CITY OF
FORT LAUDERDALE

Memorandum No. 16-018 **City Attorney's Office**

To: Honorable Mayor and Commissioners

Thru: Cynthia A. Everett, City Attorney

From: D'Wayne Spence, Assistant City Attorney

Date: January 25, 2016

Re: Regulations of Uses within Residential Neighborhoods

This memorandum is in response to a request made by Commissioner Romney Rogers at the January 5, 2016, City of Fort Lauderdale City Commission Conference Meeting. The Commissioner asked our office to write a memorandum on issues related to the regulation of uses within residential neighborhoods. In particular the Commissioner expressed an interest in the City's regulation of vacation rentals, sober homes (herein referred to as "recovery residences") and crew quarters, and the effects of federal and state law on such regulations.

Summary

All uses proposed within a residentially zoned area must comply with the City of Fort Lauderdale Unified Land Development Regulations ("ULDR"). The ULDR provisions must be applied in a manner consistent with federal or state law and in some cases may be preempted by federal or state law. Recovery residences, although considered a prohibited use in residentially zoned areas by the City, are deemed residences under federal and state law and are therefore permitted in residentially zoned areas. Likewise, vacation rentals are not considered residences by the City for purposes of zoning, however, the regulation of vacation rentals is preempted by state law and the City cannot prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals. Crew quarters is not a defined use in the ULDR and therefore the zoning administrator would have to conduct an evaluation of the use to determine whether the use is substantially similar to any permitted or accessory use listed within a zoning district in order to determine their permissibility.

Unified Land Development Regulation

Article VIII. Section 2(b) of the Florida Constitution provides municipalities with the governmental, corporate and proprietary power to enable them to, among other things,

exercise any power for municipal purposes except as otherwise provided by law. This broad grant of power by the state is referred to as home rule. The exercise of home rule can only be exercised for municipal purposes and may be preempted by state law and county charter.

Land use regulation is an exercise of the City's police power. The Community Planning Act, Chapter 163 of Florida Statutes, requires local governments to adopt comprehensive plans to guide and manage the future development of communities. The act also requires the adoption of land development regulations that are consistent with and implement the adopted comprehensive plan. The City of Fort Lauderdale's adopted land development regulations are found in Chapter 47 of the Code of Ordinances of the City of Fort Lauderdale, Florida known as the City of Fort Lauderdale, Florida Unified Land Development Regulations or "ULDR".

The ULDR established zoning districts and boundaries as depicted on the "Official Zoning Map of City of Fort Lauderdale." Each district as depicted on the map is identified by a district name that correlates with the ULDR text. The text assigns to each zoning designation guidelines for the use of land, height and bulk of buildings, density and intensity of use. There are seven general categories of types of zoning districts, two of which, Residential Zoning Districts and Residential Office Zoning Districts, established for the purpose of providing residential areas within the City. There are a total of 16 zoning districts within those two categories, which are generally the focus of any discussion of residential neighborhoods. They are listed as follows:

- *RS-4.4 - Residential Single Family/Low Density District.*
- *RS-8 - Residential Single Family/Low Medium Density District.*
- *RD-15 - Residential Single Family Duplex/Medium Density District.*
- *RDs-15 - Residential Single Family/Medium Density District.*
- *RC-15 - Residential Single Family Cluster Dwellings/Medium Density District.*
- *RCs-15 - Residential Single Family/Medium Density District.*
- *RM-15 - Residential Multifamily Low Rise/Medium Density District.*
- *RMs-15 - Residential Low Rise Multifamily/Medium Density District.*
- *RML-25 - Residential Multifamily Low Rise/Medium High Density District.*
- *RMM-25 - Residential Multifamily Mid Rise/Medium High Density District.*
- *RMH-25 - Residential Multifamily High Rise/Medium High Density District.*
- *RMH-60 - Residential Multifamily High Rise/High Density District.*
- *MHP - Mobile Home Park District.*
- *RO - Residential Office District. See Section 47-5.60.*
- *ROA - Limited Residential Office District. See Section 47-5.60.*
- *ROC - Planned Residential Office Districts. See Section 47-5.60.*

The ULDR provides a list of Permitted Uses for each zoning district. Any use that is not substantially similar to the permitted or accessory uses listed within the district are considered prohibited as interpreted by the zoning administrator. See Section 47-1.14.A.5., ULDR. Generally, these zoning districts only permit residential uses defined in the ULDR as single family, duplex, multiple family dwellings and level I and level II Social Service Residential Facilities and explicitly prohibits hotels and motels.[1] The ULDR defines these uses as follows:

> *"Single family dwelling: A dwelling unit designed for or occupied by one (1) family and includes standard, detached and attached dwellings."*
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> *"Duplex or two family dwelling: A building containing two single family dwelling units, totally separated from each other by one (1) dividing partition common to each unit, and contained entirely under one (1) roof and designed for or occupied by two (2) single family housekeeping units. A two family dwelling is a building on a single lot. A duplex is a building where one unit is on one lot and the other attached unit is on an abutting lot."*
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> *"Multifamily dwelling: A building occupied or intended to be occupied by more than two (2) families, living separately and with separate kitchens or facilities for cooking on the premises. This term shall not include hotels, motels or bed and breakfast dwellings, townhouse or cluster dwellings."*
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> *"Social Service Residential Facility (SSRF): Is any building or buildings, section of a building, or distinct part of a building, residence, private home, structure, or other place whether operated for profit or not, which is noninstitutional in character, including but not limited to, facilities licensed, or monitored by the Florida Department of Health and Rehabilitative Services (HRS) to provide a family living environment that involves more than twenty-four (24) hour supervision or daily care or lodging, care or personal services for residents in order to meet the physical, emotional or socialization needs of the residents who are persons not related to the SSRF owner or operator. An SSRF does not include hotels, motels, apartments, boarding or rooming houses, nursing homes, hospitals, child or day care centers, or family day care homes, general hospitals, special hospitals, medical clinics, jails or prisons, or skilled medical service facilities."*
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> > *Level I: A facility with a maximum of four (4) residents and not more than two (2) on-duty staff who may reside in the facility. The principal purpose of the residential facility shall be to provide a family-type living arrangement, including supervision and care necessary to meet the physical, emotional,*

[1] The permitted use list of a particular zoning district may vary from this general statement by either prohibiting some of the uses listed in this sentence or permitting other uses not listed.

personal and social needs designed to house certain clients of the Florida Department of Health and Rehabilitative Services or its designee.

a. Level I shall include only the following family foster home facilities:
i. Foster care facility for the developmentally disabled;
ii. Adult foster home for aged and disabled adults; and
iii. Family foster home for children (including those defined in F.S. § 409.175).

b. Level I facilities shall be required to be licensed by the Florida Department of Health and Rehabilitative Services to meet one (1) of these three (3) housing needs.

Level II: A facility with a maximum of eight (8) residents and not more than two (2) on-duty staff, one (1) of which may be the resident supervisor, or such increased staff levels as may be required by HRS in a particular instance. The principal purpose of the facility shall be to provide personal care, shelter, sustenance or other support services. Level II SSRF shall include family care homes, adult congregate living facilities, adult and family foster homes, RTF levels IV and V, as defined in the Florida Administrative Code, and residential facilities for the developmentally disabled. Level II shall also include accessory shelter units and emergency shelters for abused children and adults.

Also note that home occupation is also permitted as an accessory use in a residential dwelling subject to the criteria outlined in Section 47-19.7., ULDR.

Recovery residences and vacation rentals have been interpreted by the City as not substantially similar to any of the uses permitted within our single family residential zoning districts, however, federal and state law and, in the case of vacation rentals, a circuit court decision has prevented the City from enforcing the ULDR in a manner that would prohibit the establishment of such uses.

In 2010, the City successfully brought code enforcement cases against residential property owners for renting residential property on a short-term basis. The City took the position that short-term rental of residential properties violated of Sec. 47-34.1.A.1, ULDR which states that no building shall be used for any other purpose other than is permitted in the district in which such building or land is located. The case was appealed to the Seventeenth Judicial Circuit Court, Broward County, Florida, resulting in the reversal of the Special Magistrate's Final Order. *Bianco v. City of Fort Lauderdale*, Case No. 10-029269 (08). The court found that short-term vacation rental is not contrary to the zoning definition of a single-family dwelling, citing that the ULDR's definition only addresses the configuration of the structure and not the nature of its use.

The City's petition for writ of certiorari to the District Court of Appeal for the State of Florida, Fourth District, was denied on the merits on June 7, 2012.

The circuit court opinion finding that vacation rentals are not contrary to the definition of "One (1) Single Family Dwelling" sets a precedence that would call into question any future code enforcement action against short-term rentals. An amendment to the ULDR that either added a definition for short-term residential use or clarified the definition of single-family dwelling would have preserved this enforcement scheme consistent with the City's interpretation of the ULDR. Unfortunately, the state legislature enacted Chapters 2011-119, Florida Law, which preempted the City from taking such action. The City is now locked into the circuit court's interpretation that short-term rental is not contrary with the zoning definition of a single-family dwelling. The effects of Chapters 2011-119, Florida Law are discussed in detail in the section of this memorandum addressing state preemption.

State Preemption

Article VIII. Section 2(b) of the Florida Constitution provides municipalities with the governmental, corporate and proprietary power to enable them to, among other things, exercise any power for municipal purposes except as otherwise provided by law. This grants the municipal government broad authority to legislate when such legislation is not inconsistent with law. The last portion of the section is read to preempt local action when it directly conflicts with state law. The State of Florida has preempted local zoning in the following areas:

- ***Beekeeping:*** § 586.10(1), Florida Statute (2015) – "The authority to regulate, inspect, and permit managed honeybee colonies and to adopt rules on the placement and location of registered inspected managed honeybee colonies is preempted to the state through the department and supersedes any related ordinance adopted by a county, municipality, or political subdivision thereof."

  The Florida Department of Agriculture and Consumer Services Division of Plant Industry permit apiaries in residential areas subject to registration and completion of a Beekeeper Compliance Agreement.

- ***Family Daycare:*** § 166.0445, Florida Statute (2015) – "Family day care homes; local zoning regulation.—The operation of a residence as a family day care home, as defined by law, registered or licensed with the Department of Children and Families, shall constitute a valid residential use for purposes of any local zoning regulations, and no such regulation shall require the owner or operator of such family day care home to obtain any special exemption or use permit or waiver, or to pay any special fee in excess of $50, to operate in an area zoned for residential use."

"Family daycare home" means an occupied residence in which child care is regularly provided for children from at least two unrelated families and that receives a payment, fee, or grant for any children receiving care, whether or not operated for a profit." § 627.70161(2)(b), Florida Statute (2015)

- ***Community residential homes:*** § 419.001, Florida Statute (2015) - "Community residential home" means a dwelling unit licensed to serve residents who are clients of the Department of Elderly Affairs, the Agency for Persons with Disabilities, the Department of Juvenile Justice, or the Department of Children and Families or licensed by the Agency for Health Care Administration which provides a living environment for 7 to 14 unrelated residents who operate as the functional equivalent of a family, including such supervision and care by supportive staff as may be necessary to meet the physical, emotional, and social needs of the residents." - § 419.001 (1)(a), Florida Statute (2015).

  "Homes of six or fewer residents which otherwise meet the definition of a community residential home shall be deemed a single-family unit and a noncommercial, residential use for the purpose of local laws and ordinances. Homes of six or fewer residents which otherwise meet the definition of a community residential home shall be allowed in single-family or multifamily zoning without approval by the local government, provided that such homes shall not be located within a radius of 1,000 feet of another existing such home with six or fewer residents. Such homes with six or fewer residents shall not be required to comply with the notification provisions of this section; provided that, prior to licensure, the sponsoring agency provides the local government with the most recently published data compiled from the licensing entities that identifies all community residential homes within the jurisdictional limits of the local government in which the proposed site is to be located in order to show that no other community residential home is within a radius of 1,000 feet of the proposed home with six or fewer residents. At the time of home occupancy, the sponsoring agency must notify the local government that the home is licensed by the licensing entity." § 419.001 (1)(b), Florida Statute (2015).

- ***Vacation Rentals:*** "A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals. This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011." § 509.032(7)(b), Florida Statute (2015).

- ***Commercial or recreation fishing:*** 'LOCAL ORDINANCE.—No local governing authority shall adopt any ordinance that declares any commercial or recreational fishing operation to be a nuisance solely because it is a commercial or recreational fishing operation, or any zoning ordinance that unreasonably forces the closure of any commercial or recreational fishing operation. Nothing in this

act shall prevent a local government from regulating commercial and recreational fishing operations, including by requiring the use of methods, structures, or appliances where such use will prevent, ameliorate, or remove conditions which create or may create a nuisance or, pursuant to the applicable local zoning code, by declaring a commercial or recreational fishing operation to be a nonconforming use. § 379.2351(4), Florida Statute (2015).

- **Education facilities:** §1013.38(1)(c), Florida Statute (2015).

Recovery residences, as well as many other group living facilities, are community residential homes if housing 7 to 14 residents and required to be licensed by certain state agencies. The ULDR categorizes community residential homes as Social Service Residential Facilities ("SSRF") Levels II and III in the ULDR. These facilities are subject to local zoning and statutory provisions providing for notification and input from local government prior to state approval of a license.

Group living facilities with 6 or fewer residents that would otherwise meet the definition of a community residential home are deemed to be a single-family unit, noncommercial, residential use for the purpose of local law and ordinances. Similar to the circuit court decision discussed earlier in this memorandum, the State law prevents local government from treating these uses as non-residential and thus makes the uses permitted in residentially zoned areas. The statute does provide a 1,000 foot separation requirement between such facilities.

Last year the state legislature established a voluntary recovery residence certification program. In accordance with Section 397.487, Florida Statutes (2015), certified recovery residences must be actively managed by a Certified Recovery Residence Administrator credentialed by a state approved credentialing entity. Effective July 1, 2016, Service Providers licensed under Chapter 397, Florida Statute, may not refer patients to recovery residences that are not certified and managed by a Certified Recovery Residence Administrator.

A vacation rental is subset of short-term rental of residential property. The City viewed all short-term rentals as prohibited non-residential use of residential property, an opinion overturned by the Seventeenth Judicial Circuit Court. Prior to the City being able to amend its code to address the court's opinion, the state legislature enacted Florida Law 2011-119 preempting any local law, ordinance or regulation from restricting the use of vacation rentals, prohibiting vacation rentals, or regulating vacation rentals based solely on their classification, thus preventing the enactment of those recommendations.

Subsequently, the Florida Legislature enacted Florida Law 2014-71 (Senate Bill 356) revising the permitted scope of local regulations of vacation rentals. Although local governments are still prevented from prohibiting vacation rentals, effective July 1, 2014,

local governments were able to regulate vacation rental use as long as the regulations do not regulate the duration and frequency of the rentals. Section 509.032(7)(b), Florida Statutes (2014) now reads as follows:

> A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals. This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011.

On August 18, 2015, the City Commission adopted Ordinance No. C-15-29 establishing a registration and life safety compliance program to aid in addressing community concerns about the use, however, the City may not amend its code at this time to prohibit the use in certain areas.

Federal Preemption

The Tenth Amendment of the United States Constitution reserves for the states all powers not delegated to the United States. Largely, the regulations of land use and zoning issues have been left to the states so in a general sense there is no federal preemption of local land use and zoning regulation because these laws are traditionally related to state and local police power. *Skysign International, Inc. v. City and County of Honolulu,* 276 F.3d 1109, 1115 (9th Cir. 2002). There are, however, constitutional issues such as equal protection, civil rights and property rights that must be considered in the adoption and application of land use and zoning regulations. The constitutional issues are generally raised in the context of group occupancies such as recovery residences, halfway houses, and inmate transitional housing which courts have found to be residential in nature.

The courts disapprove of local government attempts to control the types of occupancies of residences. The value of residential areas and the preservation of their nature are generally understood by the courts, but the courts take issue with attempts by local government to regulate who can live together as a family unit. The regulations that come under scrutiny are those that attempt to control occupancy by familial relation. It is recognized that local government can limit the number of occupants but cannot dictate the type of connection between cohabiting individuals. There is no distinguishing between 4 individuals related by blood and 4 unrelated individuals cohabiting, therefore, zoning uses should not be defined by the types of individuals living at a residence.

Federal law takes it a step further. The Fair Housing Act, as amended by the Fair Housing Act Amendments of 1988 ("FHAA") at 42 U.S.C. § 3601 et seq., prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents or legal custodians, pregnant

women, and people securing custody of children under the age of 18), and disability, and the Americans with Disabilities Act of 1990 (ADA) prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, state and local government services, public accommodations, commercial facilities, and transportation. The courts have found drug and alcohol addiction to be disabilities protected by the FHAA and the ADA, if the addiction poses a substantial limitation on one or more major life activities.

Operators of recovery residences state that their facilities are simply a drug and substance free living environment for individuals recovering from alcohol or substance abuse and that no treatment takes place at these locations. They assert that any attempt by the City to prohibit these uses in residential communities via zoning would be unconstitutional and a violation of the ADA and FHAA. Case law does provide that zoning codes cannot treat these facilities differently based solely upon the identification of the residents. This is viewed as discrimination against the disabled. This does not preclude the City from taking necessary action against the documented negative impacts of these uses.

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