



WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM

Establishment of Group Homes
and Similar Facilities in Residential Neighborhoods

This Information Memorandum describes certain state and federal laws, including a relevant federal district court decision in Wisconsin, that affect establishment of group homes and similar facilities in residential neighborhoods. The state laws relate to licensure, establishment of community advisory committees, zoning, deed restrictions, and applicability of local building codes. Although state law requires that these facilities be established a certain distance apart from each other, two federal laws relating to discrimination against persons with disabilities have been held by federal courts to require that a municipality make a reasonable accommodation for these types of facilities. The Americans with Disabilities Act and the federal Fair Housing Act, as amended by the federal Fair Housing Amendments Act of 1988, are discussed in the description of the federal court decision.

STATE STATUTES

LICENSURE

The statutes provide that no person may conduct, maintain, operate, or permit to be maintained or operated a **community-based residential facility (CBRF)** unless it is licensed by the Department of Health Services (DHS). The term "CBRF" is defined in s. 50.01 (1g), Stats., as a place where five or more adults, who are not related to the operator or administrator, reside in which care, treatment, or services above the level of room and board are provided to residents. The residents must not require care above intermediate level nursing care and the CBRF may not include more than three hours of nursing care per week per resident. Certain exceptions to the definition of "CBRF" are provided in the statute.

DHS has the authority to provide uniform statewide licensing, inspection, and regulation of CBRFs. Rules regarding CBRFs are set forth in ch. DHS 83, Wis. Adm. Code.

Within 10 working days after receipt of an application for initial licensure of a CBRF, DHS must notify the municipality's planning commission or other appropriate municipal agency if there is no planning commission. DHS is required to request the planning commission or agency to send to DHS, within 30 days, a description of any specific hazards that may affect the health and safety of the residents of the CBRF. A license may not be

granted until the response is received or the 30-day period expires, whichever is sooner. In granting a license, DHS is required to give “full consideration” to the hazards determined by the planning commission or agency. [s. 50.03 (4) (a) 3., Stats.]

Any person who receives, with or without transfer of legal custody, five to eight children to provide care and maintenance for those children must obtain a license to operate a **group home** from the Department of Children and Families (DCF). [s. 48.625 (1), Stats.] The term “group home” is defined in s. 48.02 (7), Stats., as a facility operated by a person required to be licensed by DCF for the care and maintenance of five to eight children.

No person may receive children, with or without transfer of legal custody, to provide care and maintenance for 75 days in any consecutive 12-month period for four or more children at any one time unless the person obtains a license to operate a residential care center from DCF. [s. 48.60, Stats.] Certain exceptions are provided in the statutes. The term “**residential care center for children and youth**” is defined in s. 48.02 (15d), Stats., as a facility operated by a child welfare agency for the care and maintenance of children residing in that facility.

DCF is required to promulgate rules establishing minimum requirements for the issuance of licenses to, and establishing standards for the operation of, residential care centers and group homes. The rules must be designed to protect and promote the health, safety and welfare of the children in the care of the licensees. [s. 48.67, Stats.] Rules for group homes are set forth in ch. DCF 57, Wis. Adm. Code, and rules for residential care centers for children and youth are set forth in ch. DCF 52, Wis. Adm. Code.

The statutes also provide for a period prior to initial licensure for a municipality’s planning commission or other agency to identify specific hazards for residents of a residential care center or group home. [s. 48.68 (3), Stats.] This statute is the same as the statute that applies to CBRFs, as described above, except that the reference is to DCF for these facilities for children.

COMMUNITY ADVISORY COMMITTEE

Section 50.03 (4) (g), Stats., states that prior to initial licensure of a CBRF, the applicant for licensure must make a good faith effort to establish a community advisory committee. [The community advisory committee requirement applies also to residential care centers and group homes for children. See s. 48.68 (4), Stats.] The committee consists of representatives from the proposed CBRF, the neighborhood in which the proposed CBRF would be located, and a local unit of government. The community advisory committee is directed to provide a forum for communication for those persons interested in the proposed CBRF. Any committee that is established must continue in existence after licensure to make recommendations to the licensee regarding the impact of the CBRF on the neighborhood. DHS and DCF are directed to determine compliance with this requirement both prior to and after initial licensure.

ZONING

The state statutes governing location of community living arrangements in residential areas are set forth in s. 59.69 (15), Stats., for counties; s. 60.63, Stats., for towns; and s. 62.23 (7) (i), Stats., for cities. The chapter on villages cross-references the statute that relates to

cities; see s. 61.35, Stats. In addition to affecting the placement of community living arrangements, the statutes have separate provisions on the placement of smaller homes, including foster homes, treatment foster homes, and adult family homes. The statute that relates to location of community living arrangements in cities does not apply in the City of Milwaukee unless adopted by that city by ordinance. However, Milwaukee has incorporated provisions from the statutes into its ordinances. [Sections 295-201-113 and 245 and 295-503-1 and 2, Milwaukee Code of Ordinances.]

The above statutes refer to “**community living arrangements**,” a term that includes residential care centers for children and youth, group homes for children, and CBRFs.

No community living arrangement may be established within **2,500 feet**, or a lesser distance established by ordinance, of any other community living arrangement. Two community living arrangements may be adjacent if the municipality authorizes that arrangement and if both facilities comprise essential components of a single program. In addition to this **distance requirement**, the statutes set forth a **density requirement** under which the total capacity of community living arrangements in a municipality may not exceed 25 persons or 1% of the municipality’s population, whichever is greater. The same density requirement also applies in each aldermanic district in a city. Agents of a facility may apply for an exception to the distance requirement or the density requirement, and the exception may be granted at the discretion of the municipality.

If a community living arrangement has a capacity of **eight or fewer persons** and is licensed, operated, or permitted under the authority of DHS or DCF, the facility is entitled to locate in **any residential zone** without special zoning permission. If the community living arrangement has a capacity of **nine to 15 persons**, the facility is entitled to locate in any residential area, except areas zoned exclusively for single-family or two-family residences, but is entitled to apply for special zoning permission to locate in those areas. Facilities with a capacity of **16 or more persons** may apply for **special zoning permission** to locate in areas zoned for residential use, and a municipality may grant the special zoning permission at its discretion. The term “special zoning permission” is defined in the statutes as including special exceptions, special permits, conditional uses, zoning variances, conditional permits, and words of similar intent.

The statutes cited above also provide that not less than 11 months nor more than 13 months after the first licensure of an adult family home or community living arrangement and every year thereafter, the governing body of any municipality in which such a home or arrangement is located may make a determination as to the effect of the adult family home or community living arrangement on the health, safety, or welfare of the residents of the municipality. Procedural requirements for the determination are spelled out by statute, including hearing and notice requirements. Within 20 days after the hearing, the governing body is required to mail or deliver to the adult family home or community living arrangement its written determination, stating the reasons for the determination. If the governing body determines that the existence of a licensed adult family home or community living arrangement poses a threat to the health, safety, or welfare of the residents of the municipality, it may order the home or arrangement to cease operation unless special zoning permission is obtained. This order is subject to judicial review. The adult family home or community living arrangement must cease operation within 90 days after the date of the order, or the date of

final judicial review of the order, or the date of denial of special zoning permission, whichever is latest.

DEED RESTRICTIONS

A community living arrangement with a capacity for eight or fewer persons is a permissible use for purposes of any deed covenant that limits use of property to single-family or two-family residences. A community living arrangement with a capacity for 15 or fewer persons is a permissible use for purposes of any deed covenant that limits use of property to more than two-family residences. Covenants in deeds that expressly prohibit use of property for community living arrangements are void as against public policy. [ss. 46.03 (22) (d) and 48.743 (4), Stats.]

In reviewing the applicability of the above statute to restrictive deed covenants that existed prior to enactment of the statute, the Wisconsin Court of Appeals held that the statute applied retroactively and that this retroactive application was constitutional under the U.S. and Wisconsin Constitutions. [*Overlook Farms Home Association, Inc. v. Alternative Living Services*, 143 Wis. 2d 485, 422 N.W. 2d 131 (Ct. App. 1988), review denied 144 Wis. 2d 954, 428 N.W. 2d 552 (1988).]

APPLICABILITY OF LOCAL BUILDING CODES

Community living arrangements are subject to the same building and housing ordinances, codes and regulations of the municipality or county as similar residences located in the area in which the facility is located. [ss. 46.03 (22) (b) and 48.743 (2), Stats.]

FEDERAL COURT DECISION IN WISCONSIN

This section of the Information Memorandum summarizes a 1998 federal court decision in Wisconsin that discussed the applicability of two federal laws to placement of facilities for persons with a disability--the federal Americans with Disabilities Act (ADA) and the federal Fair Housing Act, as amended by the federal Fair Housing Amendments Act of 1988. Since the 1988 amendments that added handicap-related provisions to the federal Fair Housing Act and since enactment of the federal ADA, there have been a number of court decisions around the country regarding the applicability of those laws to state and local zoning laws that affect group homes, CBRFs, and similar types of facilities.

The issue in *Oconomowoc Residential Programs, Inc. v. City of Greenfield and Village of Greendale*, 23 F. Supp. 2d 941 (E.D. Wis. 1998) was whether the Wisconsin law that requires at least 2,500 feet between CBRFs and other community living arrangements is preempted by the Fair Housing Amendments Act of 1988 and the ADA.

Oconomowoc Residential Programs, Inc., purchased single-family houses in residential neighborhoods in the Village of Greendale and the City of Greenfield with the intention of turning them into CBRFs for developmentally disabled adults. Since Wisconsin law prohibits establishment of a new community living arrangement within 2,500 feet of an existing community living arrangement, Oconomowoc Residential Programs sought special zoning

permission from the two municipalities for waiver of the distance requirement. Both municipalities denied the requests for waivers.

The Fair Housing Amendments Act prohibits discrimination in housing because of a handicap. The act prohibits "...a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodation may be necessary to afford such person equal opportunity to use and enjoy a dwelling." In addition, the ADA prohibits a public entity from discriminating against a person on the basis of disability or from excluding such a person from public services, programs, or activities.

Although one federal law uses the term "handicap" and the other uses "disability," both terms are defined in substantially the same way. The terms mean a physical or mental impairment that substantially limits one or more of the person's major life activities, a record of having such an impairment, or being regarded as having such an impairment.

The U.S. District Court for the Eastern District of Wisconsin stated that it would need to determine whether Congress intended to preempt state law in this instance. It cited a portion of the Fair Housing Amendments Act which stated that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice..." under the Fair Housing Amendments Act is invalid. The court determined that both the Fair Housing Amendments Act explicitly, and the ADA implicitly, express Congress' intent that those acts protecting disabled persons preempt any conflicting laws.

The court then turned to whether the Wisconsin statute on distance between community living arrangements was in conflict with those federal acts. The court stated that the Wisconsin statute classifies people on the basis of disability. The court went on to state:

This spacing requirement substantially limits meaningful access to housing for the developmentally disabled. ... Thus, the subsections are an obstacle to the accomplishment and exclusion of the full purposes and objectives of Congress and to that extent they are preempted. [23 F. Supp. 2d, at 954.]

The court went on to determine that the City of Greenfield and the Village of Greendale failed to make reasonable accommodations, as required by the Fair Housing Amendments Act, and therefore were liable to Oconomowoc Residential Programs for any damages available under that Act. The court granted summary judgment to Oconomowoc Residential Programs on the issue of liability.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Richard Sweet, Senior Staff Attorney, on July 21, 2010.

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