



**VIA Electronic Delivery (EMAIL)**

June 30, 2020

Charles Hervas  
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Dear Mr. Hervas:

Please be advised that Access Living has been retained as additional counsel to represent Haymarket DuPage LLC (“Haymarket”) in its effort to secure zoning approval of the property at 860 W. Irving Park Road for the purpose of providing treatment to those experiencing substance use and mental health disorders. We write on behalf of Haymarket to request that the Village of Itasca provide a reasonable accommodation to Haymarket regarding its request for approval of its proposed healthcare facility. More specifically, we request the Village interpret its Zoning Ordinance to classify the proposed Haymarket facility as a Healthcare Facility under its Zoning Ordinance, rather than as a Planned Development.

By way of background, Access Living is a Center for Independent Living (CIL) for people with disabilities in the Chicago area. CILs are established under the Rehabilitation Act, 29 U.S.C. § 769(f). Access Living promotes the independent living philosophy of equal access of individuals with disabilities to all services, programs, activities, resources, and facilities, whether public or private. *See id.* § 769(f)-4(b)(1)(D). In furtherance of its independent living work, Access Living provides legal representation to individuals with disabilities.

**I. Factual Background**

Haymarket Center was established to operate as a State of Illinois licensed substance abuse treatment and intervention service provider under 77 Illinois Administrative Code Part 2060. It provides comprehensive medical and psychological treatment to individuals with substance use and mental health disorders. Increasingly in recent years, Haymarket Center has provided such treatment to residents of DuPage County and other collar counties at its West Loop facility. Haymarket fills a unique niche in the treatment community, because it provides a comprehensive array of services to those in need of treatment including those whose primary

source of payment is Medicaid, or who are unable to pay for treatment. These services are provided by a team of licensed professionals under the supervision of a medical director.

Recognizing the need for a treatment facility in DuPage County to expand access to life-saving treatment for suburban residents, Haymarket identified the property at 860 W. Irving Park Road, which as you know formerly housed a Holiday Inn (“Property”). Haymarket was drawn to the Property because it is reasonably accessible to patients in need, requires no new buildings or changes to the outside structure, and has sufficient parking. The guest rooms at the Property include individualized rooms, each with a bathroom but no kitchen.

The Property will operate as an in-patient treatment facility and recovery home. In-patient treatment may range from 14 to 90 days, based on an individual’s needs, with an average treatment stay of 28 days. Stays in recovery homes may range from one to twelve months with a typical stay of an estimated 90 days.

#### **A. Zoning Ordinance**

The Zoning Ordinance for the Village (“Zoning Ordinance”) defines a “Dwelling Unit” as:

one (1) or more rooms, which are arranged, designed or used as living quarters for one (1) family only. Individual bathrooms and complete kitchen facilities, permanently installed, shall be included in *each* dwelling unit. Zoning Ordinance, Section 3, “Definitions” (emphasis added).

The Property is located in the B-2 Community Business District for Itasca. In the B-2 District, a Healthcare Facility is permitted as a special use. Zoning Ordinance, Section 8.4.2(m).

The definition for a “Healthcare Facility” has two components, “Hospital” and “Clinic.” Zoning Ordinance, Section 3, “Definitions.” The Zoning Ordinance does not reference recovery homes, at least not specifically.

“Clinic” does not apply here because its definition excludes in-patient care. Zoning Ordinance, Section 3, “Definitions.”

On the other hand, the definition for a Hospital does apply. A Hospital is:

any institution, place, building or agency, public or private, whether organized for profit, or not, devoted primarily to the maintenance and operation of facilities for the diagnosis and treatment or care of two (2) or more unrelated persons admitted for overnight stay or longer in order to obtain medical care, including obstetric, psychiatric, and nursing or care of illness, disease, injury infirmity, or deformity.

The term “Hospital” without regard to the length of stay shall also include:

1. Any facility which is devoted primarily to providing psychiatric and related services and programs for the diagnosis and treatment or care of two (2) or more unrelated persons suffering from emotional or nervous disease; and
2. All places where pregnant women are received, cared for, or treated during delivery irrespective of the number of patients received.

The term "Hospital" includes general and specialized hospitals, tuberculosis sanitarium, mental or physical hospitals and sanitarium, and includes maternity homes, lying-in-homes, and homes for unwed mothers in which aid is given during delivery.

Zoning Ordinance, Section 3, "Definitions."

In the B-2 District, a Planned Development is permitted as a special use. Zoning Ordinance, Section 8.4.2(u). A Planned Development is:

a parcel of land or contiguous parcels of land of a size sufficient to create its own character, controlled by a single landowner or any group of landowners in common agreement as to control, to be developed as a single entity, the character of which is compatible with adjacent parcels, and the intent of the zoning district or districts in which it is located; the developer or developers may be granted relief from specific land-use regulations and design standards and may be awarded certain premiums in return for assurances of an overall quality of development, including any specific feature which will be of exceptional benefit to the Village as a whole and which would not otherwise be required by the Zoning Ordinance. The area of the planned development shall remain under one (1) ownership or unified control unless safeguards are provided that, in the opinion of the Plan Commission (*See* Section 4.04.5) and Board of Trustees of the Village of Itasca, will provide for the continuation of the original planned development concept.

Zoning Ordinance, Section 3, "Definitions."

Further, a Planned Development is a:

subdivision, development and use of land containing three (3) or more acres as an integral unit, combining (1) or more primary land uses, and which may provide for, but are not limited to single-family residential, multiply family residential, education, business. Commercial, industrial, recreational, park and public use areas may be described as Planned Development (also refer to Definitions Section 3.02).

Zoning Ordinance, Section 14.12, "Planned Developments."

## **B. Procedural History**

In April 2019, Haymarket conferred with the Village Zoning Administrator, Shannon Malik Jarmusz, about securing a special use permit to operate in the B-2 District as a Healthcare Facility.

In May 2019, Ms. Malik Jarmusz claimed the Property represented a mixed use of residential and medical, which would require a number of variances for operation. She directed Haymarket to apply for approval as a Planned Development under Section 8.04(2)(u) of the Zoning Ordinance, rather than as a Healthcare Facility. She characterized the Property as partially “residential” because patients would remain in the recovery home for extended periods of time.

On July 3, 2019, Haymarket filed an application for special use as a Healthcare Facility, an application for special use as a Planned Development, and an application for variances.

On July 16, 2019, a Village Attorney informed Haymarket that Ms. Malik Jarmusz rejected the application for special use for a Healthcare Facility. This was based on her determination that:

Since the B-2 District is primarily a business district, the proposed residential use (the recovery homes component) is not a traditional fit for the district [and]

When a proposed use does not fit into any existing category under the Zoning Ordinance, the petitioner may either (1) seek a text amendment or (2) planned development. Because a text amendment is forever part of the Zoning Ordinance and this type of proposal seemed unlikely to be reoccurring ... Haymarket should apply for a planned development by special use.

Memorandum from CD Director/Zoning Administrator Shannon Malik Jarmusz to President of the Village Board of Trustees Jeff Pruyn, September 3, 2019.

On August 13, 2019, Haymarket appealed Ms. Malik Jarmusz’s decision to the Village’s Plan Commission.

On August 21, 2019, the Village’s Plan Commission heard the appeal and voted unanimously to recommend denial. On September 17, 2019, the Village Board voted to deny the appeal.

Because Haymarket now owns the Property, Haymarket intends to file amended applications for zoning approval to reflect this new ownership. It is anticipated the Plan Commission will re-start the hearing process on these applications in mid to late August, 2020.

## **II. Legal Background**

The Fair Housing Act (“FHA”) prohibits discrimination against people with disabilities, including people in treatment for substance use and mental health disorders. Under the FHA, it is unlawful to refuse “to make reasonable accommodations in rules, policies, practices, or services,

when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B); *See also Joint Statement of the Department of Housing and Urban Development and Department of Justice – State and Local Land Use Laws and Practices and the Application of the Fair Housing Act*, Washington D.C. (Nov. 10, 2016) available at <https://www.justice.gov/opa/file/912366/download> Question 2, Page 3 (“Joint Statement”)(noting it is unlawful to (1) impose restrictions on housing because of alleged public safety concerns based on stereotypes of disability, or (2) refuse to provide reasonable accommodations to zoning policies when accommodations may be necessary for those with disabilities to have equal opportunity to use the housing.).

Under the Fair Housing Act, individuals using Haymarket’s services are considered people with disabilities. 42 U.S.C. § 3602(h) [protecting those with “physical or mental impairment[s]” that substantially limit major life activities, including mental illness, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism].

Two additional federal civil rights laws also prohibit discrimination against people with disabilities: the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132; and Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. § 794. Title II of the ADA applies to all public entities, including State and local governments, and prohibits discrimination in all programs, services, or activities of public entities, including those that concern the zoning process. Joint Statement at 1. Section 504 prohibits discrimination on the basis of disability in federally-assisted programs or activities. The FHA, ADA, and Section 504 all “embrace the concept that, in certain instances, the policies and practices of covered entities must be modified to accommodate the needs of the disabled.” *Wis. Comm. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 746 (7th Cir. 2006).

Here, the Village interpreted the definition of “Healthcare Facility” to exclude a facility (i.e. Haymarket DuPage) that treats people with substance use and mental health disorders. In doing so, it denied people in treatment an equal opportunity to enjoy and use the Property, in violation of the FHA, ADA, and Section 504. Thus, and as more fully explained below, Haymarket requests the Village classify Haymarket as a Healthcare Facility, and allow it to apply for a special use permit to operate as such.

Courts have found time and time again that when a municipality imposes a more onerous zoning process for a facility or home that will serve or treat people with disabilities, and does so due to their disabilities, such constitutes discrimination. In *Daveri Development Group, LLC v. Village of Wheeling*, a housing provider sought to build a permanent supportive housing center for adults with disabilities. 934 F. Supp. 2d 987 (N.D. Ill. 2013). The Board of Trustees in Wheeling determined the facility should be classified a “social service facility,” rather than a “multiple-family dwelling,” because there would be an on-site resident manager at the property, and the residents would receive off-site case management. *Id.* at 999. The Board then denied the zoning application because social service facilities were not allowed in the district where the provider wanted to build. *Id.* The court found that under this rationale “no permanent supportive housing development for the mentally disabled would ever qualify as a multi-family dwelling or be permitted in a residential district in the Village of Wheeling” and, as a result, the municipality

had to allow the provider to apply as a “multiple-family dwelling,” as a reasonable accommodation. *Id.* at 1002-05.<sup>1</sup>

In addition, in *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819 (N.D. Ill. 2001), Thresholds, a non-profit serving people with psychiatric disabilities, sought to establish a group home. *Id.* at 823. The city planner classified Thresholds as a “family community residence,” defined as a dwelling unit with not more than eight unrelated persons with disabilities, rather than a “family residence,” which included a group of not more than five unrelated persons without disabilities. *Id.* at 823. On this basis, the city denied Thresholds’ application because Threshold’s proposed location would be too close to another “family community residence.” *Id.* The Seventh Circuit found that the defendant municipality could not “treat the [Thresholds property] as a ‘family community residence,’ subject to location restrictions, rather than as a ‘family,’ not subject to those restrictions, without violating the FHAA” and thus the property “[could] not legally be considered a ‘family community residence.’” *Id.* at 833.

Here, the Village refused to allow Haymarket to apply as a Healthcare Facility because the property’s purported “residential use (the recovery homes component) is not a traditional fit for the district.” However, rooms at the Property cannot be considered residential because the Zoning Ordinance defines a dwelling unit to include “complete kitchen facilities, permanently installed.” As you are well aware, the rooms at the Property do not and will not include kitchens.

Plus, in common language, there is no distinction between the term “residence” and “dwelling.” Indeed, the Meriam-Webster dictionary defines a residence as “the act or fact of dwelling in a place for some time.” <https://www.merriam-webster.com/dictionary/residence>. Hence, as defined by the Zoning Ordinance, the Property will not operate residences (i.e. dwellings), and the Village’s determination to the contrary contravenes that Ordinance.<sup>2</sup>

Moreover, individuals served at the Property will remain on a temporary basis only until their treatment is complete, which for those in the treatment portion of the Healthcare Facility will be on average 28 days, and in the recovery home portion of the Healthcare Facility will be on average 90 days. Hence, the individuals served by the Property are much like those served in a hospital, where extended stays continue until treatment concludes.

In fact, the proposed Healthcare Facility is in appearance and practice identical to that of a hospital: it will contain individualized rooms with no kitchens, is licensed by the State of Illinois, and will provide medical and psychiatric treatment for people in treatment for substance use and mental health disorders under the supervision of a Medical Director. Indeed, the Zoning Ordinance contemplates various medical settings under its “hospital” definition, including

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<sup>1</sup> The Court also found that to allow nursing homes in the relevant district, but not housing for people with psychiatric disabilities, had a wrongful discriminatory effect on people with psychiatric disabilities. *Id.* at 1002.

<sup>2</sup> Notwithstanding the definition of dwelling in the Zoning Ordinance, a recovery home enjoys the protections of the Fair Housing Act. *Joint Statement of the Department of Housing and Urban Development and Department of Justice – State and Local Land Use Laws and Practices and the Application of the Fair Housing Act*, Washington D.C. (Nov. 10, 2016) available at <https://www.justice.gov/opa/file/912366/download> Question 8, Page 7. To put it another way, just because the Village defines dwelling in a certain way, it does not escape its obligation to comply with the Fair Housing Act with respect to the Property.

“general and specialized hospitals, tuberculosis sanitarium, mental or physical hospitals and sanitarium,<sup>3</sup> and includes maternity homes, lying-in-homes, and homes for unwed mothers in which aid is given during delivery,” and it defines a hospital this way “*without regard to length of stay.*” Zoning Ordinance, Section 3 (emphasis added). Haymarket DuPage is exactly that – a facility for people in treatment and recovery for a temporary period of time. In other words, it is, for all intents and purposes under the Zoning Ordinance, precisely what is contemplated by the term “hospital.”

Because the Property is the equivalent of a hospital under the Zoning Ordinance, by forcing Haymarket to file as a Planned Development, rather than as a Healthcare Facility, the Village is treating people with substance use and mental health conditions in a different, more onerous and costly manner than those who require regular hospital care (or a maternity home, or a home for unwed mothers, etc.). This is the essence of discriminatory treatment.

Further, because the Village’s interpretation of its own Zoning Ordinance is so at odds with its plain meaning, a fair conclusion to draw is that the Village has forced Haymarket to endure a more burdensome application process *because* the individuals served by Haymarket will be people who are in treatment for substance use and mental health disorders. This is the exact type of differential and discriminatory treatment the FHA was designed to prevent.

To avoid and reverse this unfair and discriminatory result, Haymarket requests the Village allow it to apply for a special use permit for a Healthcare Facility.

As Haymarket and the Village prepare to re-start the hearing process, this is an opportune time for the Village to consider allowing Haymarket to proceed with the zoning process under an application for a special use permit as a Healthcare Facility, rather than a Planned Development.

Please respond by July 10, 2020 as to whether the Village will grant this accommodation, as required by the FHA. You can reach Ken Walden at 312.640.2136/kwalden@accessliving.org, and Mary Rosenberg at 312.640.2155/mrosenberg@accessliving.org.

Sincerely,

*Kenneth M. Walden*

Kenneth M. Walden

*Mary Rosenberg*

Mary Rosenberg

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<sup>3</sup> Sanitarium have been considered as similar to recovery homes. *See Lake Cty. v. MacNeal*, 181 N.E.2d 85, 91 (Ill. 1962) (where “the sanitarium is a licensed rest home where male patients are treated for mental illness, senility, alcoholism and drug addiction); *see also Diversified Health Assocs. v. Zoning Borough of Norristown*, 781 A.2d 244 (Pa. Commw. Ct. 2001) (finding a “sanitarium,” which provides “treatment and rehabilitation for substance abuse problems” as a “hospital”).

