



CITY OF HARRISONBURG COMMUNITY DEVELOPMENT

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December 4, 2023

**TO THE MEMBERS OF CITY COUNCIL
CITY OF HARRISONBURG, VIRGINIA**

SUBJECT: *Consider amending the Zoning Ordinance to amend the definition of “Family” and add “Recovery Residence” use*

**EXTRACT FROM THE DRAFT MINUTES OF HARRISONBURG PLANNING
COMMISSION MEETING HELD ON:** November 8, 2023

Chair Finnegan read the request and asked staff to review.

Ms. Dang said the City is aware of three properties in the City that are in violation of the Zoning Ordinance for exceeding the residential occupancy regulations of the zoning districts in which they are located. The three properties include 760 Collicello Street, 339 West Water Street, and 69 Middlebrook Street. The overoccupancy of these units, however, is different from other overoccupancy violations that have been identified from time to time. In these three examples an organization known as Oxford House, Inc. has coordinated efforts to help individuals, who are recovering from drug and alcohol addiction, to reside in these units with other individuals in similar circumstances so that they can live in—as described by the Oxford House website—“a democratically run, self-supporting and drug free home.” The Oxford House website notes that “[t]he number of residents in a House may range from six to fifteen; there are houses for men, houses for women, and houses which accept women with children.” The City is also aware of another organization planning to establish a similar operation in the City.

On June 29, 2022, staff sent notice of violation letters to the property owners of the properties identified in the previous paragraph as well as to the residents of those addresses and to the Oxford House, Inc organization. On July 17, 2022, on behalf of the three aforementioned Oxford Houses, its residents, the Oxford House, Inc. organization, and the property owners, Stephen G. Polin, Esq., General Counsel for Oxford House, made a request to the City for reasonable accommodation pursuant to the Federal Fair Housing Act, 42 U.S.C. 3604(f)(3)(B), by requesting: “a waiver on the limitations of the maximum number of unrelated persons who can reside together as a family under the City’s definition of family, and equal treatment in the City’s single family zoning laws that is applied to “residential [*sic*] facilities.” Mr. Polin’s letter goes on to state that “[s]pecifically, I am requesting that the City waive any state licensing requirements and staffing requirements that pertain to ‘residential facilities,’ and treat the use of these Oxford Houses as the functional

equivalent of a family, and the use of the property as a single family use.” A copy of Mr. Polin’s letter is attached.

The Fair Housing Act requires municipalities to make “reasonable accommodations” to their rules, policies, practices, or services, when the accommodation is necessary to afford persons with disabilities equal opportunity to use and enjoy a dwelling. Under federal law, addiction is considered a disability; therefore, accommodation requests to the Zoning Ordinance that would facilitate recovery from addiction must be considered and, if reasonable, granted. These often take the form of “group homes.” Additional information is available in the 2016 Joint statement of the Department of Housing & Urban Development and the Department of Justice titled “State and Local Land Use Laws and Practices and the Application of the Fair Housing Act,” which is attached.

Virginia law requires localities to treat as a “single family” the residents of any group home or other residential facility that is subject to licensing requirements from the Department of Behavioral Health and Developmental Services with eight or fewer residents. In addition to state licensing requirements, these group homes must have one or more counselors or other staff members.

Group homes affiliated with Oxford House and other similar organizations are not subject to the same state licensing requirements and are resident-operated. In other words, there is no outside counselor or staff member who operates the home. Localities are often asked to accommodate these group homes by treating them no differently than state-licensed group homes.

Currently, the only process to request a reasonable accommodation for a group home requires the applicant to request an amendment to the Zoning Ordinance.

On September 13, 2022, at a regular City Council meeting, City Attorney Chris Brown requested City Council’s input on different options for Zoning Ordinance amendments to ensure compliance with Federal Fair Housing laws. At that time, City Council directed staff to prepare a Zoning Ordinance amendment to create a group home use permitted by special use permit in any residential district. On December 14, 2022, staff presented Zoning Ordinance amendments to create and define a new use called “Cooperative Sober Living Residence” and to allow this use by special use permit in most zoning district. While staff recommended approval, Planning Commission, with a unanimous 7-0 vote, recommended denial of the ordinance amendments generally because the Planning Commission believed there should be a by right option. On January 10, 2023, the Zoning Ordinance amendments were presented to City Council by City Attorney Chris Brown who then stated that staff chooses to withdraw the request for further evaluation. The meeting minutes from both the December 14, 2022, Planning Commission meeting and the January 10, 2023, City Council meeting are attached herein.

Staff is proposing to amend the Zoning Ordinance (ZO) to create and define a new use called “recovery residence” and to amend the definition of “family” to align with Section 15.2-2291 of the Code of Virginia. Together, these amendments would ensure compliance with the Fair Housing Act, which requires municipalities to make “reasonable accommodations” to their rules, policies, practices, or services, when the accommodation is necessary to afford persons with disabilities

equal opportunity to use and enjoy a dwelling and would align with the Code of Virginia's regulations associated with assisted living facilities and group homes of eight or fewer individuals. If approved as presented, recovery residences with up to eight individuals would be permitted by right within any legal dwelling unit. If a property owner wanted to have a recovery residence with more than eight individuals, they would have to apply for a special use permit (SUP).

The following is the proposed amendment to the definition of "family" and the proposed new use and associated definition for "recovery residence":

~~*Family:* One (1) or more persons occupying a dwelling and living as a single housekeeping unit, all of whom are related to each other by birth, adoption or marriage as distinguished from a group occupying a boardinghouse, roominghouse or hotel as herein defined.~~
Includes:

(a) An individual, or two or more persons related by blood, marriage, adoption, foster care, or guardianship; or

(b) A group of up to eight persons with mental illness, intellectual disability or developmental disability who are residing with one or more resident counselor(s) or other staff person(s) in a facility which is licensed by the Department of Behavioral Health and Developmental Services of the Commonwealth of Virginia. For the purposes of the Zoning Ordinance, mental illness and developmental disability shall not include current illegal use of or addiction to a controlled substance as defined in Section 54.1-3401 of the Code of Virginia or its successor;
or

(c) A group of up to eight aged, infirm, or disabled persons who are residing with one or more resident counselor(s) or other staff person(s) in a facility licensed by the Virginia Department of Social Services of the Commonwealth of Virginia; or

(d) A recovery residence, as defined, provided it has no more than eight (8) individuals.

A family is distinguished from a group occupying a boardinghouse, rooming house, or hotel as herein defined.

Recovery residence: A dwelling unit occupied by multiple unrelated residents in recovery from chemical dependency and considered disabled under the Federal Fair Housing Act Amendments of 1988 that provides a non-institutional residential environment in which the residents willingly subject themselves to rules and conditions intended to encourage and sustain their recovery. Residents of a recovery residence share kitchen facilities and other common areas of the unit. A recovery residence is not required to provide on-site supportive services to residents, but is, or intends to become, certified by a credentialing entity approved by the Virginia Department of Behavioral Health and Developmental Services.

Within the proposed "family" definition, subsection (a) broadens the existing definition to include individuals under approved foster care and guardianship. Subsections (b) and (c) align the ZO with Section 15.2-2291 of the Code of Virginia associated with assisted living facilities and group homes of eight or fewer individuals. A copy of Section 15.2-2291 is attached herein. Subsections (a), (b), and (c) are consistent with how City staff has enforced the ZO's occupancy regulations.

Finally, subsection (d) adds a recovery residence of no more than eight individuals. This amendment would allow “recovery residences, as defined, provided it has no more than eight (8) individuals” in all legal dwelling units. Staff recommends allowing up to eight individuals because this number is used in the Code of Virginia Section 15.2-2291 for group homes and assisted living facilities and it appears that eight individuals is a common standard practice.

The proposed “recovery residence” definition requires that the residence either be certified or intends to become certified by a credentialing entity approved by the Virginia Department of Behavioral Health and Developmental Services. Information on Certified Recovery Residences in Virginia and how to apply to become a Virginia Certified Recovery Residence is available at: <https://dbhds.virginia.gov/office-of-recovery-services/recovery-residences/>.

In addition to allowing recovery residences of up to eight individuals by right, staff is proposing to allow a “[r]ecover residence of more than eight (8) individuals” through approval of a SUP within the following zoning districts: R-1, R-2, R-3 (Multiple Dwelling), R-3 (Medium Density), R-4, R-5, R-6, R-7, MX-U, R-8, MH-1, MH-2, B-1, B-2, M-1, and UR. A property owner who desires to allow a “recovery residence” with more than eight individuals would apply for a SUP, which would require the typical periods for staff review, posting of signs, mailed notifications to adjacent property owners, advertisements in the local newspaper, and public hearings at Planning Commission and City Council. Note that staff is proposing to add the use to the B-2 and M-1 districts as there could be residential dwelling units that are nonconforming in those districts and thus a property owner could apply for a special use permit to allow a “cooperative sober living residence” in those units. There are also particular SUPs that can be applied for in both districts that allow for dwelling units.

Staff recommends approval of the Zoning Ordinance amendments.

Chair Finnegan asked if there were any more questions for staff.

Vice Mayor Dent said just pointing out the difference between certified and licensed, the “b” and “c” items, that does not apply to recovery residences, however, it does need to be or intend to become certified. Is that a lower standard?

Mr. Russ said this has been the source of many questions over the last four or five years and I do not know why the state came up with those two different terms, it creates a lot of confusion. The licensed facilities are typically going to have a practitioner who is actually on site and providing some sort of medical care versus the certified recovery residences. They have a list of rules that they abide by and there are larger organizations that keep them in check, but they do not necessarily have a profession providing those sorts of medical services on site. The licensed facilities versus credentialed recovery residences are two separate things.

Vice Mayor Dent asked who would that credentialing entity be?

Mr. Russ said the state approves credentialing entities. They have approved Oxford House and the Virginia Association of Recovery Residences which is sort of a larger national association of

recovery residences. Each recovery residence, to maintain your certification it is a yearly process where you submit updates on how things are going.

Chair Finnegan said my question relates to this part in the report where it says, “reasonable accommodation pursuant to the federal Fair Housing Act.” How much choice do we really have here, if we need to bring our Zoning Ordinance or these definitions into alignment with that. This is not a statement for or against, it is just a question about how much latitude do we even have.

Mr. Russ said generally speaking, eight seems to be kind of the magic number that the courts and the expert witnesses and everyone kind of decided that is where the line is reasonable. Eight unrelated people can be equivalent to a family in order to accommodate people who are recovering and that is in part to accommodate they need someone who is kind of President of the house, you need someone else who is collecting money to pay utilities and everything, you need to account for potential vacancies of one or two and you need a certain number of people there for it to fully be an operating house. Eight seems to be what works best for the model that Oxford House uses. Generally, courts have told localities that “no, you did need to approve that. You needed to make some sort of accommodation there around eight.” There are cases involving houses with 12 or 16 people. At some point, it is too big. This is no longer equivalent to a family and that is kind of what the special use permit process would be for. We may have some scenarios where it makes sense for the property or what they are proposing. Some recovery residences have individuals that have young children, so maybe you do need more than eight because some of those eight are going to be children. There is not a whole lot choice, you run the risk of a lawsuit.

Chair Finnegan said that is what I was getting at. I guess my follow up question is, it sounds like this is equivalent to or in alignment with a lot of other cities with they kind of have. So, if Harrisonburg is in trouble a lot of people are in trouble because the ordinances are all kind of the same.

Commissioner Armstrong said in here it said that typically these are organized as single gender, male house, female houses, and houses with children they tend to be designed to be specific to those types of groups. I wondered why we use persons and individuals rather than adults because the way it is designed now you are discriminating against women with children. Women with children are going to have to special use permit. If we used adults in here there would be some flexibility around the inclusion of children because the tasks you mention are adult tasks. Then we could give more flexibility to these houses with women who have children.

Mr. Russ said I am not sure that I had considered that. That is certainly interesting.

Vice Chair Byrd said you are coming to the number based on the idea of a family. You are saying that there would just be less women in there because if they had their children they would be counted as individuals and persons. They are individuals and persons.

Commissioner Armstrong said that is discriminatory to women and children.

Vice Chair Byrd said it is a recovery house. What I am saying is it is a recovery house we are trying help the people. They need help with that situation they are dealing with and the fact that they also have to take care of their children, I do not see how adding more people in aids that.

Commissioner Armstrong said that is a long discussion and I do not think it warrants a back and forth now but if you are doing shared in a recovery situation like that there is a definite shared assistance. If we are cutting down the number of adults because you are including children then you are reducing that distribution of that load and that work capacity.

Chair Finnegan said I think I understand the point that Commissioner Armstrong is making. My question to Mr. Russ would be... I do not like making edits to this language on the fly. We have a pretty full docket next month and I would hate to table this and come back to it. Is it possible to between here and City Council adjust the language? I would like to suggest that we change persons to adults or something to address that.

Ms. Dang said or individuals over age 18.

Mr. Russ said we can reach out to the Department of Behavioral Health and Developmental Services has an Office of Recovery Services that oversees this and a number of other programs, I can reach out to them and ask if they have any insight into how this holds where some of the residents that have children work and what would be most appropriate.

Vice Chair Byrd said I just wanted to clarify that is my only concern about this. We are discussing this as if these do not already exist and are dealing with the very question of bringing it up. If that has not been accounted for with the coming up of the eight, then that is a concern. Therefore, I would also be in favor of adjusting the language to account for the possibility of children not being accounted in the restrictive eight number. If they still came to the number eight and they were accounting for the presence of children, then I do not see why we would need to change the language. That was my only concern about that.

Chair Finnegan said if there is, on this Commission, an appetite to advance this with some modified language what is the best way for us to do that? Tabeing it?

Mr. Fletcher said I think you could offer, if this is the direction you are going, a recommendation for if you say you want to approve it with giving staff the flexibility to amend language appropriately to rectify issues bought up by Commissioner Armstrong. You can technically make a slight amendments even without that motion but I think it makes it more clear.

Commissioner Armstrong said it is very specific to the definition of the number eight to individuals, persons or persons over 18 are adults. That is a very specific adjustment. I would leave that up to you.

Vice Chair Byrd said I would have no issue with that.

Chair Finnegan said if somebody wanted to make a motion to support it would be with the amended language to allow for children not counting as the eight.

Mr. Fletcher said I would also like to maybe build in a bit of flexibility kind of speaking to what Mr. Russ was saying that we can reach out to the Department of Behavioral Health and Developmental Services. They may have something that says do not worry about that particular thing, we can account for that and I would like to be able to have that flexibility as well. We hear the message.

Vice Mayor Dent said just to circle back to what I asked before and your follow up question about fair housing and how much choice do we have, is having requiring certifications still allowed under Fair Housing?

Mr. Russ said yeah, that is not an issue.

Chair Finnegan opened the public hearing and asked if there was anyone in the room or on the phone wishing to speak to the request.

Paul Stevens, a regional manager for Oxford House, called in to speak to the request. He said we have no objection to the proposed amendments. While I will express some concern, we do not always agree that part of the [unintelligible] is always a reasonable accommodation depending on the house, the community and the costs, there are operational and financial needs that sometimes make a compelling case for a nine or ten bed Oxford House. We do not have any objection to the proposal here. I do want to thank Commissioner Armstrong for raising the point that she did and I could not agree with her more, that it really ought to distinguish between adults and if it does not it would certainly make up the case that any recovery residence, certainly any Oxford House that is for women and children would never be able to qualify by right they would have to do the special use permit. Oxford Houses has as a practice that are women with children typically depending on space and layout of the house will have an allowance for one or two mothers with children. It is not a house full of women that all have their children living with them. Typically, it would be a limit of up to two children per mother, whether that is one or two mothers depending on the house and the space. It is not a huge difference, but it certainly would put any proposed limits on women and children Oxford House over the eight and force them into that special use permit. I hope you will make that change and thank you Commissioner Armstrong for proposing it. I did not know if you had any questions about the whole certification distinction, but I might be able to answer those.

Vice Mayor Dent said from what Mr. Russ said it sounds like Oxford House has its own credentialing entity, is that correct?

Mr. Stevens said we are recognized as a credentialing entity by the Department of Behavioral Health and Developmental Services, so this is a relatively new thing that happened both in Virginia and a lot of other states where they have recognized the need to have some regulation on recovery residences, so they created something. Virginia's is very typical where they would identify an organization with national recognized standards for recovery residences that can sort of put their stamp of approval. We have a chartering process, so credentialing is our chartering process and as the gentleman over there said there is also for the other models the ones that generally have a owner operator or a house manager, for profit models, the Virginia Association of Recovery Residences certifies them.

Vice Mayor Dent said my only question there is you are certifying your own facilities?

Mr. Stevens said the facilities are completely independent financial and operational entities. Oxford House Incorporated is really just there to provide technical assistance to sort of keep an eye on their operations as far as their compliance with our charter requirements and to occasionally expand into new communities and help open those houses. The houses are not ours. They are independent entities that rent from individual landlords.

Chair Finnegan said I think this came up last time we were talking about... does this take it off of the tax roll? It is still a private residence that is paying property tax.

Bryan Eckstein, a resident at 73 Middlebrook Street, called in to speak to the request. He said my wife and I have lived right here for over 30 years. My concern for max occupancy with recovery residences is who enforces the max occupancy? It has been our experience that it is a revolving door and it is hard to keep track of who is coming and who is going. Our issues are also parking spaces. You would be surprised that a number of the residents are all driving and have cars, which is surprising with alcohol recovery. Also the houses have a max capacity just because the number of bedrooms and toilets. So, whether you change a number, they are still going to be so many people that is going to live within a house. Who is enforcing the building and fire codes in these homes? These are not your standard residence the way they are being run. I know that these considerations that get taken up under the special use permit process but again but if you just set the number on eight, how is that being enforced? It is my understanding that Oxford House, and anybody else, could just buy a house in a neighborhood and move in and no announcement, no fanfare, and they are there.

Chair Finnegan asked if there was anyone in the room or on the phone wishing to speak to the request. Hearing none, he closed the public hearing and opened the matter for discussion.

Vice Chair Byrd said I have been trying to wrap my head around how to word this condition. Help me along, if I was to bring it up it would be about an amendment with the condition to allow staff to add language that individuals under 18 years of age are not included in that. How do we want to say it?

Mr. Fletcher said I was just going to say to allow staff the flexibility to accommodate the concern with any type of discrimination of women with children impacting the number of individuals that can reside on the property.

Vice Mayor Dent said well would it be as simple as just adding individuals over age 18 or do we want to allow staff to...

Mr. Fletcher said I would like the opportunity for us to put our heads together.

Chair Finnegan said I did want to address the one comment that we got about the number of cars and the number of occupants in the house. I will say that in my neighborhood there are houses that are occupied by a family, they are blood related and have seven or eight cars. I do think that putting

a cap that is similar to what other cities have makes sense so that we are putting some limitation on it but we are changing the definition of what we mean by family. It feels like a good compromise between what he was saying about wanting more, we do want some regulation on that. I feel like staff did a good job of landing on something that tries to capture the concerns from the meeting that we had eleven months ago.

Vice Mayor Dent said as I recall, what we were objecting to before was not wanting to have every single one of these go through the special use permit because of the stigma that seemed to go against the intent of the Fair Housing Act. I think establishing a maximum by right with any more than that is a special use is a good compromise.

Vice Chair Byrd said I would also like to make sure the citizens know that our whole idea is to establish a baseline number of people who represent a family of people trying to recover from something and therefore if you are asking who is going to enforce this or that, the people who enforce the laws of the City are the same people who enforce all of the other laws of the City. If you have concerns about something, that is what that would be. These would be residents of the City, that is all they are, just like every other resident that you walk or drive past. All those citizens you do not know what they are doing in their houses. Just because you know what these people have done in the past and what they are trying to do now does not change the nature of anything. You will have other neighbors who you will not know doing all kinds of things. We have to always keep these things in mind that just because we know something does not mean that we know everything what is going on. That is all I wanted to say about those types of concerns from the citizens of the City. Does anyone remember what Mr. Fletcher said for that condition?

Mr. Fletcher said what I said earlier is captured in the minutes.

Vice Mayor Dent said I just wanted to add one other thing about the enforcement idea. Maybe that can be a part of the certification process that they certify that only eight people are living there but that is not up to us.

Chair Finnegan said that is not up to us. The City is not doing certification that is DBHDS. That is between DBHDS and Oxford House. I do not want to insert ourselves into the middle of that.

Commissioner Washington said last thing, instead of mother or mother with children, can we do parents with children?

Mr. Fletcher said good amendment.

Vice Chair Byrd said I will make a motion to approve the minutes with the condition as stated by Mr. Fletcher and amended by Commissioner Washington.

Commissioner Armstrong seconded the motion.

Commissioner Armstrong	Aye
Commissioner Baugh	Aye
Vice Chair Byrd	Aye

Vice Mayor Dent	Aye
Commissioner Alsindi	Aye
Commissioner Washington	Aye
Chair Finnegan	Aye

The motion to recommend approval of the Zoning Ordinance amendments passed (7-0). The recommendation will move forward to City Council on December 12, 2023.