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December 21, 2015

ATTORNEY-CLIENT COMMUNICATION
PRIVILEDGED AND CONFIDENTIAL

VIA EMAIL

Frank R. Bartle, Esquire
Dischell Bartle Dooley Law Firm
1800 Pennbrook Parkway, Suite 200
Lansdale, PA 19446

Re: Liberation House/Montgomery Township
Our File No. 245.25979

Dear Mr. Bartle:

As you know, this office has been retained by the Delaware Valley Insurance Trust to review and analyze the dispute between Liberation House, LLC and Dr. and Mrs. Domenick Braccia on the one hand and Montgomery Township on the other. The dispute involves the occupancy and use of property located at 1146 Stump Road in North Wales, PA which is owned by the Braccias and being used by Liberation House, LLC as a facility to house individuals who are recovering from addiction to alcohol and/or drugs. The Township has corresponded with the owners and operators of the property advising them to cease and desist their operation.

The Township has provided me with copies of the following documents for my review, consideration and analysis:

1. October 20, 2015 Notice of Violation and Cease and Desist Order issued by Bruce S. Shoupe, Director of Planning and Zoning for the Township to the Braccias and Liberation House, LLC;

2. November 13, 2015 application of Liberation House, LLC to the Zoning Hearing Board ("ZHB") appealing from the determination of the Zoning Officer;

3. A November 16, 2015 letter from Steven G. Polin, Esquire to Mr. Shoupe outlining the position of Liberation House, LLC and the Braccias regarding the use of the home at 1146 Stump Road;

4. A legal article entitled "Addiction, Recovery and the Right to Housing, the Important Intersection between Sober Living Homes and the FHA;

5. Pertinent provisions of the Township Zoning Ordinance;

6. Township Zoning Map;

7. The International Property Maintenance Code, 2003 Edition, adopted by the Township; and

8. Floor plans for the house at 1146 Stump Road.

FACTS

From a review of the foregoing, I understand the relevant facts to be as follows.

Dr. and Mrs. Braccia are owners of real property at 1146 Stump Road, which is located in Montgomery Township. The property is in an R-1 Zoning District, approximately 800-1,000 feet distant from the Montgomery Elementary School which is also on Stump Road. The improvements to the real property at 1146 Stump Road include a fairly large single family dwelling which reportedly was built in the mid-1990's. In addition to being a residence for the Braccia family, Dr. Braccia used a portion of the house for his medical practice. I understand that Dr. Braccia is an osteopath. The original architectural floor plans for the house depict several exam rooms, a file storage room and a waiting room on the first floor of the structure.

The documents provided did not reveal how long the property has been occupied by Liberation House. However, it is apparent that the use preexisted Mr. Shoupe's Notice of Violation and Cease and Desist Letter of October 20, 2015. According to the letter of Mr. Polin dated November 16, 2015, Liberation House, LLC is a housing provider for recovering alcoholics and drug addicts. The house is reportedly being occupied by recovering alcoholics and drug addicts. It can accommodate up to 15 such individuals, plus a house manager, for a total of 16 residents. I understand the concept of such a home is referred to by that industry as a "sober house".

The materials provided did not specify the length of time that any of the "residents" who are recovering from addiction may stay at the home. The length of time of an average stay as well as the shortest and longest stays to date, should be obtained as that information may impact the ZHB's decision and possible future litigation.

ZONING ORDINANCE

The Montgomery Township Zoning Code provides the following pertinent use regulations for an R-1 Zoning District in Section 230-26 of the Ordinance:

> A building may be erected, altered or used and a lot may be used or occupied for any one of the following principal purposes and no other, unless specifically provided for herein, i.e., home occupations.
>
> A. One Single-Family detached dwelling.

That particular use appears to be the only one pertinent to the Liberation House use of the property.

The Zoning Ordinance also provides a definition of family in Section 230-5, as follows:

> B. Family – Any group of individuals living together permanently or long-term, as opposed to transiently or short-term, as the functional equivalent of a family where the residents may share living expenses, chores, eat meals together and are a close group with social, economic and psychological commitments to each other. A family includes, for example, the residents of residential care facilities and **group homes for people with disabilities.** A family does not include larger institutional group living situations such as student-housing, dormitories, fraternities, sororities, monasteries or nunneries.

(Emphasis added).

PROPERTY MAINTENANCE CODE

The Township adopted the International Property Maintenance Code of 2003. That code provides occupancy limitations in § 404, including minimum area requirements set forth in Table 404.5. The formulae set forth in that table should be

applied to the floor plan of the house at 1146 Stump Road to determine what the maximum occupancy limits are for the "family" use of the property.

POSITION OF THE TOWNSHIP'S DIRECTOR OF PLANNING AND ZONING

Bruce S. Shoupe, Director of Planning and Zoning, sent a letter dated October 20, 2015 which is titled "Notice of Violation and Cease and Desist Order" to Mr. (sic) and Mrs. Domenick Braccia and Liberation House, LLC with an email notification to their counsel, Frederick N. Wentz, Esquire. Mr. Shoupe advised the Braccias and Liberation House that the use of the property as "short-term housing to individuals receiving treatment for various additions (sic)" ...is a use "not permitted...under the current zoning of this property R-1-Residential and violates Section 230-5 of the Township Zoning Code, definition of 'family'."

Mr. Shoupe directed the Braccias and Liberation House, LLC to discontinue that use of the property no later than thirty (30) days from the receipt of the notice. He also advised that the addressees had the right to appeal the notice to the Zoning Hearing Board. Mr. Shoupe's letter also advised that the failure to correct or remove the violation within the specified time would be a violation of the Township Code and could result in the issuance of citations and the imposition of fines not to exceed $500.00, plus court costs and attorney's fees. He further advised that each day of the violation would constitute a separate violation and subject the owners and operators to a daily fine.

ZONING APPEAL

As a result of the notification by Mr. Shoupe, Liberation House, LLC filed a Zoning Hearing Board Application, appealing from his determination. This application was timely filed with the Township on November 17, 2015. The appeal challenges the decision of Mr. Shoupe because the "applicant operates a group home for people with disabilities which is within the zoning definition of 'family'." A hearing has been scheduled before the Zoning Hearing Board on January 5, 2016.

CORRESPONDENCE FROM STEVEN G. POLIN, ESQUIRE DATED 11/16/2015

Liberation House, LLC retained, in addition to Frederick Wentz, Esquire, an attorney by the name of Steven G. Polin, Esquire from Washington, D.C. Mr. Polin provided a letter memorandum dated November 16, 2015 to Mr. Shoupe, responding to Mr. Shoupe's notice of violation. In that letter, he takes the position that Mr. Shoupe's determination that the use of the house at 1146 Stump Road is illegal to be erroneous because of Mr. Shoupe's finding that the residents of the home are "transient in nature". Mr. Polin further requested a "reasonable accommodation pursuant to the Federal Fair Housing Act; specifically, he requested that the Township treat Liberation House, LLC as the "functional equivalent of a family as that term is defined by the Township Zoning Code and treat the use of the 1146 Stump Road as a single-family use."

In the course of his letter, Mr. Polin advised that Liberation House, LLC is a housing provider for recovering alcoholics and drug addicts. The house at 1146 Stump Road could house a maximum of fifteen (15) unrelated recovering persons, plus a house manager. Mr. Polin correctly noted that the Township's definition of "family" in the Zoning Ordinance itself does not impose any numerical limitations on the number of persons who reside together and who are related by blood, marriage or adoption. The remainder of Mr. Polin's report is essentially a legal memorandum advocating on behalf of his client, alleging intentional discrimination and disparate effect on individuals with disabilities. He also requested a reasonable accommodation for the residents of the house at 1146 Stump Road, to be treated as the functional equivalent of a family. If the accommodation is granted, it will effectively permit the use of the property as a group home for individuals who are recovering from drug and alcohol addiction.

LAW

1. The Fair Housing Act

The FHA was enacted in 1968. The stated policy of the Act is to provide, within constitutional limitations, for fair housing within the United States. 42 U.S.C. §3601. The Act was originally intended to prohibit discrimination on the basis of race, color, religion or national origin. It was amended in 1988 by the Fair Housing Amendment Act (the "FHAA"). This Amendment included "handicapped" individuals as members of the class sought to be protected by the original FHA. While the 1988 amendments do not expressly apply to zoning, the courts have relied on legislative history which clearly states that the Act applies to zoning practices such as municipal restrictions on group homes. Courts have routinely invalidated denials of special use permits or variance denials for group homes when a discriminatory intent or impact is shown. Even where a legitimate reason is proffered by a municipality, courts have stressed that the Act requires municipalities to make "reasonable accommodations" to fulfill the Act's purpose of handicapped access/living in residential areas.

Federal courts, including District Courts in Pennsylvania, New Jersey and the Court of Appeals for the Third Circuit, have decided many cases involving the applicability of the FHA, the Fair Housing Amendment Act and their effect on municipal ordinances and regulations concerning group homes. This includes decisions by zoning hearing boards concerning interpretations of municipal ordinances and applications for special exceptions and variances from zoning ordinances relating to group homes. Court decisions have made it clear that individuals recovering from alcohol and drug addiction are "handicapped" individuals entitled to the protections of the FHA. For ease of discussion, we will refer to the Fair Housing Act and the Fair Housing Amendment Act collectively as the "FHA".

2. Case Law.

The following are brief summaries of cases pertinent to the issues raised in this dispute.

a. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977)

Although decided by the 7th Circuit, this case is one of the early, seminal decisions concerning the FHA's effect on local municipal ordinances. Plaintiffs were providers of low income housing. They contended that a municipality's refusal to rezone their property to permit the construction of federally financed low cost housing was a violation of the FHA. The court held that, under the circumstances, a violation of the FHA could be established by a showing of discriminatory effect without a showing of discriminatory intent. The court further held that the municipality had a statutory obligation under the FHA to refrain from zoning policies that effectively foreclosed the construction of any low cost housing within the municipality's boundaries.

Although the court did not conclude that there was clear discriminatory intent in refusing to rezone the property, it held that the effect of that refusal was to discriminate against low income housing. This was, in effect, racial discrimination because the housing would principally serve minority citizens.

b. Horizon House v. Township of Upper Southampton, 804 F.Supp. 683 (E.D. Pa. 1992)

This case confirmed that people suffering from handicaps and entities providing housing for handicapped individuals were protected by the FHA. An ordinance requiring a 1,000 foot distance between group homes and allegedly designed to prevent "clustering" of people with disabilities was struck down because of its disparate treatment of handicapped individuals.

The court found the ordinance to be facially discriminatory because it created a classification based on handicap without a legitimate governmental interest for creating such a classification.

c. Easter Seal Society of New Jersey, Inc. v. Township of North Bergen, et al., 798 F.Supp. 228 (U.S.D.C. N.J. 1992)

A District Court granted plaintiff's application for a preliminary injunction to require a township to issue a permit to allow renovations to a community residence for mentally ill individuals recovering from chemical abuse. The use was not permitted in an R-1 residential zone under the township's zoning ordinance. The township stated that the use was permitted in an I-1 (Institutional) zone which permitted board and care

facilities, halfway houses, group homes, social rehabilitation facilities, alcohol and drug centers and convalescence facilities.

The court held that refusal to issue the building permit was a violation of the FHA, citing the refusal of the township to make reasonable accommodations in the nature of a rezoning or a variance to allow the mentally ill patients to reside in a residential neighborhood, as opposed to neighborhoods designated as "institutional".

d. Remed Recovery Care Centers v. Township of Willistown, 36 F.Supp. 2d 676 (E.D. Pa. 1999)

Willistown Township in Chester County enacted a zoning ordinance which defined who may constitute a "family" and which limited the number of non-related persons who may occupy a house in a single family zoning district to five. Plaintiff was engaged in providing treatment, therapy and rehabilitation services to handicapped persons with brain injuries, autism and other disabilities and wanted to house eight individuals in one of its group homes as opposed to the ordinance's limit of five. Citing to the illegal practices listed in the FHA, which include "a refusal to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling", the Court held that there are three types of discrimination recognized under the FHA:

1. Intentional discrimination;

2. Discriminatory or disparate impact; and

3. Failure to make reasonable accommodations.

In that case, the court held that there was an FHA violation because of the township's refusal to make a "reasonable accommodation" by changing the number of individuals who could live in a group home from five to eight (seven brain-injured persons and one full time caregiver). It reasoned, however, that in order to establish the necessity of making accommodations to handicapped persons under the FHA, that the claimant must show that handicapped persons will be denied the opportunity to live in a particular dwelling of a neighborhood of their choice without accommodation. The court held that there would be no harm to the township's zoning scheme by allowing eight individuals to live in a group home as opposed to five. Without that accommodation, two brain-injured individuals would not be able to live in that home. Therefore, the court found that the township had failed to make a reasonable accommodation.

e. Barber Center, Inc. v. Peters Township, 273 F.Supp. 2d 643 (W.D. Pa. 2003)

Plaintiff, a provider of community housing for mentally retarded persons sued a township and a zoning hearing board seeking an injunction that a special exception request to allow occupancy by four residents be granted. The ordinance permitted three individuals to live together. The special exception sought a residency for four. The court held that (1) the township failed to reasonably accommodate the needs of the retarded persons, (2) the ordinance had a disparate impact on retarded persons and (3) the application of the ordinance resulted in disparate treatment of retarded persons.

On the reasonable accommodation issue, the court held that the municipality failed to show any undue financial or administrative hardship or fundamental change in its zoning scheme as a result of allowing an accommodation from three to four individuals in this group home. The court also held that an ordinance which limits the number of unrelated persons living together is facially discriminatory.

f. Sharpvisions, Inc. v. Borough of Plumb, 475 F.Supp. 2d 514 (W.D. Pa. 2007)

A borough sought to force the operator of group homes for persons with disabilities to file for a conditional use to have a single family dwelling occupied by one disabled individual. Among other things, the court held that the borough subjected the operator to disparate treatment. The borough's interpretation of its ordinance to define a "family" had disparate impact on the disabled and the borough zoning board's failure to grant the residents "family" status constituted a failure to reasonably accommodate.

In that case, the plaintiff's employees would come to the home of the disabled individual on a continuous 24 hour per day basis. There were typically two and sometimes three employees scheduled to work at the home on a shift basis whenever the disabled individual was at the residence. The definition of "family" in the residential district under the zoning code was defined as follows:

> Either an individual, or two or more persons related by blood or marriage or adoption, or a group of not more than five persons not so related occupying a premises and living as a single housekeeping unit as distinguished from a group occupying boardinghouse, lodging house, club, fraternity or hotel. Household servants employed exclusively on the premises shall be considered part of the family of their employer.

The court held that the borough's interpretation of its ordinance defining "family" so as to exclude a home for a single disabled resident from the definition of single family dwelling and to require the operator of such home to acquire conditional use permits had a disparate impact on disabled individuals. Therefore, it violated the FHA.

g. Lapid Laurel v. Zoning Board of Adjustment of the Township of Scotch Plains, 284 F.3d 442 (3d Cir. 2002)

A case which went in favor of the municipality involved a 95 bed care facility for the elderly in New Jersey. The federal court there held that a review of a reasonable accommodation challenge under the FHA to a decision of a local land use board should be limited to review of the material presented to the board. In that case, the local board had denied the request for variances to the ordinances for traffic safety and emergency access issues. The court held that the reasonable accommodations requested would impose an undue hardship on a township regarding the safety of its residents. Therefore, there was no violation of the FHA.

h. Albert v. Zoning Hearing Board, 854 A.2d 401 (PA 2004)

The Pennsylvania Supreme Court held that a township zoning officer's denial of a zoning application to operate a halfway house was appropriate. The Court ruled that the halfway house did not qualify as a "single-family detached dwelling" under the Township Zoning Ordinance because the concept of a "single-family dwelling" carried with it a certain expectation of relative stability and permanence in composition of the family unit. The operation was designed to house the residents for only that period of time necessary to prepare them to return to their own families. Thus, there was a level of instability and transience which was incompatible with the single-family concept. The Court explained that in order to qualify as a single housekeeping unit for purposes of a single family zoning district, the group of individuals in the household must not only function as a family within that household, but the composition of the group must be sufficiently stable and permanent so as not to be fairly characterized as purely transient.

Of note in this decision was the absence of an FHA-based argument that the individuals in the house had "handicaps" consistent with that definition in the FHA, and that the refusal to find the house was a single-family dwelling was discrimination against its residents. The operator also did not argue that the enforcement of the ordinance violated the FHA because it had a disparate impact on individuals with disabilities or that the Township failed to make a reasonable accommodation to allow for the group home. It appears that the decision was based solely upon existing zoning and real property law in Pennsylvania.

i. Lakeside Resort Enterprises, L.P. v. Board of Supervisors of Palmyra Township, 455 F.3d 154 (3rd Cir. 2006)

The U.S. Court of Appeals for the Third Circuit reversed a U.S. District Court for the Middle District decision on the issue of whether a proposed drug and alcohol treatment facility qualified as a dwelling under the FHA. The Middle District had earlier determined that the house did not qualify as a dwelling under the FHA. The Third Circuit reversed that decision.

In that case, the Third Circuit noted that two other courts had held that recovering alcoholics and drug addicts are handicapped for FHA purposes, so long as they are not currently using illegal drugs. *U.S. v. S. Mgmt. Corp.*, 955 F.2d 914 (4th Cir. 1992); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2nd Cir. 1997).

In *Lakeside*, the Third Circuit reasoned that a court must answer two questions to determine whether or not a specific facility is a dwelling under the FHA. These questions include the following:

1. Is the facility intended or designed for occupants who would intend to remain for a significant period of time?

2. Do occupants view the facility as a place to return to?

In addressing the first question, the Court noted that testimony at trial put the likely average stay at the proposed facility at 14.8 days because of health insurance funding. However, the Court noted that the average stay was not dispositive on the issue. The Court further ruled that the 14.8 day stay is an average and that perhaps half of the proposed residents would stay longer than 14.8 days. Thus, the Court found that even though the average stay was 14.8 days, it would be possible for residents to stay longer. Therefore, the Court concluded that the proposed facility qualified as one where residents "would intend to remain for a significant period of time".

With regard to the second question, testimony about the experience of the provider's other facilities showed that residents would eat meals together, return to their rooms in the evening, receive mail at the facility and make it their "residence" while they were there. Therefore, the residents treated the facility like a home for the duration of their stay. Thus, the Court ruled that the occupants viewed the facility as a place to return to. The result was that the facility qualified as a dwelling for FHA purposes, even though the average stay was only 14.8 days.

j. Smith v. The Salvation Army, 2015 U.S. Dist. LEXIS 113680 (W.D.Pa. 2015)

In that case, the Plaintiff was an individual with an amputated left leg. He apparently was denied access to a housing facility run by the Salvation Army which operated the facility as a family shelter, with a sleeping area located on the third floor of the building and provided free access for up to 24 homeless people at a time. The Court analyzed the case based upon the two-question approval set forth in *Lakeside*. The longest the plaintiff could have stayed was three (3) nights at the shelter.

As to the first question, the longest maximum stay by anyone would be thirty (30) days and that period was not guaranteed. Under the circumstances, the Court held that the 30 day, non-guaranteed stay period mitigated against a finding that the shelter constituted a dwelling.

With regard to the second question posed in *Lakeside* and applied in *The Salvation Army* case, the Court found that the shelter was not a place that plaintiff or any of the guests would have viewed as a place to which to return. The sleeping rooms contained military styled bunks and required six (6) people to share a room for the night. Guests were not even guaranteed the same bed or room each night and individuals were required to stay in their designated sleeping area for the night. In addition they could not customize or personalize their room or bunk. Guests were required to depart during the day and take their belongings with them. They were not permitted to receive visitors.

In summary, the Court found that their was insufficient evidence to establish that this was a facility which residents would view as one to return to like a "family" dwelling. Thus, the shelter was found not to be a dwelling for FHA purposes.

k. Oxford Investments v. City of Philadelphia, 21 F.Supp.3d 442 (E.D.Pa. 2014)

In this case, plaintiff, the operator of a facility for recovering addicts, filed an application with the City requesting an increase in the number of residents from 44 to 88. Although there were collateral issues which resulted in the grant of a motion for summary judgment, the Court held that the plaintiff's substantive claims under the FHA were all without merit. For example, the City classified the plaintiff's property as a "private penal institution" which was not a permitted use in the zoning district in question. The Court ruled that the Board was not obligated to accept the testimony of the operators as credible. It appeared in this case that the Court's decision turned on the credibility of the applicant's testimony at the Zoning Board of Adjustment (Philadelphia equivalent of the ZHB). Because of those findings of non-credibility, the Court did not believe that the plaintiff had effectively demonstrated the need for the requested accommodation (increase from 44 to 88 residents). Thus, the burden never

shifted to the defendant to establish that the requested accommodation was unreasonable.

ANALYSIS/RECOMMENDATIONS

From the foregoing survey of case law, it is apparent that group homes for individuals recovering from addiction to drugs and/or alcohol are individuals who qualify as individuals with "disabilities" or "handicaps" for purposes of the FHA. Those individuals, though, are limited to those who are recovering alcoholics and drug addicts, not those currently drinking or using drugs. Assuming the individuals who reside at 1146 Stump Road are recovering alcoholics and drug addicts, they have disabilities for FHA analysis purposes.

The next question is whether or not the "sober house" residents are a family as that terminology is defined in the zoning ordinance. A lot in an R-1 zone may be used for one single-family detached dwelling. We understand that the building on the lot in question is what one would normally consider to be a detached dwelling.

One must then review the definition of "family" in Section 230-5 of the Zoning Ordinance and apply it to the potential 15 residents and one house manager who could live in the building. The definition refers to "any group of individuals living together permanently or long-term, as opposed to transiently or short term ...". Because there is no numerical limitation on the number of individuals who comprise this group, one must look to the Property Maintenance Code and determine, based upon the floor plan and number of square feet, the upward limit of the number of individuals who could live in that house. This would involve application of the formulae in Table No. 404.5 in the Code. That analysis is not dispositive of the question of whether the individuals in the "sober house" are a "family". It simply identifies the maximum number that the Code would permit in the structure.

Of particular interest in the definition of "family" is that it includes, as an example, "group homes for people with disabilities". Obviously, the language in the first sentence of the definition differentiates between a group living together "permanently or long-term, as opposed to transiently or short-term". If the residents at 1146 Stump Road fit within the terminology "permanent or long-term" as opposed to "transient or short-term", they would qualify as a family.

The analysis of the issue of permanent/long-term vs. transient/short-term involves the application of the law in the cases cited above to the living arrangement. As stated before, please note that the *Albert* case was apparently decided on principals of Pennsylvania zoning law without regard to an FHA analysis. Therefore, although the Supreme Court found that the individuals in that particular case did not fit within the definition of "family", I would not consider it good precedent in a case in which the owners and operators of a sober house advance FHA arguments regarding discrimination and reasonable accommodation.

The more pertinent analysis would be one modeled upon the *Lakeside* case and apparently followed in several of the other cases cited (e.g., *Smith v. Salvation Army*). The two questions which form the basis of the *Lakeside* analysis are:

1. Is the facility intended or designed for occupants who would intend to remain for a significant period of time?

2. Do occupants view the facility as a place to return to?

As to the first question, in *Lakeside*, the Court recognized that the average stay at the proposed facility was 14.8 days. That average stay was apparently determined chiefly from caps on health insurance funding. However, the Court recognized that with an average stay of 14.8 days, there was likely 50% of the intended population which would stay more than 14.8 days. Other facilities run by the operator showed longer stays of similar residents, some as long as thirty (30) days. The Court noted that it had held in a different case that a stay of five (5) months was a "significant period of time". However, it also concluded that a 14.8 day average stay was longer than the typical stay in a motel, or a bed and breakfast facility. Both of those had been held not to be dwellings under the FHA. As stated before, the materials provided by the applicant, including the appeal to the Zoning Hearing Board and Mr. Polin's letter, do not specify the length of time that individuals intend to stay at the facility. Obviously, this is an area of particular concern and should be thoroughly questioned at the upcoming Zoning Hearing Board proceedings. The information which is secured during the proceedings should be viewed from the prism of the *Lakeside* case such that the actual length of the average stay will not answer the question of whether it is a permanent/long-term facility or transient/short-term facility. Obviously, the longer the average stay and the longer the actual or potential stay by individuals will act to mitigate a finding that it is a transient/short-term facility, and lend support to the position that this is more of a permanent/long-term facility.

As to the second question, the *Lakeside* decision and the cases cited therein raise a series of issues which, again, should be thoroughly vetted at the upcoming Zoning Hearing Board proceedings.

- Do the residents eat meals together?
- Do the residents return to their rooms in the evening?
- Are the residents assigned a particular room for the length of their stay?
- How many residents are there housed per bedrooms, as opposed to dormitory style or barrack style bunks?
- Do the residents receive mail at the facility?
- Do the residents have chores to maintain or keep up the facility (cooking, cleaning, laundry, yard work, shopping, room clean-up, etc)?

- Do the residents decorate or personalize their "rooms" by pictures, ornaments, photographs, or other such *indicia* of long-term residents?
- Do the residents engage in social events together, both on-site and off-site?
- Do the residents travel to work?
- How do the residents travel off-site?

The answers to these and related issues will demonstrate whether, for FHA analysis, the individuals residing at 1146 Stump Road are a "family" for purposes of the FHA because they are not transient or short-term but rather, tend towards being permanent/long-term residents in the house.

I would recommend that you proceed with the Zoning Hearing Board proceedings and secure this information by cross-examination of the individuals who are proffered by the applicants at the hearing and documents entered into the records. I would also recommend that you advise Mr. Wentz in advance that he could provide this information, in writing, in advance of the Zoning Hearing Board hearing as a demonstration that the Township is seeking a fair hearing by giving the applicant every opportunity to make a complete factual record.

As you know, there are three (3) ways in which the owner/operator of a "sober house" can establish a violation of the FHA (See, *Remed Recovery Case Centers v. Township of* Willistown, supra discussed above). I will address each form of discrimination in turn.

1. Intentional Discrimination. There is nothing in the zoning ordinance itself or any Township Ordinance that I am aware of from which one could clearly conclude that there is intentional discrimination towards individuals with disabilities, in this case, individuals recovering from drug and alcohol addiction. I do not believe Liberation House, LLC or the Braccias could make a good argument that there is a facially discriminatory ordinance at work here. In fact, the definition of "family" in the zoning ordinance includes "group homes for people with disabilities". Obviously, no argument should be made to the ZHB that a decision should be based upon the fact that the residents are recovering addicts.

2. Disparate Impact. A disparate impact can be shown if the enforcement of the ordinance has a negative impact on disabled persons as opposed to others who choose to reside in residential zones. The disparate impact argument might be advanced in some litigation down the road if the Zoning Hearing Board improperly classifies the facility as a business or a short-term facility when the facts demonstrate that it is not. Such a classification would clearly have a disparate impact on handicapped individuals because it would effectively prevent such individuals from living in residential zones.

3. Reasonable Accommodation. Mr. Polin's letter requests "reasonable accommodation", i.e., that the Township treat the residents and house manager of the home as the "functional equivalent of a family". That language is in the definition of family in the zoning ordinance. Thus, it would not be unreasonable, even if the Zoning Hearing Board finds that the 16 individuals proposed to reside at the property are not a family, to find that they are the "functional equivalent of a family" because of the case law cited above. The case law demonstrates the intent of the FHA and the Courts is to move handicapped individuals out of large institutions and into mainstream residential communities. Although I cannot exactly anticipate all of the evidence, I would expect the testimony proffered by the applicants will demonstrate that the activities of the individuals will be akin to those of a large family, including assignment to specific bedrooms, preparation and eating of meals together, chores to keep up the house, and other similar activities of a family.

Unless there are significant traffic issues, life safety issues or other legitimate and important governmental interests which the Township is being asked to waive or compromise, it is quite difficult for a municipality to defend against a reasonable accommodation challenge with regard to group homes. One of the arguments that can be made and a condition attached to the facility would be to limit the total number of occupants based upon the formulae set forth in Table 404.5 of the Property Maintenance Code. The application of that formulae would be the same, regardless of whether the residents are an active family or a group of individuals with disabilities.

As stated before, it is my recommendation that the factual issues I have identified be thoroughly vetted and investigated during the Zoning Hearing Board proceedings. However, in order to demonstrate cooperation on the part of the Township, Mr. Wentz should be advised in advance that the Township will ask the applicants to provide that information at the hearing. To the extent that the applicants can provide that information, in writing, in advance of the hearing would be helpful to a prompt determination by the ZHB of whether the use of a sober house is a "permitted use" under the Zoning Ordinance in an R-1 residential district, or whether treating the residents as the functional equivalent of a family is a reasonable accommodation which the Township should make. It may also advise the Township on the position it might take *vis-à-vis* the zoning application.

Because of the extremely sensitive nature of this letter, I would recommend that it be kept confidential and be discussed only with the Board of Supervisors in executive session as a litigation matter under the Sunshine Act and as a privileged attorney/client communication.

Please advise if you have any questions or comments.

Very truly yours,

Harry G. Mahoney

HGM:jj
cc: Robert Iannozzi, Esquire