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July 13, 2021

Via Email
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Via Email
City Attorney Blaine Myers, Esq.
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Re: Proposed Ordinance "Imposing A Moratorium Upon New Substance Abuse Rehabilitation Group Residential Facilities"

Dear Mayor Joyce, Parkersburg City Council Members, and City Attorney Blaine Myers, Esq:

I am writing to you regarding a proposed ordinance, "Imposing A Moratorium Upon New Substance Abuse Rehabilitation Group Residential Facilities," scheduled for first reading at tonight's city council meeting.

The proposed ordinance, as written and if enacted, will be in blanket violation of a host of laws, including the Americans with Disabilities Act, the Fair Housing Act, and state laws, including the West Virginia Human Rights Act and the West Virginia Fair Housing Act. The proposed ordinance would also almost certainly be found to violate rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The American Civil Liberties Union of West Virginia seeks to protect the rights and civil liberties of all West Virginians, and I request you consider our organization's concerns, as outlined below, before moving forward with this proposed ordinance.

I. The Proposed Ordinance, if Enacted, Would Deny Affected Individuals, Organizations, and Facilities Equal Protection Under the Law

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*." U.S. Const. amend. XIV, cl. 4. (Emphasis added.)

Prohibitions far less restrictive than the proposed moratorium in Parkersburg have been found to be in violation of equal protection laws across the country. In *Horizon House Developmental Services, Inc. v. Upper Southampton*, for example, a federal district court considered an ordinance that required a "distance

requirement" of 1,000 feet between family care homes that provided "residential services to persons due to age, physical disabilities, [and] developmental disabilities." *Horizon House Developmental Servs., Inc. v. Upper Southampton*, 804 F. Supp. 683, 688 (E.D. Pa. 1992). The Court in *Horizon House* found that the ordinance "excludes, restricts, and/or limits" the number of people with disabilities from the Village of Southampton, and because there is "evidence supporting the conclusion that the ordinance is the result of unfounded or stereotypical fears" and the village had not "advanced a supported rational basis or legitimate goal regarding their actions," the distance requirement was in violation of federal fair housing laws and the equal protection clause of the United States Constitution. *Id.* At 697 (citing *Baxter v. City of Belleville,* 720 F. Supp. at 732 (intent to exclude people with HIV out of fear that they would spread a disease through the community violates the FHAA); *Burstyn v. Miami Beach,* 663 F. Supp. 528 (S.D. Fla. 1987) (intent to exclude elderly people from certain streets because they would have a negative impact on the tourist trade violates the equal protection clause); *Casa Marie, Inc. v. Superior Court of Puerto Rico for Dist. of Arecibo,* 752 F. Supp. 1152, 1169 (D.P.R. 1990) (intent to exclude elderly people because of negative impact on neighborhood by seeing the elderly and ambulances violates the Fair Housing Act)).

In *Kessler Institute for Rehabilitation v. Mayor of Essex Falls*, a federal district court in New Jersey considered a situation wherein a local municipality sought a condemnation action pursuant to a city ordinance against the Plaintiff, a corporation who had bought land to build a residence to serve people with disabilities. *Kessler Inst. for Rehab. v. Mayor of Essex Fells*, 876 F. Supp. 641 (D.N.J. 1995). The Court, in considering whether or not the Plaintiff facility could survive a motion to dismiss on its equal protection claim (and ultimately finding that Plaintiff had alleged sufficient facts to move forward), noted that "[m]ere negative attitudes, or fear [of people with disabilities], unsubstantiated by factors which are properly cognizable in a local government's decision to exercise the power of eminent domain cannot justify the alleged differential treatment of the Plaintiffs as owners and potential occupiers of this property." *Kessler*, 876 F. Supp. at 663 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)).[1] *See also Potomac v. Group Home Corp.*

Here, the proposed ordinance goes farther than the cases cited, imposing a full ban on "new substance abuse rehabilitation" facilities for a year. The proposed ordinance cites as a factual finding—without any data that provides a *direct correlation* between the stated goal of the proposed ordinance and the justifications underpinning it—that a "significant percentage of residents of substance abuse facilities" are either "involuntarily evicted from programs or "voluntarily terminate participation" in such programs, and that, as a result, "a substantial number of individuals who did not previously reside in the geographical area of the City remain in this area without family or support structure, many of whom become homeless." *See* Proposed Ordinance, attached to this letter. The proposed ordinance states simply "[T]he City believes that there is a correlation between the proliferation of substance abuse facilities and the increase in the homeless population."[2] Further, comments made in the media by city officials suggest that the proposed ordinance seeks to limit the number of people who come from out of state to Parkersburg.[3] This alleged justification is not enough to survive rational basis scrutiny on an equal protection claim.

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[1] The United States Supreme Court in *Cleburne* found that an ordinance that required a special permit for residential homes for people with developmental and cognitive disabilities could not survive rational basis review in part because it rested on irrational prejudice and the government could present no rational basis for the ordinance. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

[2] An ordinance that expressly discriminates against people who are unhoused would also trigger equal protection concerns.

[3] *See, e.g.,* Hoppy Kerchevel interview with Mayor Tom Joyce at 3:18, WVMETRONEWS TWITTER ACCOUNT, *available at* https://twitter.com/WVMetroNews/status/1413511775459450880. (Mayor Joyce stating, "What percentage of people are being brought here from other states. . . we have seen a large number of people who aren't from here who are homeless . . . why would we bringing in people from out-of-state communities?" An ordinance that would restrict the rights of people from other states to

II. The Proposed Ordinance, if Enacted, Would Violate the Fair Housing Act, the Americans With Disabilities Act, and Corollary State Laws

People in recovery from substance use disorder qualify as people with disabilities under both the Fair Housing Act and the Americans with Disabilities Act. *See, e.g., United States v. Southern Mgmt. Corp.*, 955 F.2d 914, 920-23 (4th Cir. 1992) (acknowledging that residents of a supervised drug rehabilitation program meet the requisite definition under the FHA because the FHA covers people who formerly used drugs and are in recovery).

Title II of the ADA prohibits all public entities from discriminating against qualified individuals with a disability or denying those individuals the benefit of or participation in its services, programs or activities on the basis of disability. *See* 43 U.S.C. § 12132 ("No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

The FHA makes unlawful discrimination in the sale or rental of a dwelling, or to otherwise make unavailable or deny a dwelling to any buyer or renter because of a disability. 42 U.S.C. § 3604(f)(1). The term "dwelling" has been interpreted to include "a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit[.]" *United States v. Hughes Mem'l Home*, 396 F. Supp. 544, 549 (W.D. Va. 1975). Additionally "[c]ourts have articulated the standard for proving disparate impact claims under the ADA and FHA in slightly different, yet analogous, terms." *ARTICLE: Bridging The Barriers: Public Health Strategies For Expanding Drug Treatment in Communities*, 57 Rutgers L. Rev. 631, 681. Similarly, courts in both FHA cases and ADA Title II cases apply the same factors to evaluate both the direct and circumstantial evidence of intent to determine whether the disability of a treatment program's clients was a motivating factor in the implementation of its zoning practices. *Id.* at 676-77.

There are two primary ways to establish a violation of the Fair Housing Act: the first is by showing that the defendant was motivated by a discriminatory intent against [people with disabilities]," and "the second is where a defendant's actions are neutral, but have a discriminatory effect, thus having a disparate impact on [people with disabilities]." *Jeffrey O. v. City of Boca Raton*, 511 F. Supp. 2d 1339, 1349 (S.D. Fla. 2007).

In *Jeffrey O. v. City of Boca Raton*, the court considered a Fair Housing Act claim when the plaintiffs, housing providers and people recovering from substance use disorder, challenged a local ordinance that required "substance abuse treatment facilities" to be located within either a district zoned for medical facilities, or, with approval, a motel or business district. *Id.* The court found that the plaintiffs had established a prima facie case for discrimination under the Fair Housing Act, noting that it was impermissible to treat people in recovery different than people who are not in recovery in that context. *Id.*

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reside in West Virginia would implicate the right to travel freely as guaranteed by the Fourteenth Amendment of the United States Constitution. In *Pottinger v. City of Miami*, a federal district court, in considering an "anti-sleeping ordinance" targeted at people who were unhoused, noted:

> Courts also have found that laws infringe on the right to travel where their primary objective is to impede migration. One court struck a zoning ordinance that limited the construction of new homes because its express purpose and intended and actual effect was to exclude large numbers of people who otherwise would have immigrated to the city. *See Construction Industry Association v. City of Petaluma,* 375 F. Supp. 574, 581 (N.D. Cal. 1974), *rev'd on other grounds,* 522 F.2d 897 (9th Cir. 1975).

Pottinger v. City of Miami, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992).

Federal district courts in the Fourth Circuit have come to the same conclusion. For example, in *United States v. City of Baltimore*, a federal district court in Maryland, in analyzing FHA and ADA claims challenging a municipal ordinance that required facilities that provided treatment for people in recovery from substance use disorder, noted that while "[c] ourts have long recognized the importance of local land-use planning laws and therefore often give substantial deference to municipal zoning schemes . . . [s]uch deference, however, does not place municipal zoning laws beyond the purview of federal statutory protections such as the ADA and the FHA. *United States v. City of Balt.*, 845 F. Supp. 2d 640, 647 (D. Md. 2012). The court further noted that "courts have found ADA and FHA violations not only in cases of specific zoning actions such as outright permit denials, but also in cases of burdensome procedural zoning requirements uniquely placed on disabled individuals." *United States v. City of Balt.*, 845 F. Supp. 2d 640, 648 (D. Md. 2012). The court in the *City of Baltimore* case ultimately granted Plaintiffs' motion for summary judgment as to its allegations that the city's requirement of a conditional permit that also imposed unique conditions on facilities offering recovery treatment violated the FHA and ADA.

In this case, Parkersburg is considering an outright year-long *ban* on new recovery facilities. This proposal goes far beyond an "outright permit denial" or "burdensome procedural zoning requirements" and would be found to violate both the FHA and the ADA.

Finally, courts in West Virginia typically employ similar standards in an analysis under the West Virginia Human Rights Act and the West Virginia Fair Housing Act to corollary federal laws when the language of the state law substantively mirrors the federal laws. *See, e.g.*, *Brown v. Belt*, Civil Action No. 2:15-cv-11549, 2019 U.S. Dist. LEXIS 47022, at *15 (S.D. W. Va. Mar. 21, 2019) (stating that "[a] court in the Northern District of West Virginia has found, and this court agrees, that 'the West Virginia Human Rights Act is the most analogous West Virginia law to the Americans with Disabilities Act, and it is fully consistent with the Act and its underlying policies.'"); *see also W. Va. Human Rights Comm'n v. Wilson Estates Inc.*, 202 W. Va. 152, 159, 503 S.E.2d 6, 13 (1998) (noting that "[l]ike its federal counterpart, [the West Virginia Fair Housing Act] seeks to encourage fair and equal housing opportunities for all peoples."). *W. Va. Human Rights Comm'n v. Wilson Estates Inc.*, 202 W. Va. 152, 159, 503 S.E.2d 6, 13 (1998). It stands to reason that cognizable claims that arise from federal anti-discrimination laws would constitute a basis for a violation of comparable state laws.

III. Conclusion

This law is but one of a number of disturbing laws cropping up in both the state legislature and in municipalities across the state that seek, intentionally or otherwise, to further marginalize our most vulnerable neighbors. While this proposed ordinance will, if enacted, almost certainly violate various state laws and federal laws, and impinge on constitutional rights guaranteed under the United States Constitution, it also, at its core, will further marginalize people who are already struggling. We urge you to meet those in need with empathy and compassion, not fear and animus. The ACLU of West Virginia urges the city council to reconsider before moving forward with the passage of this proposed ordinance.

Regards,

Loree Stark

Loree Stark
Legal Director, ACLU-WV
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AN ORDINANCE IMPOSING A MORATORIUM UPON NEW SUBSTANCE ABUSE REHABILITATION GROUP RESIDENTIAL FACILITIES

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PARKERSBURG that in support of the adoption of this Ordinance the following findings are made:

1. The provisions of West Virginia Code 27-17-1, define "Group Residential Facilities" and "Group Residential Homes" as residential facilities for persons with a "Behavior Disability", not to exceed twelve residents, which includes persons undergoing substance abuse treatment and rehabilitation;

2. The provisions of West Virginia Code 27-17-2 explicitly mandate that Group Residential Facilities and Group Residential Homes shall be a permitted use for purposes of zoning in residential and all other zoning districts of a municipality. However, the statute is silent as to the extent the location of such facilities or homes may be geographically restricted or limited as permitted uses, nor does the statute preclude regulation of similar facilities exceeding twelve residents;

3. There has been a proliferation of substance use facilities within Wood County, West Virginia, and the City of Parkersburg. Specifically, recent statistics reflect that approximately 26% of beds in such facilities in the entire State of West Virginia are located within Wood County, and approximately 19% of beds in such facilities in the entire State of West Virginia are located within the corporate limits of the City of Parkersburg;

4. The City of Parkersburg has less than 2% of the population of the State of West Virginia. Accordingly, the existence of facilities for substance abuse rehabilitation presently located within the City are far out of proportion to that which would be otherwise needed for residents of the City and surrounding areas, and a substantial portion of residents in such facilities are from outside the geographical area of the City of Parkersburg and Wood County;

5. There is a significant percentage of residents of substance abuse facilities who either are involuntary evicted from programs or voluntarily terminate participation in such programs. As a result, a substantial number of individuals who did not previously reside in the geographical area of the City remain in this area without family or other support structure, many of whom become homeless;

6. The recent increase in the homeless population of the City of Parkersburg, significantly impacted by the proliferation of substance abuse facilities, has been detrimental to the health, safety, and welfare of the citizens of the City for many reasons, including the following:

    (a) The City of Parkersburg has experienced a substantial increase in the homeless population, which has contributed to a rise in crimes such as shoplifting and trespassing (35% increase over the past 5 years), overdose calls (174% increase), and vacant structure fires, of which there were 35 during the 2020 calendar year. The City believes that there is a correlation

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between the proliferation of substance abuse facilities and the increase in the homeless population.

(b) Numerous persons voluntarily leave such facilities or are involuntarily expelled, many of whom then remain in the Parkersburg area without a place to live. Further, a significant number of persons residing in substance abuse facilities are not from the Parkersburg and Wood County geographical area, as the City has assisted many homeless individuals in relocating to regions throughout the United States.

7. Extended time is needed for the Council of the City of Parkersburg to consider possible changes to zoning and/or other ordinances to regulate or limit substance abuse facilities, and it is possible that the West Virginia Legislature may address the issue during its 2022 Session.

8. While it is recognized that substance abuse facilities perform an important and necessary function, based on the findings as herein set forth there is a compelling basis, in the interests of the public health, safety, and welfare of the City, to temporarily preclude the establishment of any additional such facilities for a limited period of time.

It is therefore ORDAINED BY THE COUNCIL OF THE CITY OF PARKERSBURG that a MORATORIUM upon the establishment of any Group Residential Facilities or Group Residential Homes is hereby imposed until JUNE 30, 2022. The provisions hereof shall have no effect upon any such facilities in existence as of the date of the adoption of this Ordinance.

Adopted on final reading the _____ of _____, 2021.