



Sent via email

May 16, 2023

To the New Lexington Village Council,

We are writing to you on behalf of the National Homelessness Law Center (“NHLC”) and the Perry County Housing Coalition (“PCHC”) regarding Ordinance 21-7 passed on August 16, 2021, adding a “Homeless Shelter Overlay Zone” to the New Lexington Planning and Zoning Code. Ordinance 21-7 as written violates the Equal Protection Clause of U.S. Constitution, as well as Article 1, Sections 1 and 19, of the Ohio State Constitution.

Prior to the passage of Ordinance 21-7, the Village of New Lexington allowed Emergency and Charitable Services as a permitted use in Commercial, Central Business, and Industrial zoning districts. A homeless shelter would clearly fall within this category of use and is completely appropriate in these zones, which also allow Multiple-Family Dwellings, Dormitories, Rest Homes, Children’s Homes, Transient Boarding and Rooming Houses, and Motels. These are all similarly situated land uses - not identical uses but uses that are alike for “all relevant purposes.”¹ Relevant purposes include things like traffic safety and intensity, whether the type of building fits the character of the neighborhood, and whether the project will overburden public utilities or create an environmental hazard that can’t be mitigated. To be legally permissible, a zoning decision must be based on a distinction between the proposed use and other permitted similarly situated uses.² Prior to 2021, the New Lexington Zoning Code lawfully and fairly categorized Emergency and Charitable Services with similar land uses, such as motels, and permitted these services by right if they complied with the underlying rules for the relevant zone.

However, in April 2021, upon learning that PCHC was seeking out a site for a small shelter with office space for on-site services in New Lexington, the New Lexington Village Council convened to openly discuss “how to prevent a homeless shelter from showing up on the village’s doorstep.”³ Despite acknowledgement from attorney Bryan Everitt that a blanket prohibition of homeless shelters in New Lexington would be fraught with constitutional challenges, the Village Council continued to seek ways to block PCHC from moving forward. The issue was raised again during a Village Council meeting on June 21, 2021 and Councilmember Dan Bethel said that the Planning/Economic Committee “does not support a homeless shelter in New Lexington” but since a blanket ban was unconstitutional, he proposed what eventually became Ordinance 21-7.⁴ Ordinance 21-7 creates a long list of special requirements only applicable to homeless shelters that must be met to even apply for a land use permit and then gives the Village Administrator the power to deny the permit anyway.⁵

¹ *Williams v. Vermont*, 472 U.S. 14, 23–24 (1985)

² See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) at 449

³ https://www.perrytribune.com/news/article_a3a37a50-73b0-5777-9098-1b49e9570da9.html

⁴ <https://www.newlexingtonohio.gov/wp-content/uploads/2021/09/Council-Minutes-06-21-21.pdf>

⁵ <https://www.newlexingtonohio.gov/wp-content/uploads/2021/10/Ordinance-21-7.pdf>



If the zoning rules or decisions of a city prevent projects that are similarly situated to others in that zone from going forward, it will not survive an Equal Protection claim under the Fourteenth Amendment of the U.S. Constitution unless there is a “rational basis” for the difference in treatment.⁶ There is no rational basis to treat one building differently from another based on the housing status of the people who might use it and especially not based on stereotypes completely unsupported by facts. But even more so, there is no rational basis to create a special Homeless Shelter Overlay Zone and Special Use Permit process at the mere thought of an eight-bed homeless shelter in an Industrial zone, when night clubs, prisons, amphitheatres, fairgrounds, bus terminals, amusement parks, chemical processing facilities, and facilities for storage and distribution of explosive and volatile materials can all exist in that zone by right. Those uses are much more intense from a land use perspective than a small shelter with some office space.

The Supreme Court has made it clear that “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.⁷ Looking at the news coverage and council minutes regarding PCHC even hinting at finding a site for a shelter, it is clear that there are negative attitudes, bias, and fear of unhoused people and that this is affecting the Village’s zoning decisions. This opens the city up to legal liability and federal constitutional claims.

As for state claims, in Ohio courts have generally found that a zoning ordinance must meet an even stricter standard than rational basis review to be valid.⁸ The “the free use of property guaranteed by the Ohio Constitution can be invaded by an exercise of the police power” only when an ordinance *substantially relates* to the preservation of public health, safety, morals, or welfare.⁹ A general fear or unease regarding unhoused people would not be considered a substantial relationship to public health, morals, and safety. Even under lower level of scrutiny, Ohio courts have found that zoning classifications may not be arbitrary and “must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed.”¹⁰ There has not been any indication that there is a *land use* difference between the proposed shelter and other businesses or housing in the same zones as the proposed building sites. Furthermore, Ohio courts have also found

⁶ 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)

⁷ *Cleburne Living Ctr.*, 473 U.S. at 448

⁸ See *Norwood v. Horney*, 110 Ohio St.3d 353, 361-62 (2006) (“Ohio has always considered the right of property to be a fundamental right. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.”)

⁹ See, e.g., *State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 128 (1998), *Westerville v. Kuehnert*, 50 Ohio App.3d 77, 83, 553 N.E.2d 1085 (10th Dist.1988), citing *Euclid v. Ambler Realty*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) and *Nectow v. Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928).

¹⁰ *State v. Mole*, 149 Ohio St. 3d 215, 222 (Ohio 2016)



that "zone outs" of certain businesses or residences violates the free expression clause of the First Amendment of the United States.¹¹

As you may already know, PCHC is a 501(c)(3) non-profit organization that has been helping people who are unhoused in Perry County since 2006. The members of the PCHC meet monthly to coordinate and improve services for the families, individuals, single parents with children, older adults and veterans who are experiencing homelessness in Perry County. Unfortunately, their efforts have been hindered by the lack of shelter, housing programs, and other services in Perry County. They identified several properties in the Village of New Lexington that would be ideal for their project including:

1. An old law office building on High Street (zoned as Central Business) that the owner was interested in selling.
2. An automobile repair shop where the owner had passed away near Main and Union Street (zoned as Industrial); the owner's surviving wife was supportive of PCHC and interested in selling.
3. A site on Imperial Street (zoned R-3)

Unfortunately, with the uncertainty caused by the ordinance implementing the Homeless Overlay Zone and the power of the Village Administrator to deny a building permit for pretty much any reason, PCHC could not take the risk of investing in one of these properties only to be denied a permit. As such, valuable time has been lost in their effort to help unhoused people in Perry County, as well as potential partnerships and funding opportunities that would have been available if PCHC could have secured affordable and conveniently located property in 2022.

PCHC is prepared to challenge this ordinance in court, if necessary, to prevent further delay in fulfilling their mission to end homelessness in Perry County. Please feel free to contact us to discuss a mutually beneficial resolution to this matter.

Sincerely,

A handwritten signature in black ink that reads "Katie Meyer Scott".

Katie Meyer Scott, Directing Attorney
National Homelessness Law Center
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A handwritten signature in black ink that reads "Chuck Gordon".

Chuck Gordon, Attorney
Member of the Perry County Housing Coalition

¹¹ See *Ravenna Rd. Management v. City of Twinsburg*, 450 F.Supp.2d 782 (N.D. Ohio 2006) and *Phillips v. Cincinnati*, 479 F.Supp.3d 611 (S.D. Ohio 2020).