local land-use regulations that we might call those laws "ersatz federal zoning." The National Flood Insurance Program is one example. It requires that local governments prohibit certain activities in floodways and floodplains. To preserve the right of property owners to get federal flood insurance, local governments must plan and regulate consistently with the national program.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) gives religious organizations and institutionalized persons the right to seek redress in state or federal court when they believe the government is infringing on their legal rights. RLUIPA can be, and very often is, used to force zoning changes to allow

religious activities involving the use of land to go forward, overriding local plans and local regulations as necessary.

The Telecommunications Act of 1996 requires that local governments not regulate in a manner that prohibits or has the effect of prohibiting antennas and towers providing personal wireless services. The Act also directs that communities act on applications within a reasonable time and that any denial of an application must be made in writing and supported by substantial evidence. The Act is unusual in that it expressly preempts local regulation under certain circumstances. It does so if the local decision denying an application is based directly or indirectly on the environmental effects of radiofrequency emissions (47 U.S.C. §332(c)(7)).

One of the most direct initiatives from our federal government is the Air Installations Compatible Use Zones (32 CFR §256.5). The program mandates that the secretaries of military departments coordinate with local governments around military air installations "to work toward compatible planning and development in the vicinity of military airfields. . . ."

Federal law similarly influences local planning and regulation for group homes for people with disabilities. That law is the Fair Housing Amendments Act (FHAA), enacted in 1988 to extend the protections of the 1968 Fair Housing Act to people with disabilities. The FHAA prohibits a party from discriminating "in the sale or rental [of], or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap" (42 U.S.C. §3604(f)(1)). A "handicap" is defined with three alternatives: "'Handicap' means, with respect to a person, (1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in 21 U.S.C. §802)" (42 U.S.C. §3602(h)). This is essentially the same definition of the term as has been incorporated in the Americans with Disabilities Act (42 U.S.C. §12102).

Note that federal law, and many state and local laws, use the now-outmoded term "handicapped." The more accurate, appropriate, and respectful description is to use the phrase "a person with a disability" and not a "handicapped person" or a "disabled person." There is by no means universal agreement on this terminology and grammatical structure. Some argue that the generally preferred phrasing "a person with a disability" suggests a medical, rather than the social model (e.g., see Eagan 2012).

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A facility for persons with cognitive disabilities in Denver.

While the FHAA does not explicitly address group homes, the U.S. Department of Justice makes it clear (in a joint statement with the U.S. Department of Housing and Urban Development) that the FHAA does prohibit local governments from discriminating against residents on the basis of "race, color, national origin, religion, sex, handicap [disability] or familial status [families with minor children]" through land-use regulation (2015). The upshot is that group homes occupied by unrelated individuals with disabilities have special protection from exclusionary zoning under the FHAA.

Not included within the reach of the federal law, except to the extent that the residents also are disabled, are group homes that are alternatives to incarceration, temporary housing for workers, halfway houses for ex-offenders, homeless shelters, places of sanctuary and prayer, homes for those who are victims of domestic violence, college dormitories . . . you can readily add to this list. Providing for these other types of group homes is important and can be done at the same time as the community addresses its required compliance with the FHAA, but (now take a deep breath) there is one important and dramatic distinction for those types of group homes falling under the protection of the FHAA.

SHOW ME THE MONEY

That distinction has to do with the endgame of an FHAA action. In a typical zoning appeal, for example when a homeless shelter developer is denied a conditional use permit and appeals and wins, the developer still has to pay for all of its own legal costs. However, consider what happens if the developer of a group home within the reach of the FHAA—one for adults with developmental disabilities, for example—is denied a conditional use permit. If the developer appeals and also brings an action under the FHAA—and wins—that developer is a prevailing party in a fair housing suit, and is allowed, in the court's discretion, reasonable attorney fees (42 U.S.C. §3613(c)).

If the action is brought under the Civil Rights Acts of 1871, a so-called Section 1983 action for a violation of federal constitutional or statutory law, the prevailing party may recover attorney fees under the 1976 Civil Rights Attorney's Fees Act (42 U.S.C. §1988). Unless there are special circumstances, a prevailing plaintiff should be awarded attorney fees, but a prevailing defendant, for example the local planning board, is entitled to attorney fees only if the suit was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so" (*Hensley v. Eckerhart*, 461 U.S. 424 (1983)). The attorney fees provision, enacted to encourage lawyers to take on these cases, brings a heavy thumb down on the scales of justice.

How bad can that be? Last year, Newport Beach, California, settled some long-running litigation against the city brought by providers of group homes who claimed the city violated the FHAA in effectively prohibiting group homes with seven or more residents in most of the residential areas, as well as requiring that existing group homes go through the same permit process as is required for new homes, including a public review process (Fry 2015). The city of Newport Beach spent more than $4 million of its own money defending its position

A small drug and alcohol recovery facility in a low-density residential setting.

Brian J. Connolly

and agreed to pay the group homes $5.25 million. In short and in sum, the fight cost the city $10 million. Even at the cost of building a new, high-end group home specially adapted for people for physical disabilities, this $10 million "wasted" in the litigation could have provided more than 80 new beds in Newport Beach, based roughly on the $600,000 recently spent elsewhere to build a five-bed facility (Salasky 2012).

THE 'SEVEN-NUN CONUNDRUM'

To illustrate the dramatic effect of the FHAA, consider this real controversy. It is guaranteed to make you smile, shake your head in wonderment, and provide you with a conversation starter with other people who share your interest in planning and zoning.

We need to start with the typical zoning definition of "family." Nearly every local government defines "family" consistent in most respects with the definition upheld by the U. S. Supreme Court in 1974:

> With this definition an unlimited number of people can live together so long as they are related by blood, adoption, or marriage, or in the alternative, no more than two unrelated people can live together. Some local regulations allow an unlimited number of related persons to live together and along with them some limited number, say two or three, unrelated persons.

Is your definition similar? Almost certainly it is. Remember, however, that we actually have 51 constitutions in this country, one federal and 50 state, and what may be constitutional under federal law may not be constitutional under state law. A half-dozen or so states interpreting their state constitutions have ruled this kind of definition of family unconstitutional under their state constitutions, holding that the definition is not reasonably related to promoting the public's health, safety, and general welfare.

Obviously a typical group home of six or eight or more unrelated individuals, with or without one or two resident managers, cannot be located in the residential districts of nearly all of the municipalities in this country, unless those local governments happen to have some type of group home zoning.

This brings us to Joliet, Illinois, in the mid-1990s when three nuns, Franciscan Sisters of the Sacred Heart, proposed to live together in a single-family zoning district, bringing in a fourth sister and wanting to have at any time up to three additional guests, women considering becoming members of the order (Merriam and Sitkowski 1998). The regulations allowed only three unrelated people to live together. The nuns sought zoning approval to allow four nuns to live in the home and to convert the basement into the three additional bedrooms for their guests.

More than 100 home owners signed a petition against the application, claiming that the convent would damage the single-family character of the neighborhood, depress property values, and result in increased taxes when the home was removed from the tax rolls. One neighbor said: "We have no objection to three nuns living there but we do object to four or more. If this variation is allowed to go through, the city council, in effect, will be allowing a mini-hotel to be established in our neighborhood. The nuns will come and go, novices will come and go, visitors will come and go. The result will be that our property values would decrease" (Ziemba 1998).

The city council did vote to give the zoning approval, and the mayor, who lived nearby, noted that a family of seven—a couple with five children—could move into the same house without any zoning approval: "It would be legal, even though the impact would be more intense" (Ziemba 1998). Now, here is the punchline and the question you ask your planner friends at the next social event after you have described this background: Under what condition could these seven nuns live together in virtually any single-family dwelling unit in any neighborhood in any city, town, or county anywhere all across this great country regardless of the local definition family and regardless of the federal constitutional right of local government to restrict the definition of family?

Answer: These seven nuns could live together as a household unit as a matter of federal law, the FHAA to be specific, if they were recovering alcoholics or substance abusers, or otherwise disabled. The "Seven-Nun Conundrum" teaches us two things: the traditional definition of family needs to be reconsidered, as it is a complete bar to group homes, and local governments need to get out ahead of the group homes issue by affirmatively planning and regulating for them so that they are sited in the best locations and no one will ever have reason to go to court and claim that they are excluded from living in the community.

IT ALL STARTS WITH PLANNING

Planning for and regulating group homes

requires some careful thought about the community's needs and the demand for such uses. Regardless of the special attention the attorney fees provisions may demand, it is best to plan for all types of group living arrangements at the same time and under the same terms, except as is necessary to recognize that there are differences between them. It should not be the threat of the FHAA that drives a local government to plan and regulate for just those types of group living arrangements that are within the reach of the federal law.

The first step is to identify all types of group living arrangements that are needed now and in the future in your community. Survey social service agencies locally and regionally; interview state-level departments with responsibilities for those who might live in such homes. The agencies will have a list of existing group homes. Some of the homes will likely predate local regulation or may have become established by variances. It is useful to understand what is in place now in order to be able to determine current and future needs.

The operators serving the residents of area group homes can provide insight into gaps in coverage and challenges, particularly opposition, that may lie ahead. As you get further the planning process, you will likely find that access to public transportation is important for many types of facilities. Also, it is important to note that in some states, group homes operated by, contracting with, or funded by a state agency may be immune from local zoning ordinances (Kelly 2016).

The U.S. Census Bureau collects data on the disability status of respondents to the American Community Survey (ACS), and that data is helpful in developing a needs-driven comprehensive planning element. The census data categorizes disabilities as visual, hearing, ambulatory, cognitive, health care, and independent living. The data is also disaggregated by gender, age, race, education level, employment, and health insurance coverage. The ACS also has data on "Group Quarters" generally, of all types (2016).

What is often lacking in the available data and in the surveys conducted is the ability of families to care for those who are disabled and who may be prospective residents of a group home. There are many advocacy groups for people with all types of disabilities that may prove helpful in identifying the hidden demand—families who are caring for their own, often struggling and anxious about the future care of their family members. Among these organizations are the American Association of People with Disabilities, the National Disabilities Rights Network, the National Information Center for Children and Youth with Disabilities, the National Organization on Disability, and the National Supportive Housing Network.

After the need for various types of group homes, the number of beds for each, and the time frame within which they must be developed, the planning process involves identifying appropriate locations and reaching out to the neighborhoods to attempt to mitigate community opposition through meetings and workshops.

One essential decision is whether to concentrate group homes in one area, particularly where they have access to services, or to disperse them throughout the community to avoid clustering and to facilitate mainstreaming the residents. The courts are not settled on which is the preferred approach. Spacing requirements establishing minimum separating distances between group homes have met with mixed results in the courts. Ultimately, a hybrid approach may be best, locating group homes in a somewhat more clustered way with ready access to services and transportation, while the same time dispersing group homes throughout moderately low-density residential neighborhoods so that they blend seamlessly with the rest of the population.

THE REGULATIONS

Good regulations start with good definitions. Spend plenty of time talking about the types of group homes and how you will define them. See the many types listed in the ACS. You must define "family" and "disability." And to reiterate, providing for group housing is not just about persons with disabilities. There remains a critical need to accommodate all manner of group living arrangements, most of which have no protection under federal law, although they may under state law. For example, local regulations may address the many other types of group homes noted at the outset, chief among them shelters for victims of domestic violence, homes for juveniles, halfway houses for those released from incarceration or as alternatives to incarnation, homeless shelters, congregate housing, job corps shelters, workers' group living quarters (pejoratively labeled "man camps" by some), religious homes such as convent and clergy houses, retirement homes, and even fraternity and sorority houses.

They are all deserving of careful review and attention to whether current and future needs are being met, where such uses might be best located, how many beds are needed during the planning period, what design and siting considerations may be established in advance as criteria for approval, and what processes might be followed—all of which may vary from one type of group living arrangement to another.

Regulation may range from highly discretionary to as-of-right. The most discretionary would be to use a "floating zone" for group homes, where approval requires rezoning the subject parcel. That application typically includes a conceptual site plan so the regulators know what they will get if they vote to allow the floating zone to descend and apply. It is the best of both worlds for planners because the local officials are making a legislative decision in rezoning the land. Courts give the greatest deference to legislative decisions, as distinguished from quasi-judicial decisions such as variances, and administrative decisions, which include subdivision and site plan approvals.

At the same time, the locality gets to see what it is going to get by having a conceptual site plan as part of the rezoning application. The applicants for group homes also may prefer this approach because the conceptual site plan is inexpensive to produce, and once they have the zoning they will have a vested right to develop it consistent with the conceptual site plan. At that point they can finance the detailed architectural and engineering work to get to the final site plan approval stage.

At the other end of the continuum is the as-of-right approach, with zoning districts allowing group homes subject only to compliance with the code and issuance of a certificate of zoning compliance and building permits.

In between these end points is the quasi-discretionary conditional use permit, sometimes called a special permit, special use permit, or special exception. In these cases, the group home use is permitted, but an application and public hearing are required to determine if it is appropriate for a particular site.

Take care not to stigmatize the potential residents. Federal appellate courts covering about half of the country have found that a formal, discretionary approval, such a conditional use permit, is not acceptable when used in making a decision regarding persons with disabilities or those otherwise protected under the FHAA, because they stigmatize the resi-

Brian J. Connolly

An assisted living facility outside of Denver.

dents by requiring them to come "hat in hand" for permission to live like any other household. The floating zoning approach has the same problem. At the same time, local officials have a real need to make sure that the group home meets the needs of its residents, fits in with its neighbors, and blends in such that is it is indistinguishable from others. Questions that arise include access to transportation, appearance and scale, parking, and density of occupancy. Locational criteria such as these and others must be assessed either through a public review or by staff.

Which approach to take along the continuum of discretion is a difficult, even intractable, ethical, legal, and public policy decision. Ultimately, it may be politically necessary to have some discretion in the process.

Given that residents may have cognitive or physical disabilities affecting mobility, it is especially essential to give special care to housing, building, and fire codes in the administration of any group homes program. One common issue is determining the "right" number of residents permitted. Some of the federal courts have used a "rule of eight" allowing up to eight essentially as-of-right—but beyond that, supporting greater discretion by the local government. (*Oxford House-C v. City of St. Louis*, 77 F 3d, 249, 253). Smaller group homes tend to be better integrated in single-family detached neighborhoods, while the larger group homes provide economies of scale, the opportunity for a higher level of service, and often peer support that is essential to some populations, such as those in drug and alcohol abuse recovery. Again, a hybrid approach allowing a range of levels of occupancy depending upon the setting may prove to be the most advantageous strategy. For example, a group home in a single-family residence of not more than eight people including caregivers and managers might be as-of-right. Any home with greater occupancy could be required to have some type of formal review, perhaps site plan review at a public meeting, or a conditional use permit, or even a rezoning with a floating zone or overlay district. But it also may depend upon the context. Would it be necessary, for example, to require a public hearing for the conversion of an existing 10-apartment building to a group residence for 40 people recovering from addiction?

ONE REALLY GOOD EXAMPLE

Almost three decades ago, the city of Ames, Iowa, the home of Iowa State University, found itself in a perfect storm of neighborhood invasions by college students, challenges to the traditional definition of family, the need to accommodate a variety of household types, and a state statutory mandate regarding group homes. Somehow, under the leadership of elected and appointed officials, including the then planning director Brian O'Connell, the community developed a comprehensive approach mitigating all of the impacts of the storm. I was along for the ride as a consultant to the city in developing the regulations.

By developing definitions of "family" (§29.201) and "functional family" (§29.1503(4)(d)), Ames was able to prevent groups of undergraduates from taking over single-family houses and at the same time accommodate any seven Franciscan nuns who might choose to live in the city and any other groups of people that were truly functioning as a type of family, including extended gay and lesbian families with unrelated individuals and foster children (long before the right to same-sex marriage).

Group homes ("Group Living"), defined in part as being "larger than the average household size," were addressed consistent with the state statutes, while distinguishing them from "Household Living," considered to be "[r]esidential occupancy of a dwelling by a family," and the definition of family was made less restrictive. The regulations today have evolved in some respects from the initial ones first adopted in the early 1990s, and they are better for it. One especially salutary aspect of this definitional scheme is that a group home for persons with disabilities with eight or fewer residents is considered a "Family Home" as defined in Section 29.201 of the Ordinance and in Iowa Code Section 414.22, and is treated like any single-family use. What is also interesting is how Ames conformed its local regulation with state definitions and requirements.

The regulations are not perfect—no regulations are—and they should not be considered a model for adoption elsewhere without careful consideration. However, the city did a good job of reconciling competing needs and the regulations are worthy of consideration.

THE ULTIMATE ESCAPE HATCH: 'REASONABLE ACCOMMODATION'

If a community does not have good planning and regulations, such that group homes are not readily approved and developed without discrimination, the FHAA requires that local governments provide a "reasonable accommodation" for group homes with disabled persons (42 U.S.C. §604(f)(3)(B)). In the words of a federal appellate court: "reasonable accommodation provision prohibits the enforcement of zoning ordinances and local housing policies in a manner that denies people with disabilities access to housing on par with that of those who are not disabled" (*Hobson's, Inc. v. Township of Brick*, 89 Fed.3d 1096, 1104 (3rd Cir. 1996)). A reasonable accommodation

can be anything, including use or dimensional variances, amending the regulations, issuing a building permit even though it is illegal under the regulations, and allowing a group home to be considered similar enough to some other use permitted under the regulations, such as a bed and breakfast. Being forced to make a reasonable accommodation is a poor substitute for good planning and regulation, but sometimes it may be all you have.

MEET THE NEED, MEET THE LAW

Becoming a group homes guru requires recognizing the need for them, and planning for and regulating them with a fine-grained approach to make sure that they are fully integrated with the rest of the community while protecting the interests of all stakeholders. It is the right thing to do, and it is the law. Community opposition to group homes can often be traced back to lack of information or misinformation, fear of negative community impacts, shortcomings in local procedures that preclude full public participation in the decision-making process, outright prejudice and bias, and conflicting interests and development goals (Iglesias 2002).

The federal Fair Housing Amendments Act, the principal federal law dealing with matters of housing discrimination against people with disabilities, and other federal and state antidiscrimination laws (including the Americans With Disabilities Act, the Rehabilitation Act, and state-law equivalents), require local governments to plan for and enable group homes through reasonable regulation for those expressly protected under the law. In addition, it is the responsibility of all of us to provide safe, clean, decent housing for all citizens, many of whom can only be accommodated in group homes.

ABOUT THE AUTHOR

Dwight H. Merriam, FAICP, founded Robinson & Cole's Land Use Group in 1978, where he represents land owners, developers, governments, and individuals in land-use matters. He is past president of the American Institute of Certified Planners and received his masters of regional planning degree from the University of North Carolina and his Juris Doctor from Yale.

Cover photo: AlexeyVS/Thinkstock

Vol. 33, No. 6

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for $95 (U.S.) and $120 (foreign). James M. Drinan, JD, Executive Director; David Rouse, FAICP, Managing Director of Research and Advisory Services. Zoning Practice (ISSN 1548–0135) is produced at APA. Jim Schwab, FAICP, and David Morley, AICP, Editors; Julie Von Bergen, Senior Editor.

Missing and damaged print issues: Contact Customer Service, American Planning Association, 205 N. Michigan Ave., Suite 1200, Chicago, IL 60601 (312-431-9100 or customerservice@planning.org) within 90 days of the publication date. Include the name of the publication, year, volume and issue number or month, and your name, mailing address, and membership number if applicable.

Printed on recycled paper, including 50-70% recycled fiber and 10% postconsumer waste.

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HAS YOUR COMMUNITY MADE SPACE FOR GROUP HOUSING?

6

Failor, Craig

From: Daniel Lauber <dan@grouphomes.law>
Sent: Monday, September 11, 2017 11:38 AM
To: Failor, Craig
Subject: Re: Proposed Oak Park Zoning Ordinance and Group Homes

Craig,

I finally got a chance to look at this memo in depth. I very much appreciate you sharing it with me. Unfortunately, the consultant's memo isn't responsive to the concerns I raised and its proposal is not in keeping with Oak Park's goals and objectives, and certainly not with the intention of establishing and maintaining the inclusive community that Tammie advances.

This is very complex area that does not lend itself to inadequately informed decisions.

What is proposed in that memo runs afoul of the Fair Housing Act in several ways, including:

1. The definition of "community residence" is more than a bit inadequate. It needs to make it clear that a community residence emulates a biological family and seeks to achieve normalization and community integration of its residents. The definition we used in Delray Beach is state of the art:

> A community residence is a residential living arrangement for up to ten unrelated individuals with disabilities living as a single functional family in a single dwelling unit who are in need of the mutual support furnished by other residents of the community residence as well as the support services, if any, provided by the staff of the community residence. Residents may be self-governing or supervised by a sponsoring entity or its staff, which provides habilitative or rehabilitative services, related to the residents' disabilities. A community residence seeks to emulate a biological family to normalize its residents and integrate them into the surrounding community. Its primary purpose is to provide shelter in a family–like environment; treatment is incidental as in any home. Supportive inter-relationships between residents are an essential component. A community residence shall be considered a residential use of property for purposes of all zoning, building, and property maintenance codes. The term does not include any other group living arrangement for unrelated individuals who are not disabled nor residential facilities for prison pre–parolees or sex offenders.

Now a jurisdiction can, and should, set a cap on the maximum number of occupants allowed as of right based on how the ability to emulate a biological family. As best I've been able to determine over the years, once you get beyond 10 or 12 people, emulating a biological family is hard to do and the home operates more like a mini-institution. Cities I've worked with having been setting the cap at 10 or 12 and establishing an objective "reasonable accommodation" process in which the applicant has the burden to demonstrate that it will be able to successfully emulate a biological family. This reasonable accommodation process can be administrative (preferred) or public. The language needed to properly establish a reasonable accommodation process and the standards for evaluating applications is pretty nuanced. This is different than a special use permit. I can send you appropriate language if you wish.

So the definition of "community residence" in a jurisdiction with a cap of four unrelateds in its definition of "family" should include language along these lines (when you place a cap of 10 residents allowed as of right):

> A "community residence" occupied by five to ten unrelated individuals with disabilities can be a "family community residence" or a "transitional community residence." The owner or operator of a community residence may apply for an administrative reasonable accommodation to house more than 10 residents in accord with the standards and procedures established in [cross reference to the section in the zoning code on "reasonable accommodation"].

The zoning ordinance then needs to include the following definitions:

> A family community residence is a relatively permanent living arrangement for fice to ten unrelated people with disabilities with no limit on how long a resident may live in the home. The length of tenancy is measured in years. Oxford House is a family community residence.
>
> A transitional community residence is a temporary living arrangement for five to ten unrelated people with disabilities with a limit on length of tenancy that is measured in weeks or months, not years.

Keep in mind that any group of four or fewer people is a "family" under the village's zoning definition of "family" and must receive the same zoning treatment as any other group of four or fewer unrelated individuals living together as a single housekeeping unit. Consequently any zoning provision that requires a community residence to be licensed, etc. or that imposes a spacing distance is **not** applicable to community residences that fit within that cap of four (live-in staff counts toward the cap of four; shift staff do not count because they don't live there). Similarly, even if a community residence for four or fewer is a transitional community residence, zoning would have to it treat the same as any family even though a jurisdiction can require a special use permit for transitional community residences (that exceed four residents) to locate in single-family districts. It's the case law that requires this -- we all have to learn to live with it. As the material I previously sent you explains, the courts routinely disallow spacing distances and licensing requirements when the number of occupants of a community residence falls within the cap on unrelateds in the zoning code's definition of "family" or there is no limit on the number of unrelateds (either due to absence of a cap in the definition of "family" or the absence of a definition of "family" altogether).

I'd urge great caution in the blanket exclusion of "residential care facilities" from the definition of "family." In some states, assisted living can include very small groups of unrelated people that fit within the four person cap on unrelateds in Oak Park's zoning. I strongly advise staff to research this because such assisted living arrangements need to be treated the same as any other family. It's no different than if you had a biological family of four in which one member required assisted living support -- would the village really seek to prohibit such living arrangements? That would almost certainly fly in the face of the Fair Housing Act.

2. It is inappropriate and without foundation to divide a jurisdiction's zoning treatment of community residences based on the number of occupants. I started out with that approach in 1974 (you might call it Beta Version 0.8), but the law and understanding of community residences have evolved quite a bit since then (I'm up to at least Release Version 5.0). A jurisdiction's zoning can treat community residences differently in terms of similarity to permanent as opposed to more transient housing, not on the number of residents. The Delray Beach report I sent you provides a pretty thorough explanation of the distinction between family community residences and transitional community residences (and see the definitions above).

Consequently, a jurisdiction can require a special use permit for **transitional community residences** (5-10 residents, in our ongoing example) in single-family districts, but must allow them as of right in multiple family districts (including PUDs and mixed use where multiple family residences are allowed) as long as it meets the spacing and licensing requirements. **Family community residences** (5-10 occupants) must be allowed as of right in *all* residential districts (indeed, in any zoning district where residences are allowed including PUDs,

mixed use, etc). Special use permit standards must be narrowly crafted based on the reason a special use permit is required (i.e., located within the spacing distance; State of Illinois doesn't require a license, certification, or accreditation; and when a special use permit is required in a single-family district) -- in other words the standards are not necessarily the same for all three circumstances under which a special use permit is required.

3. The proposal continues to miss the point about the spacing distance and licensing requirements. The Delray Beach report explains much of this. I can't think of any way to justify a 1,000 foot *radius* spacing distance -- the longest justifiable distance is a typical block of 660 feet. A jurisdiction can justify a 1,000 foot spacing distance, even 1,250 feet, if it is measured along the pedestrian right of way from the proposed community residence to the closest existing community residence, but *not* as a radius. Administratively speaking, using a radius is more precise and much easier to administer. Which way of measuring -- and hence the length of the spacing distance -- is a policy decision that warrants thoughtful discussion among staff and elected officials.

4. Off-street parking requirements need to be narrowly tailored to the actual demand a specific community residence will generate. Group homes for people with developmental disabilities require off-street overnight parking only for overnight staff -- residents don't operate a vehicle. Sober homes and recovery communities generate much more parking demand since residents can drive and can have a vehicle on premise. Group homes for people with mental illness and those for some physical disabilities can fall in between. This is explained in the Delray Beach study I sent you. The language can be a bit nuanced. Here's the language we used in Delray Beach, which was appropriate for Delray Beach.

> Community Residences: Shall provide off-street parking for the greater of (a) the number of off–street spaces required under this code for the type of dwelling unit (single family, duplex, multi-family, etc.) in which the community residence is located, or (b) 0.5 off-street spaces for each staff member on a shift and/or live-in basis plus, when residents are allowed to maintain a motor vehicle on premises, the maximum number of occupants that is permissible under this land development regulation and the city's building and property maintenance codes. Off-street spaces may be provided on the premises or at an off-site location other than a street or alley.

Keep in mind that the total number of occupants of any community residence is governed by the same building or property maintenance code provision to prevent overcrowding that applies to *all* residences. That's usually a formula along the lines of a minimum of 70 sq ft of bedroom space (excluding closets) for the first occupant of the bedroom plus 50 sq ft for each additional occupant of the bedroom (some codes use 70 rather than 50). So if an operator sought to house 9 people in a dwelling unit large enough for just 6, she would be limited to just 6 residents (the Supreme Court ruled this way in 1996 in *Edmonds*).

The video at the bottom of http://grouphomes.law essentially offers a 75-minute short course on zoning for community residences (taking into account that it had to deal with Nevada's since repealed state laws on community residences and the art and science of zoning for community residences has evolved a bit since then).

Illinois is one of 11 states without any statewide zoning for community residences for people with disabilities, although some of the state licenses do establish a spacing distance between group homes under the same licensing. But when such group homes fit within the cap on the number of unrelateds in the definition of "family" zoning cannot enforce those spacing distances from licensing. Only the licensing agency can.

While I will literally be laid up following my Sept 14 hip replacement (assuming it's not postponed again). I should be pretty functional again sometime in October if you'd like to continue this discussion. Any jurisdiction would be very imprudent to rush into any further revisions to its provisions for community residences absent

adequate study and a full understanding of the principles and case law that govern such zoning.

In summary, the proposals in the consultant's memo solve very little, open up some Pandora's boxes, and leave Oak Park vulnerable to legal challenge while not fulfilling the village's long-established commitment against housing discrimination.

I hope this information is helpful.

Please reply now simply to confirm you received this email. Thanks very much.

On 9/7/2017 11:44 AM, Failor, Craig wrote:

> Hi Dan,
>
> This is a memorandum prepared by our consultant regarding Community Residences and Family. Can you take a look to see if we have captured the key issues?
>
> **Thanks.**
> Craig
>
> Craig M. Failor AICP, LEED AP
> Village Planner
> Village of Oak Park, Illinois
> Direct Line: (708)358-5418
> Website: www.oak-park.us
>
> ---
>
> **From:** Daniel Lauber [mailto:dan@grouphomes.law]
> **Sent:** Tuesday, September 05, 2017 3:38 PM
> **To:** Failor, Craig
> **Cc:** Tammie Grossman; Stephanides, Paul
> **Subject:** Re: Proposed Oak Park Zoning Ordinance and Group Homes
>
> Craig,
>
> Thanks for the heads up and for calling today. I have a feeling that I did not make myself clear enough. So let me spell it out a bit more precisely.
>
> Now I personally have no problem with Oak Park not establishing a cap on the number of unrelated people who can occupy a dwelling unit as a single housekeeping unit. Philosophically that's fine with me. The problem with not establishing a cap rests with the case law under the Fair Housing Act. Collectively, the court decisions make it very clear that the absence of such a cap on unrelated prohibits the jurisdiction from establishing any additional requirements on a group of people with disabilities that it does not impose on all other unrelated people living together. (And when a jurisdiction does have a cap on unrelateds, any community residence for people with disabilities that fits within that cap cannot be subject to any regulation, like requiring a license, not applicable to all other families that fit within the cap on unrelateds.)
>
> **The bottom line is:** As long as a jurisdiction does set *not* a cap on the number of unrelated individuals who can occupy a dwelling unit, that jurisdiction *cannot* impose any additional requirements on a group of people with disabilities -- like requiring a license. Pure and simple -- pretty darned well-established by the case law.

Consequently, the new proposed definition of "community residence" (see below) runs afoul of the Fair Housing Act by limiting community residences to those that are "licensed, certified, or accredited for specialized residential care." A license, certification, or accreditation is not available for many types of recovery communities or sober homes and I've never heard of a license, etc. available for homeless shelters. (Also note that homelessness is not a disability and a reasonable accommodation is not required for homeless shelters. Also note that homeless shelters can take many forms, from a single family house occupied by one or more families to an apartment building or commercial building. They cannot be rationally treated identically under zoning.)

I can picture the village telling the operator of a group home, say for people with eating disorders; a sober home for which there is no license, certification, or accreditation available; or an Oxford House that it cannot locate in Oak Park because it doesn't have a state license, certification, or accreditation -- even though none of those is required by the State of Illinois. I cannot think of any way for the village to win that lawsuit.

> Community Residence. A residence licensed, certified, or accredited for specialized residential care for: 1) care of persons in need of personal services or assistance essential for activities of daily living; 2) care of persons in transition or in need of supervision; or 3) the protection of the individual. (Community residences include facilities for drug and alcohol rehabilitation, though it does not include medical care for detoxification or treatment), and those transitioning from homeless status. Community residences does not include facilities for adults or minors who have been institutionalized for criminal conduct and require a group setting to facilitate transition into society.

This proposed definition appears to be based on very good intentions and not sound planning and zoning theory, principles, or practice.

It is also very possible that this blanket exclusion of the community residences for adults or minors who have been institutionalized for criminal conduct *may* violate the Fair Housing Act, depending on how the village interprets this imprecise language. Most of the residents of sober homes have been jailed for criminal conduct (usually drug or alcohol related). While a village certainly can exclude halfway houses that are an alternative to jail or prison, they can't simply exclude people because they have a criminal past.

This issue is too complex and nuanced to be handled the way staff proposes, both substantively and procedurally. The professionally responsible approach would be to conduct adequate research on these questions *before* adopting any zoning amendments regarding community residences for people with disabilities. I think that the failure to specify "people with disabilities" in the definition of "community residences" reflects the need to conduct adequate research on the proper zoning approach to take.

Thanks again for your time and consideration. I hope that staff will have the prudence to reconsider the position it expressed in our phone call today.

On 9/5/2017 9:39 AM, Failor, Craig wrote:

> Dan,

After review of your email, staff is requesting changes to the Zoning Ordinance. Please review the first item on the Village Board's agenda regarding motions for change.

Thanks.
Craig

Craig M. Failor AICP, LEED AP
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FROM:

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Maximum Restrictions Local Zoning Can Place on Community Residences for People With Disabilities

People with substantial disabilities often need to live where they receive staff support to engage in the everyday life activities most of us take for granted. These sorts of living arrangements — group homes, halfway houses, and recovery communities — fall under the broad rubric "community residence." Their primary use is as a residence or a home like yours and mine, not a treatment center nor an institution.

One of the essential characteristics of community residences is that they seek to emulate a family. The staff function as parents, doing the same things our parents did for us and we do for our children. The residents with disabilities are in the role of the siblings, being taught or retaught the same life skills and social behaviors our parents taught us and we try to teach our children.

Community residences seek to achieve "normalization" of their residents and incorporate them into the social fabric of the surrounding community. Most are licensed by the state to assure that residents receive proper support and care.

Guiding Principles

- Community residences are a residential use of land.
- As long as they are not clustered together on a block, community residences have no effect on the value of neighboring properties as found by more than 70 scientific studies.
- Community residences have no effect on neighborhood safety as found by every scientific study.
- Other studies have found that group homes and halfway houses for persons with disabilities do not generate undue amounts of traffic, noise, parking demand, or any other adverse impacts.
- To achieve their goals of normalization and community integration, community residences should be scattered throughout all residential districts rather than concentrated in any single neighborhood or on a single block.
- The Fair Housing Amendments Act of 1988 requires local government to make a "reasonable accommodation" in their laws and policies to enable people with disabilities to live in the community of their choice — which means allowing community residences for those who need to live in one with minimal restrictions.

Maximum Zoning Restrictions on Community Residences

Zoning provisions can be less restrictive than those reported here. These provisions are the most restrictive that comply with the Fair Housing Act.

Nearly every city, village, and town has a zoning ordinance that defines a "family" or "household" that can occupy a dwelling unit. These definitions allow related people to occupy a home as well as a specified number of unrelated people, usually 3, 4, or 5 unrelated individuals.

When a proposed community residence for people with disabilities complies with a jurisdiction's definition of "family," it must be allowed as of right (a permitted use) in all residential districts under the definition of "family." So if the zoning definition of "family" allows up to 5 unrelated people to live together, then a community residence for up to 5 people with disabilities complies with that definition and must be allowed without any additional zoning restrictions everywhere a family can reside. Any additional zoning requirement placed on such a home would be discriminatory on its face.

The requirement to make a "reasonable accommodation" kicks in when a proposed community residence for people with disabilities would house more unrelated people than the zoning code's definition of "family" allows. So if an operator wished to open a group home for 7 people with disabilities when the definition of "family" caps the number of related residents at 5, the city would have to make a "reasonable accommodation" to allow this group home for 7 residents.

Collectively, court decisions suggest that any reasonable accommodation must meet three tests:

- The proposed zoning restriction must be intended to achieve a legitimate government purpose
- The proposed zoning restriction must actually achieve that legitimate government purpose
- The proposed zoning restriction must be the least drastic means necessary to

achieve that legitimate government purpose

The maximum zoning restrictions described below enable community residences to locate in all residential zoning districts through the least drastic regulation needed to accomplish the legitimate government interests of preventing clustering of several community residences on a block (which undermines the ability of community residences to achieve their purposes and function properly and can alter the residential character of a neighborhood), as well as protecting the residents of the community residences from improper or incompetent care and from abuse. They are narrowly tailored to the needs of the residents with disabilities to provide greater benefits than any burden that might be placed upon the residents with disabilities.

A proposed community residence that houses more unrelated people than allowed under a town's definition of "family" should be allowed as a permitted use in all residential zoning districts if it:

- Is located more than 660 linear feet from property line to property line or 660 linear feet along the shortest legal pedestrian path from the proposed home to an existing community residence, whichever is shortest, and
- Is eligible for or has received the appropriate license or certification from the state, the local county, local city, or federal government.

If a proposed community residence would be located within this 660 linear foot spacing distance (the length of a typical block) or if a license or certification is not required for it, then the heightened scrutiny of a special or conditional use permit is warranted. Note that if a license or certification is denied, the proposed community residence is not allowed at all, even by special use permit.

It may be legal to require a special use permit in single–family districts for community residences that limit the length of residency, i..e. halfway houses. A city cannot, however, treat community residences for people with certain disabilities differently than other disabilities.

Regulating the number of occupants of a community residence

According to a 1995 U.S. Supreme Court decision, the proper vehicle for regulating how many people can live in a community residence is through a village's building code or property maintenance code applicable to all residences. In its 1995 decision in Edmonds v. Oxford House, 514 U.S. 725, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995), the Court ruled that housing codes that "ordinarily apply uniformly to all residents of all dwelling units ... to protect health and safety by preventing dwelling overcrowding" are legal and apply to all housing, including community residences for people with disabilities. It also found that zoning ordinance restrictions that focus on the "composition of households rather than on the total number of occupants living quarters can contain" are subject to the Fair Housing Act. Ibid. at 1782.

Consequently, the provisions of a town's building or property maintenance code that determine how many people can live in a dwelling apply to community residences, which by definition, are dwellings. Generally these codes regulate occupancy by the number of square feet in each bedroom based on health and safety standards applicable to all people. They usually require 70 square feet of liveable space for the first occupant of a bedroom and an additional 50 square feet for each additional occupant of a bedroom. So if two people share a bedroom, the bedroom must be at least 120 square feet in size, like 10 x 12 feet.

A zoning ordinance, however, can set a rational limit on the total number of people who live in a community residence based on emulating a family. Experts generally believe that a community residence with up to 12 residents can emulate a family. But it is very unlikely that the home with more than 12 residents can effectively emulate a family. It's pretty clear that a "home" for 16 or 20 people is a mini–institution and not a community residence.

Further reading

Visit http://www.grouphomes.law to access a key law review article that explains these limitations on zoning, research on the impacts of community residences on the surrounding neighborhood, and a video workshop on zoning for community residences.

1. ADD: Def. of family. (5 or 6 unrelated)
2. Permitted: based on def. of Family (unrelated)
3. Permitted: 660 lin. ft distance if more than def of family. (? up to 15 persons)
4. SP. USE: within 660 lin. ft and over def. of Family.

PARKING: BASED ON STRUCTURE TYPE

Q What defines "Comm. Res."?