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MEMORANDUM

TO: Planning Commission

FROM: Carla Cushman, Assistant City Attorney

DATE: September 24, 2015

RE: 15PD029 – Final Planned Development Overlay to allow an oversized garage in the Low Density Residential District located at 1224 Skyline Drive

This application seeks a planned development to allow a 42 x 68 foot detached five-stall garage. A planned development as the applicant has requested would approve the conditional use of an oversize garage and would permit a reduction in the front yard setback from 25 feet to 2 feet and a height exception to allow a height of 16 feet instead of 15 feet.

In the letter of intent submitted by Kent Hagg on behalf of Mr. Hammond, he invokes the Americans with Disabilities Act as support for granting the planned development application. Mr. Hagg states that the applicant's disability causes him to have difficulty walking long distances and causes him to seek "environmentally controlled areas" with "external temperature regulation" to prevent symptoms. Below I outline the relevant portions of the ADA, discuss their application to the matter before you, and offer a few cases that have been litigated as points of comparison.

Reasonable accommodations under the ADA

Section II of the Americans with Disabilities Act (ADA) states that 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."[1] *42 U.S.C. 12132.* The regulations implementing the ADA

[1] This provision prohibits intentional discrimination, such as when a City applies its zoning regulations in a way that discriminates against a group home for disabled people on the basis of

provide that "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[2] *28 C.F.R. 35.130(b)(7).* Application of a city's zoning ordinances to a particular matter falls within the scope of these provisions. "A 'reasonable' accommodation – by its very nature – constitutes 'preferential treatment for persons with disabilities, and that treatment is necessary to achieve the basic equal-opportunity goals created by laws" addressing people with disabilities. *Essling's Homes Plus, Inc., a Minn. Corp. v. City of St. Paul, 356 F.Supp.2d 971, 980 (D. Minn. 2004).*

An "[a]ccommodation is required if such accommodation (1) is reasonable, and (2) necessary, (3) to afford a disabled person the equal opportunity to use and enjoy a dwelling." *State ex rel. Henderson v. Des Moines Mun. Housing Agency, 745 N.W.2d 95, *3 (Ia. Ct. App. 2007).* The reasonableness of an accommodation is a fact-specific inquiry asking whether the unique facts of the situation render the proposed accommodation reasonable under the circumstances. The applicant has the burden to show that the accommodation is reasonable on its face. *Oconomowac Residential Programs, Inc., 300 F.3d at 783 (citing US Airways, Inc. v. Barnett, 535 U.S. 391 (2002)); see also Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 950 (8th Cir. 1999).* Once the applicant has made this showing, the City "must come forward to demonstrate unreasonableness or undue hardship in the particular circumstances." *Oconomowac, 300 F.3d at 783.* "A zoning waiver is unreasonable if it is so 'at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.'" *Id. at 784.*

As to the second prong, whether an accommodation is "necessary" requires "a showing that the desired accommodation will affirmatively enhance a disabled [person's] quality of life by ameliorating the effects of the disability." *Oconomowoc, 300 F.3d at 784; see also Tsombanidis, 352 F.3d at 578.* "Any accommodation requested must be related to the limitation faced by the handicapped person or persons." *Essling's Homes Plus, Inc., 356 F.Supp.2d at 980.*

These laws mean that when the basis for a zoning application is a citizen's disability, the Planning Commission has an obligation to consider whether or not an accommodation is necessary – if the proposed accommodation will affirmatively enhance the disabled person's quality of life by ameliorating the effects of the disability. Next, the Planning Commission

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the residents' disabilities. *Tsombanidis v. West Haven Fire Department, 352 F.3d 565, 573-74 (2nd Cir. 2003).* Additionally, cities cannot apply a facially neutral policy in a way that imposes a significantly adverse or disproportionate impact on disabled individuals – this constitutes discrimination as well. *Id. at 575.* Applicant does not make any claims as to discrimination under these two theories.

[2] The Fair Housing Amendment Act similarly provides that unlawful discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services[.]" *42 U.S.C. 3604(f)(3)(B).* "The requirements for reasonable accommodation under the ADA are the same as those under the FHAA." *Oconomowoc, 300 F.3d at 783 (7th Cir. 2002) (citing 42 U.S.C. 13121(2)).*

should determine if the accommodation would afford the disabled person the equal opportunity to use or enjoy his dwelling as to a non-disabled individual. If the accommodation is determined to meet these two requirements, the Planning Commission should then evaluate whether the applicant's proposal is a reasonable accommodation, and it shall approve what it concludes is a reasonable accommodation.

Applicant's requests.

Mr. and Mrs. Hammond propose a 5-stall garage of 2,856 square feet. That footage, added to their existing attached 3-stall garage of 896 feet, totals 3,572 square feet. The square footage of the dwelling unit is 916, meaning that the garages are more than three times the size of the dwelling unit. Under City ordinance, a garage is oversize when it is more than 30 percent of the size of the gross floor area of the dwelling unit, or more than 1,500 square feet, whichever is greater. *RCMC 17.04.315.* Any oversize garage must be approved as a conditional use. *Id.; RCMC 17.08.030J.* The applicant also requests a reduction in the front yard setback from 25 feet to 2 feet, and a variance from the height exception from 15 feet to 16 feet. Each of these requests must be evaluated as a proposed reasonable accommodation for the disability, as discussed above.

The reasons applicants give for these "reasonable accommodations" are to be able to "protect and maintain his water truck," and to "house and maintain his specially designed motor home and pontoon boat."[3] *Letter from Kent Hagg, dated August 14, 2015, page 2.* The applicant's medical information discussed reasonable accommodations for his disability in the following ways:

- One provider says his disability "prevents normal temperature regulation" and requires him to seek "environmentally controlled areas to maintain his medical condition to prevent symptoms. It is my understanding that he is seeking to build an additional workshop on his property, and I recommend that [it] be as close to his house as possible to limit exacerbation of his symptoms." *Letter from Jon M. Wingert, MD dated April 19, 2013.*

- Another provider stated: "it would be advantageous to have a shop building located as close as possible to his home. . . . Working in an enclosed building, within a few feet of walking distance from his home, large enough to house his vehicles, equipment and tools, can be therapeutic for Mr. Hammond. An environmentally controlled area provides relief of chronic pain and anxiety caused by his health conditions." *Letter from Mark A. Gebbie, D.P.M., undated.*

- A third provider stated that "Patient will benefit from a shop to work at – which will be therapeutic for his medical conditions. This has to be attached to home[4] as his

[3] Applicant gives many other arguments in support of his request, but these are the only reasons given that relate to his disability and therefore are the only reasons relevant to the ADA issue.
[4] The proposed garage is not "attached to home" as this letter discusses.

> mobility is limited [sic] from medical conditions." *Letter from Ashok Kumar MD, dated April 30, 2013.* The same provider in another letter states that "[i]t is necessary for [Mr. Hammond] to have his motor home in close proximity at all times" because his disability "can be treated with the special adaptive equipment he has in his RV." *Letter from Dr. Ashok Kumar, July 6, 2012.*

It would seem that the medical recommendation that the "workshop" or "shop" be close to the house speaks to the front yard setback variance request. Because any additional garage space would require a conditional use permit for an oversize garage, all of the medical comments apply to the CUP request. None of the medical recommendations addresses the variance request to increase the height of the structure from 15 feet to 16 feet.

The Planning Commission will have to weigh the medical recommendations provided by applicant and the proposed accommodations to decide whether the 5-stall garage and the setback and height exceptions proposed by applicant are (1) necessary to afford applicant equal opportunity to use and enjoy his dwelling and (2) reasonable under these circumstances. If the Planning Commission concludes that the proposal is not necessary to counteract the effects of the disability, it should deny the request. If the Planning Commission concludes that a modification is necessary but that the specific 5-stall garage is not reasonable, it should propose an accommodation that is reasonable to address applicant's disability.

Caselaw

Following are a few court cases that are comparative to the matter at hand:

In *Trovato v. City of Manchester, N.H.,* the Trovatos applied for a building permit to construct a paved parking area in front of their house. *992 F.Supp.493, 495-496 (D. N.H. 1997).* Mrs. Trovato and the Trovato's daughter have muscular dystrophy and have difficulty walking. The permit was denied because it violated setback requirements. Applicants appealed the decision to the Zoning Board of Adjustment, which "expressed genuine sympathy for the plaintiff's situation, but felt legally constrained to deny the appeal." *Id.* When the ZBA denied a request for rehearing to consider the Board's obligations under federal law, applicants sued under the ADA and the Fair Housing Act.

The reviewing Court found that applicants "have demonstrated that, given their disabilities, they would derive great benefit from a parking space in their front yard and the lack thereof has adversely affected their 'use or enjoyment' of their home." *Id. at 497.* Noting that the law requires municipalities to make reasonable accommodations, the Court found that this request was reasonable, and that the City had "not shown that the requested parking space would have disrupted the character of plaintiff's neighborhood" or that there would have been any other burden on the City. The Court also stated the following: "Nor has the city suggested any reasonable alternative accommodation." *Id. at 498.* The Court ruled in favor of the applicants on their claims under both the ADA and the FHA.

An Oregon Court took a liberal approach to what constitutes a "reasonable accommodation" in *Kulin v. Deschutes County, 872 F.Supp.2d 1093, 1096 (D. Or. 2012).* Kulin, a legally blind individual, obtained county building permits to construct three detached buildings on his property. Thereafter he received notice that the last building, a warehouse, violated the County's Home Occupation Code. The Code stated that a home occupation may not employ more than two employees, and that the home occupation may not occupy more than 35 percent of the combined floor area of the participant's dwelling. Kulin requested an amendment to the Home Occupation Code to allow for exceptions to accommodate persons with disabilities; the County did not adopt the amendment. Thereafter he sought a variance to request an accommodation pursuant to the ADA with regard to the number of employees – he wanted to employ five employees – and asked for a variance to the limitation on floor area of 35 percent of the dwelling to allow the business to occupy approximately six times the permitted amount. The Hearings Officer denied the request for additional square footage but approved four employees for the business. The applicant sued.

The Court concluded that Kulin's request for additional employees was a reasonable accommodation under the circumstances, since two replacement employees were needed to perform work Kulin was unable to do and one replacement employee was necessary to cover the costs of those employees. *Id. at 1101-1102.* With regard to the variance to the floor space limitation, the applicant argued that he must maintain his business on-site as a home occupation because, due to his disabilities, it was the only occupation that allowed him to take frequent rest breaks he needed. The County argued that to grant this variance request would give the applicant an advantage based on his disability by providing greater rights than non-disabled individuals, and that the accommodation Kulin requested was related more to gaining a financial evidence and avoiding costs than his disability. Ultimately, the Court agreed with Kulin, finding that "the costs of granting Kulin's request [for increased floor space] are clearly not disproportionate to the benefits that the accommodation will produce and will result in no cost to the County."[5] *Id. at 1105.*

In contrast to these two situations, I offer the following cases that are outside of the realm of zoning regulations but instructive nonetheless. In *Pruett v. State of Arizona,* a disabled individual sought a variance from the state's wildlife regulations to allow her to possess a chimpanzee in her home as a service animal. *606 F.Supp.2d 1065, 1068 (D. Ariz. 2009).* State law listed chimpanzees as "restricted," meaning that they could not be privately imported or owned without a special license that did not apply to service animals. When state officials refused Pruett's request, she sued under the ADA. The Court denied her relief, finding that Pruett had not established that keeping the chimpanzee in her home was necessary to counteract the effects of her disability, concluding that waiver of the prohibition on chimpanzees "fundamentally alters the nature of the Arizona statutes and regulations intended to protect the

[5] In making this final determination, the Court was heavily influenced by the fact that the applicant had built the warehouse per a County building permit prior to the County objecting to the home occupation use.

safety of its residents," and stating that the proposed accommodation was not reasonable. *Id. at 1078, 1079.*

Finally, in *Young v. City of Claremore, Oklahoma*, a person with cerebral palsy used a golf cart to travel around the city, and as a result received numerous citations from the police for violating state law prohibiting golf cars on public streets and highways. *411 F.Supp.2d 1295, 1298 (N.D. Okla. 2005).* Young asked for a reasonable accommodation to use his golf cart on all city streets; his reason for the request was that even though he could operate an automobile with his disability, he became more anxious driving a car due to its potential speed and preferred a golf cart. The Court concluded that the modification was not necessary to allow Young meaningful access to driving on the streets, since he could drive a car. *Id. at 1310-11.* Furthermore, the request was not a reasonable accommodation. "Plaintiff presents the Court with only one alternative, which is unfettered access, a modification which would require exceptions to statutes which already allowed for use of golf carts by people with disabilities. *Id. at 1310.* The Court also found that the City had proven that it was impossible to take steps to mitigate the safety risks inherent in Young's proposal, and that the City could prohibit the modification that would result in a direct threat to the safety of others. *Id. at 1313.*

As these cases show, reviewing courts don't need to find overt discrimination to find for the applicant on an ADA/FHA claim. A failure to make a reasonable accommodation by itself may be grounds for reversal of the decision based upon these federal laws, even if there is no discriminatory intent, and evaluation of what constitutes a reasonable accommodation is a case-by-case determination unique to the situation.

If you have any further questions on this matter, please feel free to give me a call at any time. My number is 394-4140, and my email is carla.cushman@rcgov.org.