RESEARCH MEMO

To: Dan McHugh

From: Stanford Criminal Justice Center

RE: Possible Legal Issues Concerning the Redland's Proposed Ordinance Regulating Parolee Housing and Sober Living Arrangements

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There are three main questions that may potentially form a legal basis for challenging or attacking the legality of the Redlands Ordinance seeking to regulate or prohibit through the use of conditional use permits parolee housing or parolee sober living arrangements comprised of six or fewer parolees unofficially residing together in a single-family use restricted zone. These questions are:

1. Do the city's delegated land-use powers and zoning enabling laws permit it to regulate housing arrangements for a certain designated class of persons, namely parolees, or to regulate the private alcohol consumption by this class of persons in such living arrangements under the auspices of regulating parolee sober living arrangements?

2. Does state preemption of alcohol regulation prohibit the city from attempting to regulate parolee sober living arrangements by regulating private alcohol consumption or to enforce a city-mandated prohibition on private alcohol consumption by the parolee-residents of these homes?

3. Do federal and state antidiscrimination and fair housing laws prohibit the city from regulating parolee or sober living housing arrangements?

Overall, it is most likely that the Ordinance, if passed by the city, would go unchallenged and could legally withstand any challenge brought against it. However, this memo will further flesh out the three problem areas that we have isolated in order to provide some guidance in structuring and implementing the Ordinance to avoid such potential legal pitfalls.

Similar Ordinances in Practice

As you know, other cities and counties in California have implemented ordinances similar to the Redlands Ordinance that prohibit or regulate the ability of parolees or certain classes of parolees to live in certain designated areas. These ordinances may serve as examples of ones that may survive, and have thus far survived, legal scrutiny and perhaps also serve to indicate the political viability of such ordinances.

For instance, in November 2002, the City of Fontana successfully approved a similar ordinance regulating parolee homes in residential family zones using the conditional use permit. This

ordinance has been in effect since shortly after its adoption, with no apparent problems, and may serve for a model for what is possible using this type of ordinance.

Polk County, Iowa has also proposed a similarly structured ordinance regulating the areas in which convicted sex offenders may reside within a residential zone. This ordinance mirrors one recently implemented in Des Moines, and would restrict a convicted sex offender from residing within 2,000 feet of the following child-oriented facilities: public parks, public libraries, public swimming pools, and multi-use recreational trails, in addition to the current residency restrictions for sex offenders around schools and day care centers mandated by existing Iowa state law.

Following this example, it is reasonable to think that if a city may restrict residency for a certain class of ex-convicts, namely sex offenders, without issue, then a city ordinance restricting residency for a similar class of citizens—parolees—for similar public safety concerns should withstand legal scrutiny as well. The Polk County webpage may be found at:

http://www.co.polk.ia.us:8080/modules.php?name=News&file=article&sid=802

City Land-Use Delegations and Zoning Enabling Laws

This might be the strongest avenue for challenging the proposed Ordinance, if the city's delegated land-use power from the state or its zoning enabling laws do not seem to include the authority from the state to regulate parolee or sober living housing arrangements under the auspices of local land-use regulation powers. This is a determination that must be made by reviewing the pertinent laws and state-delegated land-use authority in Redlands.

We would recommend looking first at Redlands' zoning enabling acts that delegate zoning authority to the city to determine the scope of local authority versus state authority in zoning matters. Next, depending on whether Redlands is a charter city or a general law city, you may be able to look in the city's charter for specific provisions concerning delegated land-use powers by the state to the city. While charter cities tend to be older municipalities and most California cities generally tend to be under general law, this is a distinction worth looking into. If Redlands is under general law, the scope of the city's formal authority to act as delegated by the state will likely be enumerated statutorily instead of contained in a charter.

Another possible avenue worth looking into is the city's authority to regulate parolees using CUPs under occupancy limitation laws and whether residency restrictions on certain classes of people (here, parolees) generally counts as a legitimate "land-use" such that it would fall under the city's delegated authority to regulate land-use.

There are two related cases that deal with the topic of a city's ability to regulate based on occupancy limitations. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) involved a city ordinance that restricted land use to single-family dwellings, where the word "family" was defined as one or more related persons or a number of persons not exceeding two that were unrelated. The U.S. Supreme Court upheld the constitutionality of this ordinance since the ordinance did not involve a fundamental right guaranteed by the Constitution and did not involve a procedural disparity inflicted on some persons, but not others.

In *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977), the Supreme Court found that the Ohio city's housing ordinance which attempted to regulate which members of an extended family network could permissibly live together under the zoning definition of "family" was unconstitutional because it bore no rational relationship to any permissible state objective and violated the Due Process Clause of the Fourteenth Amendment by infringing on the sanctity of family autonomy.

Unlike the Belle Terre ordinance, this ordinance defined "family" in such a way that a second grandchild was excluded from living in the dwelling. The Court distinguished this case from *Belle Terre* by saying that the Belle Terre ordinance drew the line between related and unrelated individuals, while the East Cleveland ordinance distinguished between degrees of related individuals. The Court said here that cutting off the definition of "family" to include only the nuclear family was unfounded, since the security and support benefits characteristic of families were traditionally provided by the extended family as well.

However, the Court's loosening of the definition of "family" past the nuclear family does not seem like it would extend to a group of unrelated persons whose sole common characteristic is that they are on parole from a federal or state prison, and it would be unlikely that six or fewer parolees living in a common dwelling would qualify as a "family" for legal purposes. In fact, in *Belle Terre*, the Court explicitly authorized it as within legislature's purview to define family on the basis of related versus unrelated persons.

Two possible messages to take out of these cases are that: 1) As long as you do not regulate housing by distinguishing *between* classes of related family members, courts will allow legislative authority to restrict based on other classifications; and 2) If Belle Terre was permitted to prohibit any group of three or more unrelated persons from living in the same housing unit (presumably under the public policy rationale of eliminating hippie communes and college frat houses from setting root in a small, college-dominated town at the time), then perhaps restricting or regulating groups of six or fewer unrelated parolees living in the same housing unit under a public safety rationale is also permissible.

State Alcohol Preemption

If the aim of the Redlands Ordinance is to regulate sober living homes as separate from parolee homes, and in doing so, to enforce sobriety in these homes by prohibiting private alcohol consumption by the occupants of the homes, the city may run into a preemption problem—that the state's regulation of alcohol effectively prohibits the city from attempting to regulate it. Depending on state law, the city may not be permitted to prohibit certain classes of people or certain areas of the city from privately consuming alcohol. We are not sure of the actual black-letter law on this, but can think of no instance in national history where a city was permitted, or even has attempted, to restrict private consumption of alcohol for certain classes of people or in certain areas within its borders.

However, if the aim of the Ordinance is simply to regulate those parolee homes that self-identify as "sober living arrangements" without any city-mandated adherence to such sober living principles, the preemption problem will disappear. There may be a potential negative incentive structure, however, if the city allows sober living homes to occupy certain sections of the city that other parolee homes are restricted from by virtue of their admirable clean-living ideals, but without regulating whether these sober living principles are being adhered to, such that parolee homes would want to claim sober living status to guarantee them priority zoning but then not be required in any way to comply with this self-designation.

Equal Protection in Fair Housing Law

Drug and alcohol addiction are explicitly *not* categorized as disabilities for the purposes of federal antidiscrimination, disabilities, and fair housing law, so drawing a distinction around sober living parolee homes will most likely not implicate these protections. Parolees are also not, in themselves, a suspect class and an ordinance regulating housing on the basis of parolee status would likely pass rational basis scrutiny if challenged.

However, a potential fair housing or equal protection claim may arise if, as a result of the Redlands Ordinance, most or all parolee homes are relegated to poorer, more minority-influenced areas of the city, and if most parolees who are relegated to the minority neighborhoods are themselves minorities, this Ordinance might have a disparate impact effect of enforcing racial segregation in housing by sending the minority parolees to existing minority neighborhoods and keeping them out of predominantly white neighborhoods. Nationwide, we know that a large proportion of the people in prisons and of those who are then paroled are minorities – mainly of African American or Hispanic descent. Depending on the demographic constitution of the parolees being returned to the Redlands community, such potential segregationist effects are something that the city government should keep an eye on in both the drafting and implementation of this ordinance, in order to avoid this problem.

There is also the possibility that homes of six or fewer occupants fall under the federal housing law minimum occupancy limit for federal regulation, such that federal housing law would not even apply to them. It would be advisable to look into the "Mrs. Murphy's boarding house" clause of federal housing law to determine the minimum unit or person per dwelling limit for federal housing law to apply.