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TO: Timothy R. Schmitt, City of Howell

FROM: Pam Kisch, FHC

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I also sent this via certified mail on October 10, 2019.

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October 10, 2019

Timothy R. Schmitt, A/CP
Community Development Director
City of Howell
611 E. Grand River
Howell, MI 48843

Dear Mr. Schmitt:

The Fair Housing Center of Southeast & Mid Michigan has been working with the Amber Reineck House in connection with its efforts to open and operate a sober living home for women in the City of Howell.

This kind of housing is protected by the Fair Housing Act, the Elliott Larsen Civil Rights Act, and the Michigan Persons with Disabilities Civil Rights Act. In addition, we have been investigating and monitoring the City's recent proposed legislation, Ordinances 929 (Zoning Amendments) and 930 (Licensing Amendments).

It is our opinion, supported by the enclosed opinion from our legal counsel, that the proposed ordinances 929 and 930 as currently drafted violate the federal Fair Housing Act. We also believe the proposed ordinances are in violation of Michigan's Elliott Larsen Civil Rights Act and the Persons with Disabilities Civil Rights Act.

This letter is formal Notice to the City of Howell that, should the proposed ordinances be enacted, the Fair Housing Center will file formal complaints of disability discrimination with the U.S. Department of Housing and Urban Development, the Michigan Department of Civil Rights, and/or the U.S. Department of Justice. The Fair Housing Center may also file a civil action for injunctive relief and damages in the U.S. District Court for the Eastern District of Michigan.

We are all hopeful that this matter can be resolved quickly and without the need for further legal action. We await your response.

Sincerely,

Pamela A. Kisch
Executive Director

CC: Interim City Manager Ervin Suida (via email)
City Attorney Dennis Perkins (via fax)

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October 3, 2019

VIA EMAIL

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RE: CITY OF HOWELL PROPOSED ZONING ORDINANCES 929 AND 930

Dear Clients:

You have engaged our firm to review and provide an opinion concerning proposed Zoning Ordinances 929 and 930 ("the Ordinances") now under consideration by the City of Howell, Michigan, in light of the prohibitions against discrimination against people with disabilities contained in the federal Fair Housing Act, 42 U.S.C. §3601 et seq. ("FHA" or "the Act").

It is our opinion that the proposed Ordinances, as presented to the Howell City Council at its meeting on September 23, 2019, violate the FHA in several respects. They identify and categorize housing that will serve people with disabilities for specific unjustified burdensome restrictions, impose different zoning standards based solely on disability, and directly impede congregate group homes for people with disabilities like the Amber Reineck House from operating.

As an initial matter, it appears that the proposed ordinance derives from disability-based community opposition. In similar factual circumstances, and because of community opposition to sober living facilities and a pending application from a sober home, an ordinance modification was found to have been proposed and enacted with discriminatory intent. See *Caron Foundation of Florida v. City of Delray Beach*, 879 F. Supp. 2nd 1353 (S.D. Fla. 2012) (cited with approval in *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F. 3d 1142 (9th Cir. 2013)). Our firm is litigating a zoning discrimination claim against the town of Cromwell, Connecticut involving

such community opposition. In denying summary judgment to the City, the Court recently concluded that there was "considerable evidence" from which a jury could conclude that the City acted with discriminatory intent, including but not limited to "the response of Town officials to community opposition to the Reiman Drive residence, based on the disabilities of its intended residents." *Gilead Community Services, Inc. v. Town of Cromwell*, Case No. 3:17-cv-00627 (Sept. 30, 2019).

The FHA is violated even if the challenged municipal actions do not themselves directly deny access to housing, but instead can be construed as "discouragement" or "delaying tactics," *see United States v. Youritan Construction Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973), *aff'd in part, remanded in part*, 509 F.2d 623 (9th Cir. 1975). Discriminatory zoning practices that delay the availability of housing, even if the housing ultimately came to fruition, have been found to violate the Act. *See S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, 752 F. Supp. 2d 85, 97 (D. Mass. 2010).

Moreover, the purpose of these ordinances appears to be to restrict or eliminate the establishment of group homes rather than to serve as a neutral amendment to protect the health or safety of people with disabilities. The need for the proposed Ordinance was allegedly the proliferation of sober living homes across Howell, but the study commissioned by the city shows only a total of three such group homes. Of the three sober homes, all are for men. The evidence does not support a claim that there is an overrepresentation of sober homes in Howell. There seems to be no actual need for a dispersal requirement, and a review of the map suggests that there are few if any other areas in Howell to disperse sober homes to. The so-called expert report lumps treatment facilities together with sober homes and housing for persons who are formerly incarcerated. For purposes of compliance with the FHA, this is an apples-to-oranges analysis.

Below we first provide some preliminary background information about the application of the FHA to zoning ordinances that affect housing for people with disabilities. We then explain our opinion in more detail in light of the legal standards applicable to this area.

LEGAL PROTECTIONS FOR GROUP HOMES SERVING PEOPLE WITH DISABILITIES, INCLUDING SOBER LIVING HOMES

The FHA contains "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." *Bentley v. Peace & Quiet Realty 2 LLC*, 367 F. Supp. 2d 341, 345 (E.D.N.Y. 2005) (quoting H.R.Rep. No. 711, 100th Cong., 2d Sess. 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2179); *see also* 42 U.S.C. § 3601 (stating the FHA is intended to provide "fair housing throughout the United States"). Indeed, the FHA "repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion." *Laflamme v. New Horizons, Inc.*, 605 F. Supp. 2d 378, 386 (D.Conn. 2009).

Individuals recovering from drug or alcohol addiction are deemed to be disabled within the meaning of, and therefore are protected by, the FHA (which uses the term "handicap" as equivalent to disabled). *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 917-23 (4th Cir. 1992);

Elliott v. City of Athens, 960 F.2d 975, 977 n. 2 (11th Cir.1992), *cert. denied*, 113 S. Ct. 376 (1972); *Oxford House, Inc. v. City of Baton Rouge*, 932 F. Supp, 2d 683 (M.D. La. 2013); *Oxford House, Inc. v. Twp. of Cherry Hill*, 799 F. Supp. 450, 458-60 (D.N.J. 1992); *United States v. Borough of Audubon, N.J.*, 797 F. Supp. 353, 358-59 (D.N.J. 1991).

Although local governments have a substantial interest in passing and enforcing ordinances to regulate land usage, such ordinances cannot be applied in an unlawfully discriminatory manner. When officials choose to do otherwise, federal and state interests transcend the deference ordinarily afforded to local land use decisions. *Larkin v. State of Michigan Dept of Social Servs*, 89 F.3d 285 (6th Cir. 1996); *Step By Step, Inc. v. City of Ogdensburg*, 176 F. Supp. 3d 112 (N.D.N.Y. 2016) (granting a preliminary injunction requiring zoning approval for housing for persons with mental illness).

Zoning ordinances can violate the FHA when, either as written or as applied, they effectively prohibit the siting or development of group home settings for people with disabilities in R1 zones. See *Larkin, supra; Oxford House Inc. v. Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993); *Twp. of Cherry Hill*, 799 F. Supp. 450. Several cases hold that requiring a variance for residency for an unrelated household group that requires special treatment and prohibiting occupancy until that approval is given establishes a prima facie case of disparate impact based on disability.

As noted above, decisions made by local government officials in response to community opposition to group homes can be a violation of the FHA. "[A] decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter." *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997). If the City decided to deny an application because of the expressed bias of residents, intentional discrimination would be shown. See *Cmty. Hous. Trust v. Dep't of Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208, 227 (D.D.C.2003). ("[E]ven where individual members of government are found not to be biased themselves, plaintiffs may demonstrate a violation of the [FHA] if they can show that discriminatory governmental actions are taken in response to a significant community bias."); *Borough of Audubon, N.J.*, 797 F. Supp. at 361 ("Discriminatory intent may be established where animus towards a protected group is a significant factor in the community opposition to which the commissioners are responding."). Even a proposed change to a zoning ordinance because of community opposition to sober living facilities generally has been found to have been done with discriminatory intent. See *Caron Found. of Fla., Inc. v. City of Delray Beach*, 879 F. Supp 2d 1353 (S.D. FL 2012) cited with approval in *Pac. Shores Props.*, 730 F. 3d at 1162.

REQUESTS FOR REASONABLE ACCOMMODATIONS FROM ZONING REQUIREMENTS

In addition to straightforward discrimination in the application of its zoning code, a city can be liable under the Act for refusing to make *exceptions* to its code for the benefit of people with disabilities. In other words, people with disabilities are entitled to special treatment not available to other protected classes of people. The Act's definition of "discrimination" includes a "refusal to make reasonable accommodations . . . when such

accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

Generally, a claim of this nature requires a showing that a group home requested a reasonable and necessary accommodation to a zoning provision and the city refused the request. A request for reasonable accommodation can be made at any time. *See*, e.g. *Douglas v. Kriegsfeld Corp.*, 884 A. 2d 1109 (D.C. Cir. 2005). But a clear and valid request is necessary to trigger such a claim. A plaintiff "must first provide the governmental entity an opportunity to accommodate them through the entity's established procedures used." *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 578 (2d Cir. 2003). However, if making a request would be clearly futile or "foredoomed," then the plaintiff is not required to make such a request. *United States v. Vill. of Palatine, Ill.*, 37 F.3d 1230, 1234 (7th Cir. 1994).

ZONING ORDINANCES 929 AND 930, AS PRESENTED TO HOWELL CITY COUNCIL ON SEPTEMBER 23, 2019.[1]

It is our opinion that the proposed Ordinances exhibit the following illegal features:

1. Ordinance 929, Section 1, creates a separate category of housing for people with drug and/or alcohol addictions: "Sober Living Home." This type of categorization based on a specific type of disability is discriminatory on its face. *See Larkin v. State of Michigan Dept of Social Servs*, 89 F.3d at 290 ("By their very terms, these statutes apply only to AFC facilities which will house the disabled, and not to other living arrangements. As we have previously noted, statutes that single out for regulation group homes for the handicapped are facially discriminatory."); *Montana Fair Housing v. City of Bozeman*, 854 F. Supp.2d 832, 837 (D. Mont. 2012) ("The Authorized Uses Section discriminates against the handicapped on its face. . . [It] applies less favorably to a protected group, i.e., individuals who require assisted living care due to disabilities."). Zoning ordinances cannot contain different standards, procedures, preferences, or exemptions based on the type of disability of people living in the home.

2. Ordinance 929, Section 5, establishes a process for requesting accommodations under the FHA and other laws prohibiting discrimination against people with disabilities. Although a zoning authority may establish a rational process for requesting accommodations to its zoning regimen, the procedures and standards included in Section 5 are excessive, inappropriate, and discriminatory. Section 5 requires congregate living facilities for people with disabilities to meet requirements that are not otherwise required for families or people living in a communal setting

[1] We have not seen the minutes of the City Council meeting of September 23, but have been informed that the current "exemption" from these Ordinances for adult foster care homes and sober living homes of six persons or less that appears in Section 5(b) of Ordinance 929 may be removed. If this exemption language is removed, even small operators of sober living homes would have standing to challenge these Ordinances in court.

who are not disabled. These onerous and unlawful standards and procedures include, for example:

a. Requiring Special Accommodation Use applications to go through the public hearing and notice requirements contained in Section 3.03 (Special Land Uses) of the zoning code (Ord. 929, Section 5(b)).[2]
b. Requiring housing providers seeking Special Accommodations Uses to obtain licenses and meet the licensing requirements of Ordinance 930 (Ord. 929, Section 5(b)).[3]
c. Requiring a concept plan containing information that is not otherwise required for families or non-disabled congregate living arrangements (Ord. 929, Section 5(d)).
d. Imposing standards and requirements that are not otherwise required for families or non-disabled congregate living arrangements (Ord. 929, Section 5(e)).
e. A provision relating to acceptable design standards that is not otherwise required for families or non-disabled congregate living arrangements (Ord. 929, Section 5(f)).

3. Ordinance 930 establishes a licensing and registry system for adult foster care facilities and sober homes. Unlike other congregate living situations involving non-disabled people, it requires such facilities to apply for and obtain licenses to operate within the city. The requirements, standards, and procedures for obtaining a license under this Ordinance do not apply to families or non-disabled congregate living situations. This Ordinance is facially discriminatory, and in our opinion will not withstand a legal challenge.

The Sixth Circuit requires that specific regulatory burdens on housing for people with disabilities must be based on the unique needs of people with disabilities. With respect to discriminatory housing regulations, the city "may impose standards which are different from those to which it subjects the general population, so long as that protection is demonstrated to be warranted by the unique and specific needs and abilities of those handicapped persons." *Marbrunak, Inc. v. City of Stow,* 974 F.2d 43 (6th Cir. 1992). Here there is no evidence of such specific tailoring. None of the proposed requirements can be argued to protect health or safety of residents with disabilities; all seem extremely vague, or designed to burden the application process, or both.

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2 *See, e.g., Larkin, supra,* 89 F.3d at 292 (public notice requirements for group homes violate the FHA and are preempted by it).

3 See, e.g., *Nevada Fair Housing Center, Inc. v. Clark County,* 2007 WL 610640 (D. Nev. 2007) ("[T]he court finds that Clark County's group home ordinance is facially discriminatory. The ordinance explicitly discriminates against disabled adults by implementing a . . . requirement that does not apply to similarly situated non-disabled adults.")

In *Pacific Properties, supra*, the Court held that an ordinance that subjected a sober living home to the requirements that it submit a detailed application for a special use permit and/or reasonable accommodation in order to operate and going to a public hearing violated the Act. "Subjecting an entity protected by anti-discrimination laws to a permit or registration requirement, when the requirement is imposed for a discriminatory purpose, has obvious adverse impacts upon that entity and being forced to submit to such a regime is sufficient to establish injury in a disparate treatment case." *Pac. Shores,* 730 F. 3d at 1165.

Legislative history underlying the Act describes this type of conduct as prohibited under the Act. "Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety, and land-use in a manner which discriminates against people with disabilities .... [These and similar practices would be prohibited." H.R. REP. No. 711, supra note 34, at 24, reprinted in 1988 U.S.C.C.A.N. at 2185. See also *Oxford House-Evergreen v. City of Plainfield,* 769 F. Supp. 1329 (D.N.J. 1991). With regard to public safety issues, "[R]estrictions predicated on public safety cannot be based on stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents. As for restrictions purporting to benefit the handicapped person, these must also be individually tailored to produce some discernable benefit to the particular handicapped people in question. In addition, these benefits must outweigh any corresponding burdens arising because of the discriminatory regulation. *See generally Bangerter v. Orem City Corp.* 46 F.3d 1491 (10th Cir. 1995).

LEGAL REMEDIES

The Fair Housing Act provides a broad range of legal remedies should the City of Howell enact Ordinances 929 and 930 as currently drafted. Your organizations can file administrative complaints of discrimination with the U.S. Department of Housing and Urban Development and/or the Michigan Department of Civil Rights. You can also lodge formal complaints with the U.S. Department of Justice, which has often challenged similar zoning ordinances. You can also initiate litigation in federal court in the Eastern District of Michigan, where our attorneys are authorized to practice. The remedies available under the Fair Housing Act include temporary, preliminary, and permanent injunctive relief, as well as compensatory damages and attorneys' fees.

Please call if you have any questions regarding the opinions and conclusions contained in this letter.

Sincerely,

RELMAN, DANE & COLFAX PLLC

Stephen M. Dane

By: _____

Stephen M. Dane