Attachment D

MEMORANDUM

TO: LOWEL SILER
FROM: BRYAN WARDELL[1]
RE: REGULATION OF GROUP HOMES IN DURHAM COUNTY
DATE: 8/30/2012

Per your request I have researched the feasibility of regulating the location and/or placement of "Group Homes" within the geographical boundaries of the County. It should be noted at the outset that the vast majority of Group Homes are located within the territorial jurisdiction of the City of Durham (the "City") and would be subject to City regulation and enforcement. The County, however, has received a number of requests for information concerning the regulation of group homes from its citizens; consequently, it is a matter which is properly addressed in this memorandum.

I. Overview of Federal and State "Group Home" Protections

A. North Carolina State Law

Chapter 168 of the North Carolina General Statutes provides a number of protections for persons with disabilities. Among these is Article 3 ("Family Care Homes"), which restricts the ability of local governments to dictate the size or location of family care homes through zoning ordinances. Specifically, the statute mandates that family care homes be treated as single-family residences for zoning purposes and that no special permits, limitations, or requirements be imposed on such homes.[2] However, the statute allows local governments to prohibit family care homes from being located within a one-half mile radius of one another. This provision is important as a means of preventing a loophole wherein group homes could simply erect numerous six-person homes side-by-side rather than building one large facility.

The definitions of "family care home" and "disability" under this statute are obviously key. As defined, a family care home is one that: (1) has six or fewer residents; and (2) offers "support and supervisory personnel that provides room and board, personal care and habilitation services in a family environment for . . . resident persons with disabilities."[3] A person with a disability includes any individual "with a temporary or permanent physical, emotional, or mental disability . . . but not including mentally ill persons who are dangerous to others."[4]

At first glance, it is immediately clear that the statute excludes from protection populations such as recently-released prisoners, parolees, and at-risk youth, as such individuals are not suffering from "temporary or permanent physical, emotional, or mental disabil[ities]." Further, North Carolina case law has offered an even more narrowly-tailored reading of the

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[1] *Many thanks to Matt Triplett, a Duke University Law Student and intern with the County Attorney's Office, for contributing his time and efforts in assisting with this Memorandum.*

[2] N.C.G.S. § 168-22(a).

[3] N.C.G.S. § 168-21(1).

[4] *Id.* at (2).

statute. In *Taylor Home of Charlotte v. City of Charlotte*,[5] the city zoning board denied a residential permit to an organization that wished to provide a six-bed treatment and living facility to individuals with "full-blown AIDS." The city determined that such a facility was not protected under the family care homes statute because individuals with "full-blown AIDS" were necessarily in the last stages of life and, therefore, could not be "mainstreamed" into daily living in a single family zoned neighborhood. Accordingly, these individuals were not handicapped as defined in the statute. Moreover, the city determined that the level of care to be provided at the facility was so comprehensive and complex that it could not be characterized as "personal care and habilitation services in a family environment." The North Carolina Court of Appeals affirmed this entire line of reasoning,[6] and the North Carolina Supreme Court denied certiorari.[7]

However, notwithstanding the flexibility that this case seems to provide to local governments, I question the case's validity in light of rapidly-evolving societal views about illnesses generally and HIV/AIDS in particular. More importantly, the application of federal law (as discussed below) limits the application of this case.

B. Federal Law

Federal anti-discrimination statutes and constitutional provisions provide the federal mechanism by which local government zoning authority is curtailed. Specifically, under the federal Fair Housing Act (FHA), it is unlawful for any individual, entity, or unit of government to "discriminate in the sale or rental, *or to otherwise make unavailable or deny*, a dwelling to any buyer or renter because of a handicap."[8] Local governments are deemed to violate this provision upon a plaintiff's showing that a policy or practice has a disparate impact on a protected class.[9] The statute defines "handicap" as any "physical or mental impairment which substantially limits one or more of [a] person's major life activities."[10] This definition, as with the state law, excludes populations such as parolees and at-risk youth, but it includes those suffering from substance abuse and similar disabilities.[11]

The federal law is less certain than the North Carolina statute on a number of points. For instance, "discrimination" includes the failure of a local government to "make reasonable accommodations" for individuals protected by the law.[12] However, it is unclear whether "reasonable accommodation" permits a county government to use zoning ordinances to prohibit the operation of group homes serving residents in excess of six individuals in residential areas.[13]

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[5] 116 N.C. App. 188, 447 S.E.2d 438 (N.C. App. 1994).
[6] *Id.* at 195–96, 447 S.E.2d at 443–44.
[7] 338 N.C. 524, 453 S.E.2d 170.
[8] 42 U.S.C. § 3604(f) (emphasis added).
[9] David Owens, *Can a Group Home be Zoned Out of the Neighborhood?*, COATES' CANONS: NC LOCAL GOVERNMENT LAW BLOG (May 15, 2012), http://canons.sog.unc.edu/?p=6660.
[10] 42 U.S.C. § 3602(h)(1).
[11] Owens, *supra* note 9.
[12] 42 U.S.C. § 3604(f)(3)(B).
[13] Owens, *supra* note 9.

It is also unclear whether proximity limitations in excess of a half-mile are permitted under the law.[14]

Notwithstanding these uncertainties, it is clear that at least some reasonable restrictions on the size and proximity of group homes are permitted under the FHA. For instance, a North Carolina federal court construed this statute in *Oxford House, Inc. v. City of Wilmington.*[15] In that case, Oxford House wished to open two "large" (i.e., eight to twelve individuals) residential rehabilitation living facilities for recovering alcoholics and drug addicts. The organization brought suit under the FHA after the City of Wilmington denied a proposed zoning ordinance amendment that would have made such facilities possible. Notably, the city ordinance being challenged closely mirrored the language of the North Carolina statute, permitting group homes of up to eight individuals in residential neighborhoods, but not within one-half mile of one another. Larger homes were restricted to multi-family residential districts. However, Oxford House argued that the eight-person limit failed to afford a "reasonable accommodation" because the organization's treatment plan required eight to twelve residents. The court disagreed, observing that Oxford House had failed to show why nine rather than eight individuals would be "necessary" for the organization's treatment plan.[16] Likewise, the half-mile proximity restriction was upheld.[17] Therefore, Wilmington's zoning restrictions on group homes were affirmed.

Obviously this case is just one example of the type of fact-intensive analysis that a federal court would conduct under the FHA. Still, the case demonstrates how reasonable and carefully-defined zoning ordinances regarding the size and proximity of group homes in residential areas are permitted under the FHA. However, the case also demonstrates the potential that the North Carolina statutes might not be the stopping-point for local government regulation. In other words, it may not be enough to simply comply with the North Carolina statutes by limiting group homes to six individuals each and preventing the homes from being located within a half mile of one another, if a plaintiff could show necessity under the FHA.[18] Therefore, any county zoning ordinance must be mindful of the FHA's added restrictions and must be flexible enough to permit group homes to operate in certain areas when such necessity has been shown.

Beyond the FHA, other federal anti-discrimination statutes and constitutional principles apply. However, since federal anti-discrimination statutes are generally limited to race, sex, age and other such classifications (none of which seem to be at play here), these statutes should not affect Durham County's zoning authority over group homes. Therefore, as long as a zoning ordinance does not involve a suspect classification (race, sex, etc.) or impinge on a fundamental right (bodily autonomy, privacy, etc.), the ordinance will be examined under the deferential rational basis test (requiring an ordinance to be rationally related to some legitimate government purpose).[19]

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[14] *Id.*

[15] No. 7:07-CV-61-F, 2010 WL 4484523 (E.D.N.C. 2010).

[16] *Id.* at *13.

[17] *Id.* at *10; *see also* Oxford House, Inc. v. City of Raleigh, 1999 WL 1040013 (E.D.N.C. 1999) (upholding a 375-yard proximity restriction).

[18] Owens, *supra* note 9.

[19] Bannum, Inc. v. City of St. Charles, Mo., 2 F.3d 267 (8th Cir. 1993).

II. What Some Other Jurisdictions are Doing

A. Cumberland County

Cumberland County is similar to Durham County in that they have few, if any, group homes. Section 909 of the Cumberland County Zoning Ordinance restricts group homes from being within ½ mile of each other. The text of § 909 reads as follows:

> No group home may be located within one-half mile radius of an approved or existing group home or approved or existing residential habilitation support facility, regardless of the jurisdiction of the approved or existing home or facility. A group home for not more than six resident handicapped persons, any one of whom may be dangerous to others as defined in N.C. Gen. Stat. § 122C-3(11)(b) is not a permitted use in any residential district[20].

B. City of Charlotte

The City of Charlotte has an 800 foot separation restriction on the placement of any new group home subject to a few exceptions. The text of Section 12-517 of the Charlotte Code reads as follows:

> Section 12.517. Group Homes.
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> This ordinance provides for the location of group homes in a wide variety of residential and nonresidential districts. However, the public has an interest in assuring that a concentration of group homes within neighborhoods or along streets in residential districts be minimized. Accordingly the following standard will apply to the location of group homes in single family residential districts. New group homes must be separated from existing group homes in a single family residential district by a distance of 800' measured from the closest point of each lot property line in a straight line. This standard will not apply in circumstances when the sites are separated by a major thoroughfare, major topographical feature such as a major stream floodway, or by major non-residential or public uses such as a park school, church, or shopping or office area.

[20] The City of Fayetteville has a similar separation requirement of 2000 + feet.

C. City of Raleigh

The City of Raleigh has a 375 yard separation requirement on the placement of any new supporting housing residence of between 4 and 12 unrelated people which includes group homes. The Raleigh Ordinance requires the following:

Supportive housing residences shall meet all of the following:

- No supporting housing residence shall be established, constructed, expanded, altered, changed, occupied, or increased in the number of occupants except in accordance with the Housing Code, Article H, Chapter 6 Part 10.
- The total number of individuals occupying a supportive housing residence must not exceed twelve (12).
- No supportive housing residence shall be established or maintained without a responsible person on site.
- Off-street parking is provided in accordance with §10-2081.
- No supportive housing residence shall be located within three hundred seventy-five (375) yards (determined by straight line from property line to property line) of any other supportive housing residence or any existing group care facility, family care home or family group home established prior to the effective date of this ordinance.*

  The supportive housing residence must conform to one (1) or more of the following:

  a. Licensed by the federal or state government

  b. Funded in part by governmental grants or loans

  c. Provides room and board, personal care, and habilitation services in a family environment

CONCLUSION

These are but a few of the ways in which Cities have chosen to deal with the regulation of group homes and supportive care facilities. Municipalities are limited in what they can do in light of the legislature's specific intent to limit regulation of these facilities through local zoning laws. Upon information and belief, the County of Durham has few, if any, group homes outside of the territorial jurisdiction of the City that would be subject to any additional regulations.