



February 27, 2023

Sent via email

To the Puyallup Mayor, Deputy Mayor, City Council and City Attorney,

I was recently contacted by several concerned Puyallup residents regarding the proposed ordinance requiring licensing for permanent supportive housing and other services related to homelessness. We are currently monitoring restrictive zoning and land use ordinances that affect unhoused and formerly unhoused people across the country, with an eye towards litigation if the ordinance is unconstitutional or violates the Fair Housing Act.¹ The proposed ordinance in Puyallup is exactly the sort of law that raises a variety of unintended legal issues and, if passed, would not stand up to legal challenge, under federal or state law.

The first issue is that requiring licensing for certain units of housing based on the characteristics of the people living in those units, rather than the intensity of the land use, is almost certainly a violation of the Equal Protection clause of the U.S. Constitution.² In zoning cases brought under Equal Protection claims, the test is 1) whether the plaintiff has been treated differently from others “similarly situated”, 2) whether the different treatment is intentional and purposeful, and 3) whether there is a “rational basis” for the difference in treatment. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). Different treatment in zoning needs to be based on a real distinction between the proposed use and other permitted similarly situated uses. In the proposed ordinance, the only difference between Permanent Supportive Housing (“PSH”) and other residential uses where unrelated people live under the same roof is that the people living in PSH have affirmatively been identified as having a disability that requires some assistance in maintaining housing due to former periods of homelessness. The proposed ordinance intentionally and purposefully creates a legal requirement where disabled, formerly unhoused people living in houses, duplexes, triplexes, and apartment buildings are treated differently than other people living in these same exact buildings.

Under rational basis review, the Supreme Court has made it clear that “[m]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding” is not a rational basis to treat one group differently than another similarly situated one. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) at 448.³ For cities in Washington that have a comprehensive plan like Puyallup,⁴ “properly cognizable” factors include those addressed by the plan, such as the general uses of land, standards of population density and building intensity for each type of

¹ 42 U.S.C. 3601

² U.S. Const., amend. XIV, § 1

³ See also *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) at 433, “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”

⁴⁴ <https://www.cityofpuyallup.org/438/Comprehensive-Plan>

land use, transportation, protection of groundwater, utilities, conservation of the natural environment, etc.⁵ Under rational basis review, a court is going to look at the comprehensive plan to determine whether different treatment of a particular type of housing is reasonable and not arbitrary. Puyallup's comprehensive plan directly addresses the need for more housing for people with "special needs" and specifically states as a goal and policy to "Promote a variety of housing for people with special needs, such as the elderly, disabled, homeless, and single householders...Encourage and support the development of emergency, transitional and permanent housing with appropriate on-site services for persons with special needs...Encourage the fair distribution of special needs housing throughout the City, recognizing that some clustering may be appropriate if in proximity to public transportation, medical facilities, or other essential services."⁶ Requiring a special license for each unit of PSH completely violates the requirements of the plan to "promote a variety of housing" and "encourage and support" this kind of housing – it is an unreasonable barrier with no basis in legally permissible zoning factors.

The proposed ordinance also raises Fair Housing Act issues. Under the Fair Housing Act (FHA), it is unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap."⁷ The FHA considers a person to be "handicapped" if the person: 1) has a physical or mental impairment that substantially limits one or more major life activities; 2) has a record of such impairment; or 3) is regarded as having such an impairment.⁸ The Department of Housing and Urban Development ("HUD") has further defined "physical or mental impairment" in its regulations to include "[a]ny physiological disorder," "[a]ny mental or psychological disorder," including "mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities," as well as substance use disorder.⁹ Point in time counts consistently show that approximately 25% of all unhoused people have a physical or mental disability, compared to 6% of the general population – and for unsheltered people the number is closer to 70%.¹⁰ The FHA also requires that a plaintiff's mental or physical disability substantially impair a major life activity. HUD has defined "major life activity" to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹¹

As such, it is not a stretch to state that ordinances targeting people who are unhoused or formerly unhoused could fall under FHA scrutiny. Case law supports this position. There is little question that unsheltered and unhoused people who suffer physical and mental impairments are substantially limited in carrying out major life activities. Furthermore, for residents of PSH (or transitional or

⁵ RCW 35A.63.061 and xxx; more detailed factors can be found in WAC Chapter 365-196

⁶ <https://www.cityofpuyallup.org/DocumentCenter/View/1373/Housing-Element-?bidId=>

⁷ 42 U.S.C. § 3604(f)(1)

⁸ 42 U.S.C. § 3602(h)

⁹ 24 C.F.R. § 100.201(a)

¹⁰ <https://www.naccho.org/blog/articles/homelessness-among-individuals-with-disabilities-influential-factors-and-scalable-solutions>

¹¹ 28 C.F.R. § 41.31(b)(2); 45 C.F.R. § 84.3(j)(2)(ii); 24 C.F.R. § 100.201(b)

emergency housing) who do not currently suffer any mental or physical impairment, it is still possible to argue that they are nonetheless protected under the FHA as persons who are “regarded as having such an impairment.”¹² The stereotypes and assumptions of the community about unhoused people can trigger this type of protection.

Also, it is worth mentioning that Washington has a statute regarding the “residential structures occupied by persons with handicaps”, which states that “[n]o city may enact or maintain an ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure occupied by persons with handicaps differently than a similar residential structure occupied by a family or other unrelated individuals.”¹³ The statute specifies that “handicaps” is as defined under the FHA.

The proposed ordinance provisions regarding limitations on homeless shelters also raises Equal Protection and FHA issues. The FHA defines a dwelling as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.” 42 U.S.C. § 3602(b). A number of courts have interpreted this provision to cover homeless shelters. *See, e.g., Woods v. Foster*, 884 F. Supp. 1169 (N.D. Ill. 1995); *Lakeside Resort Enters., LP v. Bd. of Supervisors of Palmyra Twp.*, 455 F.3d 154 (3d Cir. 2006), *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1044 n.2 (9th Cir. 2007) (rehearing en banc).

In *Woods*, the Northern District of Illinois recognized a homeless shelter to be a dwelling for purposes of the FHA due to the fact that the people living there had nowhere else to reside. “[T]he shelter is their residence in the sense that they live there and not in any other place.” *Woods*, 884 F. Supp. at 1173 – 74. In reaching its conclusion, the court reasoned that “hav[ing] no other place to return to or reside” effectively converts the place where one lives into the place where one “dwells.” *Id.* at 1174. The court also rejected the argument that a 120-day limit on the amount of time an individual could live at the shelter transformed a resident’s stay into a “transient visit” or made the shelter a public accommodation. “[A]lthough the length of time [the residents] live there depends on their success in finding more permanent housing[,] [t]heir residence is not so short-lived or transient that the Shelter can be considered a mere public accommodation.” *Id.* at 1174. In other words, the court acknowledged that a shelter may be a temporary dwelling without being a transient one. *Id.*

The FHA further requires municipalities “to make reasonable accommodations” in its ordinances when “such accommodations may be necessary” to afford handicapped persons “equal opportunity” for housing. 42 U.S.C. § 3604(f)(3)(B). For example, if a zoning ordinance or an ordinance setting the maximum number of occupants permitted to occupy a dwelling unreasonably interferes with the ability of the mentally or physically handicapped to find or afford housing or shelter, the city must accommodate the affected persons by making reasonable exemptions or modifications to its existing

¹² 42 U.S.C. § 3602(h)(3)

¹³ RCW 35A.63.240



policies. *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 945 (9th Cir. 1996). In *Turning Point*, the Ninth Circuit upheld a maximum occupancy restriction as reasonable ordinance only after the city negotiated this figure with the plaintiff-homeless shelter. *Id.* At the same time, the court rejected a term in the permit that the city granted to the homeless shelter to operate which would have allowed the city to annually inspect the shelter. *Id.* The court found “no persuasive justification for this requirement” because the purpose of conducting an annual review could be accomplished “under the ordinary law of nuisance and the city’s power to declare and abate nuisances.” *Id.* As such, unreasonable restrictions on the operation of a homeless shelter or a refusal by a municipality to reasonably accommodate a homeless shelter may violate the FHA.

No matter how you look at it, the proposed zoning ordinance in Puyallup regarding special licensing for PSH or shelters will inevitably bring legal challenges that are very likely to be successful under state or federal law. I would be more than happy to meet with you to discuss how Puyallup can improve its zoning code to better address homelessness without passing an ineffective and illegal ordinance.

Sincerely,

A handwritten signature in black ink that reads "Katie Scott". The signature is written in a cursive, flowing style.

Katie Meyer Scott, Senior Attorney
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