

# MEMORANDUM

**To:** Michael Grace\ Vishnu Patel, Gregory Bernard, Tom Diana, Jeannette Koster  
**From:** Susan Siegel  
**Subject:** Zoning code changes relating to sober living residences  
**Date:** April 20, 2015

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The following memorandum is a response to several points that were raised during the board's April 14 discussion. As the discussion ended inconclusively, I will be requesting a follow up work session discussion after you have had an opportunity to review the memorandum.

Please note that as I have addressed the issues included in this memorandum in public statements and in articles that have been published in local newspapers, I do not consider this memorandum a confidential document.

## **There are three inter-related issues that I believe need to be addressed**

1. Does the current definition of family, adopted in ????, adequately respond to changing circumstances and the advent of SLRs? If not, then how should it be modified to reflect today's new circumstances?
2. Does the current definition of convalescent home, adopted approximately 50 years ago, adequately respond to changing circumstances in the health care industry? If not, then how should it be modified?
3. Like boarding houses and day care centers, should the zoning code include a specific special permit for a convalescent home or any related type of facility?

Related to these three questions, I ask you to consider the following.

### **A. Why a change in the current definition of family is needed**

*Current definition: One of more persons occupying a dwelling unit and living as a single housekeeping unit with kitchen facilities and other rooms in common.*

1. Under the existing definition, a SLR **can** open as a family in any single family residence on any street.
  - a. Throughout the 16 month approval process for Compass Westchester, it was stated — repeatedly — that the owners of 482 Underhill Avenue could, if they wanted, open their SLR as a family and not apply for a special permit for a convalescent home. The fact that they did choose to apply for the special permit does not diminish the argument that they could have, if they wanted, open as a family.
  - b. At the October 7, 2014 public hearing (see video 3:37:05) the supervisor stated:  
*“There may not be any reason for these gentlemen [CW] to have submitted an application for a convalescent home. They could have done it by right [meaning as a family].”*
  - c. At the same meeting, the very same point was made by Bob Davis, CW's attorney, when he stated that the SLR”  
*“falls squarely within the code's definition of family which is very broad.”*

2. The town **cannot** regulate a SLR that opens as a family.
  - a. The major concern of town residents, including those who support the SLR concept, is that under the existing very broad definition of “family,” there could be a proliferation of unregulated SLRs that could negatively impact neighborhoods. Any number of SLRs could open in any single family residence anyplace in Yorktown, all without any land use regulation.
  - b. At the October 7, 2014 hearing (video, 3:15:28), the supervisor **twice** made it clear that the town could not regulate SLRs that opened as a family (video at 3:15:28 and again at 3:36:36.) He said : *“The fact that under the definition of family the ability for the Town Board to even legislate restrictions and conditions upon this type of use is problematic.”*

*When you talk about what the definition of a family is that is enforceable under a zoning code, it’s not a nuclear family, mom dad or extended family. It becomes anyone living together under . . . sharing a common kitchen.”*
3. It’s in the town’s interest to permit SLRs by special permit rather than as a family.
  - a. This point is not disputed and was made numerous times by the supervisor and does not have to be repeated here. By amending the definition of family as it relates to unrelated adults, the zoning code would preclude a SLR from opening as a family but would permit SLRs by special permit.

**B. Does the town have the constitutional right to define “family” and would suggested changes in the definition withstand legal challenge?**

The draft definition incorporates language that would require a fixed number of unrelated adults to show that they are the “functional equivalent of a family.”

1. The definitions is modeled after definitions used in other zoning codes in New York State and elsewhere and follows guidelines suggested by the Local Government Division of the NYS Department State in a legal memorandum on the definition of family. The memorandum was last reviewed in May, 2014.
2. Town Board members are faced with conflicting legal advice.
  - a. The town attorney has dismissed the state memorandum as “advisory only” and has given her “advice” that the functional equivalent argument was meant to be used to college students, e.g., in fraternity houses. Her contention that the state’s memo is outdated has been shown to be in error.
  - b. In the event the town attorney produces her own legal memorandum to support her position, board members will have to decide whose conflicting advice to take.
3. The advice of the town attorney notwithstanding, the concept of including the “functional equivalent of a family” for unrelated individuals has been upheld in the courts, most recently in 2014, as a legitimate exercise of zoning designed to preserve the character of single family zones and the stability of neighborhoods. Both could be jeopardized by the instability of having houses with transient residents (increased traffic, parking needs, noise, etc.)
  - a. One of the most frequently cited cases is the **U.S. Supreme Court case**, Village of Belle Terre v. Boraas.
    - i. The case upheld the right of a municipality to define what constitutes a family as a legitimate use of its police power.
    - ii. The court held the city had a rational basis for its prohibition on housing large numbers of unrelated individuals because creating a quiet neighborhood is a permissible state goal and this ordinance is closely related enough to this goal to be sustained under the rational basis test.

### **C. Recovering addicts are a protected class and the town can't discriminate against them**

1. The proposed new definition of family **does not** discriminate against recovering addicts.
2. The proposed zoning changes allow SLRs to obtain a special permit — and the draft special permit provisions very specifically include a section that says that the approving authority can waive any of the above requirements if needed — much like the town's current very specific special permit provisions for gas stations has a paragraph that allows the approval authority waive any of the requirements.

### **D. Requiring the ZBA to determine who is a “functional equivalent of a family” will create a bureaucratic nightmare**

1. This is not likely to happen as it's not likely there will be many challenges to the definition of family because the zoning code has a reasonable alternative for SLR applications — the special permit route.
2. The clearer the zoning code is in identifying criteria for defining a “functional equivalent of a family,” e.g., must be permanent, not transient, the less likely there would be a challenge.
  - a. While anyone can challenge anything, given existing case law, a court would likely find that such a lawsuit was not “ripe” because the applicant should first apply for a special permit and sue only in the event the permit was denied.
3. By having the clearly spelled out — and legal — special permit provision, a potential SLR has a clear route to achieve what it wants without having to challenge the family definition. And the proposed special permit requirements are not onerous.

### **E. Special permit conditions must address only land use issues**

1. Both the supervisor and the town attorney have made it clear that regulating land use issues is legitimate.
2. If you look over the draft provisions — all subject to further discussion — they deal very specifically with land use issues, **not** the operation of the facility.
3. There's no reason why not to have a specific permit for convalescent homes — or whatever it's called. If we have a specific permit for boarding houses which house transient residents, why not SLRs that similarly house transient residents?

### **F. Is there a need to clarify the definition of a convalescent home?**

1. The current zoning code has **two** definitions for nursing home
  - a. Section 300-3 that uses the exact same definition for convalescent home and nursing home,
  - b. Section 300-42 that is exclusively for a nursing home.
  - c. At minimum, this dual definition of “nursing home” should be eliminated.
2. The term “convalescent home” is an outdated term and doesn't reflect the current types of care provided by a variety of health care facilities.
  - a. The NYS Department of Health does not list “convalescent home” as a type of facility providing care.
  - b. There are NO regulations or licensing requirements governing convalescent homes.
  - c. As one DOH staff member said when I asked about any such regulations: It's an old term that's no longer used.

3. NYS Public Health Law Section 2852 defines a nursing home as:
  - a. *Nursing home means a facility providing herein nursing care to sick, invalid, infirm, disabled **or convalescent person** in addition to lodging and board or health-related service, or any combination of the foregoing.....”*
  
4. Medicare definition of convalescent care:
  - a. *“medical services that help an individual recover from illness or injury.”*