MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO: Sebastian J. Garafalo, Mayor

DATE: June 5, 1986

RE: Community Housing For Mentally Retarded Adults

GENERAL ISSUE:

Will the establishment of the proposed community residence be in violation of Section 16.06.01 of the Zoning Code of the City of Middletown?

SPECIFIC ISSUES:

I. What is the impact of Section 8-3e of the Connecticut General Statutes on Section 16.06.01 of the Middletown Zoning Code?

II. What is the import of Section 8-3f of the Connecticut General Statutes on the development of community housing for the retarded in a city or town?

III. What is the effect of a failure to obtain a license from the state for a community residence for the retarded under the provisions of Section 19a-467 (formerly Section 19-574) of the Connecticut General Statutes?

LAW:

Section 8-3e Connecticut General Statutes

(a) No zoning regulation shall treat any community residence which houses six or fewer mentally retarded persons and two staff persons and which is licensed under the provisions of section 19a-467 in a manner different from any single family residence.

(b) Any resident of a municipality in which such a community residence is located may, with the approval of the legislative body of such municipality, petition the commissioner of mental retardation to revoke the license of such community residence on the grounds that such community residence is not in compliance with the provisions of any statute or regulation concerning the operation of such residences.

Section 8-3f Connecticut General Statutes

No community residence established pursuant to Section 8-3e shall be established within one thousand feet of any other such community residence without the approval of the body exercising zoning powers within the municipality in which such residence is proposed to be established.

Section 19a-467 Connecticut General Statutes

(a) No person, firm or corporation shall conduct or maintain within this state a residential facility for the lodging, care or treatment of mentally retarded persons or autistic persons unless such person, firm or corporation, upon written application, verified by oath, has obtained a license issued by the department of mental retardation.

(b) Said department shall prescribe reasonable regulations for such facilities to insure the comfort, safety, adequate medical care and treatment of such persons. After receiving an application and making such investigation as is deemed necessary and after finding the specified requirements to have been fulfilled, said department shall grant a license to such applicant to conduct a facility of the character described in such application, which license shall specify the name of the person to have charge and the location of such facility. Any person, firm or corporation aggrieved by any requirement of said regulations or by the refusal to grant any license may within twenty days of any order directing the enforcement of any provision of such regulations or the refusal of such license, appeal therefrom in accordance with the provisions of Section 4-183, except venue for such appeal shall be in the judicial district in which such facility is located. If the licensee of any such facility desires to place in charge thereof a person other than the one specified in the license, application shall be made to the department of mental retardation, in the same manner as provided for the original application, for permission to make such change. Such application shall be acted upon within ten days from the date of the filing of same. Each such license shall be renewed annually upon such terms as may be established by regulations and may be revoked by the department of mental retardation upon proof that the facility for which such license was issued is being improperly conducted, or for the violation of any of the provisions of this section or of the regulations prescribed by said department of mental retardation, provided the licensee shall first be given a reasonable opportunity to be heard in reference to such proposed revocation. Any person, firm or corporation aggrieved by such revocation may appeal in the same manner as hereinbefore provided. Each person, firm or corporation, upon filing an application under the provisions of this section for a license for a facility providing residential services for five or more persons, shall pay the state treasurer the sum of fifty dollars.

(c) Subject to the provisions of this section, the department of mental retardation may contract with any nonprofit organization for the operation of a community-based residential facility, provided such facility is licensed by the department of mental retardation.

(d) Any person, firm or corporation who conducts any facility contrary to the provisions of this section shall be fined not more than one thousand dollars or imprisoned not more than six months or both.

16.06.01 of the Zoning Code of the City of Middletown defines family as:

An individual, or two (2) or more persons related by blood or marriage, or a group of not more than (5) persons (excluding servants) not related by blood or marriage, living together as a single housekeeping group in a dwelling unit.

I. WHAT IS THE IMPACT OF SECTION 8-3e C.G.S. ON SECTION 16.06.01 OF THE MIDDLETOWN ZONING CODE?

Many states, including Connecticut, have litigated the issue of whether a group of retarded adults would constitute a "family" within the meaning of their ordinances. The Zoning Code of the City of Middletown defines "family" as "An individual, or two (2) persons related by blood or marriage, or a group of not more than 5 persons (excluding servants) not related by blood or marriage, living together as a single housekeeping group in a dwelling unit." (Sec. 16.06.01).

The leading Supreme Court case, of Village of Belle Terre, et al v. Bruce Boraas, et al, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536, held that an ordinance which limited the amount of unrelated persons constituting a "family", but permitting occupancy by any number of persons related by blood, adoption or marriage, was not unconstitutional since it did not violate any right to interstate travel and was reasonable in that it bore a rational relationship to a permissible state objective thus not violative of equal protection. The court stated further that the exercise of discretion in determining the "number" of unrelated persons which constitute a family is a legislative rather than a judicial function.

The state courts in which this issue has been litigated generally hold that group homes for mentally retarded adults bear the generic character of a family unit. Costley v. Caromin House, Inc., 313 NW 2d 21 (1981, Minn.); West Monroe v. Ouachita Association for Retarded Children, 402 So. 2d 259 (1981, La. App.); Mongony v. Bevilacqua, 432 A.2d 661 (1981, RI). One court found that even though the limitation of the use of a single-family dwelling was proper, the definition of "family" as persons "related by blood, marriage, or adoption" was too restrictive. Therefore, the court allowed eight mentally retarded adults to reside with house parents in a single-family zoned neighborhood finding that this use conformed to the purpose of the zoning ordinance. Freeport v. Association for Help of Retarded Children, 94 Misc. 2d 1048, 406 NYS 2d 221 affirmed 60 App. Div. 2d 644, 400 NYS 2d 724 (1977). One court disallowed proposed group homes for mentally disabled adults finding that such homes were either "boarding" or "rooming" houses and therefore not a permissible use in a neighborhood zoned for family-only occupancy. Civitans Care, Inc. v. Board of Adjustment, 437 So. 2d 540 (1983, Ala App.).

The Connecticut case of Oliver v. Zoning Commission of the Town of Chester, et al, 31 Conn. Sup. 197 (1974), although not directly on point with the present situation, held that a community residence in which eight or nine employable mental retardates would live in a family setting under the supervision of house parents, would qualify as a single-family use since its proposed use "as a single housekeeping unit" brought it within the definition of "family" under the Town of Chester zoning regulations. This case predates the enactment of section 8-3e. In Oliver, the application of the owner of the home had been denied under the permitted uses for this zone which included single-family dwellings and up to eight roomers and boarders. However, the zoning commission,

upon the owner's application for a special exception, granted the exception stating that the proposed use met the requirements of a nursing home. The plaintiff, an abutting land owner, appealed. The plaintiff claimed that the proposed use constituted an institution for the insane and thus excluded it from a permissible special exception under the Chester zoning regulations. Recognizing that the "...expanding program of rehabilitating our mentally retarded through community residences may face similar zoning hurdles in other areas," Supra, 31 Conn. Sup. 197, 201, the court distinguished between those designated as "mentally ill" and those as "mentally retarded" by citing the statutory definitions of both terms thereby disclaiming plaintiff's contention. The court held that the proposed use was not in compliance with the special exception granted as a nursing home since the proposed use "illustrates the residential nature" of the home for these adults. It then examined the owner's first application under the permitted uses of this property. Supra, 31 Conn. Sup. 197, 203. Finding that the proposed use did not fit the definition of "lodging house" or "boarding house", as defined in the Connecticut General Statutes, the court found that said proposed use constituted a permitted single-family use. Article IIg of the Chester zoning regulations defined "family" as "one or more persons occupying the premises as a single house-keeping unit, as distinguished from a group occupying a boarding house, lodging house, club, fraternity or hotel." Supra, 31 Conn. Sup. 197, 205. Since the definition of "family," under the Chester zoning regulations did not limit the number of persons comprising a family unit, the court held that reference had to be made to the regulations established by the Commissioner of Mental Retardation and applicable building, fire and health codes. Ordinarily, the court stated, "(i)n determining the composition or membership of a family under zoning regulations, where the "ordinance has expressly defined the meaning of the term 'family,' the declared definition of course controls." Planning & Zoning Commission v. Synanon Foundation, Inc., 153 Conn. 305, 311 Cited Supra, 31 Conn. Sup. 197, 205.

In 1979, five years after the decision in the Oliver case, the state legislature passed Sec. 8-3e of the Connecticut General Statutes. Subsection (a) which states that "(n)o zoning regulation shall treat any community residence which houses six or fewer mentally retarded persons and two staff persons...in a manner different from any single family residence.", deserves our attention. There has been no reported case law, either interpreting this statute, or dealing with community housing for the mentally retarded since the Oliver decision. A research of the legislative history of the bill reveals that the statute had been passed to make it easier to provide housing for mentally retarded adults since such housing had, in the past, faced a lot of opposition from the local community.

On May 15, 1979, Representative Farricielli, a proponent for the passage of Section 8-3e of the Connecticut General Statutes, stated that "It (the bill) would protect the right of an important segment of our population to choose their place of residence free from discriminatory anti-zoning laws." Speaking in opposition to the bill, Representative Joyner stated that "This (bill) would pre-empt the towns and force the zoning changes into the towns . . . it's pre-empting part of the Home Rule Act." Although speaking in favor of the bill, Representative Rogers stated that "I think the final decisions on zoning should be left to the individual town or city . . . the main problem today in establishing or trying to establish group homes is what is being run into because of zoning . . . the rights and the privileges of the mentally retarded will have to take precedence over local zoning in this

respect." Representative Farricielli, in response to a question by Representative Parker about whether this bill would supercede a local zoning code which describes a single family residence as related members of a single household stated that "Yes, it will supercede that, but only, only in the case of mentally retarded persons licensed under the provisions of 19-574 (presently 19a-467 C.G.S.) . . . this would supercede that section of local zoning." Passage of the bill would allow the Department of Mental Retardation "to promulgate regulations that each of the communities could then use for uniformity." (Representative Farricielli).

The import of the legislative history of the statute discloses the concern of our legislators in the development of community housing for the retarded. Arguably, since Sec. 8-3e of the Connecticut General Statutes speaks to the "treatment" of such community housing as single family residences and does not definitively establish the number of mentally retarded adults allowed to live in a community residence stating "six or fewer", the zoning regulations of the municipality, if not in direct conflict with the statute, should control. Therefore, since our definition of "family" does not conflict, but only limits the number of unrelated persons by blood or marriage who can reside as a single housekeeping unit to not more than five, our zoning regulation should control.

The Synanan Foundation, Inc. case, as cited in the Oliver decision, Supra, 53 Conn. 305, 311, stands for the proposition that an ordinance which defines family controls. Carrying this reasoning one step further, it can be argued that since only a municipality can determine the number of those unrelated individuals who may reside together as a single housekeeping unit in conformity with local building, safety, fire and health codes, a limitation to five unrelated individuals as set forth in our ordinance would conform to the intent of Sec. 8-3e of the Connecticut General Statutes. The statute does not require six to be in residence, it leaves the number open, presumably to allow local zoning regulations to determine the number of unrelated individuals constituting a family unit. Therefore, until the courts determine that local zoning regulations not in direct conflict with the language "six or fewer" have been preempted by Sec. 8-3e of the Connecticut General Statutes, our regulations should control.

II. WHAT IS THE IMPORT OF SECTION 8-3f OF THE CONNECTICUT GENERAL STATUTES ON THE DEVELOPMENT OF COMMUNITY HOUSING IN A CITY OR TOWN?

On May 9, 1982, Section 8-3e of the Connecticut General Statutes was amended to include Section 8-3f which disallowed the establishment of such community residences within 1,000 feet of one another" . . . without the approval of the body exercising zoning powers within the municipality." Representative Meyer, a proponent of the amendment, stated that "It (the amendment) will be in line with what we have passed for other group homes and it will basically give the local community an opportunity to do what is best for everyone in the community and for the people in group homes."

The statute was passed to prevent housing for the mentally retarded within a community from becoming institutionalized because of the proximity of such housing to one another. It allows the municipality some power with respect to the future development of community housing for the retarded within the same area. The planning and zoning commission ultimately decides whether or not to allow

community residences within 1,000 feet of one another. Therefore, a proposed community residence which is within 1,000 feet of an established residence must get approval of the Planning and Zoning Commission before its establishment can be in compliance with the General Statutes.

III. WHAT IS THE EFFECT OF A FAILURE TO OBTAIN A LICENSE FROM THE STATE FOR A COMMUNITY RESIDENCE FOR THE RETARDED UNDER THE PROVISIONS OF SECTION 19a-467 (FORMERLY SECTION 19-574) OF THE CONNECTICUT GENERAL STATUTES?

Section 19a-467(a) C.G.S. provides, in pertinent part, that "No person, firm or corporation shall conduct or maintain within this state a residential facility for the lodging, care or treatment of mentally retarded persons . . . unless such person, firm or corporation, upon written application, verified by oath, has obtained a license issued by the Department of Mental Retardation." Subsections (b) and (c) of Section 19a-467 C.G.S. provide for the method of application for said license and subsection (d) provides for the fining and/or imprisonment of any person, firm or corporation who conducts any facility contrary to the provisions of Section 19a-467 C.G.S..

Section 8-3e of the Connecticut General Statutes requires that the community residence be licensed under the provisions of Section 19a-467 C.G.S.. Representative Farricielli, in the debate in the House of Representatives over the passage of the bill which became Section 8-3e C.G.S., stated in answer to a question asked by Representative Parker, that ". . . it (Section 8-3e) will supercede . . . , but only, only in the case of mentally retarded persons licensed under the provisions of 19-574." (presently Section 19a-467 C.G.S.).

Therefore, the licensing procedure is a requirement which must be complied with before Section 8-3e C.G.S. can apply to the establishment of a community residence for the mentally retarded.

CONCLUSION

The Zoning Code Enforcement Officer must be assured that the proposed community residence has been properly licensed pursuant to Section 19a-467 of the Connecticut General Statutes. Furthermore, if a proposed residence is to be established within 1,000 feet of an established community residence, prior approval by the Planning and Zoning Commission is required by Section 8-3f of the General Statutes.

Section 8-3e of the General Statutes permits "six or fewer" mentally retarded persons to reside in a community residence. The language of Section 16.06.01 of the Middletown Zoning Code permits five unrelated persons to reside together as a "single housekeeping group in a dwelling unit." In comparing our zoning regulation to the statutory language of Section 8-3e C.G.S., there is no conflict. The number of five unrelated persons falls within the language of "six or fewer" of the Statute. If the legislators had intended that a specific number of mentally retarded persons would constitute a family, the broad language of "six or fewer" would not have been used.

A community residence must be established in conformance with the language of Section 16.06.01 of the Middletown Zoning Code and Sections 8-3e, 8-3f and 19a-467 of the Connecticut General Statutes. Therefore, failure to follow the aforementioned sections would result in a violation of law.

Trina A. Solecki
Assistant City Attorney

TAS/es