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U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY

Washington, D.C.
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JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE

REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT

Introduction

The Department of Justice ("DOJ") and the Department of Housing and Urban Development ("HUD") are jointly responsible for enforcing the federal Fair Housing Act[1] (the "Act"), which prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability.[2] One type of disability discrimination prohibited by the Act is the refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.[3] HUD and DOJ frequently respond to complaints alleging that housing providers have violated the Act by refusing reasonable accommodations to persons with disabilities. This Statement provides technical assistance regarding the rights and obligations of persons with disabilities and housing providers under the Act relating to

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[1] The Fair Housing Act is codified at 42 U.S.C. §§ 3601 - 3619.

[2] The Act uses the term "handicap" instead of the term "disability." Both terms have the same legal meaning. *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (noting that definition of "disability" in the Americans with Disabilities Act is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988"). This document uses the term "disability," which is more generally accepted.

[3] 42 U.S.C. § 3604(f)(3)(B).

reasonable accommodations.[4]

Questions and Answers

1. What types of discrimination against persons with disabilities does the Act prohibit?

The Act prohibits housing providers from discriminating against applicants or residents because of their disability or the disability of anyone associated with them[5] and from treating persons with disabilities less favorably than others because of their disability. The Act also makes it unlawful for any person to refuse "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford ... person(s) [with disabilities] equal opportunity to use and enjoy a dwelling."[6] The Act also prohibits housing providers from refusing residency to persons with disabilities, or placing conditions on their residency, because those persons may require reasonable accommodations. In addition, in certain circumstances, the Act requires that housing providers allow residents to

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[4] Housing providers that receive federal financial assistance are also subject to the requirements of Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794. Section 504, and its implementing regulations at 24 C.F.R. Part 8, prohibit discrimination based on disability and require recipients of federal financial assistance to provide reasonable accommodations to applicants and residents with disabilities. Although Section 504 imposes greater obligations than the Fair Housing Act, (*e.g.*, providing and paying for reasonable accommodations that involve structural modifications to units or public and common areas), the principles discussed in this Statement regarding reasonable accommodation under the Fair Housing Act generally apply to requests for reasonable accommodations to rules, policies, practices, and services under Section 504. *See* U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2002-01(HA) (www.hud.gov/offices/fheo/disabilities/PIH02-01.pdf) and "Section 504: Frequently Asked Questions," (www.hud.gov/offices/fheo/disabilities/sect504faq.cfm#anchor272118).

[5] The Fair Housing Act's protection against disability discrimination covers not only home seekers with disabilities but also buyers and renters without disabilities who live or are associated with individuals with disabilities 42 U.S.C. § 3604(f)(1)(B), 42 U.S.C. § 3604(f)(1)(C), 42 U.S.C. § 3604(f)(2)(B), 42 U.S.C. § (f)(2)(C). *See also* H.R. Rep. 100-711 – 24 (reprinted in 1988 U.S.C.A.N. 2173, 2184-85) ("The Committee intends these provisions to prohibit not only discrimination against the primary purchaser or named lessee, but also to prohibit denials of housing opportunities to applicants because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities."). *Accord*: Preamble to Proposed HUD Rules Implementing the Fair Housing Act, 53 Fed. Reg. 45001 (Nov. 7, 1988) (citing House Report).

[6] 42 U.S.C. § 3604(f)(3)(B). HUD regulations pertaining to reasonable accommodations may be found at 24 C.F.R. § 100.204.

make reasonable structural modifications to units and public/common areas in a dwelling when those modifications may be necessary for a person with a disability to have full enjoyment of a dwelling.[7] With certain limited exceptions (*see* response to question 2 below), the Act applies to privately and publicly owned housing, including housing subsidized by the federal government or rented through the use of Section 8 voucher assistance.

2. Who must comply with the Fair Housing Act's reasonable accommodation requirements?

Any person or entity engaging in prohibited conduct – *i.e.*, refusing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling – may be held liable unless they fall within an exception to the Act's coverage. Courts have applied the Act to individuals, corporations, associations and others involved in the provision of housing and residential lending, including property owners, housing managers, homeowners and condominium associations, lenders, real estate agents, and brokerage services. Courts have also applied the Act to state and local governments, most often in the context of exclusionary zoning or other land-use decisions. *See e.g.*, City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 729 (1995); Project Life v. Glendening, 139 F. Supp. 703, 710 (D. Md. 2001), aff'd 2002 WL 2012545 (4th Cir. 2002). Under specific exceptions to the Fair Housing Act, the reasonable accommodation requirements of the Act do not apply to a private individual owner who sells his own home so long as he (1) does not own more than three single-family homes; (2) does not use a real estate agent and does not employ any discriminatory advertising or notices; (3) has not engaged in a similar sale of a home within a 24-month period; and (4) is not in the business of selling or renting dwellings. The reasonable accommodation requirements of the Fair Housing Act also do not apply to owner-occupied buildings that have four or fewer dwelling units.

3. Who qualifies as a person with a disability under the Act?

The Act defines a person with a disability to include (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

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[7] This Statement does not address the principles relating to reasonable modifications. For further information see the HUD regulations at 24 C.F.R. § 100.203. This statement also does not address the additional requirements imposed on recipients of Federal financial assistance pursuant to Section 504, as explained in the Introduction.

The term "substantially limits" suggests that the limitation is "significant" or "to a large degree."

The term "major life activity" means those activities that are of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, and speaking.[8] This list of major life activities is not exhaustive. *See e.g.*, Bragdon v. Abbott, 524 U.S. 624, 691-92 (1998)(holding that for certain individuals reproduction is a major life activity).

4. Does the Act protect juvenile offenders, sex offenders, persons who illegally use controlled substances, and persons with disabilities who pose a significant danger to others?

No, juvenile offenders and sex offenders, by virtue of that status, are not persons with disabilities protected by the Act. Similarly, while the Act does protect persons who are recovering from substance abuse, it does not protect persons who are currently engaging in the current illegal use of controlled substances.[9] Additionally, the Act does not protect an individual with a disability whose tenancy would constitute a "direct threat" to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by reasonable accommodation.

5. How can a housing provider determine if an individual poses a direct threat?

The Act does not allow for exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (*e.g.*, current conduct, or a recent history of overt acts). The assessment must consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat. Consequently, in evaluating a recent history of overt acts, a provider must take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat (*i.e.*, a significant risk of substantial harm). In such a situation, the provider may request that the individual document

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[8] The Supreme Court has questioned but has not yet ruled on whether "working" is to be considered a major life activity. See Toyota Motor Mfg, Kentucky, Inc. v. Williams, 122 S. Ct. 681, 692, 693 (2002). If it is a major activity, the Court has noted that a claimant would be required to show an inability to work in a "broad range of jobs" rather than a specific job. *See* Sutton v. United Airlines, Inc., 527 U.S. 470, 492 (1999).

[9] *See, e.g.*, United States v. Southern Management Corp., 955 F.2d 914, 919 (4th Cir. 1992) (discussing exclusion in 42 U.S.C. § 3602(h) for "current, illegal use of or addiction to a controlled substance").

how the circumstances have changed so that he no longer poses a direct threat. A provider may also obtain satisfactory assurances that the individual will not pose a direct threat during the tenancy. The housing provider must have reliable, objective evidence that a person with a disability poses a direct threat before excluding him from housing on that basis.

Example 1: A housing provider requires all persons applying to rent an apartment to complete an application that includes information on the applicant's current place of residence. On her application to rent an apartment, a woman notes that she currently resides in Cambridge House. The manager of the apartment complex knows that Cambridge House is a group home for women receiving treatment for alcoholism. Based solely on that information and his personal belief that alcoholics are likely to cause disturbances and damage property, the manager rejects the applicant. The rejection is unlawful because it is based on a generalized stereotype related to a disability rather than an individualized assessment of any threat to other persons or the property of others based on reliable, objective evidence about the applicant's recent past conduct. The housing provider may not treat this applicant differently than other applicants based on his subjective perceptions of the potential problems posed by her alcoholism by requiring additional documents, imposing different lease terms, or requiring a higher security deposit. However, the manager could have checked this applicant's references to the same extent and in the same manner as he would have checked any other applicant's references. If such a reference check revealed objective evidence showing that this applicant had posed a direct threat to persons or property in the recent past and the direct threat had not been eliminated, the manager could then have rejected the applicant based on direct threat.

Example 2: James X, a tenant at the Shady Oaks apartment complex, is arrested for threatening his neighbor while brandishing a baseball bat. The Shady Oaks' lease agreement contains a term prohibiting tenants from threatening violence against other residents. Shady Oaks' rental manager investigates the incident and learns that James X threatened the other resident with physical violence and had to be physically restrained by other neighbors to keep him from acting on his threat. Following Shady Oaks' standard practice of strictly enforcing its "no threats" policy, the Shady Oaks rental manager issues James X a 30-day notice to quit, which is the first step in the eviction process. James X's attorney contacts Shady Oaks' rental manager and explains that James X has a psychiatric disability that causes him to be physically violent when he stops taking his prescribed medication. Suggesting that his client will not pose a direct threat to others if proper safeguards are taken, the attorney requests that the rental manager grant James X an exception to the "no threats" policy as a reasonable accommodation based on James X's disability. The Shady Oaks rental manager need only grant the reasonable accommodation if James X's attorney can provide satisfactory assurance that James X will receive appropriate counseling and

periodic medication monitoring so that he will no longer pose a direct threat during his tenancy. After consulting with James X, the attorney responds that James X is unwilling to receive counseling or submit to any type of periodic monitoring to ensure that he takes his prescribed medication. The rental manager may go forward with the eviction proceeding, since James X continues to pose a direct threat to the health or safety of other residents.

6. What is a "reasonable accommodation" for purposes of the Act?

A "reasonable accommodation" is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. Since rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling. The Act makes it unlawful to refuse to make reasonable accommodations to rules, policies, practices, or services when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling.

To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability.

Example 1: A housing provider has a policy of providing unassigned parking spaces to residents. A resident with a mobility impairment, who is substantially limited in her ability to walk, requests an assigned accessible parking space close to the entrance to her unit as a reasonable accommodation. There are available parking spaces near the entrance to her unit that are accessible, but those spaces are available to all residents on a first come, first served basis. The provider must make an exception to its policy of not providing assigned parking spaces to accommodate this resident.

Example 2: A housing provider has a policy of requiring tenants to come to the rental office in person to pay their rent. A tenant has a mental disability that makes her afraid to leave her unit. Because of her disability, she requests that she be permitted to have a friend mail her rent payment to the rental office as a reasonable accommodation. The provider must make an exception to its payment policy to accommodate this tenant.

Example 3: A housing provider has a "no pets" policy. A tenant who is deaf requests that the provider allow him to keep a dog in his unit as a reasonable accommodation. The tenant explains that the dog is an assistance animal that will alert him to several sounds, including knocks at the door, sounding of the smoke detector, the telephone ringing, and cars coming into the driveway. The housing

provider must make an exception to its "no pets" policy to accommodate this tenant.

7. Are there any instances when a provider can deny a request for a reasonable accommodation without violating the Act?

Yes. A housing provider can deny a request for a reasonable accommodation if the request was not made by or on behalf of a person with a disability or if there is no disability-related need for the accommodation. In addition, a request for a reasonable accommodation may be denied if providing the accommodation is not reasonable – *i.e.*, if it would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the provider's operations. The determination of undue financial and administrative burden must be made on a case-by-case basis involving various factors, such as the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would effectively meet the requester's disability-related needs.

When a housing provider refuses a requested accommodation because it is not reasonable, the provider should discuss with the requester whether there is an alternative accommodation that would effectively address the requester's disability-related needs without a fundamental alteration to the provider's operations and without imposing an undue financial and administrative burden. If an alternative accommodation would effectively meet the requester's disability-related needs and is reasonable, the provider must grant it. An interactive process in which the housing provider and the requester discuss the requester's disability-related need for the requested accommodation and possible alternative accommodations is helpful to all concerned because it often results in an effective accommodation for the requester that does not pose an undue financial and administrative burden for the provider.

Example: As a result of a disability, a tenant is physically unable to open the dumpster placed in the parking lot by his housing provider for trash collection. The tenant requests that the housing provider send a maintenance staff person to his apartment on a daily basis to collect his trash and take it to the dumpster. Because the housing development is a small operation with limited financial resources and the maintenance staff are on site only twice per week, it may be an undue financial and administrative burden for the housing provider to grant the requested daily trash pick-up service. Accordingly, the requested accommodation may not be reasonable. If the housing provider denies the requested accommodation as unreasonable, the housing provider should discuss with the tenant whether reasonable accommodations could be provided to meet the tenant's disability-related needs – for instance, placing an open trash collection can in a location that is readily accessible to the tenant so the tenant can dispose of his own trash and the provider's maintenance staff can then transfer the trash to the dumpster when they are on site. Such an accommodation would not involve a

fundamental alteration of the provider's operations and would involve little financial and administrative burden for the provider while accommodating the tenant's disability-related needs.

There may be instances where a provider believes that, while the accommodation requested by an individual is reasonable, there is an alternative accommodation that would be equally effective in meeting the individual's disability-related needs. In such a circumstance, the provider should discuss with the individual if she is willing to accept the alternative accommodation. However, providers should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability, and an individual is not obligated to accept an alternative accommodation suggested by the provider if she believes it will not meet her needs and her preferred accommodation is reasonable.

8. What is a "fundamental alteration"?

A "fundamental alteration" is a modification that alters the essential nature of a provider's operations.

Example: A tenant has a severe mobility impairment that substantially limits his ability to walk. He asks his housing provider to transport him to the grocery store and assist him with his grocery shopping as a reasonable accommodation to his disability. The provider does not provide any transportation or shopping services for its tenants, so granting this request would require a fundamental alteration in the nature of the provider's operations. The request can be denied, but the provider should discuss with the requester whether there is any alternative accommodation that would effectively meet the requester's disability-related needs without fundamentally altering the nature of its operations, such as reducing the tenant's need to walk long distances by altering its parking policy to allow a volunteer from a local community service organization to park her car close to the tenant's unit so she can transport the tenant to the grocery store and assist him with his shopping.

9. What happens if providing a requested accommodation involves some costs on the part of the housing provider?

Courts have ruled that the Act may require a housing provider to grant a reasonable accommodation that involves costs, so long as the reasonable accommodation does not pose an undue financial and administrative burden and the requested accommodation does not constitute a fundamental alteration of the provider's operations. The financial resources of the provider, the cost of the reasonable accommodation, the benefits to the requester of the requested accommodation, and the availability of other, less expensive alternative accommodations that would effectively meet the applicant or resident's disability-related needs must be considered in determining whether a requested accommodation poses an undue financial and administrative

burden.

10. What happens if no agreement can be reached through the interactive process?

A failure to reach an agreement on an accommodation request is in effect a decision by the provider not to grant the requested accommodation. If the individual who was denied an accommodation files a Fair Housing Act complaint to challenge that decision, then the agency or court receiving the complaint will review the evidence in light of applicable law and decide if the housing provider violated that law. For more information about the complaint process, see question 19 below.

11. May a housing provider charge an extra fee or require an additional deposit from applicants or residents with disabilities as a condition of granting a reasonable accommodation?

No. Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation.

> **Example 1**: A man who is substantially limited in his ability to walk uses a motorized scooter for mobility purposes. He applies to live in an assisted living facility that has a policy prohibiting the use of motorized vehicles in buildings and elsewhere on the premises. It would be a reasonable accommodation for the facility to make an exception to this policy to permit the man to use his motorized scooter on the premises for mobility purposes. Since allowing the man to use his scooter in the buildings and elsewhere on the premises is a reasonable accommodation, the facility may not condition his use of the scooter on payment of a fee or deposit or on a requirement that he obtain liability insurance relating to the use of the scooter. However, since the Fair Housing Act does not protect any person with a disability who poses a direct threat to the person or property of others, the man must operate his motorized scooter in a responsible manner that does not pose a significant risk to the safety of other persons and does not cause damage to other persons' property. If the individual's use of the scooter causes damage to his unit or the common areas, the housing provider may charge him for the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

> **Example 2:** Because of his disability, an applicant with a hearing impairment needs to keep an assistance animal in his unit as a reasonable accommodation. The housing provider may not require the applicant to pay a fee or a security deposit as a condition of allowing the applicant to keep the assistance animal. However, if a tenant's assistance animal causes damage to the applicant's unit or the common areas of the dwelling, the housing provider may charge the tenant for

the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

12. When and how should an individual request an accommodation?

Under the Act, a resident or an applicant for housing makes a reasonable accommodation request whenever she makes clear to the housing provider that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of her disability. She should explain what type of accommodation she is requesting and, if the need for the accommodation is not readily apparent or not known to the provider, explain the relationship between the requested accommodation and her disability.

An applicant or resident is not entitled to receive a reasonable accommodation unless she requests one. However, the Fair Housing Act does not require that a request be made in a particular manner or at a particular time. A person with a disability need not personally make the reasonable accommodation request; the request can be made by a family member or someone else who is acting on her behalf. An individual making a reasonable accommodation request does not need to mention the Act or use the words "reasonable accommodation." However, the requester must make the request in a manner that a reasonable person would understand to be a request for an exception, change, or adjustment to a rule, policy, practice, or service because of a disability.

Although a reasonable accommodation request can be made orally or in writing, it is usually helpful for both the resident and the housing provider if the request is made in writing. This will help prevent misunderstandings regarding what is being requested, or whether the request was made. To facilitate the processing and consideration of the request, residents or prospective residents may wish to check with a housing provider in advance to determine if the provider has a preference regarding the manner in which the request is made. However, housing providers must give appropriate consideration to reasonable accommodation requests even if the requester makes the request orally or does not use the provider's preferred forms or procedures for making such requests.

Example: A tenant in a large apartment building makes an oral request that she be assigned a mailbox in a location that she can easily access because of a physical disability that limits her ability to reach and bend. The provider would prefer that the tenant make the accommodation request on a pre-printed form, but the tenant fails to complete the form. The provider must consider the reasonable accommodation request even though the tenant would not use the provider's designated form.

13. Must a housing provider adopt formal procedures for processing requests for a reasonable accommodation?

No. The Act does not require that a housing provider adopt any formal procedures for reasonable accommodation requests. However, having formal procedures may aid individuals with disabilities in making requests for reasonable accommodations and may aid housing providers in assessing those requests so that there are no misunderstandings as to the nature of the request, and, in the event of later disputes, provide records to show that the requests received proper consideration.

A provider may not refuse a request, however, because the individual making the request did not follow any formal procedures that the provider has adopted. If a provider adopts formal procedures for processing reasonable accommodation requests, the provider should ensure that the procedures, including any forms used, do not seek information that is not necessary to evaluate if a reasonable accommodation may be needed to afford a person with a disability equal opportunity to use and enjoy a dwelling. See Questions 16 - 18, which discuss the disability-related information that a provider may and may not request for the purposes of evaluating a reasonable accommodation request.

14. Is a housing provider obligated to provide a reasonable accommodation to a resident or applicant if an accommodation has not been requested?

No. A housing provider is only obligated to provide a reasonable accommodation to a resident or applicant if a request for the accommodation has been made. A provider has notice that a reasonable accommodation request has been made if a person, her family member, or someone acting on her behalf requests a change, exception, or adjustment to a rule, policy, practice, or service because of a disability, even if the words "reasonable accommodation" are not used as part of the request.

15. What if a housing provider fails to act promptly on a reasonable accommodation request?

A provider has an obligation to provide prompt responses to reasonable accommodation requests. An undue delay in responding to a reasonable accommodation request may be deemed to be a failure to provide a reasonable accommodation.

16. What inquiries, if any, may a housing provider make of current or potential residents regarding the existence of a disability when they have not asked for an accommodation?

Under the Fair Housing Act, it is usually unlawful for a housing provider to (1) ask if an applicant for a dwelling has a disability or if a person intending to reside in a dwelling or anyone associated with an applicant or resident has a disability, or (2) ask about the nature or severity of such persons' disabilities. Housing providers may, however, make the following inquiries, provided these inquiries are made of all applicants, including those with and without disabilities:

- An inquiry into an applicant's ability to meet the requirements of tenancy;
- An inquiry to determine if an applicant is a current illegal abuser or addict of a controlled substance;
- An inquiry to determine if an applicant qualifies for a dwelling legally available only to persons with a disability or to persons with a particular type of disability; and
- An inquiry to determine if an applicant qualifies for housing that is legally available on a priority basis to persons with disabilities or to persons with a particular disability.

Example 1: A housing provider offers accessible units to persons with disabilities needing the features of these units on a priority basis. The provider may ask applicants if they have a disability and if, in light of their disability, they will benefit from the features of the units. However, the provider may not ask applicants if they have other types of physical or mental impairments. If the applicant's disability and the need for the accessible features are not readily apparent, the provider may request reliable information/documentation of the disability-related need for an accessible unit.

Example 2: A housing provider operates housing that is legally limited to persons with chronic mental illness. The provider may ask applicants for information needed to determine if they have a mental disability that would qualify them for the housing. However, in this circumstance, the provider may not ask applicants if they have other types of physical or mental impairments. If it is not readily apparent that an applicant has a chronic mental disability, the provider may request reliable information/documentation of the mental disability needed to qualify for the housing.

In some instances, a provider may also request certain information about an applicant's or a resident's disability if the applicant or resident requests a reasonable accommodation. See Questions 17 and 18 below.

17. What kinds of information, if any, may a housing provider request from a person with an obvious or known disability who is requesting a reasonable accommodation?

A provider is entitled to obtain information that is necessary to evaluate if a requested reasonable accommodation may be necessary because of a disability. If a person's disability is obvious, or otherwise known to the provider, and if the need for the requested accommodation is also readily apparent or known, then the provider may not request any additional information

about the requester's disability or the disability-related need for the accommodation.

If the requester's disability is known or readily apparent to the provider, but the need for the accommodation is not readily apparent or known, the provider may request only information that is necessary to evaluate the disability-related need for the accommodation.

> **Example 1:** An applicant with an obvious mobility impairment who regularly uses a walker to move around asks her housing provider to assign her a parking space near the entrance to the building instead of a space located in another part of the parking lot. Since the physical disability (*i.e.*, difficulty walking) and the disability-related need for the requested accommodation are both readily apparent, the provider may not require the applicant to provide any additional information about her disability or the need for the requested accommodation.
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> **Example 2:** A rental applicant who uses a wheelchair advises a housing provider that he wishes to keep an assistance dog in his unit even though the provider has a "no pets" policy. The applicant's disability is readily apparent but the need for an assistance animal is not obvious to the provider. The housing provider may ask the applicant to provide information about the disability-related need for the dog.
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> **Example 3:** An applicant with an obvious vision impairment requests that the leasing agent provide assistance to her in filling out the rental application form as a reasonable accommodation because of her disability. The housing provider may not require the applicant to document the existence of her vision impairment.

18. If a disability is not obvious, what kinds of information may a housing provider request from the person with a disability in support of a requested accommodation?

A housing provider may not ordinarily inquire as to the nature and severity of an individual's disability (*see* Answer 16, above). However, in response to a request for a reasonable accommodation, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (*i.e.*, has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation. Depending on the individual's circumstances, information verifying that the person meets the Act's definition of disability can usually be provided by the individual himself or herself (*e.g.*, proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits[10] or a credible statement by the individual). A doctor or other

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[10] Persons who meet the definition of disability for purposes of receiving Supplemental Security Income ("SSI") or Social Security Disability Insurance ("SSDI") benefits in most cases meet the definition of disability under the Fair Housing Act, although the converse may not be true. *See e.g.*, Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 797 (1999)

medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability. In most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry.

Once a housing provider has established that a person meets the Act's definition of disability, the provider's request for documentation should seek only the information that is necessary to evaluate if the reasonable accommodation is needed because of a disability. Such information must be kept confidential and must not be shared with other persons unless they need the information to make or assess a decision to grant or deny a reasonable accommodation request or unless disclosure is required by law (*e.g.*, a court-issued subpoena requiring disclosure).

19. If a person believes she has been unlawfully denied a reasonable accommodation, what should that person do if she wishes to challenge that denial under the Act?

When a person with a disability believes that she has been subjected to a discriminatory housing practice, including a provider's wrongful denial of a request for reasonable accommodation, she may file a complaint with HUD within one year after the alleged denial or may file a lawsuit in federal district court within two years of the alleged denial. If a complaint is filed with HUD, HUD will investigate the complaint at no cost to the person with a disability.

There are several ways that a person may file a complaint with HUD:

- By placing a toll-free call to 1-800-669-9777 or TTY 1-800-927-9275;

- By completing the "on-line" complaint form available on the HUD internet site: http://www.hud.gov; or

- By mailing a completed complaint form or letter to:

    Office of Fair Housing and Equal Opportunity
    Department of Housing & Urban Development
    451 Seventh Street, S.W., Room 5204
    Washington, DC 20410-2000

(noting that SSDI provides benefits to a person with a disability so severe that she is unable to do her previous work and cannot engage in any other kind of substantial gainful work whereas a person pursuing an action for disability discrimination under the Americans with Disabilities Act may state a claim that "with a reasonable accommodation" she could perform the essential functions of the job).

Upon request, HUD will provide printed materials in alternate formats (large print, audio tapes, or Braille) and provide complainants with assistance in reading and completing forms.

The Civil Rights Division of the Justice Department brings lawsuits in federal courts across the country to end discriminatory practices and to seek monetary and other relief for individuals whose rights under the Fair Housing Act have been violated. The Civil Rights Division initiates lawsuits when it has reason to believe that a person or entity is involved in a "pattern or practice" of discrimination or when there has been a denial of rights to a group of persons that raises an issue of general public importance. The Division also participates as *amicus curiae* in federal court cases that raise important legal questions involving the application and/or interpretation of the Act. To alert the Justice Department to matters involving a pattern or practice of discrimination, matters involving the denial of rights to groups of persons, or lawsuits raising issues that may be appropriate for *amicus* participation, contact:

U.S. Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section – G St.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

For more information on the types of housing discrimination cases handled by the Civil Rights Division, please refer to the Housing and Civil Enforcement Section's website at http://www.usdoj.gov/crt/housing/hcehome.html

A HUD or Department of Justice decision not to proceed with a Fair Housing Act matter does not foreclose private plaintiffs from pursuing a private lawsuit. However, litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and the Department of Justice encourage parties to Fair Housing Act disputes to explore all reasonable alternatives to litigation, including alternative dispute resolution procedures, such as mediation. HUD attempts to conciliate all Fair Housing Act complaints. In addition, it is the Department of Justice's policy to offer prospective defendants the opportunity to engage in pre-suit settlement negotiations, except in the most unusual circumstances.

11-0762

March 2006

Fact Sheet:

Alcohol- and Drug-Free Housing (Sober Living)

General Information

Alcohol- and drug-free houses (also known as sober living) are important in supporting treatment and recovery services in a community by helping recovering persons to maintain an alcohol- and drug-free lifestyle. Residents are free to organize and participate in self-help meetings or any other activity that helps them maintain sobriety. The house or its residents: do not and cannot provide any treatment, recovery, or detoxification services; do not have treatment or recovery plans or maintain case files; and do not have a structured, scheduled program of alcohol and drug education, group or individual counseling, or recovery support sessions. Persons typically become residents of an alcohol- and drug-free house after being in a licensed non-medical residential alcohol or other drug recovery or treatment facility. However, participation in a licensed facility is not necessarily a prerequisite for residency.

Alcohol- and drug-free houses are not required to be licensed nor are they eligible for licensure. By definition, they do not provide alcohol or drug recovery or treatment services and are, therefore, not subject to regulation or oversight by the State Department of Alcohol and Drug Programs (ADP).

These houses have three things in common:

- They ensure that a person who is in recovery lives in an environment that is free from alcohol and drug use.
- The residents themselves reinforce their recovery through support with other recovering persons.
- The residents are free to voluntarily pursue activities to support their recovery, either alone or with others.

If you need an alcohol- and drug-free house

General information about alcohol- and drug-free housing is useful; however, personal investigation is essential. If you are interested in a particular house, you may wish to consider whether:

- The house appears clean and well maintained.
- There is a rental agreement for each resident, signed by the owner, representative, or landlord, and the resident, that shows clearly the amount of any deposit, refund policy, rent payment schedule, policy on return of rent if a person leaves, and housekeeping duties.
- There are other conditions of residency.
- There is a written policy dealing with use of alcohol or other drugs.
- Local planning officials have any record of local ordinance violations at the house.
- Residents, or former residents, who are willing to speak with you about their experience with the house, have good things to say about it.
- It is recommended to you by the staff of a licensed facility, by the county alcohol or drug program administrator, or by other personal contacts knowledgeable about alcohol or drug abuse treatment or recovery.

Licensing and Certification Division
Residential and Outpatient Programs
Compliance Branch

California Dept. of Alcohol and Drug Programs
1700 K Street, Sacramento, CA 95814

Phone: (916) 322-2911
FAX: (916) 322-2658; TDD: (916) 445-1942

Landlord/Tenant Rules

Alcohol- and drug-free houses are subject to landlord/tenant laws in California, and may be subject to zoning and other requirements of the local jurisdiction. The "Guide to Housing" referenced below recommends that you check local laws carefully and, with the help of an attorney, determine how the laws might apply to your situation. For example, if you want to start an alcohol- and drug-free living house you might need to know how to design a rental agreement to allow for prompt eviction for violation of house rules when eviction is necessary. You may want to become familiar with the more applicable laws that include the following:

- California Civil Code beginning with Section 53 and California Government Code beginning with Section 12980 (nondiscrimination in housing);
- California Civil Code beginning with Section 1940 (landlord/tenant laws);
- California Code of Civil Procedure beginning with Section 1159 (eviction procedures); and
- Public Law 100-430 (Federal Fair Housing Amendments Act; forbids discrimination on basis of disability in sale, rental, zoning, land use restriction, and other rules).

Other sources of information about alcohol- and drug-free houses

➢ **Department of Alcohol and Drug Programs**
Resident Run Housing Programs
1700 K Street
Sacramento, CA 95814-4037

The ADP offers a loan program whereby a nonprofit organization may apply for a loan of up to $4,000 to cover start-up expenses for a home with six or more residents. The loan is repayable over a two-year period, and is interest free.

➢ **California Association of Addiction Recovery Resources**
2129 Fulton Avenue
Sacramento, CA 95821
(916) 338-9460

This association has a guideline for establishing and operating an alcohol- and drug-free house.

➢ **Sober Living Network**
P.O. Box 5235
Santa Monica, CA 90409
(310) 396-5270

The network serves as an information resource for local community sober living coalitions and individual homes.

➢ **County alcohol and drug programs**

Each county in California has a program which can be found listed in the County Government Section of the telephone directory's white pages or by calling the County Health Department's general information number.

➢ **Oxford House Inc.**
P.O. Box 994
Great Falls, VA 22066-0994

An Oxford House is a self-governing alcohol-and drug-free house chartered by Oxford House, Inc. The first Oxford House was founded in 1975 by the residents themselves. Oxford House, Inc., will issue a charter to a group wishing to organize an Oxford House. They should be able to direct you to the nearest chartered Oxford House.

➢ **A Guide to Housing for Low Income People Recovering from Alcohol and Other Drug Problems. U.S. Department of Public Health Services, National Institute on Alcohol Abuse and Alcoholism, 5600 Fishers Lane, Rockville, MD 20857.**

11-0762

Fair Housing for Sober Living: How the Fair Housing Act Addresses Recovery Homes for Drug and Alcohol Addiction

Matthew M. Gorman,*
Anthony Marinaccio,** and
Christopher Cardinale†

MUNICIPALITIES AND COUNTIES across the country are familiar with the Fair Housing Act ("FHA") which, generally speaking, forbids discrimination in housing based upon disabilities. Because "disability" has been interpreted as including individuals recovering from drug or alcohol addiction, discriminatory housing practices involving recovering addicts is forbidden. "Sober living homes" function under the belief that housing addicts in an environment that fosters recovery, such as low crime, drug free, single family neighborhoods, is essential to the success of any addict's treatment. When community members and neighborhood residents object, raising public safety concerns, municipalities and counties must address how the FHA affects local government's authority to regulate alcohol and drug recovery facilities in residential neighborhoods. This article summarizes the legal characteristics of sober living homes and their relation with the FHA. In particular, this article illustrates how the FHA can be used by owners of sober living homes to lawfully operate a facility, by neighbors and concerned residents to control the growth of sober living homes, and by local governments to balance the interests of both groups.

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I. What is a Sober Living Home?

The facilities and operators of individual sober living homes vary greatly, but it is often argued that the location of the home in a single-family neighborhood is critical to fostering addiction recovery by avoiding the temptations other environments can create.[1] The organizational design of sober living facilities also differs, ranging from the private landlord renting his home to recovering addicts, to corporations operating several full-time treatment centers across the country and employing professional staff.[2]

Because of the vast diversity in location and structure, the sober living model can be easily abused by landlords seeking to maximize rents. Because nearly any single family home can become a "sober living home" by adopting that label, some single family homes house upwards of twenty or thirty individuals under the guise of "sober living"; in reality, they provide little in the way of actual treatment. This makes regulation of sober living homes by public agencies difficult, as they are forced to differentiate between legitimate homes and those abusing the system. Additionally, public agencies are forced to deal with public outrage often inspired by homes located in their communities. Complications are compounded by various state licensing provisions that regulate facilities providing care for the disabled or for those recovering from addiction.

II. How Does the FHA Apply to Sober Living Homes?

As amended in 1988, the FHA prohibits housing discrimination on the basis of "handicap," which is defined as: "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance."[3]

1. Oxford House v. Twp. of Cherry Hill, 799 F. Supp. 450, 453, 456 (D.N.J. 1992) (quoting testimony of Mr. Regan, Executive Director of the Governor's Council on Alcoholism and Drug Abuse for the State of New Jersey).

2. *See* Oxfordhouse.org, Self-Help for Sobriety Without Relapse, http://www.oxfordhouse.org/userfiles/file/oxford_house_history.php (last visited July 16, 2010) (among the most prevalent sober living homes is the Oxford House network. Each Oxford House facility is an independent organization, but the umbrella organization serves as a network connecting approximately 1,200 self-sustaining homes and serving 9,500 people at any one time).

3. 42 U.S.C. § 3602(h) (2009).

Congress enacted the Rehabilitation Act a few years prior to the FHA and clearly included "Individuals who have a record of drug use or addiction" in their definition of "disabled" under the Act.[4] Because Congress incorporated many terms of the Rehabilitation Act into the FHA, courts have included drug and alcohol addiction in their definition of "physical or mental impairment" under the FHA. For example, the Ninth Circuit has held that "[i]t is well established that individuals recovering from drug or alcohol addiction are handicapped under the [FHA] Act."[5]

A. *Establishing Alcohol or Drug Addiction As a Disability Under the FHA*

Demonstrating a disability under the FHA requires a plaintiff to "show: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of having such an impairment; or (3) that the plaintiffs are regarded as having such an impairment."[6] To be substantially limited, the impairment must prevent or severely restrict the person from activities that are centrally important to most people's lives, and it must be long term.[7] Current drug and alcohol use, judged at the time the alleged discrimination occurred, are specifically excluded from protection under the FHA.

B. *Nexus Between the Addiction Disability and Housing Need*

To qualify for FHA protection, in addition to establishing a disability, a *nexus* linking the treatment of the disability with the need for housing must be shown. In the context of sober living homes, this nexus exists when living at a particular location, for example in a single-family neighborhood, is a means of treating the alcohol or drug disability. Specifically, proponents of sober living homes allege that such environments foster sobriety and encourage trust and camaraderie between home residents. Courts have routinely agreed with this theory.[8] This broad application of the FHA opens the door to any a number of living arrangements. Essentially, FHA protections might extend anywhere a

4. *See Oxford House*, 799 F. Supp. at 459.
5. Corp. of the Episcopal Church in Utah v. W. Valley City, 119 F. Supp. 2d 1215, 1219 (D. Utah 2000).
6. Reg'l Econ. Cmty. Action Program v. City of Middletown, 294 F.3d 35, 46 (2d Cir. 2001).
7. *See id.* at 47.
8. *Id.*

sober environment is provided or where support for addiction recovery is encouraged.

C. *What Locations May Qualify as Sober Living Homes Protected by the FHA?*

Despite the broad application of FHA protections, there are some limitations to the Act. First, the FHA only applies to "dwellings," which includes "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families."[9] This definition is important because while "dwellings" are protected, "shelters" and other temporary housing are not. Thus, because of the short-term care provided at sober living facilities and the high turnover rate at the facilities, facilities resembling "shelters" rather than "dwellings" are not protected.

There are two factors for determining whether a facility constitutes a "dwelling": (1) whether the facility is intended or designed for occupants intending to remain for a significant period; and (2) whether the occupants of the facility view it as a place to return.[10] Courts typically define a "significant period of time" as longer than a typical hotel stay, but it can possibly be as short as two weeks.[11] Courts also analyze the extent to which the occupants treat the facility as their home, and whether they perform tasks such as cooking, cleaning, and laundry at the site. Accordingly, while boarding homes, halfway houses, flop houses, and similar locations have been found to be "dwellings" under the FHA,[12] homeless shelters and other similar locations are not protected.[13]

III. How Does the FHA apply to a Sober Living Home?

FHA violations are established either (1) by showing *disparate impact* based upon a practice or policy; or (2) by "showing that the defendant failed to make *reasonable accommodation* in rules, policies, or practices so as to afford people with disabilities an equal opportunity to live in a dwelling."[14]

9. 42 U.S.C. § 3602(b) (2009).
10. *See* Lakeside Resort Enters., LP v. Bd. of Supervisors, 455 F.3d 154, 158 (3d Cir. 2006).
11. *See id.* at 159.
12. *See* Schwarz v. City of Treasure Island, 544 F.3d 1201, 1214 (11th Cir. 2008).
13. *See* Johnson v. Dixon, 786 F. Supp. 1, 4 (D.D.C. 1991).
14. Corp. of the Episcopal Church in Utah v. W. Valley City, 119 F. Supp. 2d 1215, 1219 (D. Utah 2000) (emphasis added).

A. *Disparate Impact*

To establish a disparate impact a plaintiff must demonstrate that the challenged practice or policy actually or predictably resulted in discrimination.[15] If this is established, the burden shifts to the defendant (the municipality denying a permit for a sober living home) to prove its actions further a legitimate government interest with no alternative, less discriminatory means to serve that purpose.[16] Additionally, a more substantial government justification is required to deny plaintiffs requesting mere removal of an obstacle to housing, as opposed to some affirmative action.[17] Sober living homes often have difficulty proving a disparate impact in areas zoned to exclude other group living arrangements such as fraternity or sorority houses.[18] To prevail, the sober living home would have to prove the exclusion disparately impacts substance abusers more so than those living under different group arrangements.[19]

Regardless of this barrier, evidence of discriminatory intent makes proving a disparate impact substantially easier. Records of council meetings containing discriminatory statements against alcoholics have been found to be sufficient evidence of intent to discriminate.[20] In such situations, courts are quick to find in favor of sober living homes asserting disparate impact claims.[21]

B. *Reasonable Accommodation*

The FHA also requires "reasonable accommodation in rules, policies, practices, or services, when such accommodation may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling."[22] An accommodation is reasonable if it does not cause undue hardship, fiscal, or administrative burdens on the municipality, or does not undermine the basic purpose a zoning ordinance seeks to achieve.[23] A three-part test is applied to determine whether a reasonable accommodation is necessary: (1) the accommodation must be

15. Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993).
16. *Id.*
17. *Id.* at 1185.
18. *See id.*
19. *Corp. of the Episcopal Church in Utah*, 119 F. Supp. 2d at 1215, 1220.
20. *Town of Babylon*, 819 F. Supp. at 1179, 1181.
21. *Id.*
22. *Id.* at 1185 (citing 42 U.S.C. § 3604(f)(3)(B)).
23. Oxford House, Inc. v. Twp. of Cherry Hill, 799 F. Supp. 450, 463-66 (D.N.J. 1992).

reasonable and (2) necessary, and must, (3) allow a substance abuser equal opportunity to use and enjoy a particular dwelling.[24] Courts also consider the governmental purposes of the existing ordinance or action, and the benefits or accommodation to the handicapped individual.[25] Under this scheme, municipalities must change, waive, or make exceptions in their zoning rules to afford people with disabilities the same access to housing as those who are without disabilities.[26] However, fundamental or substantial modifications to municipal or zoning codes are not required.[27]

C. *Standing and Exhaustion of Remedies*

The first hurdle plaintiffs must establish when challenging an ordinance or decision by a government body is whether the plaintiff has *standing*. Any "aggrieved person"—one who has been injured by a discriminatory housing practice—may bring suit to seek relief for a discriminatory housing practice.[28] An organization can also bring a suit under the FHA when its purpose is frustrated and when it expends resources because of a discriminatory action.[29] For example, if a discriminatory practice has injured an organization's outreach program, the organization would have standing to sue on its own behalf.[30] Additionally, traditional organization standing exists to allow suits on behalf of organization members.[31]

In addition, there is another barrier to asserting claims under the FHA. "Plaintiffs must first provide the governmental entity an opportunity to accommodate them through the entity's established procedures used to adjust the neutral policy in question."[32] However, a plaintiff is not required to appeal a decision through the local body appellate processes, and may bring suit when accommodation is first denied.[33]

24. *Corporation of Episcopal Church in Utah*, 119 F. Supp. 2d at 1221.
25. *Id.*
26. *Town of Babylon*, 819 F. Supp. at 1186; Horizon House Developmental Serv. Inc., v. Twp. of Upper Southampton, 804 F. Supp. 683, 699 (E.D. Pa. 1992).
27. Sanghvi v. City of Claremont, 328 F.3d 532 (9th Cir. 2003) (ruling that the plaintiffs presented no evidence from which the jury could conclude that the requested accommodation was required for Alzheimer's patients); *see also* City of Edmonds v. Wash. State Bldg. Code Council, 18 F.3d 802, 806 (9th Cir. 1994).
28. CAL. GOV'T. CODE § 12989.1 (West 2010).
29. Fair Hous. of Marin v. Combs, 285 F.3d 899, 903 (9th Cir. 2002).
30. *Id.* at 905.
31. Smith v. Pacific Props. & Dev. Corp., 358 F.3d 1097, 1101 (9th Cir. 2004).
32. Tsombanidis v. W. Haven Fire Dept., 352 F.3d 565, 578 (2d Cir. 2003).
33. Bryant Woods Inn v. Howard County, 124 F.3d 597, 601-02 (4th Cir. 1997).

IV. Pitfalls and Possibilities in Regulating Sober Living Sites

The interests of individuals recovering from addiction and the interests of community residents seeking to preserve the "family-friendly" character of their neighborhoods are pitted against each other in any FHA case. Faced with these competing interests, local jurisdictions must use discretion in making decisions to regulate sober living homes so as not to violate FHA restrictions. The first challenge facing local agencies seeking to regulate sober living homes is the lack of a standard land use definition for such facilities. Local agencies must categorize the facilities within existing land use definitions such as "boarding houses," "rooming houses," or other types of "group living facilities." These land uses often require conditional use permits or other discretionary approval from the city or county. However, zoning restrictions of this type are subject to limitations.[34] Municipalities faced with a problematic sober living home may, depending upon the zoning restriction in place, classify the facility as an unpermitted zoning house, assert the facility is an unlawful multi-family use, or claim the facility operates a "business" akin to a hotel or hostel that is prohibited in residential zones. Another option is to attempt to use local or state building and housing codes, or other codes associated with land use laws and regulations to restrict the facility's operation.

In response to such local government action, sober living facilities may assert disparate impact or reasonable accommodation claims, or both, under the FHA.[35] The success of these claims, however, may be affected by specific exemptions contained in the FHA. For example, local, state, and federal restrictions regarding the maximum number of occupants permitted in a dwelling are specifically exempted under the FHA.[36] The occupancy limits considered reasonable are often determined by building inspectors or health and safety inspectors.[37] An additional exemption in the FHA allows housing developments for older persons ("HOP") and discrimination based upon family status.[38] If the

34. Turning Point, Inc., v. City of Caldwell, 74 F.3d 941 (9th Cir. 1996).
35. Oxford House, Inc. v. Twp. of Cherry Hill, 799 F. Supp. 450, 450 (D.N.J. 1992).
36. 42 U.S.C. § 3607(b)(1) (2009).
37. *Turning Point, Inc.*, 74 F.3d at 941.
38. Gibson v. County of Riverside, 181 F. Supp. 2d 1057, 1072 (C.D. Cal. 2002) (holding county did not qualify for 55-or-over HOP exception and therefore its actions in enacting ordinance imposing age restrictions on persons occupying dwelling units in certain areas violated the FHA prohibition on familial-status based discrimination).

housing development meets the qualifications of an HOP established by Congress, ordinances discriminating based upon age are valid.[39]

Exemptions under the FHA do allow cities some leeway in enforcing zoning and planning schemes. However, because exemptions are exceptions to the general rule prohibiting discrimination, the exceptions are construed narrowly.[40]

V. Unanswered Questions

While cases have done much to flesh out the application of the FHA in the context of sober living regulation, much remains unanswered. For example, while cities and counties may seek to strictly apply the FHA in order to limit the establishment of sober living facilities, courts have not addressed whether doing so violates those agencies' housing requirements, including obligations to maintain adequate affordable housing and to meet regional housing needs allocations.[41]

Perhaps more importantly, no cases have addressed whether the FHA applies to "specialized" residential sites, such as locations which exclusively house parolees or probationers, locations which house sex offenders, or locations commonly known as "reentry facilities," which serve as transitional housing for those recently released from prison who are seeking to transition into "normal" life. Such facilities have increased over the past several years, and may increase dramatically in the near future, given the government plans to reduce prison overcrowding[42] and federal court-ordered reductions in prison populations. Additionally, the downturn in the economy may also cause a dramatic increase in the number of facilities. Because sober living homes provide a "safe haven" for such individuals, a rise in sober living facilities can be expected.

39. *Id.* at 1075-76.

40. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995) (exception to "a general statement of policy" is sensibly read "narrowly in order to preserve the primary operation of the [policy]").

41. CAL. GOV'T. CODE §§ 65580, 65913 (West 2010).

42. *See, e.g.*, American Legislative Exchange Council, A Plan to Reduce Prison Overcrowding and Violent Crime (July 2007), http://www.alec.org/am/pdf/ALEC-state-factor-bail.pdf.

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The Fair Amendments Act of 1988 and Group Homes for the Handicapped

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By John H. Foote

Hazel & Thomas, P.C., Manassas, Virginia

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Introduction. Regulation of group homes for persons with one or more handicapping conditions, is a volatile issue throughout the United States. Since the General Assembly's first foray into the field in 1977, directing certain local zoning controls over group homes for the mentally ill, mentally retarded, and developmentally disabled (see Va. Code Ann. § 15.1-486.2, now repealed, and its current version, § 15.1-486.3), there have been major changes in federal law with direct impact on local authority to deal with the location and control of group homes. Indeed, that law now creates significant and important restrictions on the extent of permissible local regulation. This article outlines the current state of affairs affecting group homes for the handicapped. It offers clear warning to local governments that ordinances and policies which are discriminatory in purpose or effect, or which fail to make reasonable accommodation for the needs of the handicapped, can have costly consequences.

Congregate living arrangements among unrelated people are nothing new, of course, nor is their treatment by the courts. There has been legislation and litigation over what constitutes a "family" for years. Localities are not powerless to define the term: more than twenty years ago, the United States Supreme Court held that local ordinances defining "family" to mean one or more persons related by blood, adoption or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit, are constitutional. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). But facially neutral classifications can have unintended results or affirmatively discriminatory purposes or effects, and not long after Belle Terre, the Court held that a definition of "family" which criminalized a grandmother's desire to live with her two grandsons -- who were not brothers but cousins -- was an unconstitutional deprivation of her due process rights. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

The Fair Housing Amendments Act. Restrictions on the definition of family, however, are only one aspect of America's approach to housing and housing discrimination. For many years Congress has made it national policy to eliminate such discrimination in all its forms, through the Fair Housing Act of 1968. The original Act (Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619) banned, among other things, housing discrimination on the basis of race, color, religion, and national origin, and provided for a variety of enforcement mechanisms. The Act was amended in 1974 and again in 1988, however, and it was these latter changes, known as the Fair Housing Amendments Act of 1988 (the "FHAA"), which made truly substantive revisions in the law, and which form the source of the principal restrictions on local control of group homes. See PL 100-430, 102 Stat. 1619 (1988), 42 U.S.C. 3601, et seq.

Even before the FHAA, the United States Supreme Court had held in City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), that the Equal Protection Clause prohibits a city from requiring a special use permit for group homes for mentally retarded persons, when such permits are not required for other similar residential uses. But it was the FHAA which truly altered the landscape. Drawing heavily on existing law with respect to handicap discrimination in federally-supported programs (See § 504 of the

Rehabilitation Act of 1973, 29 U.S.C. 701), the Act made it unlawful for any one of a number of covered entities, including local governments

to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of --

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented or made available; or

(C) any person associated with that buyer or renter.

42 U.S.C. 3604(f)(1).

The Act defines discrimination to include not only traditional discriminatory practices, but also "refusal 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). While localities need not do everything humanly possible to accommodate a disabled person, the "reasonable accommodation" requirement imposes affirmative duties to modify local requirements when they discriminate against the handicapped. Liddy v. Cisneros, 823 F. Supp. 164, 176 (S.D. NY 1993).

The Act defines handicap extremely broadly as

(1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment.

Although there are exceptions to this definition, including those "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others" (42 U.S.C. 3604(f)(9)), and people afflicted with the "current, illegal use of or addiction to a controlled substance" (42 U.S.C. § 3602(h)), handicap does include people who take drugs legally, or people who were once, but no longer are, illegal drug users. United States v. Southern Management Corp., 955 F.2d 914, 919-23 (4th Cir. 1992).

Congress understood that one of the central problems for the establishment of group homes is baseless hostility on the part of neighbors and even local governments themselves. It manifestly intended, therefore, to preempt state and local laws which effectuated or perpetuated housing discrimination. The House Judiciary Committee said that

[t]he FHAA, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion. . . .

While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment of or imposition of health,

safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discrimination against persons with disabilities. The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decision and practices. The Act is intended to prohibit the application of special requirements through land-use regulation, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individual to live in the residence of their choice in the community . . . . Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities. Such discrimination often results from false or overprotective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited.

House Committee on the Judiciary, Fair Housing Amendments Act of 1988, H.R. Rep. No. 711, 100th Cong. 2d Sess., at 18, 24. Thus, with specific regard to the exercise of local powers, the Act says clearly that "[a]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. 3615 (emphasis supplied).

Judicial treatment of "handicap." The decisions interpreting the FHAA have been far reaching in determining what constitutes a handicap. In fact, it is difficult to conceive a disability that does not constitute a handicap. Thus the FHAA has been held to cover not only rather obviously handicapped folks, such as the wheelchair-bound, or visually impaired, but also those who are disadvantaged by alcoholism and drug addiction (e.g.,Oxford House v. Township of Hill, 799 F. Supp. 450 (D. N.J. (1991)), those beset by emotional problems and mental illness or retardation (e.g.,Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth, 876 F. Supp. 614 (D. N.J. 1994)), and old age. United States v. Commonwealth of Puerto Rico, 764 F. Supp. 220, 224 (D.P.R. 1991). It extends to communicable diseases, including AIDS and HIV. Support Ministry v. Village of Waterford, 808 F. Supp. 120, 133-35 (N.D. N.Y. 1992). The homeless can be deemed handicapped, if only because their homelessness is related to other, specific handicaps. Stuart B. McKinney Foundation v. Town of Fairfield, 790 F. Supp. 1197 (D. Conn. 1992).

It has been estimated that one out every six persons in America is handicapped under this definition. Housing Discrimination: Law and Litigation, by Robert G. Schwemm (Clark, Boardman, Callaghan 1990), § 11.5(2), p. 11-56.

4. Judicial Treatment of Discriminatory Housing Practices. FHAA group home cases turn on one -- or more frequently all -- of three different theories: discriminatory intent, discriminatory effect, or failure to make "reasonable accommodation" to the needs of the handicapped. While the decisions often involve all three, there are several identifiable subclassifications of FHAA cases worthy of note.

Family composition rules. Many cases involve local ordinance definitions of "family" that preclude group homes. Rarely do these definitions survive scrutiny in the group home context. Although lower courts had been roughly handling "family composition rules" for some time, in City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995) the Supreme Court held that such rules are plainly subject to the FHAA and while limitations on unrelated residents is not per se invalid, they must be scrutinized carefully for their discriminatory intent or effect.

An example of these cases is Oxford House v. Township of Cherry Hill, 799 F. Supp. 450 (D. N.J. 1991), the federal court rejected a state court ruling that residents of a group home for recovering alcoholics were not a single family under the Township's ordinance, and that they were not handicapped. The court noted that those handicapped by alcoholism or drug abuse are persons more likely than others to need a living arrangement in which sufficiently large groups of unrelated people live together in residential neighborhoods for mutual support during the recovery process. The Township produced no evidence of a

nondiscriminatory reason for its position. See also Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D. N.J. 1991)(nine residents necessary to make a group home for recovering alcoholics viable.)

Special use permits and the imposition of restrictive conditions. Several cases have involved requirements for special use permits, or the imposition of particular conditions on those permits. While the Eastern District of Virginia has held that the mere requirement for a special use permit does not violate the Act (Oxford House v. City of Virginia Beach, 825 F. Supp. 1251 (E.D. Va. 1993)), in fact courts rarely uphold denials of such permits, or the imposition of burdensome conditions. In Bangerter v. Orem City, Utah, 46 F.3d 1491 (10th Cir. 1995), for example, the court of appeals found that requirements that a group home for mentally retarded adults give assurances its residents would be properly supervised on a 24-hour-a-day basis, and that the home establish a community advisory committee to deal with neighbor's complaint, were not imposed on other communal living arrangements under the City's zoning ordinance, and were intentionally discriminatory.

In Turning Point, Inc. v. City of Caldwell, Idaho, 74 F.3d 941 (9th Cir. 1996), the City asserted that a homeless shelter for 16 residents in a single-family district was a "boarding house" that required a special use permit to exceed twelve persons. A permit was granted, but for a limited number of residents, and subject to requirements for resident staff, parking spaces, a new sidewalk and landscaping and an annual review of the permit. The court rejected these restrictions as having no relationship to legitimate zoning purposes, and set occupancy at 25 based on testimony from the Fire Chief. It reduced the parking requirement, eliminated the sidewalk and landscaping, and struck the annual review requirement. See also Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43, 46-48 (6th Cir. 1992) (invalidating requirement that a home for four mentally retarded adult women install an alarm system interconnected to ceiling sprinkler system, doors with push bars swinging outwards with lighted exit signs, and fire walls and flame retardant wall coverings, as based on false and overprotective assumptions); North Shore-Chicago Rehabilitation, Inc. v. Village of Skokie, 827 F. Supp. 497, 499-502 (N.D. Ill. 1993) (enforcement of requirements on home for traumatically brain-damaged adults that home consist of five or fewer residents on a permanent basis, with paid professional staff, license from state, local occupancy permit and compliance with local, was discriminatory and constituted a failure to make reasonable accommodation).

Dispersal requirements. A number of localities have imposed requirements that group homes be geographically dispersed in an effort to deinstitutionalize target populations. Dispersal rules do not generally survive. In Larkin v. State of Michigan, 883 F. Supp. 172, 177 (E.D. Mich. 1994) a state statutory scheme precluded issuance of a license if it would "substantially contribute to an excessive concentration" of such facilities, and required notification be given to the City Council to review the number of existing and proposed facilities within 1500 feet of a proposed facility and to its neighbors. The City argued that its dispersal requirement prevented formation of "ghettos" and normalized the environment. The Court found no rational legal basis for these provision, and held that they were facially discriminatory, since "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."

In United States v. Village of Marshall, 787 F. Supp. 872, 878 (W.D. Wis. 1991), a Wisconsin statute required that group homes be separated by 2,500 feet. A group home for six mentally ill persons was proposed 1619 feet from another existing home. The trial court found no evidence to support this requirement and held that the reasonable accommodation requirement mandated the grant of permission.

In Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth, 876 F. Supp. 614, 622-23 (D. N.J. 1994) a state statute permitted six residents but required a special use permit for more than six, but which could be denied if located within 1500 feet of an existing residence or community shelter for victims of domestic violence, or the number of persons other than resident staff residing at the existing residence exceed the greater of 50 persons or .5% of the municipal population. The court invalidated the statute on the ground that there was no evidence that developmentally disabled persons present a danger to the community: "The record is devoid of any evidence upon a fact finder could reasonably conclude that community residences housing more than six developmentally disabled persons

would detract from a neighborhood's residential character." See also Horizon House v. Township of Upper South Hampton, 804 F. Supp. 683, 695-97 (E.D. Pa. 1992) (aff'd without opinion, 995 F.2d 217 (3rd Cir. 1993) (1000 foot dispersal rule was on based unfounded fears about people with handicaps and facially invalid).

Not all courts have agreed with this approach. In Familystyle of St. Paul v. City of St. Paul, Minn., 923 F.2d 91 (8th Cir. 1991) the court was faced with a request for a special use permit to expand an existing campus of homes from 119 to 130 mentally ill persons. The City issued temporary permits on condition that Familystyle work to disperse its facilities consistently with Minnesota's deinstitutionalization policy which required that community residential facilities for the mentally impaired be located at least one-quarter mile apart. The court rejected the argument that the dispersal requirements impermissibly limited housing choices, holding that nondiscrimination and deinstitutionalization are compatible goals. Contrary to the legislative history and treatment by other courts, the Eight Circuit suggested that the FHAA did not intend simply to eliminate state and local zoning authority.

Neighbor notification requirements. Yet another class of cases has involved requirements that neighbors be specifically notified of the advent of group homes. None of these schemes has survived. In Potomac Group Home v. Montgomery County, 823 F. Supp. 1285, 1296-99 (D. Md. 1993), the court struck a requirement that neighbors of each group home adjacent and opposite and neighborhood civic associations be notified prior to the location of a group home for disabled elderly, as unsupported by legitimate justification. "The requirement is as offensive as would be a rule that a minority family give notification and invite comment before moving into a predominantly white neighborhood." See also Horizon House, supra, (notification requirement based on discriminatory intent and effect and violation of reasonable accommodation rule).

Reasonable accommodation requirements. Finally, a special subset of cases have involved a locality's failure to make "reasonable accommodation" for the needs of the handicapped. The Act requires localities to make such accommodation by amendment to or variance of local ordinances and policies when they stand in the way of the location and operation of group homes. An accommodation is reasonable unless it requires a "fundamental alteration in the nature of a program or imposes undue financial and administrative burdens." Southeastern Community College v. Davis, 442 U.S. 397, 410-412 (1979) (interpreting § 504 of the Rehabilitation Act). Mere adherence to existing zoning requirements and land use policies is generally insufficient to protect the locality, if those requirements and policies contravene the Act. A good example of the extent to which the courts will go is Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3rd Cir. 1996), where the court of appeals said there that although "what the 'reasonable accommodation' standard requires is not a model of clarity", a failure to amend ordinances to permit nursing homes for handicapped persons in residential zones is a failure to make reasonable accommodation.

In Judy B. v. Borough of Tioga, 889 F. Supp. 792, 799-800 (M.D. Pa. 1995), United Christian Ministries wanted to convert a motel into SROs for the disabled. They were denied a use variance, and the denial was upheld by the state courts, but the federal court held that the denial was a failure to make reasonable accommodation, and that changes must be affirmatively made so that people with handicaps may use and enjoy a dwelling. Granting a use variance would require an "extremely modest" accommodation in the zoning rules, and the proposed use was fundamentally consistent with the neighborhood. See also United States v. City of Philadelphia, 838 F. Supp. 223 (E.D. Pa. 1993), aff'd 30 F.3d 1488 (3rd Cir. 1994) (requirement for a rezoning constituted a failure to make reasonable accommodation).

While localities must make reasonable accommodations, it does appear that they must first be given an opportunity to do so. In United States v. Village of Palatine, Illinois, 37 F. 3d 1230 (7th Cir. 1994) the Oxford House program, which has a policy of refusing to seek local permits, declined to seek a required special use permit, The court held that it had never invoked the procedures that would have permitted reasonable accommodation to be made. See also Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996) (restriction to eight residents by-right not discriminatory, and Oxford House's refusal to apply for permits to house more than eight residents rendered reasonable accommodation claim unripe).

Neighborhood opposition as a defining characteristic. As has been suggested, there is frequently hostile citizen opposition to the location of group homes. It is perhaps fatal for the locality to accede to such pressure, which the courts invariably find to be based on groundless fears.

In Stuart B. McKinney Foundation v. Town of Fairfield, 790 F. Supp. 1197, 1221-22 (D. Conn. 1992) the court invalidated a requirement for a special exception for the use of a two-family residence as a home for seven HIV-positive persons. Despite efforts to act quietly, the location of the home was leaked to the press, and there was a large gathering at a local firehouse and much political uproar. The trial court noted that meetings were marked by many bigoted remarks. Subsequently, the Planning Director sent the home a letter asking thirteen questions, including inquiry into standards of admission, number of people who would live at the property, average anticipated length of residence, type of medical care, how the determination of departure date was made, leases, payment of rent and other expenses, staffing, services and facilities to be provided and transportation. The City admitted that there were no legitimate dangers to public health and safety from HIV-positive residents, and the court found that the City's practices evidenced a clear discriminatory intent. See also Support Ministry v. Village of Waterford, 808 F. Supp. 120, 133-35 (N.D. N.Y. 1992) (citizen opposition and government hostility manifested when Town passed ordinance to assure the defeat of a group home for AIDS victims and named opponents to the Zoning Board of Adjustment. Uncontradicted evidence showed that it was "[c]rystal clear" that local ordinance was enacted to prevent Support Ministries from establishing its home.)

In Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D. N.J. 1991), the Mayor and other city officials led hostile responses to a group home, and the Zoning Administrator had first announced that Oxford House was a permitted use but after a City Council meeting at which much opposition was expressed by the neighborhood, changed her position. The court found the City's conduct intentionally discriminatory.

A cautionary tale. Localities must not underestimate the time and difficulty that FHAA cases can cost. The lengthy saga of Smith & Lee Associates is instructive. The case involved efforts by a private group home operator to locate a foster care home for twelve elderly handicapped residents in a single family residential district. Michigan law authorized adult foster care homes for six or fewer residents in all residential neighborhoods, but in order to house more than six the home required local approval, which was denied.

The district court first held that the City had been guilty of discriminatory intent, disparate impact, and failure to make reasonable accommodation, and imposed a $50,000 civil penalty on the City. Smith & Lee Associates, Inc. v. Taylor, Michigan, 798 F. Supp. 442 (E.D. Mich. 1992). The court of appeals reversed. Smith & Lee Associates, Inc. v. Taylor, Michigan, 13 F.3d 920, 929-32 (6th Cir. 1993). It upheld the constitutionality of Taylor's definition of "family", and reversed the lower court's finding as to discriminatory intent. As to reasonable accommodation it concluded that the district court could not simply order the locality to advise Smith & Lee that it could proceed.

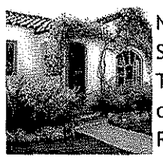
On remand, however, the district court again held that City had been motivated by discriminatory animus, and directed the City to amend its ordinance and to pay Smith & Lee profits from the impermissible limitation on the number of residents. United States v. City of Taylor, Michigan, 872 F. Supp. 423, 429-443 (E.D. Mich. 1995).

11-0762

Sober Living Homes Save Lives

THE SOBER LIVING DIALOGUE CONTINUES

Paul Dumont



Neighbors of a few poorly operated group homes persuaded Councilmember Greig Smith to propose an ordinance outlawing sober living homes in our neighborhoods. The 2007 Motion **[link]** sought to regulate Sober Living Homes and that file was closed as the matter was sent to the Planning Department Staff. Several Staff Reports followed. The January 2010 report stated "Staff considered alternative amendments to this definition as a way to regulate sober living homes as unlicensed group residential uses, and found that every alternative definition was fatally flawed. Every alternative considered was illegal, unenforceable, or discriminatory. In particular, some were too broad in their impact, such that several individuals living as roommates would be prohibited.

Other definitions, such as ones that require investigation of who uses what rooms or facilities in the household, are unenforceable." Greig Smith could not accept these facts, and the Planning Commission never considered that report.

In the three years Planning Staff was considering the issue, a handful of particular group homes were identified as nuisance properties, apparently the result of an after-the-fact search for justification for the regulation.

Most all of the specific addresses contained in the public file are not sober living homes at all. Rather, they range from a CSUN College Party House to sex offender homes.

The January 2010 report pointed out that the "vast majority" of sober living homes are "well integrated into their surrounding neighborhoods and do not cause problems."

Councilmember Smith's office worked in conjunction with the City Attorney's Nuisance Abatement Prosecutors to close these [non-sober living] homes in Council District 12, without the new proposed ordinance.

The October 2010 Staff Report completely reversed the January findings, and broadened the regulatory scope adding a definition of "Correctional or Penal Institution [as] ...any building...used for the housing...[of] persons under sentence from a federal, state or county court..." and required a Conditional Use Permit. In other words, if two or more people on probation lived together anywhere in LA, they would need a CUP.

The Department of Corrections and several prisoner/housing rights groups, and a flood of other opposition caused Planning Staff to eliminate those provisions entirely in the February 2011 Supplemental Staff Report. Provisions making it illegal for anyone to rent more than one room under separate agreements remain.

This proposal was presented to the Planning Commission and the motion to approve failed. Greig Smith, presented another motion, **[link]** Council File No. 11-0262, to assert jurisdiction over the failed proposal and that request is scheduled for a PLUM Committee Meeting March 29, 2011. **[link]**

Many groups including Association of Community Human Service Agencies, Shields for Families, Disability Rights California, Corporation for Supportive Housing, Shelter Partnership, LA County Department of Mental Health, AADAP Inc., CAADPE, United Homeless Healthcare Partners, So Cal Assoc Non Profit Housing, Walden House, Public Counsel, Amistad de Los Angeles, and the Inner City Law Center have all weighed in with comments and are opposed to the proposed ordinance. The Sober Living Coalition obviously opposes the proposal.

This regulatory attempt started with complaints about group homes mischaracterized as "sober living" homes. When City Planners realized sober living homes were not the problem, they changed the scope to "boarding houses".

Real sober living homes were not and are not the problem, and real sober living homes are not boarding houses. As proved by recent Nuisance Abatement actions existing laws are sufficient to address any problem properties, sober or not.

Problem home operators obviously do not follow existing laws, and any new law will only serve to create barriers to quality sober housing that has saved many lives in Los Angeles for decades, without negatively impacting our neighborhoods.

Licensed drug and alcohol treatment centers got caught up in the witch hunt and the current version of the ordinance limits occupancy to "two per bedroom", with no definition of bedroom or consideration of their existing licensed capacity.

The State Alcohol and Drug Program licensing agency was not consulted. No licensed treatment centers are identified in Planning's public records as causing any problems requiring action by our City.

Recovering drug addicts and alcoholics will be living somewhere in our City. The proposed ordinance only identifies where they cannot live. Pushing them out of single family neighborhoods (where evidence shows they are most effective) with insufficient capacity in multi-family zones is not a plan.

Once again, City Planning has failed to plan.

(Paul Dumont is a recovering alcoholic and Sober Housing Advocate. He can be reached at ***paulrdumont@hotmail.com*** *)* -cw

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VALLEY VOICES

Sober-living housing can be good neighbors

By Paul Dumont

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DRUG and alcohol rehabilitation program funding has been nearly eliminated in recent years in California. Proposition 36, approved by voters in 2000, has been stripped of money despite ample evidence the long-term financial benefits outweigh the relatively small investment in helping Californians trapped in addiction.

It's an easy political decision because most alcoholics and addicts are uninterested in politics while high.

Recent local, state and federal legislative actions have largely centered on budget deficit reductions. Social service programs will be gutted, leaving our nation's most vulnerable populations without the government safety net. The short-term savings will soon be forgotten and the lasting community problems will be devastating.

Billions of California's dollars will be taken away from welfare programs, the elderly, early childhood education and mental health. The people's need for these services will not go away with the funding. Nongovernmental providers will be struggling to fill the gap.

One type of social service program that is offered at no cost to government is sober-living housing. These social model recovery homes are supported by the residents themselves, as they should be. Typically people end up there after completing inpatient drug treatment programs or in conjunction with lower cost outpatient treatment. The homes are democratically managed by the residents.

The city of Los Angeles is considering an ordinance to regulate sober-living homes out of existence. The Community Care Facilities proposal would declare thousands of single-family homes in Los Angeles "boarding houses," banned in single-family neighborhoods. The ill-fated logic is that such uses are not appropriate for single-family zones and that these homes belong in multifamily areas.

There is no sufficient capacity in Los Angeles' multifamily zones to accommodate existing sober-living homes.

The very concept of sober living is to reintegrate people to our neighborhoods. Banishing them to high density areas runs counter to goals.

Recovering addicts and alcoholics function better in larger group settings and their chances of success are enhanced when located away from high-density zones where drugs are more readily available. Families move out of apartments into homes as they grow larger, and for many people in recovery this is their first real family.

Problem group homes can be dealt with

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effectively through existing nuisance abatement procedures.

Instead of banishing one of our most vulnerable populations from some neighborhoods, City Council members should craft an ordinance defining sober-living homes and allowing their existence by right in single-family neighborhoods.

Other jurisdictions, such as the Orange County Sheriff's Department, have established an accrediting agency funded by inspection fees to oversee the homes. This agency can balance both the needs, benefits and rights of sober-living providers, the residents they serve and the neighborhood.

No one should have to live near a problem residence regardless of whether the people are sober. Most sober living homes are good neighbors, so good in fact that most neighbors aren't aware they are there. We believe strong nuisance abatement procedures are the means to this end.

Paul Dumont is a recovering alcoholic and sober housing advocate in the San Fernando Valley.

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URL: http://www.aclufl.org/legislature_courts/legal_department/briefs_complaints/bocahousecomplaint.cfm

COMPLAINT CHALLENGING BOCA RATON ORDINANCE THAT BANS "SOBER HOUSES"

Filed March 7, 2003

United States District Court

Southern District of Florida

JEFFREY O., MICHAEL DOE, TODD C., DOUG B., WILLIAM F., STEVE L., PETER B., REGENCY PROPERTIES OF BOCA RATON, INC., a Florida corporation, and AWAKENINGS OF FLORIDA, INC., a Florida corporation,

Plaintiffs,

vs.

CITY OF BOCA RATON, a Florida municipal corporation,

Defendant.

COMPLAINT

Plaintiffs Jeffrey O., Michael Doe, Todd C., Doug B., William F., Steve L., Peter B., Regency Properties of Boca Raton, Inc. ("Boca House"), a Florida corporation, and Awakenings of Florida, Inc. ("Awakenings"), a Florida corporation, sue Defendant City of Boca Raton (the "City"), a Florida municipal corporation, and allege:

Introduction

1. By this action, Plaintiffs seek relief from a zoning ordinance (City Ordinance No. 4649; the "Ordinance") recently adopted by the City that prohibits sober living residences for people in recoverypersons recovering from drug or alcohol addiction from being locatedresiding in any residential neighborhoods within the City. The Ordinance specifically targets Plaintiffs and other related non-parties by banishing persons recovering from drug and alcohol addiction from the City's residential areas. The Ordinance takes effect immediately and makes no provision for grandfathering the City's 12-plus existing sober living residences, so that they will have to cease providing drug and alcohol-free housing to persons in recovery. The City's conduct threatens to displace Boca House's and Awakening's current residents from the residential neighborhood where they now reside and has caused continuing harm to Plaintiffs, as well as to Boca House's and Awakenings' prospective handicapped and disabled residents, who are on waiting lists and in need of independent, drug and alcohol-free housing opportunities. Plaintiffs also challenge the City's refusal to make a reasonable accommodation with respect to other zoning provisions that prohibit sober living residences from having four or more unrelated residents in a single dwelling unit, even on a temporary or emergency basis.

2. The Ordinance specifically targets Plaintiffs and other related non-parties by banishing persons recovering from drug and alcohol addiction from the City's residential areas.The City's has not offered a tenable pretense of having any non-discriminatory intent was clearly discriminatory, as both City officials and the constituency they seek to placate, have madeit abundantly clear through their statements and actions that theytheir intendedt to preclude persons recovering from drug and alcohol addiction from continuing to reside near the non-disabled population of the City. The City was motivated by public prejudice against persons in recovery. In fact, the hearing at which the Ordinance was enacted is rife with statements to the effect that sober living facilities attract "pedophiles, murderers, God knows what . . . " and that persons in recovery are "not our citizens." The City enacted the Ordinance based on these expressed stereotypes and generalized fears about people in recovery with disabilities. The City made its decision in the context of strong, discriminatory opposition to persons who live in sober houses, which in turn tainted the City with discriminatory intent. The result of the Ordinance is to prohibit in most of the City any residential use that seeks to provide the drug and alcohol-free environment critically needed for persons to recover successfully from addiction. Thus, the City iswould now forcinge the relocation away from other City residents of persons who, due to addiction, need drug and alcohol-free sober living residences to relocate to areas segregated from other City residents. The City now restricts such residences to areas and which are zoned for medical and hospital or motel uses -- , in essence creating a defined ghetto for persons

in recovery.

Parties and Jurisdiction

3. This action arises under the Fair Housing Act of 1968, as amended, 42 U.S.C. §3601, et seq. (the "FHAA"), the Americans with Disabilities Act, 42 U.S.C. 11213, et seq. (the "ADA"), the Declaratory Judgment Act, 28 U.S.C. § 2201, and the equal protection and due process guarantees of the 14th Amendment to the United States Constitution for which 42 U.S.C. § 1983 provides a remedy. The action arises from the City's discrimination on the basis of handicap or disability in the zoning and regulation of housing. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 (a)(3) and (a)(4), and pursuant to 42 U.S.C. § 3613.

4. Venue is appropriate in the Southern District of Florida because the cause of action accrued in Palm Beach County, Florida and because the Defendant is a municipality located in Palm Beach County, Florida.

5. Plaintiff, Jeffrey O., is a recovering alcoholic with disabilities, who is in need of stable housing during his transition from rehabilitation to integrated community living.

6. Plaintiff, Michael Doe, is a recovering alcoholic with disabilities who is in need of stable housing during his transition from rehabilitation to integrated community living.

7. Plaintiff, Todd C., is a recovering alcoholic with disabilities who is in need of stable housing during his transition from rehabilitation to integrated community living.

8. Plaintiff, Doug B., is a recovering drug addict with disabilities who is in need of stable housing during his transition from rehabilitation to integrated community living.

9. Plaintiff, William F., is a recovering drug addict with disabilities who is in need of stable housing during his transition from rehabilitation to integrated community living.

10. Plaintiff, Steve L., is a recovering drug addict with disabilities who is in need of stable housing during his transition from rehabilitation to integrated community living.

11. Plaintiff, Peter B., is a recovering drug addict with disabilities who is in need of stable housing during his transition from rehabilitation to integrated community living.

12. Plaintiffs Jeffrey O., Michael Doe, Todd C., Doug B., William F., Steve L., Peter B., (the "Residents") currently reside in drug and alcohol-free rental housing for persons recovering from drug and/or alcohol addiction operated by Plaintiff Boca House. They will be forced to move out of the single and multi-family residential areas of the City if injunctive relief barring enforcement of the Ordinance is not granted. The Residents are qualified persons with disabilities that affect one or more major life activities that are of central importance to most people's daily lives, including abstaining from alcohol or drug abuse without a structured supportive setting and living independently without a sober housing environment. In addition, they have been diagnosed as suffering from alcohol or drug dependence; they are participating in alcohol or drug treatment on an outpatient basis at facilities unrelated to Boca House and Awakenings; and they are regarded as disabled. All other individuals residing at Boca House and Awakenings are similarly "handicapped" within the meaning of the FHAA and 24 C.F.R. § 100.201(a)(2), and are "qualified persons with disabilities" within the meaning of the ADA, 42 U.S.C. § 12102(2).

13. Boca House is a Florida corporation whose principal place of business is in Boca Raton, Florida. Awakenings is a Florida corporation whose principal place of business is in Boca Raton, Florida. Boca House and Awakenings own housing units (apartments, townhomes and single family homes) in residential settings, which they rent to individuals who are recovering from substance addiction so they can live in a drug and alcohol-free environment.

14. Because of the City's actions described above and below, the Plaintiffs have been and will continue to be injured by the City's discriminatory housing practices and are therefore "aggrieved persons" within the meaning of the Fair Housing Act, 42 U.S.C. § 3602(d). Boca House and Awakenings have standing as housing providers to bring this action on behalf of themselves and on behalf of their residents who are persons with disabilities.

15. The City is a municipal corporation established and organized under the laws of Florida and is located in Palm Beach County, Florida. As such, it is, and was, acting under color of state law. Further, it provides programs and services in the form of zoning laws and enforcement of those laws.

Background Facts

The Sober Living Residences

16. Since 1990, in response to an ever increasing demand for safe, drug and alcohol-free housing, Boca House and Awakenings have operated apartment buildings and rented housing to persons that are recovering from drug or alcohol addiction who are currently not illegally using controlled substances, and to any other persons with disabilities who want to live in a supportive drug and alcohol-free environment.

17. Boca House and Awakenings provide their residents a safe environment to live in, typically after they have

successfully completed substance abuse treatment. To accomplish this, both Boca House and Awakenings require drug testing as a condition of residency and expel residents found to be using drugs or alcohol. Although Boca House and Awakenings provide a supportive environment, they do not provide treatment or counseling for drug or alcohol addiction.

18. Alcoholism and drug addiction are lifetime diseases. They are chronic, progressive and, ultimately, fatal. Avoiding relapse and progressing in recovery are therefore the most important aspects of a recovering addict's life. Finding and staying in a healthy, functional environment, surrounded by people who are not using alcohol or drugs, away from people and situations that previously triggered substance use, with access to transportation and work opportunities, are essential elements to avoiding relapse.

19. Sober living residences such as Boca House and Awakenings provide such an environment and operate on the premise that people in the early, and for some, later stages of recovery from drug and alcohol addiction will have a better chance of success in remaining sober if they live in a highly supportive environment where substance abuse is not tolerated.

20. Each apartment, townhome or single family home operated by Boca House and Awakenings is unsupervised and is governed by its residents, who pay rent and maintain the household. The residents in each home are the functional equivalent of a family and run their household as they see fit. Any resident who uses drugs or alcohol is immediately and automatically expelled. While many Boca House and Awakenings residents have made multiple prior attempts at long-term recovery, the majority of those who live at Boca House or Awakenings for one year or more maintain long-term sobriety.

21. People who are handicapped or disabled by alcoholism or drug abuse are more likely to need living arrangements such as what a sober living residence provides, in which groups of unrelated individuals reside together in residential neighborhoods for mutual support during the recovery process. The Ordinance therefore has a disparate impact on such handicapped or disabled people in recovery.

22. Between 1990 and the passage of the Ordinance on May 29, 2002, Boca House and Awakenings purchased various buildings in the City and renovated them according to code in order to provide affordable drug and alcohol-free housing to disabled persons. Boca House and Awakenings invested time, money and effort into these projects.

23. Boca House and Awakenings intend to continue renting housing to persons who are recovering from drug or alcohol addiction and any other persons with a disability who want to live in a supportive drug and alcohol-free environment. The City has, however, routinely targeted them for arbitrary, discriminatory and abusive regulatory and enforcement actions. It has also refused to provide necessary reasonable accommodations from zoning restrictions, such as a City's limitation on four or more unrelated persons residing in a single dwelling unit, even where such accommodation was sought for temporary or emergency situations. The City's efforts were meant to impede Boca House's and Awakenings' ability to provide the drug and alcohol-free housing needed by persons in recovery. These efforts culminated with the passage of the Ordinance on May 29, 2002, which imposes an outright ban on sober living residences in residential zoning districts.

24. Since the enactment of the Ordinance, Boca House and Awakenings have had opportunities to acquire additional properties that would provide much needed housing for persons recovering from alcoholism or substance addiction. But, because of the City's actions, Boca House and Awakenings has had to forgo providing any additional such housing. The City's actions currently prevent Boca House and Awakenings from acquiring or converting any property in the City's residential areas to provide housing in a supportive drug and alcohol-free environment for persons recovering from alcoholism or substance addiction. In addition, the City's overly restrictive interpretation of its zoning code and refusal to provide a reasonable accommodation therefrom has limited the number of residents at Boca House's and Awakenings' existing properties. The City's actions have thus caused significant and continuing harm to Boca House and Awakenings. The City's actions have also caused significant and continuing harm to Boca House's and Awakenings' prospective residents, who are on waiting lists for sober living residence housing.

25. Florida state law does not prohibit the current uses of Boca House and Awakenings' properties, and contains no prohibition against private housing providers requiring drug or alcohol testing as a condition of residency. But because the Ordinance would apply to the established use of Boca House and Awakenings' properties, it threatens to prevent them from continuing to provide housing to persons who are recovering from drug or alcohol addiction and other persons with disabilities who want to live in a supportive, drug and alcohol-free environment.

The City's Ordinance

26. On May 29, 2002, the City's Council enacted the Ordinance which provides:

> Section 1. Section 28-2, Code of Ordinances, is amended to read:
>
> "Substance Abuse Treatment Facility" shall mean a service provider or facility that is: 1) licensed or required to be licensed pursuant to Section 397.311(18). Fla. Stat. or 2) used for room and board only and in which treatment and rehabilitation activities are provided at locations other than the primary residential facility, whether or not the facilities used for room and board and for treatment and rehabilitation are operated under the auspices of the same provider. For the purposes of this paragraph (2), the following shall be deemed to satisfy the "treatment and rehabilitation activities" component: (a) service providers or facilities which require tenants

to participate in treatment and rehabilitation activities as a term or condition of, or essential component of, the tenancy: or (b) service providers or facilities which facilitate, promote, monitor, or maintain records of, tenant participation in treatment and rehabilitation activities, or perform testing to determine whether tenants are drug and alcohol free, or receive reports of results of such testing.

"Social Service activities" shall mean the administration of any community-oriented service including offices, meetings, storage, library and similar administrative users. It shall not mean any social service activities, including without limitation, substance rehabilitation services, counseling activities and services, shelters for the homeless or abused, food/meal distribution for the needy, job training, and teen oriented programs.

Section 2. Section 28-197, Code of Ordinances, is created to read:

Section 28-197. Status of Substance Abuse Treatment Facilities.

Any substance Abuse Treatment Facility that exists as of the effective date of this ordinance must comply with all provisions and requirements of this ordinance no later than eighteen (18) months after its effective date.

Section 3. Section 28-743, Code of Ordinances, is amended to read:

Section 28-743. Conditional uses.

(e) Substance Abuse Treatment Facility, provided that such facilities shall not be located within a radius of 1,000 feet of another existing facility.

27. The ordinance allows the uses it defines as "Substance Abuse Treatment Facilities" only in the areas that are zoned for medical and hospital uses (the MC - Medical Center district), or with conditional approval from the City council to areas zoned for motelbusiness use (the RB-1 - Motel Business district). In subsequent correspondence, the City has confirmed that uses that meet the revised definition of "Substance Abuse Treatment Facility" are restricted to the MC or RB-1 districts, that the Ordinance prohibits such uses in any other zoning district, and that at the end of the 18-month period set forth in Section 2 of the Ordinance any established use meeting the definition of "Substance Abuse Treatment Facility" would be subject to the locational requirements of the Ordinance.

28. The Ordinance targets any residential use that makes treatment or rehabilitation a condition of residency even if the treatment or rehabilitation takes place off site and is unaffiliated with the housing provider. It also extends to residential uses that require drug or alcohol testing as a condition of residency or so much as receive a report of drug or alcohol testing regarding a resident. The City thus now prohibits sober living residences from being established or expanded in any of the City's residential zoning districts. And established sober living residences may not be continued in such areas past November 2003.

29. The Ordinance as originally drafted applied only to licensed facilities providing treatment or rehabilitation services. During the Commission's debate, however, the Ordinance was revised first to include within the definition of a "Substance Abuse Treatment Facility" non-licensed facilities, and then broadened to include even mere residential uses based solely upon the receipt of a report of substance abuse testing regarding a resident.

30. The City is, therefore, not simply targeting licensed facilities or the provision of counseling or medical treatment. Rather, the Ordinance constitutes a sweeping attack aimed at excluding persons in recovery from residing in any residential district in the City. The Ordinance is expressly designed to relegate any housing provider that provides the environment needed by persons in recovery to the MC or RB-1 districts, where no other residential uses are located. In effect, the City has segregated from the remainder of the City's residential population those City residents that due to addiction require a supportive drug and alcohol-free environment. This causes the type of isolation of handicapped and disabled persons that the FHAA and the ADA were enacted to prohibit.

31. Additionally, the Ordinance requires that Substance Abuse Treatment Facilities "not be located within a radius of 1,000 feet of another existing facility" thereby restricting these facilities to the point where they may cease to exist altogether.

32. The Ordinance applies retroactively requiring that "any substance abuse treatment facility that exists as of the effective date of this Ordinance must comply with all provisions and requirements of this ordinance no later than 18 months after its effective date." This last requirement was inserted specifically to target Boca House and Awakenings and to displace the Residents. The Ordinance was thus created as a means to expel and ban specific, disabled or handicapped persons from the City's residential neighborhoods based solely on their federally protected status.

33. The City's discriminatory intent to oust specific disabled or handicapped individuals from the City's residential districts is reflected by the statements of the City Attorney Diana Grub Frieser, Mayor Steve Abrams, and Council Members during regular Council meetings.

34. For instance, City Attorney Diana Grub Frieser explained how the Ordinance was intended to address not just licensed facilities but any residential use that houses persons in recovery in residential areas:

> This Ordinance as drafted was intentionally drafted, based on direction from this council, to broadly encompass both the statutory definitions [of a treatment facility] and more. And the reason I say that is as you will recall, when the statute was going through the legislative process at different times it had a much broader scope. And

what was adopted, in fact, had a narrower scope excluding certain facilities that the city had concerns about and wanted to address, because we believe that they had similar adverse impacts in our residential areas. And that's why it was drafted broader.

35. Throughout the Council meeting at which the Ordinance was enacted, neighbors expressed their disdain for the Residents and made clear their desire to expel the Residents from the City. Among them:

a) Rose Vinti, the President of Boca Hill Condominium Association (condominiums located across the street from Boca House) explained that "living in a sober house area would be deteriorating to the surrounding neighborhood," and that the condominium owners "would like to see them go."

b) Grace Fisher, another resident, insisted that allowing former substance abusers to continue residing in the City's neighborhoods would result in the ghettoization of those neighborhoods, particularly her own. She was concerned that "adult drug addicts [were being put] into a residential neighborhood" where she felt they did not have a right to be and that Boca House and Awakenings attract "pedophiles, murderers, God knows what . . . . You are putting adult drug addicts into a residential neighborhood."

c) Another neighbor, Anthony Amunatogui, stated: "My concern, is not with the halfway house. It's the location in my neighborhood. . . . There [are] appropriate places to house those type[s] of facilities and we should house those facilities in those places."

d) Mark Traveis, the President of Boca Marquee's Condominium Association (located on Southwest 6th Street) also voiced his opinion: "Addicts in every family, sure, but do they have to be in my backyard and across the street, down everywhere in such concentration?"

e) Carolyn O'Brien, a business owner, landlord and resident of the City: "[l]et's get them [addicts] out."

36. During the Council Meeting Mayor Abrams and several Council Members acknowledged that the Ordinance serves to ease the frustrations and complaints of the neighbors of sober living residences. The statements of the Mayor and Council Members confirm that the City's intent of the Ordinance was to discriminate against handicapped individuals and segregate them from the remainder of the City's residents. Particularly indicative of this intent is Mayor Abrams' exclamation that "[t]here is a time and place for everything, and there are appropriate places for these facilities, but this neighborhood is not it."

37. Councilwoman Carol Hanson followed by remarking on her six year struggle to make the sort of "improvements" the Ordinance accomplishes. Most of the other Council Members agreed, including Councilwoman Susan Haynie who referred to herself as the Council's "original NIMBY" and acknowledged that the Ordinance was enacted to provide a solution to the "problem" of persons in recovery residing in the City's residential neighborhoods.

38. In addition to the Ordinance, the City's discrimination has been carried out through the use of unreasonably restrictive zoning and regulations, arbitrary, capricious and abusive zoning and building code enforcement practices, and attempts to convince other governmental bodies to take overly aggressive regulatory actions -- all of which were intended to limit Boca House's and Awakenings' ability to rent housing to handicapped or disabled persons and to limit handicapped or disabled persons' choice of housing in residential areas. The Ordinance is the culmination of the City's discriminatory efforts, and now prohibits both the establishment and continuation of sober living residences in any residential areas.

39. The Ordinance is purposefully discriminatory against persons with disabilities and discriminatory on its face, and for both reasons is therefore a per se violation of the FHAA and ADA. Nevertheless, Plaintiffs have requested reasonable accommodations from the Ordinance necessary to afford equal housing opportunities to persons with disabilities. Suggested accommodations included removing the Ordinance's retroactive language to allow grandfathering of existing uses and modifying its definition of the term "Substance Abuse Treatment Facility" to exclude residential uses that do not provide treatment or counseling services. The City has refused to make such accommodations. City officials have indeed refused to so much as place the issue on the City Commission's agenda, despite various requests from the Plaintiffs.

40. Further, Plaintiffs have requested a reasonable accommodation from the City's limitation on four or more unrelated persons living together, regardless of the size of the living unit, but the City has continued to enforce that prohibition even where the limitation is exceeded only on a temporary or emergency basis.

41. Plaintiffs have attempted to resolve their concerns regarding the Ordinance amicably but to no avail. Throughout various attempts to negotiate with the City, all that has been accomplished is the City attorney's suggestion that the City Council might consider making changes to the Ordinance at some indefinite future time.

42. Meanwhile, however, the Ordinance remains in effect and is causing ongoing harm to Plaintiffs and the Residents, as well as other members of the City's targeted class of persons recovering from drug and alcohol addiction. Additionally as Boca House and Awakenings are now prohibited from providing any additional drug and alcohol free housing, the City's conduct is causing ongoing harm to persons who have applied to become Boca House's and Awakenings' residents and are on waiting lists for independent housing opportunities.

43. The Plaintiffs have retained counsel to represent them in this action and have agreed to pay them reasonable

attorneys' fees and costs.

Count One: Violations of the Fair Housing Amendments Act

44. The Plaintiffs re-allege paragraphs 1 through 43.

45. The City's Ordinance violates the FHAA, 42 U.S.C. § 3604 (f), because the Ordinance discriminates against the Plaintiffs and other Boca House and Awakenings residents on the basis of their disabled and handicapped status.

46. The City's Ordinance is discriminatory on its face. Additionally, it was enacted with discriminatory intent and has a disparate impact on persons recovering from drug and alcohol addiction.

47. The City has refused to provide a reasonable accommodation from the City's limitation on four or more unrelated persons living together, regardless of the size of the living unit, and has continued to enforce that prohibition even where the limitation is exceeded only on a temporary or emergency basis.

48. The City's Ordinance does not contain, and the City has refused to make, a reasonable accommodation, even though reasonable accommodations are necessary to afford handicapped and disabled persons equal opportunity to use and enjoy a dwelling.

49. As a result of the City's unlawful conduct, the Plaintiffs and other Boca House and Awakenings residents have been and continue to be damaged.

Count Two: Violations of the Americans with Disabilities Act

50. The Plaintiffs re-allege paragraphs 1 through 43.

51. The City's Ordinance violates the ADA, 42 U.S.C. § 12101 et seq., because it subjects the Plaintiffs to discrimination.

52. The Plaintiffs and the other residents of Boca House and Awakenings are "qualified individuals" as defined by 42 U.S.C. § 12131.

53. The Plaintiffs and the other residents of Boca House and Awakenings qualify as persons with disabilities as defined by 42 U.S.C. § 12131.

54. The City is a public entity as defined by 42 U.S.C. § 12131.

55. The Plaintiffs and the other residents of Boca House and Awakenings would and could have legally resided in their current residences but for the Ordinance.

56. The City is in violation of the Americans with Disabilities Act by enacting the Ordinance and refusing to repeal it.

57. The City's Ordinance is discriminatory on its face. Additionally, it was enacted with discriminatory intent and has a disparate impact on persons recovering from drug and alcohol addiction.

58. The City has refused to provide a reasonable accommodation from the City's limitation on four or more unrelated persons living together, regardless of the size of the living unit, and has continued to enforce that prohibition even where the limitation is exceeded only on a temporary or emergency basis.

59. The City's Ordinance does not contain, and the City has refused to make, a reasonable accommodation, even though reasonable accommodations are necessary to afford handicapped and disabled persons equal opportunity to use and enjoy a dwelling.

60. As a result of the City's unlawful conduct, the Plaintiffs and the other residents of Boca House and Awakenings have been and continue to be damaged.

Count Three: Declaratory Judgment

61. The Plaintiffs re-allege and restates paragraphs 1 through 43.

62. This is an action for a declaratory judgment pursuant to 28 U.S.C. § 2201 where the Plaintiffs seek a declaration of their rights.

63. There is an actual, ongoing controversy between the Plaintiffs and the City as to whether the Ordinance violates federal law or is otherwise illegal or unconstitutional, and whether the City has illegally refused to provide a necessary reasonable accommodation from the limitation on four or more unrelated persons occupying a dwelling unit.

64. The Plaintiffs have a reasonable apprehension of enforcement or other proceedings by the City.

65. The controversy between the Plaintiffs and the City is ripe for resolution.

Count Four: 42 U.S.C. § 1983

66. The Plaintiffs re-allege paragraphs 1 through 43.

67. The Plaintiffs and the other residents of Boca House and Awakenings have been deprived, under color of state law, of rights, privileges and immunities secured by the Constitution and laws of the United States, particularly the equal protection guarantee of the Fourteenth Amendment to the United States Constitution, for which 42 U.S.C. § 1983 provides a remedy.

68. The City's actions, taken under color of law, are arbitrary, capricious and unreasonable, discriminate against disabled and handicapped persons, and violate the Equal Protection clause of the Fourteenth Amendment to the United State Constitution.

69. As a result of the City's unlawful conduct, the Plaintiffs have been and continue to be damaged.

Relief Requested

Wherefore, the Plaintiffs request that this Court:

a. Enter judgment in favor of Plaintiffs, declaring that the City violated the Fair Housing Act, the Americans with Disabilities Act, and Equal Protection Clause of the Fourteenth Amendment, declaring the City's Ordinance unlawful and void ab initio, and declaring that the City must provide a reasonable accommodation to allow four or more unrelated persons in a sober living residence dwelling unit;

b. Enter a preliminary and permanent injunction enjoining the City, its officers and officials, their successors in office, their agents, and all those acting or purporting to act in concert with them, from enforcing the Ordinance or, as it applies to sober living residences, the limitation on four or more unrelated persons in a dwelling unit;

c. Award the Plaintiffs actual and compensatory damages;

d. Award the Plaintiffs their reasonable attorney's fees and costs pursuant to 42 U.S.C. §§ 1988 and 3613, and 29 U.S.C. § 794 (a); and

e. Award all further relief that the Court deems proper and necessary.

Dated: March 7th, 2003.

Briefs and Complaints

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IR0762

Attachment 5
Draft DRP Fair Housing and Anti-Discrimination Guidelines

DRP STAFF MANUAL

ANTI-DISCRIMINATION AND FAIR HOUSING

The purpose of this manual is to guide Department of Regional Planning staff in the application of fair housing and other anti-discrimination laws in planning activities.

This document covers the following topics:

1. Protected Statuses
2. Fair Housing and Disability
3. Protections for Residential Uses
4. Religious Discrimination

1. PROTECTED STATUSES

State and federal law protects certain individuals and groups from discrimination in housing and land use decisions. The protected statuses include:[i]

- Race
- Color
- Religion
- Sex / Gender Identity
- National Origin
- Familial Status (whether or not a household has children)
- Disability
- Marital Status
- Ancestry
- Sexual Orientation
- Source of Income
- Age (not including preferences imposed by a senior housing program)
- Veteran Status
- Income Level
- Method of Financing

In general, state and federal law defines discrimination to mean any distinction, exclusion, restriction or

preference, which has the purpose or effect of limiting any right or freedom.[ii] In the planning context, discrimination may include considering the above listed protected statuses to limit land use or housing opportunities.[iii]

The U.S. Department of Justice and the California Department of Fair Employment and Housing enforce anti-discrimination laws. These agencies report that today, the most common type of discrimination cases in planning and zoning are related to religion, disability or income.

PREFERENTIAL TREATMENT[iv]

While local governments must treat residential developments that may be used or occupied by persons of protected status equally to any other residential developments, the law does not preclude actions or regulations that provide preferential treatment in certain instances, such as:

- Residential developments or emergency shelters financially assisted by a public entity;
- Any housing intended for use or occupancy by low, moderate or middle-income households; and
- Housing for agricultural workers.

This preferential treatment may include, but need not be limited to, reduction or waiver of fees or changes in architectural requirements, site development and property line requirements, building setback requirements, or vehicle parking requirements that reduce development costs. Some jurisdictions incentivize housing for senior citizens. It is not appropriate to offer preferential treatment on the basis of other statuses, such as race, sexual orientation or national origin.

2. FAIR HOUSING AND DISABILITY

Multiple state and federal laws provide protections for persons with disabilities, who may experience discrimination, including:

- Title VIII of the Civil Rights Act of 1968 (Fair Housing Act, as amended) prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, and requires housing providers and local governments to make reasonable accommodations;
- The Americans with Disabilities Act (ADA), prohibits discrimination against individuals with disabilities in a number of areas, including all public services – irrespective of federal financial assistance;
- Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in any program or activity that is conducted by the federal government or that receives federal financial assistance, such as grant monies for housing developments.

DEFINITION OF DISABILITY

According to the California Fair Employment and Housing Act, disability[v] is defined as a physical or mental impairment that limits one or more major life activities. A person is considered disabled if they have a history of disability, or if they are regarded as having a disability.[vi]

- "Limits" means that the activity is difficult to achieve, regardless of mitigating measures such as medication or mobility devices, or previous reasonable accommodations.

- "Major life activity" means any task central to most people's daily lives, such as but not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This can include brushing one's teeth, getting dressed, bathing, household chores, preparing meals, etc.

- "Physical or mental impairment" includes chronic or episodic medical conditions and genetic or inherited characteristics that cause disease or disorders. Impairments can include, but are not limited to orthopedic, visual, speech and hearing impairments, cosmetic disfigurement, anatomical loss, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, alcoholism and drug addiction. [vii,viii]

Current users of illegal drugs are not covered by Fair Housing laws, unless they have another disability. A temporary condition, such as a broken leg, pregnancy, use of crutches, etc. may not qualify as a physical or mental impairment.

The protections afforded to people with disabilities also extend to those associated with them. For example, providers and developers of housing for people with disabilities have "standing" to file a court action alleging a violation under either federal or state fair housing laws or seek administrative relief.

STRUCTURAL ACCESSIBILITY FOR THE DISABLED

Disability discrimination is a unique issue in planning and development, in part because people with disabilities can be discriminated against solely by the design of the built environment. In response, federal and state laws have established accessible design and construction requirements for certain structures and programs, such as multi-family housing, transportation and public and commercial facilities.

MULTI-FAMILY HOUSING

The Fair Housing Act establishes design and construction requirements for multifamily housing. The design requirements apply to certain buildings built for first occupancy after March 13, 1991.

Requirements for multifamily buildings of four or more units with an elevator:

- Public and common areas must be accessible to persons with disabilities;
- Doors and hallways must be wide enough for wheelchairs;

- All units must have:
  - An accessible route into and through the unit
  - Accessible light switches, electrical outlets, thermostats and other environmental controls
  - Reinforced bathroom walls to allow later installation of grab bars and
  - Kitchens and bathrooms that can be used by people in wheelchairs.

If a building with four or more units built after March 13, 1991 has no elevator, these standards apply to ground floor units.[ix]

PUBLIC FACILITIES AND TRANSPORTATION

The Americans with Disabilities Act (ADA) requires that all government agencies provide equal access to public buildings, rights-of-way, telecommunications and public transportation.

PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES

The ADA mandates standards for accessible design in many commercial businesses. Under Title III of the ADA, no individual, because of his or her disability, may be deprived of the full and equal enjoyment of the goods, services, facilities, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. "Public accommodations" include most places of lodging (such as inns and hotels), recreation, transportation, education, and dining, along with stores, care providers, and places of public displays, among other things. In addition, Title III requires existing facilities, when readily achievable, to remove any architectural barriers that make access difficult for persons with disabilities. Historic structures and private clubs or religious institutions may be exempt from the structural accessibility provisions of the ADA.

While construction standards are primarily implemented through the state and local building codes, planners should be familiar with these standards to point out any inconsistencies in site plan review or enforcement. In 2010, the Department of Justice adopted revised standards for accessible design.

PROGRAMMATIC ACCESSIBILITY FOR THE DISABLED

In addition to the prescribed structural accessibility standards above, state and federal law mandate procedural requirements that ensure that local government programs and services are accessible. When requested, the County must reasonably modify its policies, practices, or procedures and provide auxiliary aids and services to assist persons with disabilities in utilizing our services to ensure program accessibility unless the modifications would fundamentally alter the nature of the service, program, or activity . The Department staffs an accessibility coordinator to assist in providing auxiliary aids and services requests. Such services include, but are not limited to:

- TDD/TTY (telecommunications devices for the deaf and mute);
- Re- producing materials in larger fonts;

- Sign language interpreters; and
- Closed –captioning for video presentations.

REASONABLE ACCOMMODATION FOR HOUSING ACCESS

A reasonable accommodation is a change, adaptation or modification to a policy, program, service or workplace, which will allow a qualified person with a disability to participate fully in a program, take advantage of a service, or perform a job. Since persons with disabilities may have special needs due to their disabilities, simply treating them exactly the same as others may not ensure that they have equal opportunity.

Reasonable accommodations include those that are necessary in order for the person with a disability to use and enjoy a dwelling, including public and common use spaces. Under the Fair Housing Amendments Act and the ADA, local jurisdictions have an affirmative duty to make accommodations where accommodation may be reasonable and necessary under the law to ensure that people with disabilities have equal access to housing.

In order to show that a requested accommodation may be necessary, there must be an causal link, or nexus, between the requested accommodation and the individual's disability. What is reasonable must be determined on a case-by-case basis. According to federal law, there is a four-pronged test of reasonable accommodation:

1. Is the person requesting the accommodation a qualified person with a disability? Or does the requestor represent a qualified person with a disability?
2. Is there an causal link, or nexus, between the accommodation and the disability of the requestor?
3. Would the accommodation be a fundamental alteration to the nature of a program, or undermine the purpose of the program?
4. Would the accommodation impose an undue administrative or financial burden on the local jurisdiction?

For more information on the Department's procedure for reasonable accommodation, please refer to Title 22.

DEFINITION OF FAMILY

Persons with disabilities may be negatively affected by an illegal definition of family in a zoning code. A definition of "family" that distinguishes between related and unrelated persons, and imposes numerical occupancy limits on unrelated persons violates privacy rights[x] and fair housing laws. This definition may prohibit the siting and development of congregate homes for individuals with disabilities, when these homes function as non-traditional families.[xi]

A functional zoning code definition of family better addresses fair housing and privacy laws, while still maintaining the single-family character of the neighborhood. A functional equivalent of a traditional family consisting of unrelated persons can be evidenced by one or more of the following:

1. Single housekeeping unit;
2. Shared use of the entire structure;
3. Shares expenses for food, rent, utilities or other household expenses; and/or
4. More or less permanent living arrangement.

In addition to defining "family," local jurisdictions may set reasonable maximum occupancy limits per dwelling unit or per cubic foot of air space, as long as those restrictions apply regardless of relation by blood, marriage or adoption. Maximum occupancy limits may be more restrictive than those outlined in the Uniform Building Code; however any occupancy standards should be applied notwithstanding the familial status of the occupants, except that different standards may apply to children than adults.

3. PROTECTIONS ASSOCIATED WITH RESIDENTIAL USES

To further fair housing goals, state law protects certain residential uses through zoning preemption or other limits on local regulation. Income level and method of financing are protected statuses only when associated with a residential use. This law is intended to eliminate discriminate against public housing developments or non-profit housing providers. A local jurisdiction may not deny, condition a project, or impose different requirements, based on, in whole or in part,

- The income level of the future occupants; or
- The financing mechanism of the development.[xii]

The state identifies a need for multifamily housing, and extends the following protections to multi-family developments. Multifamily projects may not be denied, or conditioned in a manner that renders the project infeasible, because either:

a) The project is consistent with the local jurisdiction's zoning ordinance and general plan; or
b) The project is consistent with the general plan, but not the zoning ordinance, because the zoning ordinance has not been updated to reflect the more recently updated general plan.[xiii]

AFFORDABLE HOUSING DEVELOPMENTS

The Housing Accountability Act protects housing for very low, low, moderate and/or middle-income households.[xiv] A local jurisdiction cannot disapprove a housing development project, including farmworker housing, for very low, low-, or moderate-income households, or an emergency shelter, or condition these uses in a manner that renders them infeasible, including through the use of design review standards, unless it makes written findings, based upon substantial evidence in the record, as to one of the following:

1. The jurisdiction has a certified Housing Element, and has met its share of housing need for the income category proposed to occupy the development;
2. The project would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid this impact without rendering the development unaffordable or financially infeasible;
3. The denial of the project or imposition of conditions is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable or financially infeasible;
4. The project is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or which does not have adequate water or wastewater facilities to serve the project; or
5. The project is inconsistent with both the zoning ordinance and general plan (land use or housing element) as it existed on the date the application was deemed complete, and the housing element is in substantial compliance.

In addition, state law limits the application of conditional use permits to certain attached housing developments available to very low, low or moderate-income households. The project must be affordable for a period of at least thirty years, and either statutorily exempt from CEQA[xv] or have other infill characteristics as provided by Government Code Section 65589.4.[xvi]

SUPPORTIVE/TRANSITIONAL HOUSING

Supportive housing is housing that is linked to onsite or offsite services that assist residents in retaining the housing, improving their health status, and maximizing their ability to live and, when possible, work in the community. There is no limit to length of stay. Transitional housing is assisted rental housing or supportive housing, but operated under program requirements that call for the termination of assistance and recirculation of the assisted unit to another eligible program recipient at some predetermined future point in time, no less than six months. Both supportive and transitional housing serve persons with low incomes having one or more disabilities, including among other populations, adults, emancipated youth, families, families with children, elderly persons, young adults aging out of the foster care system, individuals exiting from institutional settings, veterans, and homeless people.

Transitional housing and supportive housing must be treated the same as any other residential use within the same zone. For example, when multifamily residential developments are permitted in the zone, the local government cannot impose any additional restrictions on supportive housing than what are imposed on other multifamily units. In addition, transitional and supportive housing may not be denied if consistent with the zoning and the local jurisdiction has not yet met its need for new housing units affordable to the income levels to be served by the proposed project, except in limited circumstances.

EMERGENCY SHELTERS

Emergency shelters must be permitted as a by-right use in at least one zone with sufficient capacity to meet the jurisdiction's need. Emergency shelters may only be subject to those development and management standards that apply to residential or commercial development within the same zone except that a local government may apply written, objective standards that include only the following:

a) The maximum number of beds or persons permitted to be served nightly by the facility;
b) Off-street parking based upon demonstrated need, provided that the standards do not require more parking for emergency shelters than for other residential or commercial uses within the same zone;
c) The size and location of exterior and interior onsite waiting and client intake areas;
d) The provision of onsite management;
e) The proximity to other emergency shelters, provided that emergency shelters are not required to be more than 300 feet apart;
f) The length of stay;
g) Lighting; and
h) Security during hours that the emergency shelter is in operation.

FARMWORKER HOUSING

In addition to the protections provided by the Housing Accountability Act, the state identifies farmworkers as the lowest average wage earners and has enacted laws that regulate the siting of farmworker housing. For the purposes of zoning and land use, farmworker housing for five, but no more than six farmworkers must be considered a single-family structure and treated as a residential land use. In addition, farmworker housing consisting of no more than 36 beds in group living quarters or 12 units or spaces for farmworkers and their households, must be treated as an agricultural land use. For more information on the County's farmworker housing ordinance, see Title 22.[xvii]

ZONING PREEMPTION FOR LICENSED RESIDENTIAL USES

To further anti-discrimination laws, and to address identified needs, state law protects certain land uses from local zoning regulations that limit the siting and conditioning of the use. This means that local governments are limited in their application of zoning laws to such uses. Many of these "preemptions" only apply to uses of a certain occupancy size, such as six or fewer residents. [xviii] Although these uses are protected to a specific occupancy, state law is silent on the regulation of these uses at greater occupancies. Irrespective of this silence, state and federal fair housing and anti-discrimination laws are otherwise applicable.

ALCOHOLISM RECOVERY FACILITIES

Alcoholism Recovery Facilities (RADTFs) provide food, shelter, and recovery services, on a 24-hour basis, for persons with alcohol and/or other drug abuse problems. Services include detoxification; group, individual or educational sessions; and/or recovery or treatment planning, but not medical care. These facilities are required to be licensed by the California Department of Alcohol and Drug Programs. For the

purposes of zoning, a RADTF with six or fewer residents, not including staff and operators, must be considered a single-family residential use.[xix] Hospitals, clinics and "sober living" environments are not included in this category.

HEALTH FACILITIES

Health facilities include Residential Care Facilities for the Chronically Ill (RCFCI) and Intermediate Care Facilities (ICF). RCFCIs provide care and supervision to adults who have Acquired Immune Deficiency Syndrome (AIDS) or the Human Immunodeficiency Virus (HIV), and are licensed by the State Community Care Licensing Division. ICFs are health facilities licensed by the Licensing and Certification Division of the California Department of Public Health to provide 24-hour-per-day services. Both types may provide intermittent or continuous skilled nursing care. For the purposes of zoning, a RCFCI or ICF with six or fewer residents, not including staff and operators, must be considered a single-family residential use.

COMMUNITY CARE FACILITIES

Community Care Facilities (CCFs) include Adult Residential Facilities (ARFs) and Children's Residential Facilities. CCFs are licensed by the Community Care Licensing Division of the State Department of Social Services to provide 24-hour non-medical residential care to children and adults with disabilities who are in need of personal services, supervision, and/or assistance essential for self-protection or sustaining the activities of daily living. Children's residential facilities include Group Homes, Foster Family Homes and Small Family Homes. These facilities are required to be licensed by the California Community Care Licensing Division. For the purposes of zoning, CCFs with six or fewer residents, not including staff and operators, must be considered a single-family residential use.

RESIDENTIAL CARE FACILITIES FOR THE ELDERLY

Residential Care Facilities for the Elderly (RCFEs) provide care, supervision and assistance with activities of daily living, such as bathing and grooming. They may also provide incidental medical services under special care plans. The facilities provide services to persons 60 years of age and over and persons under 60 with compatible needs. The facilities can range in size from six beds or fewer to over 100 beds. The residents in these facilities require varying levels of personal care and protective supervision. For the purposes of zoning, a RCFE with six or fewer residents, not including staff and operators, must be considered a single-family residential use.

4. RELIGIOUS DISCRIMINATION

Enacted in 2000, the Federal Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits zoning and land use laws that substantially burden the religious exercise of churches or other religious assemblies or institutions unless implementation of such laws is the least restrictive means of furthering a compelling governmental interest.

In addition, RLUIPA prohibits zoning and land use laws that:

(1) treat churches or other religious assemblies or institutions on less than equal terms with nonreligious institutions;

(2) discriminate against any assemblies or institutions on the basis of religion or religious denomination;

(3) totally exclude religious assemblies from a jurisdiction; or

(4) unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.

Jurisdictions have discretion to regulate gathering places, including places of worship. However, any regulations placed upon religious uses must be at least as generous as the regulations applied to other gathering places. Specific zones may only exclude places of worship if they also exclude similar uses. In the evaluation of regulations for religious institutions, consider the requirements for other places where large groups of people assemble for secular purposes, including:

- Fraternal organizations;
- Theaters;
- Private clubs;
- Sports fields; and
- Meeting halls.[xx]

5. DISCRIMINATION IN PLANNING ACTIVITIES

Discrimination claims can arise from either a discriminatory intent or a discriminatory effect. Discriminatory intent occurs when a policy, procedure or decision is clearly biased against a person or group of people based on protected status. Discriminatory effect occurs when a neutral policy, procedure or decision has an adverse disparate impact on a person or group of people with protected status.

Examples of discriminatory intent:

- A zone district that specifically does not permit affordable housing developments, but permits other types of housing;
- A project condition that requires a housing development for persons with disabilities to include excessive security features based solely on generalized assumptions about the needs of the disabled residents;
- A zoning ordinance that specifically does not permit synagogues, but allows for other places of worship and secular gathering places; and
- The denial of a permit for an Asian super-market because the decision makers reasoned that the development would be better situated in a predominantly Asian neighborhood.

Examples of discriminatory effect:

- A zoning code definition of family that precludes any number of unrelated persons from living together (discriminates against persons with disabilities);

- A permit condition that regulates visiting occupational therapists differently than it would visiting piano teachers (discriminates against persons with disabilities); and
- A comprehensive plan policy that allows only studio- and one-bedroom apartments to be constructed in the urban center (discriminates against families with children).

CASE PROCESSING

In reviewing project-specific development proposals, planners may encounter arguments for—or against—a project based on the future occupants' or visitors' statuses. Project proponents and opponents should be informed about fair housing rights and anti-discrimination laws. Likewise, decision-makers should be clear in public hearings that the characteristics of future occupants or visitors are immaterial to any decision about a development proposal. In addition, privacy rights make it illegal to discuss a person's disability in a public hearing.[xxi]

The following are some examples of factors that may not be considered in the discretionary review of development projects serving persons of protected status (not inclusive):

a) Generalized public concerns and opposition to the use on the basis of protected status;
b) In the case of housing, the fact that the project may be run for profit or require a state license;
c) The existence of alternative neighborhoods in which the use could locate;
d) A sense that a neighborhood or street already has its "fair share" of similar uses, or concerns that the use will "start a trend" of other similar uses;
e) Concerns that the occupants will increase public service needs, such as fire, health and safety;
f) Concerns that the residents or visitors are "incompatible" with the neighborhood character;
g) Concerns that the residents or visitors will increase crime or other socially disruptive behavior; or
h) Concerns that the use will decrease property values in the neighborhood.

Project conditions must also be non-discriminatory. Project conditions must not subject the use to requirements that would not otherwise be required of similar uses, if not for the status of the occupant or visitor. These include, but are not limited to, curfews, signage and more frequent inspections.

PLAN MAKING

Generally, avoiding language that calls out the protected status of any person or group avoids intentional discrimination. While it may be necessary to identify protected statuses in background research, analyses and outreach, it is safest to eliminate reference to status in policy, except in very limited circumstances. Some examples of when this may be appropriate include policies and programs that address the cultural and historic context and identity of a community (e.g. "Consider developing design guidelines for Chinatown that address the cultural history of Chinatown and Chinese immigration." or "Maintain Olvera Street as a Mexican-American cultural landmark through historical and cultural references in public art and the design of public spaces."). Some examples of discriminatory general plan policies may include those that reference specific religious denominations (e.g. "Support

the development of a new Cathedral on Oak Ave."; "Restrict street parking adjacent to the Scientology center to Sundays and Wednesdays only."); or limit the siting of uses associated with a protected status, such as age, disability or income (e.g. "Direct affordable housing to areas with existing infrastructure,"; "Discourage senior housing in hillside areas.").

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[i] Federal law uses the term "protected classes." This document uses the term "protected statuses" to include those covered by state law.

[ii] California Government Code §8315

[iii] California Government Code Section 65008 (1)

[iv] California Government Code Section 65008 (e)(2)

[v] California Government Code Sections 12955.3- 12926, and Title 42 United States Code 3601 et seq.

[vi] The Fair Housing Act uses the term "handicap;" most state laws uses the term "disability" which has exactly the same legal meaning.

[vii] The California Fair Employment and Housing Act (FEHA) mirrors the Fair Housing Amendments Act of 1988, except that the state statute defines disability more broadly to include any impairment that "limits" a major life activity, where the federal statute requires that the impairment "substantially limit" a major life activity.

[viii] Two other federal laws offer protection against discrimination to people with disabilities; both may apply to local government land use and zoning activities. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination on the basis of disability in any program or activity that is conducted by the federal government or that receives federal financial assistance. The Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., prohibits discrimination against individuals with disabilities in a number of areas, including all public services – irrespective of federal financial assistance. Both § 504 and the ADA require reasonable accommodation.

[ix] Department of Housing and Urban Development. *Fair Housing Accessibility Guidelines*. 24 CFR Ch. I, Subch. A, App. II. 1991.

[x] City of Santa Barbara v. Adamson (1980) 27 Cal.3d 123, 133

[xi] Oxford House Inc. v. Babylon, 819 F.Supp. 1179 (E.D. N.Y. 1993); Oxford House v. Township of Cherry Hill, 799 F.Supp 450 (D.N.J. 1992); United States v. Schuykill Township, 1991 WL 117394 (E.D. Pa. 1990), reconsideration denied (E.D. Pa. 1991).

[xii] California Government Code Section 65008(b) et seq.

[xiii] California Government Code Section 65008(b)(1)(D)

[xiv] California Government Code Section 65589.5 et seq.

[xv] Projects must be statutorily exempt per Public Resources Code 21159.22, 21159.23, or 21159.24.

[xvi] California Government Code Section 65589.4

[xvii] California Government Code Sections 51220-51222; Health and Safety Code Sections 17021.5 and 17021.6

[xviii] California Health & Safety Code Sections 1566 et seq.

[xx] American Planning Association, *A RLUIPA Primer*. Planning Advisory Service (PAS), EIP-23. May 2009.

[xxi] The California Public Records Act of 2004 (Government Code Sections 6250-6270) has exceptions for medical information.

11-0762

BILL ANALYSIS

Date of Hearing: April 29, 2008
Counsel: Kathleen Ragan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Jose Solorio, Chair

AB 2593 (Adams) - As Amended: April 28, 2008

SUMMARY : Allows a city or county to adopt a local ordinance to include a residential facility that serves six or fewer persons, including a sober living facility, within the definition of "single-family dwelling" for the purpose of restricting more than one paroled sex offender from living in these facilities. Specifically, this bill :

1) Deletes from current law the provision that a single-family dwelling shall not include a residential facility which serves six or fewer persons.

2) Allows a city or county to adopt a local ordinance to include a residential facility that serves six or fewer people, including a "sober living facility" within the definition of "single-family dwelling."

3) Provide that a single room within a hotel is considered a single-family dwelling.

EXISTING LAW :

1) Provides, in a statute entitled "Sex Offender Registrant Parolees", that notwithstanding any other provision of law, when a person is released on parole after having served a term of imprisonment in a state prison for which registration as a sex offender is required, that person may not, during the period of parole, reside in any single family dwelling with any other person required to register as a sex offender, unless those persons are legally related by blood, marriage, or adoption. [Penal Code Section 3003.5(a).]

2) States that for purposes of the above section, "single-family dwelling" shall not include a residential facility which serves six or fewer persons. [Penal Code Section 3003.5(a).]

3) States that whether or not unrelated persons are living together, an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons shall be considered a residential use of property, and the residents and operators of such a facility shall be considered a family for the purposes of any law or zoning ordinance which relates to the residential use of property. [Health and Safety Code (HSC) Section 11834.23.]

4) Prohibits any person required to register as a sex offender from residing within 2,000 feet of any public or private school, or park where children regularly gather. [Penal Code Section 3003.5(b).]

5) States that nothing in this law shall prohibit municipal jurisdictions from adopting local ordinances which further restrict the residency of any person for whom registration as a sex offender is required. [Penal Code Section 3003.5(c).]

6) Provides that no person required to register as a sex offender, for an offense committed against an elder or dependent adult, as defined, shall enter or remain on the grounds of a day care or residential facility where elders or dependent adults are regularly present or living, without having registered with the facility administrator or his or her designees, except to proceed expeditiously to the office of the facility administrator or designee for the purpose of registering. [Penal Code Section 653c(a).]

7) Provides that notwithstanding any other provision of law, an inmate who is released on parole for a violation of lewd and lascivious acts with a child, or continuous sexual abuse of a child, whom the Department of Corrections and Rehabilitation (CDCR) has determined poses a high risk to the public shall not be placed or reside, for the duration of his or her parole, within one-half mile of any public or private school including any or all of Kindergarten and Grades 1 through 12,

inclusive. [Penal Code Section 3003(g).]

8) Requires any inmate convicted of a felony registerable sex offense and who is committed to prison and released on parole shall be monitored by global positioning system for the term of his or her parole. [Penal Code Section 3000.07(a).]

9) Provides specified punishment for a sex offender entering onto

the grounds of a day care or residential facility, as follows:

a) States that a first conviction shall be punishable by a fine not exceeding $2,000; by imprisonment in a county jail for a period of not more than six months; or by both that fine and imprisonment.

b) Provides that if a defendant has been previously convicted once of a violation of this section, he or she shall be punished by imprisonment in a county jail for a period of not less than ten days nor more than six months; or by both imprisonment and a fine not exceeding $2,000, and shall not be released on probation, parole or any other basis until he or she has served at least 10 days.

c) States that if a defendant has been previously convicted two or more times of a violation of this section, he or she shall be punished by imprisonment in a county jail for a period of not less than 90 days or more than six months; or by both imprisonment and a fine of not exceeding $2,000, and shall not be released on probation, parole or any other basis until he or she has served at least 90 days.

d) States that nothing in this section shall preclude or prohibit prosecution under any other provision of law. [Penal Code Section 653c(e).]

10) States that except as otherwise provided, an inmate who is released on parole shall be returned to the county that was the last legal residence of the inmate prior to his or her incarceration. "Last legal residence" shall not be construed as the county wherein the inmate committed an offense while confined in a state prison or local jail facility or while confined for treatment in a state hospital. [Penal Code Section 3003(a).]

11) States that for the purposes of any contract, deed, or covenant for the transfer of real property, a residential facility for the elderly which serves six or fewer persons shall be considered a residential use of property and a use of property by a single family, notwithstanding any disclaimers to the contrary. (HSC Section 1569.87.)

12) Includes as a "facility exempt from licensing" recovery houses or similar facilities providing group living

arrangements for persons recovering from alcoholism or drug addiction where the facility provides no care or supervision. [HSC Section 1505(i).]

13) Provides that for the purposes of any contract, deed, or covenant for the transfer of real property, a residential facility which serves six or fewer persons shall be considered a residential use of property by a single family, notwithstanding any disclaimers to the contrary. (HSC Section 1566.5.)

14) States that the "Community Care Facilities Act" (HSC Section 1501 et seq.) does not apply to recovery houses or similar facilities providing group living arrangements for persons recovering from alcoholism or drug addiction where the facility provides no care or supervision, or to any alcoholism or drug abuse recovery or treatment facility, as defined. [HSC Section 1505(i)(j).]

15) Exempts from licensing "any alcoholism or drug abuse recovery or treatment facility as defined by HSC Section 11834.11. [HSC Section 1505(j).]

16) Defines "residential facility" as any family home, group care facility, or similar facility determined by the director, for

24-hour non-medical care of persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual. [HSC Section 1502(a)(1).]

17) States Legislative declaration: "Six or Fewer Persons: Provides that the Legislature hereby declares that it is the policy of this state that each county and city shall permit and encourage the development of sufficient types and numbers of alcoholism or drug abuse recovery treatment facilities as are commensurate with local need." Further states that the provisions of this article apply equally to any chartered city, general law city; county, county and city, district, and any other local public entity. (HSC Section 11834.20.)

18) States for the purposes of this article, "six or fewer persons" does not include the licensee or members of the licensee's family or persons employed as facility staff. (HSC Section 11834.20.)

19) Provides, in a section of FEHA, "Effect of Federal Law", that nothing in this part shall be construed to afford the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 and its implementing regulations. (24 C.F.R. Section 100.1 et seq.) or state law relating to fair employment and housing as it existed prior to the effective date of this section. Provides that any state law that purports to require or permit any action that would be an unlawful practice under this part shall to that extent be invalid. This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws. (Government Code Section 12955.6.)

20) States, that the Legislature makes specified findings and declarations regarding unlawful housing practices [Government Code Section 12955.6 Uncodified Legislative Findings and Declarations] including, but not limited to:

a) That public and private land use practices, decisions, and authorizations have restricted, in residentially zoned areas, the establishment and operation of group housing and other uses;

b) That persons with disabilities and children who are in need of specialized care and included within the definition of family status are significantly more likely than other persons to live with unrelated persons in group housing; and,

c) That this act covers unlawful discriminatory restrictions against group housing for these persons.

21) States in the California Constitution that "all people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy. (Cal. Const. Art. I 1.)

22) Held that CDCR may place two or more sex offender parolees in a "residential facility which serves six or fewer persons, as that term is defined in the California Community Care Facilities Act." Further, the term "residential facility which serves six or fewer persons" has a well established

meaning that may reasonably be applied in interpreting the language of Penal Code Section 3003.5. [89 Cal. Op. Atty. Gen. 199 (2006).]

23) Held that if a residential facility serves six or fewer persons, it is considered a residential use of the property under local ordinances and treated as any other single-family dwelling in the same community. [73 Ops. Cal. Atty. Gen. 58, 59 (1990).]

24) Provides that an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons shall not be subject to any business taxes, local registration fees, use

permit fees, or other fees to which other single family dwellings are not likewise subject. (HSC Section 11834.22.)

25) States that whether or not unrelated persons are living together, an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons shall be considered a residential use of property, and the residents and operators of such a facility shall be considered a family for the purposes of any law or zoning ordinance which relates to the residential use of property. (HSC Section 11834.23.)

26) Prohibits requiring a conditional use permit, zoning variance or other zoning clearance for an alcoholism or drug recovery or treatment facility that serves six or fewer persons that is not required of a single-family residence in the same zone. (HSC Section 11834.23.)

27) Defines "handicapped person" as a person with a physical or mental impairment; that phrase includes but is not limited to . . . drug addiction and alcoholism." (28 C.F.R. 41.31.)

28) States that the opportunity to seek, obtain and hold housing without discrimination because of familial status or disability, is hereby recognized as and declared to be, a civil right. [Government Code Section 12921(b).]

FISCAL EFFECT : None

COMMENTS :

1) Author's Statement : According to the author, "AB 2593 intends to eliminate any potential conflict of uses in residential

neighborhoods and to reduce potential dangers associated with multiple sex offenders living next door to a family with children. This bill will permit a city or county to regulate the over-concentration of sex offenders in a residential care facility that serves six or fewer individuals."

2) Background : According to background information provided by the author, "AB 2593 removes the exclusion of a residential facility which serves six or fewer persons from the definition of a single family dwelling. AB 2593 allows a county or city to prohibit a person released on parole, after having served a term of imprisonment for any offense for which registration as a sex offender is required, from residing, during the parole period, in any single family dwelling with any other person also on parole, unless those persons are related.

"Residential care facilities are often single family dwellings that are in residential neighborhoods and may house several sex offenders under one roof. As a result, paroled sex offenders are concentrated in a single family home located in neighborhoods where children live, ride their bikes, play in front yards, and walk to and from school. This environment places young, innocent children at serious risk of assault, injury or death, and can foster sexual misconduct on the part of paroled sex offenders.

3) Comments :

a) Although this bill amends a Penal Code section relating to sex offender parolees, this bill also inserts a specific reference to "sober living facilities" into that section. (Penal Code Section 3003.5.) Sober living facilities exist to help persons disabled by an addiction to alcohol or drugs in their recovery process. Is it the intent of this bill to only allow local jurisdictions to regulate sex offenders released on parole after serving a term of imprisonment for a registerable sex offense? After the sex offender has successfully completed parole, is it this bill's intent to allow sex offender registrants to live anywhere they desire, subject to the provisions enacted pursuant to Proposition 83 as Penal Code 3003.5(b) and (c)?

Or, since Penal Code Section 3003.5 (b) and (c) restrict the residency of all registered sex offenders, not just those

on parole, is this bill intended to allow local ordinances

to regulate the residency of non-parolee registered sex offenders? Under the provisions of this bill, will all registered sex offenders be precluded from residing in a sober living facility if that facility already houses one registered sex offender?

b) Legislative restrictions which are focused on family composition rather than the number of occupant dwelling units have been held to be violative of both the Federal Fair Housing Act and the State of California's Fair Employment and Housing Act; and unconstitutional under the United States and California Constitutions. ["The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, and Ninth Amendments to the United States Constitution. This right should be abridged only when there is a compelling public need."] See below for further discussion of this issue.

c) There is no definition, either in this bill or in existing law, of "sober living facilities."

d) A "Fact Sheet" issued in December 2007 by the California Department of Alcohol and Drug Programs states in part that alcohol and drug-free houses (also known as "sober living facilities") are important in supporting treatment and recovery services in a community by helping recovering persons to maintain an alcohol- and drug-free lifestyle.

e) Persons who are recovering alcoholics or drug addicts are "disabled" persons entitled to the protections of the Federal Fair Housing Act and the California Fair Employment and Housing Act. [42 U.S.C. 3601 et seq.; Government Code 12921(b).]

"[C]ongress intended to recognize that addiction is a disease from which, through rehabilitation efforts, a person may recover, and that an individual who makes the effort to recover should not be subject to housing discrimination based on society's 'accumulated fears and prejudices' associated with drug addiction." [United States v. Southern Management Corporation, 955 F. 3d 914, 923 (4th Circuit 1992).] "Our ruling is fair notice regarding the ambit of the [Federal Fair Housing Act's] coverage of drug

addicts." (Id. at p. 923.)

f) In targeting "sober living facilities" and other residential facilities serving six or fewer persons (generally group homes serving a protected class under the Fair Housing Act), this bill invites prohibited discrimination against disabled persons and other potential residents of such group homes, notwithstanding this bill's stated focus on registered sex offenders. The United States Supreme Court has clearly held that local ordinances that target the type of occupants, rather than the number of occupants (to prevent overcrowding) violate the Fair Housing Act. [City of Edmonds v. Oxford House, Inc., (1995) 514 U.S. 725.]

g) The law clearly distinguishes between registered sex offenders and "sexually violent predators." Sexually violent predators are persons who have been civilly committed due to their risk of re-offending. There have been only four sexually violent predators ever released under existing law. Determination of status as a sexually violent predator occurs through civil commitment proceedings, which are completely separate from sex offender registration requirements under the Penal Code.

h) Nothing but anecdotal evidence has been presented regarding any connection between "sober living facilities" and registered sex offenders.

i) Where will parolees required to register as sex offenders live ? As bills such as this one deprive such people of housing options, is it contemplated that the State will be responsible for the construction, development, and management of alternative types of housing? Would this bill make it harder for parole agents to locate housing for these parolees? From a public safety viewpoint, would it be safer for these parolees to be homeless than to live in a single-family dwelling, or sober living facility with another sex offender? If these parolees also have a substance abuse problem, would this bill make it impossible, or extremely difficult, to place sex offender parolees in small sober living facilities? Would limiting the ability of parole agents to place sex offenders in sober living facilities enhance public safety? Is being a roommate in a regulated facility (such as a

sober living facility) more dangerous than two sex offenders being adjacent neighbors in residential hotels or apartment complexes?

4)The Federal Fair Housing Act: The Federal Fair Housing Act (42 U.S.C. Section 3601 et seq.) makes it unlawful to discriminate against any person because of race, color, religion, sex, familial status or national origin. [42 U.S.C. Section 3604(b).] It is also unlawful to discriminate in the sale or rental, or to otherwise make unavailable, a dwelling to any buyer or renter because of handicap . [42 U.S.C. Section 3604(f)(1).] In implementing regulations, the Federal Government also defines "handicapped person" as a person with a physical or mental impairment; that phrase includes but is not limited to ? drug addiction and alcoholism ." (28 C.F.R. Section 41.31.)

5)Discrimination is further defined to include a refusal 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. Section 3604(f)(3)(B).]

In defining "handicap", the Fair Housing Act encompasses the handicap of the buyer or renter; a person residing in or intending to reside in that dwelling or of any person associated with that buyer or renter. [42 U.S.C. Section 3604(f)(1).] Implementing regulations further define "handicapped person" as a person with a physical or mental impairment; that phrase includes but is not limited to ? drug addiction and alcoholism." (28 C.F.R. Section 41.31.)

The Federal Fair Housing Act defines "family" as including a single individual. [42 U.S.C. Section 3602(c).] The Act defines "dwelling" as any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or use for the construction or location thereon of any such building, structure, or portion thereof. [42 U.S.C. Section 3602(b).]

The Federal Americans with Disabilities Act 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. (42 U.S.C. Section 12132.)

6)The United States Supreme Court and Federal Appellate Courts have held that Local Ordinances Prohibiting a Specified Number of Unrelated Persons from Living Together in a Family Residence Zone are Unconstitutional .

a) The United States Supreme Court has held that laws which focus on the composition of households rather than the total number of occupants in living quarters violate the Federal Fair Housing Act. The Court stated that a local ordinance governing areas that are zoned for single-family dwellings - which provision had been invoked against a group home for persons recovering from alcoholism and drug addiction - is a family composition rule and is not a maximum occupancy restriction (which might be exempt from scrutiny under the Federal Fair Housing Act. [City of Edmonds v. Oxford House, Inc., (1995) 514 U.S. 725.] As a family composition rule, however, the ordinance was held subject to strict scrutiny under the Fair Housing Act and underlying constitutional principles.

Thus, the United States Supreme Court has held that local ordinances which focus on the composition of the household (e.g., sober living facilities) rather than the total number of occupant living quarters are prohibited by the Federal Fair Housing Act. The Court distinguished between the composition of the households and the total number of occupant living quarters.

b) Federal lower courts have held that group homes are dwellings. "It is well settled that the Fair Housing

Amendments Act applies to the regulation of group homes." [Larkin v. Mich. Dept. of Social Services, 89 F. 3d 285, 289 (6th Circuit 1996).] A court has also discussed the legislative intent expressed in the House Resolution Report No. 100-711 as to the types of discrimination that committee intended to prevent under the Fair Housing Amendments Act, and noting in particular "the enactment or imposition of heath, safety, or land-use requirements on congregate living arrangements among non-related persons with disabilities." [Lakeside Resort Enterprises et.al. v. Board of Supervisors of Palmyra Township, 455 F. 3d 154 (3rd Circuit (2006); cert. denied 2007 U.S. LEXIS 1182

(January 22, 2007).]

In the Lakeside Resort case, the issue was whether a proposed drug and alcohol treatment facility qualified as a dwelling under the Fair Housing Act. The Federal Appellate Court held that while the residents were at the facility, they treated the facility like a home, eating together, receiving mail and visitors, and decorating their rooms. Therefore, the appellate court deemed the facility a dwelling under 42 U.S.C. Sections 3602(b) and 3604(f)(1). "We hold that the facility intended as a drug and alcohol treatment facility is a dwelling under the Fair Housing Act." (Id. at p. 160.)

"Alcoholism is impairment, and where alcoholics are unable to maintain abstinence and continued recovery in an independent living situation, they are substantially limited in their ability to care for themselves and thus such individuals are disabled under the Americans with Disabilities Act (42 U.S.C. 12102.)" [Regional Econ. Community Action Program, Inc. v. City of Middletown 281 F. 3d 333 (2nd Circuit 2002); corrected 294 F.3d 35; cert. denied (2002) 537 U.S. 813 (2002).]

In MX Group, Inc. v. City of Covington 106 F. Supp. 2d 914 (E.D. Ky. 2000); affirmed 293 F3d 326 (6th Circuit 2006), the Court found that recovering heroin addicts were 'persons with disabilities' under 42. U.S.C. Section 12102(2), where addiction was a long-term problem affecting major life activities of working and parenting, at a minimum, and the prospective clients of the facility had a record of or were regarded as being disabled.

The court in A Helping Hand, LLC v. Baltimore County, MD (2005 District Court Maryland) 2005 U.S. Dist. LEXIS 22196, recognized that the Americans with Disabilities Act applies to local zoning decisions. Also, numerous precedents establish that the administration of zoning laws is a "service, program or activity" within the meaning of 42 U.S.C. Section 12132. The court further noted that the plaintiff "does not presently rely on other theories that may be available under the ADA, including disparate impact and failure to provide reasonable accommodation." The Helping Hand Court also reviewed the procedural history of the local ordinance, and determined that the circumstances

indicate that the bill was specifically designed to prevent A Helping Hand from providing services to its disabled clients. "Courts have found that a decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decision makers personally have no strong views on the subject." (Id.)

7)Local Ordinances Passed Pursuant to This Bill May Result in Protracted, Costly Litigation, Brought by Both Private Plaintiffs and the United States Government : Because local ordinances passed pursuant to this bill are likely to invite local legislation enacted in the context of strong, discriminatory opposition, it appears likely that such local ordinances will be the subject of lengthy, costly litigation against any locality that passes an ordinance discriminating against persons with disabilities. [See, e.g., United States v. City of Boca Raton, (2008 S.D. Florida), 2008 U.S. Dist. LEXIS 20088, a case brought by the United States Department of Justice, under 42 U.S.C. 3614(a), which gives the Attorney General the authority to commence an action under the Fair

Housing Act whenever "he has reasonable cause to believe that any person or group of persons has been denied any of the rights granted by the Act and such denial raises an issue of general public importance." The United States Department of Justice also filed a brief in a related case, Jeffrey O. v. City of Boca Raton, 511 F. Supp. 2d 1339 (S.D. Fla. 2007). In both cases, the City was alleged to have established a classification directed at housing for persons with particular disabilities and imposed unique restrictions on that housing.]

In the United States v. Boca Raton case, the court reiterated its finding in Jeffrey O., supra, that the portion of the city ordinance which capped the number of unrelated individuals who could live together in residential zones at 3, to be in violation of the Fair Housing Act because it did not establish a reasonable accommodation procedure. The U.S. v. Boca Raton court also held that the purpose of the Fair Housing Act is to "prohibit local governments from applying land use restrictions in a manner that will give disabled people less opportunity to live in certain neighborhoods than people without disabilities" citing Good Shepherd Manor Foundation v. City of Momence, 323 F. 3d 557, 562 (7th Circuit 2003).

As the court ruled in Community Housing Trust v. Department of

Consumer and Regulatory Affairs, 257 F. Supp. 2d 208 (D.D.C. 2003) "an ordinance which ? classifies persons upon the basis of their 'common need for treatment, rehabilitation, assistance, or supervision in their daily living does, in fact, apply different standards to persons on the basis of their disability."

This bill, in specifically singling out "sober living facilities" for appropriate differential treatment by local ordinances, thus violates the Fair Housing Act by applying different standards to the disabled persons who reside in sober living facilities. By so doing, this bill will likely result in any number of lawsuits, by private individuals, groups who own sober living facilities, and the United States Government under the provisions of Section 3614. (42 U.S.C. Section 3614.) As stated in United States v. Boca Raton, supra, "governmental agencies are not bound by private litigation when the agency's action seeks to enforce a federal statute that implicates both public and private interests," citing Herman v. South Carolina National Bank, 140 F.3d 1413, 1425 (11th Circuit 1998); U.S. v. City of Boca Raton, supra.

8) California Statutory Law, as Set Forth in the California Fair Employment and Housing Act, Provides Greater Protections to the Disabled than Afforded in Federal Law . In Government Code Section 12926.1, "the Legislature finds and declares as follows:

a) The law of this State in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection , this state's law has always, even prior to passage of the federal act, afforded additional protections.

b) The law of California contains broad definitions of physical disability, mental disability, and medical condition.

c) Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. In addition, the Legislature has

determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this State than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any

mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.

d) States that notwithstanding any [contrary] interpretation of law the Legislature intends: (a) for state law to be independent of the Americans with Disabilities Act of 1990, (b) to require a 'limitation' rather than 'a substantial limitation' of a major life activity, and (c) by enacting Section 12926(4)(i) and (k) to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity.

9) California Law in FEHA Declares Discrimination on the Basis of Disability in Housing Accommodations to be against Public Policy . (Government Code Section 12920.)

10) The California Supreme Court and California Appellate Courts have Held That Land Use Practices Which Promote Discrimination on the Basis of Disability Are Unlawful :

a) The California Supreme Court Held Unconstitutional a Local Ordinance Prohibiting 12 Unrelated Persons from Living Together in a Family Residence Zone. In City of Santa Barbara v. Adamson, (1980) 27 Cal. 3d 123, the California Supreme Court stated, "The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose? The right of privacy

is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, and Ninth Amendments to the United States Constitution. This right should be abridged only when there is a compelling public need . . . . [citing White v. Davis, 13 Cal. 3d 757, at pp. 774-775. (1979).]"

b) Other California Appellate Court Decisions on Discrimination in Housing On the Basis of Disability : In Hall et al., v. Butte Home Health, Inc., 60 Cal. App. 4th 308 (3rd District 1997), the appellate court stated, "The Legislature amended the Fair Employment and Housing Act (Gov. Code, 12955 and 12955.6), in 1993, and thereby declared restrictive covenants which, through land use practices, promote discrimination on the basis of disability, to be unlawful. One reason for the legislative change was to bring California law into conformity with the federal Fair Housing Act of 1968, which precludes the enforcement of restrictive covenants, even those neutral on their face, that have the purpose of discriminating, in housing, against handicapped individuals. The Hall Court also stated: "Furthermore, Gov. Code, 12955.6, was intended to and did invalidate the portion of Health & Safety Code, 1569.87, that permitted the use of pre-1979 restrictive covenants to exclude group homes for the disabled elderly."

In Broadmoor San Clemente Homeowners Association v. Nelson, 25 Cal. App. 4th 1, (4th Appellate District 1994) the Court held that the "Federal Fair Housing Act of 1968, was amended in 1988 to make it unlawful 'to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of ? a person residing in, or intending to reside in that dwelling after it is so sold, rented or made available. [42 U.S.C. 3604(f)(1).] Restrictions on housing accommodations for the disabled violate the Federal Fair Housing Act as amended in 1988.

"[I]n discussing the scope of the amended Act, the House Committee on the Judiciary reviewed the legislative history of the Federal Fair Housing Act and noted 'In discussing the scope of the amended Act, the House Committee on the Judiciary stated that the Act is intended to prohibit special restrictive covenants or other terms or conditions,

or denials of service because of an individual's handicap, and which ? exclude, for example, congregate living arrangements for persons with handicaps".

The Broadmoor Court also discussed federal cases which found violations of the Federal Fair Housing Act by the enforcement of a neutral covenant in state law designed to terminate the operation of a home for the handicapped. [See, e.g., Casa Marie v. Superior Court of Puerto Rico, 752 F. Supp. 1152 where "the court held that the Fair Housing Act was violated by the defendants' enforcement of a neutral restrictive covenant in state court to terminate the operation of a home for the handicapped," citing U.S. v Scott 788 F. Supp. 1155, 1561 (Dist. Court Kansas 1992). Broadmoor, supra, at p. 8.]

The court held that enforcement of a covenant that had the effect of excluding group homes for the handicapped was prohibited by law. Specifically, federal law prohibits enforcement of a restrictive covenant having the effect of excluding group homes for the handicapped. (Broadmoor supra.)

The Broadmoor case reviewed the history of the 1993 amendments to the Fair Employment and Housing Act (FEHA). The amendments added "It shall be unlawful to discriminate through public or private land use practices? because of disability? Discrimination includes but is not limited to restrictive covenants. Section 1569.87 of the Health and Safety Code permits restrictive covenants executed before 1979 to prohibit residential care facilities for the elderly. "It therefore appears from the face of Government Code Sections 12955 and 12955.6 that the portion of 1569.87 containing such permission has been repealed . The legislative intent expressly stated in the act amending Sections 12955 and 12955.6 confirms this conclusion." (Broadmoor, supra, at p. 8.)

"Federal law prohibits enforcement of a restrictive covenant which has the effect of excluding group homes for the handicapped. The legislative intent expressed as part of the amendments, specifically refers to the desirability of making group housing for the disabled available in residential areas. (Broadmoor, supra, at p. 9.)

c) California Appellate Courts Have Adopted the "Discriminatory Impact" Theory of Housing Discrimination : Broadmoor, supra, was cited with approval by the California Supreme Court in Konig v. Fair Employment and Housing Commission, 28 Cal. 4th 743, 750 (2002) and by Sisemore v. Master Financial Inc., 151 Cal. App. 4th 1386 (6th District Court of Appeal 2007.) In Sisemore, the Court stated that "a plaintiff need not show a discriminatory intent to establish a disparate impact claim under the Fair Housing Act," citing Pfaff v. U.S. Department of Housing and Urban Development, (9th Circuit 1996) 88 F. 3d 739, 745-746. "Rather, the essential premise of a Fair Housing Act disparate impact claim is that some housing practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." [Sisemore, supra at p. 1420, citing Mountain Side Mobile Estates v. Secretary of HUD, (10th Circuit 1995) 56 F. 3d 1243, 1250-1251.]

11) "Sober Living Facilities" Are Not Defined in This Bill : Although this bill specifically references "sober living facilities" the bill does not define precisely what is meant by that term. The only reference found to "sober living facilities" was in a fact sheet issued in December 2007 by the California Department of Alcohol and Drug Programs. That fact sheet, which cites no statutory or regulatory authority, states, in part:

a) Alcohol and drug-free houses (also known as "sober living facilities") are important in supporting treatment and recovery services in a community by helping recovering persons to maintain an alcohol- and drug-free lifestyle. Residents are free to organize and participate in self-help meetings or any other activity that helps them to maintain sobriety.

b) The house or its residents do not and cannot provide any treatment, recovery, or detoxification services; do not have treatment or recovery plans or maintain case files, and do not have a structured or scheduled program of alcohol and drug education, group or individual counseling,

or recovery support sessions.

c) Persons typically become residents of an alcohol- and drug-free house after being in a licensed non-medical

residential alcohol or other drug recovery or treatment facility. However, participation in a licensed facility is not necessarily a prerequisite for residency.

d) Alcohol- and drug-free houses are not required to be licensed, nor are they eligible for licensure. By definition they do not provide alcohol or drug recovery or treatment services and are, therefore, not subject to regulation or oversight by the State Department of Alcohol and Drug Programs (ADP.)

e) These houses have three things in common:

i) They ensure that a person who is in recovery lives in an environment that is free from alcohol and drugs;

ii) The residents themselves reinforce their recovery through support with other recovering persons; and,

iii) The residents are free to voluntarily pursue activities to support their recovery, either alone or with others.

f) Alcohol- and drug-free houses are subject to landlord/tenant law in California, including the Unruh Civil Rights Act (Civil Code Section 53 et seq.) and FEHA's provisions regarding non-discrimination in housing (Government Code Section 12980 et seq.).

g) The Fact Sheet also directs readers to the Federal Fair Housing Amendments Act, 42 U.S.C. 3601 et seq.) which "forbids discrimination on the basis of disability in sale, rental, zoning, land use restriction and other rules."

12)Arguments in Support :

a) The Mayor, Town of Apple Valley (the sponsor of this bill), states, "The intent of AB 2593 is to preserve public safety, ensure the integrity, quality, and public-service benefit derived from group homes, and to protect our children and communities from the proliferation of registered sex offenders living in residential neighborhoods. If adopted, AB 2593 would provide cities and counties with greater oversight and authority over sex offender housing concentrations in Residential Care

Facilities (small group homes of six residents or less) licensed by the State. Because existing law does not permit a city or county to regulate the number or types of residents living in a small group home, AB 2593 is necessary to permit a city or county to adopt a local ordinance to prohibit more than one registered sex offender from residing in a small group home.

"Over the last several years, public outcry has grown significantly throughout California, particularly here in Apple Valley. Local elected officials are charged with the reasonability of providing public safety for all California residents. AB 2593 would go a long way to providing safer communities and addressing public concern regarding state licensed group homes while continuing to improve the public benefit these facilities provide.

"AB 2593 is a good public safety measure which will allow communities who are most affected by the release of sexually violent predators to have a say in the placement of these individuals."

b) The Bakersfield Office of the City Attorney states, "The intent of AB 2593 is to preserve public safety, ensure the integrity, quality and public-service benefit derived from group homes, and to protect our children and communities from the proliferation of registered sex offenders living in residential neighborhoods. If adopted, AB 2593 would provide cities and counties with greater oversight and

authority over sex offender housing concentrations in Residential Care Facilities (small group homes of six residents or less) licensed by the State and sober living facilities . . . . AB 2593 would go a long way to providing safer communities and addressing public concern regarding state licensed group homes while continuing to improve the public benefit these facilities provide."

c) The Mayor, City of Hesperia , states, "Over the last several years, public outcry has grown significantly throughout California, particularly here in the High Desert region of San Bernardino County. AB 2593 would go a long way to providing safer communities and addressing public concern regarding state licensed group homes while continuing to improve the public benefit these facilities provide."

13)Arguments in Opposition :

a) The California Public Defenders Association states, "AB 2593 would bar parole officials from placing sex offenders in residential facilities or sober living facilities that serve six or fewer persons. This bill would place additional burdens on parole authorities in finding places for 290 registrant parolees to live.

"The California Sex Offender Management Task Force identified housing as one of the key problems blocking successful reintegration of offenders into the community. Research has shown that stability is a key factor in preventing sex offenders from re-offending. Making it impossible for sex offender parolees to live in the community, this bill makes it more likely that sex offenders will become homeless and be more likely to commit new offenses."

b) The American Civil Liberties Union states, "This bill would place additional burdens on parole authorities in finding places for sex offender parolees to live. The California Sex Offender Management Task Force identified housing as one of the key problems blocking successful reintegration of offenders into the community. Research has shown that stability is a key factor in preventing sex offenders from re-offending. The additional hurdles imposed by this bill are counterproductive."

14)Related Legislation :

a) AB 724 (Benoit) would allow a city or county the right to exercise its police power to regulate, without restriction, the use and occupancy of a single-family residence located in a single-family residence zone, as defined. AB 724 failed passage in the Committee on Health.

b) AB 370 (Adams) would allow a city or county to include in a local definition of single-family dwelling a residential facility which serves six or fewer persons. AB 370 was held on the Appropriations Committee's Suspense File.

c) SB 992 (Wiggins) would require the Department of Alcohol

and Drug Programs (DADP) to administer the licensure and regulation of adult recovery maintenance facilities, as defined and also required DADP to adopt emergency regulations in this regard. SB 992 failed passage on the Assembly floor.

d) SB 1000 (Harman) would have required registration of sober living facilities with the Department of Alcohol and Drug Programs. SB 1000 failed passage in the Senate Health Committee and was returned to the Secretary of the Senate.

e) SB 913 (Hollingsworth) would have deleted the provision in existing law which exempts residential facilities that serve six or fewer persons from the prohibition against more than one parolee required to register as a sex offender from living in a single-family dwelling, unless

they are related. SB 913 failed passage in the Senate Public Safety Committee and was returned to the Secretary of the Senate.

REGISTERED SUPPORT / OPPOSITION :

Support

Mayor, Town of Apple Valley (Sponsor)
Bakersfield Office of the City Attorney
Mayor, City of Hesperia

Opposition

American Civil Liberties Union
California Public Defenders Association

Analysis Prepared by : Kathleen Ragan / PUB. S. / (916) 319-3744

1-0262

FAQ SHEET | Solutions for Treatment Expansion Project (STEP)
A Project of Futures Associates, Inc.

How fair housing laws impact the conditional use permit process for residential alcohol and drug treatment programs and local land use issues regarding sober living residences.

FREQUENTLY ASKED QUESTIONS (FAQ) • September 2007

Q 1. What is federal fair housing law?

A. Individuals in this country have the right to choose where they live. Therefore, fair housing issues have historically fallen under civil rights law. In fact, the formal name of the Fair Housing Act is Title VIII of the 1968 Civil Rights Act. It was the first major civil rights law that focused specifically on housing since the first Civil Rights Act passed in 1866 as part of Reconstruction legislation following the Civil War

The fair housing portion of the 1968 legislation prohibited housing discrimination based on color, national origin, and religion, and in 1974, added gender. Many types of housing related discrimination are covered under this act, such as mortgage lending, homeowner's insurance, and sales. This discussion, however, shall focus on those tenets of the law as they impact zoning and other land use considerations.

Further refinements to fair housing laws were made in the Fair Housing Amendments Act (FHAA) of 1988. In the late 1970s and early 1980s, NIMBY (Not In My Back Yard) responses became common as communities fought against the establishment of group homes and residential treatment programs for substance abusers and the mentally ill. The tipping point for this social phenomenon was the new practice of deinstitutionalization of those populations who were previously treated and/or housed in large state funded and administered institutional facilities. The thinking of the day, still current, is that the mentally ill and substance abusers have better treatment outcomes and living experiences in smaller "family-like" homes and residences located in residential neighborhoods where they can be a part of the community, rather than in large impersonal institutions removed from the pulse of community life.

Q 2. What parts of the Fair Housing Amendments Act (FHAA) of 1988 directly impact the siting of residential alcohol and drug treatment programs?

A. There are six key elements of the law that directly affect residential treatment and their potential locations.

1. Specific populations are designated as "handicapped" or "disabled" and are therefore protected from housing discrimination. Included in this classification are substance abusers and the mentally ill.[1] (Note: The exception to the classification of housing protections for substance abusers is for those that are currently active in their addictions to illegal drugs.[2])
2. Residential treatment programs and other types of group homes - where individuals reside for an extended period, as opposed to an overnight "hotel" situation - are housing situations protected by the FHAA.
3. The law establishes that local governments have an "affirmative duty" to provide "reasonable accommodation," or flexibility, when considering zoning and other land use parameters for housing for persons with disabilities, which includes residential treatment settings (See Q 4 for further description).[3]
4. Persons with disabilities, or their agents, have remedy within the law and can sue if they believe that they have been discriminated against.[4]
5. Any local regulations specifically designed to restrict

"Repeatedly, the courts have ruled that local governments denying use permits based on stereotypical negative NIMBY projections are discriminatory . . ."

residential alcohol and drug treatment programs or sober living residences that are not generally applicable to other comparable housing are also in violation of fair housing laws.

6. A local government that uses NIMBY as a basis for its decision to deny a use permit to a residential program for persons with disabilities as identified by fair housing laws is in violation of those laws.

Repeatedly, the courts have ruled that local governments denying use permits based on stereotypical negative NIMBY projections are discriminatory in that their effect is to restrict where persons with disabilities can live. Furthermore, courts have stated that NIMBY projections have no validity as they are not supported by data and in fact, are contradicted by data.[5] Making a determination as to whether a person or even a group home or residential program is a threat to neighborhood health and safety must be demonstrated on an individualized basis using specific criteria, not be made on stereotypical assumptions.

Q 3. If it has been a violation of fair housing laws since 1988 for a local government to base denial of a use permit to a residential alcohol and drug treatment program on NIMBY arguments, why does NIMBY remain today the most effective means communities have to prevent their local governments from issuing use permits to these residential programs?

A. It is commonly known in local governments that fair housing laws make it illegal to discriminate in the sale or rental of individual housing units on the basis of race, national origin, religion or gender. What is not as commonly known in local governments is that fair housing laws also apply to land use decisions involving the granting of use permits for residential treatment programs that house persons with disabilities as identified by fair housing laws, such as substance abusers. However, lack of knowledge by local governments is not an excuse for discrimination. The FHAA has been in existence since 1988 and has been widely publicized by the U.S. Department of Housing and Urban Development and by national and local disability and fair housing advocacy organizations.

One reason for this lack of attention is because residential programs for substance abusers and the mentally ill comprise such a small percentage of the housing and building concerns that come before local governments. For instance, in San Diego County, compare the presence of hundreds of thousands of houses, apartment complexes and commercial buildings to that of only 77 licensed residential alcohol and drug treatment programs. In fact, some local governments have never had occasion to consider a use permit for such a program. Of the 19 local governments in San Diego County, only nine have a state licensed residential substance abuse program.

Q 4. Since land use issues depend upon local conditions, do local zoning laws automatically preempt fair housing laws?

A. No. Fair housing laws prohibit local governments from using zoning and other land use requirements to discriminate against the housing needs of persons with disabilities. Courts have further strengthened the intention of federal fair housing laws in a series of decisions that apply any one of three tests to local regulations: (1) discriminatory intent, (2) discriminatory impact, or (3) failure to provide reasonable accommodation.[6] An accommodation is considered reasonable as long as it does not place an undue administrative or financial burden on the local government considering the application. California Attorney General Bill Lockyer, put it this way:

"Thus, municipalities relying upon these alternative procedures have found themselves in the position of having refused to approve a project as a result of consideration which, while sufficient to justify the refusal under the criteria applicable to grant of a variance or conditional use permit, were insufficient to justify the denial when judged in light of the fair housing laws' reasonable accommodation mandate."[7]

Not all denials of use permits are discriminatory against persons with disabilities. Sometimes it may be both legitimate and appropriate for a local government to turn down a residential alcohol and drug treatment provider for a use permit. That is why the application of reasonable accommodation criteria is critical. Reasonable accommodation is not a one way street. Providers are also obliged to be flexible in their responses to legitimate land use concerns that their facility might cause, such as increased parking, traffic, the building size or design, or outdoor lighting issues.

Q 5. How can residential alcohol and drug treatment providers ensure that they can get a conditional use permit (CUP) for their programs?

A. There are no guarantees that treatment providers will be granted a CUP, but fair housing laws definitely improve the odds for providers over what they have been in the past. When a residential provider submits a CUP application, it is important to include in the application a

request for reasonable accommodation from the local government. Specifically it should include:

- Identifying the category of persons with disabilities per fair housing law (substance abusers) that the proposed residential program will be serving.
- Specifying the accommodations in land use that will be necessary to make this residential facility available to those with disabilities.
- Identifying the ways in which the requested accommodation will not impose an undue financial or administrative burden on the local government to which the provider is applying.

However, a provider proposing a treatment facility of more than six beds in a residential dwelling, or a facility with six beds or fewer seeking to increase its number of beds, may not need to apply for a CUP, but instead can apply for reasonable accommodation. There are many reasons to pursue this course of action. Any provider seeking to do this may want to consult with a fair housing professional who is knowledgeable in this area of land use. For more information on this subject see: http://www.mhas-la.org/DeveloperGuide3-9-05.pdf

There are additional actions to take which are specified in the resource guide (How to Site a Residential Alcohol and Drug Treatment Program Using Fair Housing Laws) prepared by the Solutions for Treatment Expansion Project (STEP) at Futures Associates.

Q 6. Can local governments put special restrictions on sober living residences?

A. No. Sober living residences are living arrangements where people abstinent from alcohol and drugs seek a clean and sober living environment. There is no staff, except there may be a house manager, and there are no treatment or counseling services given. They are considered the same as any other rental situation. Local governments cannot require restrictions or permits for one residence without requiring the same for all.

The category of land use that sober living residences fall under is that of density requirements. Such regulations are intended to prevent overcrowding in residential settings. In defining density requirements local governments use one of two criteria: (1) a density limitation tied to general occupancy limitations per single residential dwelling, or (2) a density limitation based on how the local government defines "family."

Density requirements based on occupancy limitations, limiting the number of people allowed per square footage, are considered non-discriminatory because they apply equally to everyone and are, therefore, exempt from the application of fair housing laws. However, few local governments use this type of density limitation as it can impact large families.

The most common type of density limitation is tied to how a local jurisdiction defines "family." A typical definition would be that a family consists either of people who are related by blood or adoption (no number cap), or no more than six unrelated people. In such jurisdictions, a sober living residence may need to request reasonable accommodation if that jurisdiction informs them they are not in compliance with local density requirements. However, in jurisdictions in which there is no cap on the number of unrelated persons living together in a single family residence, sober living residences do not need to request reasonable accommodation as they are within the legal density guidelines.

Q 7. If my state's fair housing laws are not equivalent to the protections specified in federal fair housing law, which one prevails?

A. Federal fair housing law will always be considered the "floor."[8] If state law provides fewer protections than federal law, then federal law prevails. Some states may have more protections in their fair housing laws than federal law, such as California. In that case, the law that provides the most protection prevails. (See California Fair Employment and Housing Act: http://www.dfeh.ca.gov/Statutes/feha.asp)

Q 8. What are the consequences for local governments that do not follow fair housing laws in denying use permits to residential alcohol and drug treatment programs?

A. A local government can be sued by a provider or potential residents of the facility denied a use per-

mit if it was perceived that the permit was denied because of NIMBY concerns, or restrictions applicable only to residential alcohol and drug treatment programs, or because of the failure of the local government to provide reasonable accommodation. Similarly, the United States Department of Justice has authority to step in and enforce federal law when there is an allegation that a state or local government is discriminating in violation of the FHAA in their land use decisions. If the courts find in favor of the residential provider or its potential residents, a local government would have to pay attorney fees. Additionally both federal and state fair housing laws provide for the added potential consequences of having to pay damages and be assessed penalties.

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References

[1] Federal Fair Housing Act, 42 U.S.C. Section 3602 (h)

[2] Federal Fair Housing Act, 42 U.S.C. Section 3602 (h) (3)

[3] Federal Fair Housing Act, 42 U.S.C. Section 3604 (f) (3) (B)

[4] Federal Fair Housing Act, 42 U.S.C. Section 3613 (c)

[5] Daniel Lauber, "Impacts on the Surrounding Neighborhood of Group Homes for Persons with Developmental Disabilities." Governor's Planning Council on Development Disabilities, Springfield, Illinois, Sept. 1986.
Council of Planning Librarians, "There Goes the Neighborhood. . . A Summary of Studies Addressing the Most Often Expressed Fears about the Effects of Group Homes on Neighborhoods in which They Are Placed," April 1990.

[6] Ted H. Gathe, City of Vancouver, WA, "Group Homes: Local Control and Regulation Versus Federal and State Fair Housing Laws," Municipal Research and Services Center of Washington.

[7] Bill Lockyer, California Attorney General, Letter to All California Mayors, "Adoption of a Reasonable Accommodation Procedures," page 3, paragraph 2, May 15, 2001.

[8] Federal Fair Housing Act, 42 U.S.C. Section 3615

For more information please contact Futures Associates at E-mail: info@FuturesAssociates.org

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KEY PROVISIONS OF THE FEDERAL FAIR HOUSING AMENDMENTS ACT OF 1988

Sec. 802. [42 U.S.C. 3602] Definitions

(h) "Handicap" means, with respect to a person--

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

Sec. 804. [42 U.S.C. 3604] Discrimination in sale or rental of housing and other prohibited practices

As made applicable by section 803 of this title and except as exempted by sections 803(b) and 807 of this title, it shall be unlawful--

(f) (2) To discriminate against any person in the conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of--

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes

(B) a refusal 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;

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515 F.3d 356 (2008)

A HELPING HAND, LLC, A Maryland Corporate Entity; John Doe 1; Jane Doe Number 1; John Doe 2, Plaintiffs-Appellees, and Jane Doe Number 2; Jane Doe Number 3, Plaintiffs,
v.
BALTIMORE COUNTY, MARYLAND; Office of the Zoning Commissioner of Baltimore County; County Council of Baltimore County; Baltimore County Department of Permits and Development Management, Defendants-Appellants.

No. 06-2026.

United States Court of Appeals, Fourth Circuit.

Argued: December 4, 2007.
Decided: February 12, 2008.

358 *357 ARGUED: Jeffrey Grant Cook, Paul M. Mayhew, Baltimore County Office of Law, *358 Towson, Maryland, for Appellants. Richard A. Simpson, Ross, Dixon & Bell, L.L.P., Washington, D.C., for Appellees. ON BRIEF: John E. Beverungen, County Attorney, Baltimore County Office of Law, Towson, Maryland, for Appellants. Deborah A. Jeon, ACLU of Maryland, Baltimore, Maryland; Jimmy R. Rock, Ross, Dixon & Bell, L.L.P., Washington, D.C., for Appellees.

Before MOTZ and DUNCAN, Circuit Judges, and BRINKEMA, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, vacated in part, and remanded by published opinion. Judge MOTZ wrote the opinion, in which Judge DUNCAN and Judge BRINKEMA joined.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

This case arises from the enactment of a county zoning ordinance rendering operation of a methadone treatment clinic at its chosen location unlawful. The clinic alleges that the ordinance violates the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (2000 & Supp.2005), and the Due Process Clause of the Fourteenth Amendment. After the close of all evidence, the district court granted judgment as a matter of law to the clinic on its ADA disparate impact claim and one element of its ADA intentional discrimination claim. After deliberation, the jury returned a verdict for the clinic on the remaining elements of its ADA intentional discrimination claim and its due process claim. The district court then granted the clinic declaratory and injunctive relief. The County appeals. For the reasons that follow, we affirm in part, reverse in part, vacate in part, and remand the case for further proceedings consistent with this opinion.

I.

A Helping Hand, LLC ("the Clinic") is a for-profit methadone clinic located in Baltimore County, Maryland, which Joel Prell, a local resident, established in 2002. Methadone, a federally-approved drug, is used to treat severe, chronic opioid addiction, including heroin addiction. Methadone helps addicts to stop using narcotics by blocking the physical craving for other opioids. Like many other methadone clinics, the Clinic provides methadone maintenance treatment to eligible, admitted patients, along with services such as counseling.

Prell began looking into the possibility of opening a private methadone clinic in Baltimore County in 2001 and identified 116 Slade Avenue as a possible location. In November 2001, Prell wrote to the County Department of Permits and Development Management to inquire about the possibility of opening a methadone clinic at the Slade Avenue site. On November 21, the County notified Prell in writing that a drug addiction counseling and treatment center constituted a use "permitted by right" under the zoning ordinance applicable to the Slade Avenue site, but that a "change of occupancy permit" might be required before establishing a clinic at that site. Prell promptly inquired about the need for a change of occupancy permit; the County then informed him that because the Slade Avenue site was currently being used as a medical office, establishing a methadone treatment center at the site would not require a change of occupancy permit and he did not need to submit any additional documentation.

359 Relying on this advice, Prell arranged for incorporation of the Clinic, entered into a lease for the Slade Avenue site, and applied for the *359 required federal and state certifications and permits.

Soon, the surrounding community learned of these plans and voiced strong opposition to the proposed location of the Clinic. Local community associations distributed flyers, scheduled meetings, held public demonstrations, and organized letter writing and telephone campaigns in an attempt to prevent the Clinic from opening. Some of the protests became very heated; for example, police officers were needed to control a protest outside of the Clinic during a community open house. Several local newspapers extensively reported on the protests, and a community association website posted updates about the organized community opposition to the Clinic.

Kevin Kamenetz, the County councilman representing the district in which the Clinic sought to open, became actively involved in the organized opposition to the Clinic. In addition to enlisting the support of state officials in this effort, Councilman Kamenetz regularly communicated with the community leaders opposing the Clinic and participated in open community meetings to develop strategies to prevent the Clinic from opening.

On April 1, 2002, Councilman Kamenetz introduced to the County Council legislation that he had helped to write, Bill 39-02 ("the Bill"). The Bill created a new category—"state-licensed medical clinics"— which included drug abuse treatment centers, and proposed new zoning requirements for that category. The Bill provides that these "state-licensed medical clinics" could no longer operate as a matter of right in commercial zones; instead, such clinics can operate in commercial zones only by "special exception," requiring a permit and a public hearing before any permit can be issued. Additionally, the Bill required such clinics to be located at least 750 feet from the nearest residence. After introduction of the Bill, the County Council scheduled a work session for April 9,2002, so that members of the community could voice comments about the proposed Bill to the Council. At the work session, several leaders of community groups that had organized in opposition to the Clinic spoke in support of the Bill.

Bill 39-02 was not the County's first attempt to use a new zoning ordinance to' prevent a methadone clinic from operating. In 1998, the County had sought to prevent a different methadone treatment clinic from opening by requiring that the clinic prevail at a public hearing before being permitted even to apply for a zoning permit. A federal court held that process to violate the ADA, however. *Smith Berch, Inc. v. Baltimore County*, 115 F.Supp.2d 520 (D.Md.2000), *vacated on other grounds*, *Smith-Berch, Inc. v. Baltimore County*, 64 Fed.Appx. 887 (4th Cir.2003). Opponents of A Helping Hand, including Councilman Kamenetz and other public officials, knew the holding of the prior case—in Kamenetz' words, that "methadone clinics must be treated the same as any other type of medical clinic . . . when choosing a location"—and they understood that their plan to prevent the Clinic from opening presented potential ADA problems. As Councilman Kamenetz explained at a community meeting, Bill 39-02 contained this new (narrowly defined) category of "state-licensed medical clinics" because it was not permissible for legislation to "suggest that a methadone clinic itself could be treated differently."

Meanwhile, Prell continued the process of obtaining the necessary permits to open A Helping Hand. By March 2002, Prell had received approval from all of the relevant federal agencies, including the Drug Enforcement Administration, the Substance Abuse and Mental Health
360 Services *360 Administration, and the Council on Accreditation. During a site visit to the Clinic on April 2, 2002, state officials stated that the Clinic was "in compliance, and . . . should be receiving [its necessary state] license shortly." A week later, however, state officials notified Prell that the County had advised them that Prell had not submitted materials demonstrating that the Clinic's site plan and parking were adequate and that therefore the Clinic's occupancy permit had "not yet been approved," so the State would not issue the necessary state license. [1] Prell promptly contacted the County, which told him that it had erred in earlier informing him that the Clinic needed neither an occupancy permit nor any supporting documentation. Now, the County contended that the Clinic was required to submit a site plan and parking plan to obtain an occupancy permit. Prell testified that, during this period, he overheard a conversation in which a County official assured the head of a local community association that the Clinic would never be allowed to open.

Prell subsequently submitted the requested site and parking plans to the County. The County still refused to issue the occupancy permit and required the Clinic to submit a plan depicting the utilities, including the plumbing and electrical operation of the building. The Clinic promptly submitted this additional documentation, and on April 15, the County finally issued the Clinic an occupancy permit. That same morning, Prell hand-delivered the permit to the Maryland Department of Health and Mental Hygiene and obtained from the Department the necessary state license. Accordingly, by the morning of April 15, 2002, the Clinic had received final federal, state, and county approval, including a valid County zoning permit.

Later that same day, April 15, 2002, the County Council voted to enact Bill 39-02, and the County Executive signed the Bill into law the next morning, April 16, 2002. Although not unprecedented, several aspects of the Bill's enactment departed from normal procedure. The County Council passed the Bill only fifteen days after its initial introduction, in marked contrast to the one to two months County officials frequently took to enact new legislation. Moreover, the County Council voted that the legislation would become effective on the date of enactment, rather than on the normal default effective date of forty-five days after enactment.

Additionally, shortly before enacting the Bill, the County Council revised it in one significant respect. As originally proposed, the Bill granted a six-month grace period to clinics

established shortly before the Bill's effective date that extended the time in which those clinics were required to come into compliance with the Bill's provisions. At the eleventh hour, however, the County Council amended the Bill to grant this grace period *only* to clinics established *and operating* prior to the Bill's effective date.

Soon after enacting the Bill, the County moved to enforce it against the Clinic, threatening to fine the Clinic $200 a day and to seek civil penalties unless the Clinic ceased operation. The Clinic challenged the citation, claiming entitlement, at the very least, to the six-month grace
361 period, *361 because it began operating on the afternoon of April 15, a day before the April. 16 effective date of the Bill. The County rejected this argument and began assessing fines against the Clinic. Meanwhile, the County granted a variance to the only other facility to which the Bill applied, a kidney dialysis center, permitting the dialysis center to open without meeting the requirements of the Bill.

On August 2, 2002, the Clinic filed this action on its own behalf, alleging two claims for violation of Title II of the ADA—one for intentional discrimination and one for disparate impact—and one claim that the County violated the Due Process Clause. The County agreed to postpone further enforcement of the Bill pending the outcome of this lawsuit. Three individual patients later joined the suit as "Doe" plaintiffs, each alleging the same two ADA claims as the Clinic and an additional claim for unlawful interference with their rights under the ADA.

Following lengthy and contentious discovery, the case was tried for ten days before a jury. After the close of all evidence, the district court granted judgment as a matter of law to the Clinic and the Doe plaintiffs on their ADA disparate impact claims and one element of their ADA intentional discrimination claims. The jury then considered the remaining claims. The jury returned a verdict for the. Clinic on the due process claim and a verdict for the Clinic and Doe plaintiffs on the ADA intentional discrimination claims, but awarded the Doe plaintiffs zero dollars in damages (the Clinic did not seek money damages). The jury returned a verdict for the County on the individual Doe plaintiffs' claims that the County unlawfully interfered with their rights under the ADA.

The district court accordingly awarded judgment to the County on the unlawful interference claims brought by the Doe plaintiffs and declaratory judgment and injunctive relief to the. Clinic and Doe plaintiffs on their successful ADA and due process claims. Only the County appeals. We first consider the ADA claims and then the due process claim.

II.

Congress enacted the Americans with Disabilities Act in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Pub.L. No. 101-336, § 2(b)(1), 1990 U.S.C.C.A.N. (104 Stat.) 327, 329 (codified at 42 U.S.C. § 12101(b)(1)). The Act prohibits discrimination against persons with disabilities in three major areas of public life: employment, under Title I, 42 U.S.C. §§ 12111-12117; public services, under Title II, 42 U.S.C. §§ 12131-12165; and public accommodations, under Title III, 42 U.S.C. §§ 12182-12189. *See* Tennessee v. Lane, 541 U.S. 509, 516-17, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004).

This case concerns Title II of the ADA, which provides 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." 42 U.S.C. 12132. Title II defines "public entity" to include local governments like Baltimore County, *id.* § 12131(1)(A), and on appeal the County does not dispute that municipal zoning qualifies as a public "program" or "service" and the enforcement of zoning ordinances constitutes an "activity" of a local government within the meaning of Title II.[2]

362 *362 Title II creates a remedy for "any person alleging discrimination on the basis of disability" and provides that the "remedies, procedures, and rights" available under Title II are the "remedies, procedures, and rights set forth in section 794a of [the Rehabilitation Act]." *Id.* § 12133. Section 794a of the Rehabilitation Act, in turn, provides that the available "remedies, procedures, and rights" are those set forth in Title VII of the Civil Rights Act. 29 U.S.C. § 794a (a)(1) (2000).

Pursuant to congressional instruction, *see* 42 U.S.C. § 12134(a), the Attorney General has issued regulations implementing Title II of the ADA. *See* 28 C.F.R. pt. 35 (2007). These regulations provide further guidance interpreting many of the provisions of Title II. Although the Supreme Court has yet to decide whether the regulations are entitled to the full deference afforded under, Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Court has counseled that the views expressed by the Department of Justice in the implementing regulations "warrant respect." Olmstead v. L.C., 527 U.S. 581, 597-98, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999).

In addition to the provisions of the statute and the implementing regulations, Congress has directed courts to construe the ADA to grant at least as much protection as the Rehabilitation Act and its implementing regulations. 42 U.S.C. § 12201(a); *see also* Bragdon v. Abbott, 524 U.S. 624, 631-32, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998). Moreover, because the ADA "echoes and expressly refers to Title VII, and because the two statutes have the same purpose," courts confronted with ADA claims have also frequently turned to precedent under Title VII. *See, e.g.*, Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir.2001) (collecting cases). Thus, courts have construed Title II of the ADA to allow a plaintiff to pursue three

distinct grounds for relief: (1) intentional discrimination or disparate treatment; (2) disparate impact; and (3) failure to make reasonable accommodations. *See, e.g., Wis. Cmty. Servs.*, 465 F.3d at 753; *Tsombanidis*, 352 F.3d at 573; *see also* Raytheon Co. v. Hernandez, 540 U.S. 44, 52-53, 124 S.Ct. 513, 157 L.Ed.2d 357 (2003) (citing Title VII cases in discussing disparate treatment and disparate impact claims under Title I of the ADA).

With this authority to guide us, we turn to the specific ADA issues in the case at hand.

A.

The County first argues that the Clinic does not have standing to bring suit under Title II of the ADA. Whether a party has standing to bring a claim in federal court involves "both consititutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Kowalski v. Tesmer*, 543 U.S. 125, 128-29, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (quoting *Worth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Unquestionably, the Clinic has met the minimum consitutional standing requirements. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The County maintains that the Clinic lacks prudential standing to bring an ADA claim
363 for injury *363 it suffers because of its association with ADA protected patients.

Prudential standing "normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth*, 422 U.S. at 509, 95 S.Ct. 2197. However, this rule is "subject to exceptions, the most prominent of which is that Congress may remove it by statute," either "expressly or by clear implication." *Id.* at 509-10, 95 S.Ct. 2197. Thus, Congress may, by statute, empower one party to bring suit because of harm *it* suffers due to unlawful discrimination against another party. The County acknowledges this but maintains that because Title II contains no explicit recognition of an "association" cause of action, the Clinic lacks prudential Standing.[3]

Whatever appeal this argument has in a vacuum collapses upon scrutiny of the statute as a whole. When we consider the assertedly fatal absence of an express "association" discrimination provision in Title II in light of the statute's language, structure, and legislative history, the regulations promulgated pursuant to it, and the well-reasoned and unanimous view of our sister circuits, we must reject the County's argument.

First, although Title II contains no express right to be free from discrimination because of association with qualified individuals with disabilities, Title II's enforcement provision does *not* limit its remedies to individuals with disabilities. Rather, Title II expressly provides a remedy to "*any person* alleging discrimination on the basis of disability in violation of section 12132." 42 U.S.C. § 12133 (emphasis added); *see also* 1 U.S.C. § 1 (2000) (defining "person" to include various entities). This broad language in the enforcement provision "evinces a congressional intention to define standing to bring a private action . . . as broadly as is permitted by Article III of the Constitution." *MX Group*, 293 F.3d at 334 (quoting *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 47 (2d Cir.1997), *superseded by Rule on other grounds as stated in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n. 7 (2d Cir.2001)) (internal quotation marks and alterations omitted).

This interpretation seems particularly reasonable when we look to the text of the statute as a
364 whole and the accompanying legislative history. Titles I, II, and III of *364 the ADA do not contain neatly drawn parallel provisions; while Titles I and III list many specific actions that constitute discrimination, Title II simply provides a blanket prohibition on discrimination without listing any specific acts that are proscribed. *Compare* 42 U.S.C. §§ 12112(b) (Title I) *and id.* § 12182(b) (Title III) *with id.* § 12132 (Title II). When listing the specific actions that constitute discrimination in Titles I and III, Congress expressly protected entities that suffer discrimination "because of the known disability of an individual with whom the . . . entity is known to have a relationship or association." 42 U.S.C. § 12182(b)(1)(E) (Title III); *see also id.* § 12112(b)(4) (Title I); *Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal.*, 31 F.3d 209, 214 (4th Cir.1994). Certainly aware of this asymmetry, the House Committee on Education and Labor explained that, in Title II, "[t]he Committee has chosen not to list all the types of actions that are included within the term `discrimination', as was done in titles I and III. . . . The Committee intends, however, that the forms of discrimination prohibited by [Title II] be identical to those set out in the applicable provisions of titles I and III of this legislation." H.R.Rep. No. 101-485 (II), at 84 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 367; *see also* S.Rep. No. 101-116, at 44 (1989). Of course, Titles I and III do provide a cause of action for associational discrimination. *See* 42 U.S.C. §§ 12112(b)(4), 12182(b)(1)(E).

Furthermore, Congress specifically directed the Attorney General to promulgate regulations implementing Title II that "shall be consistent with this chapter." 42 U.S.C. § 12134(a), (b); *see also* H.R.Rep. No. 101-485(111), at 52 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 475 ("The Committee intends that the regulations under title II incorporate interpretations of the term discrimination set forth in titles I and III. . . ."); H.R.Rep. No. 101-485(II), at 84 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 367 ("[T]he construction of `discrimination' set forth in section 102(b) and (c) and section 302(b) should be incorporated in the regulations implementing this title."). In response to this congressional directive, the Attorney. General promulgated regulations implementing Title II that do indeed bar associational discrimination. These regulations explicitly prohibit local governments from discriminating against entities because of the disability of individuals with whom the entity associates. 28 C.F.R. § 35.130 (g). Additionally, the appendix to the regulations clarifies that this provision is "intended to ensure that entities such as health care providers . . . and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities." 28 C.F.R. § 35.130(g) app. A.

Finally, every circuit that has considered whether a methadone clinic has standing under Title II of the ADA to bring a claim based on injuries resulting from its association with the addicted persons it serves has found that the clinic does have standing. *See Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399, 405-07 (3d Cir.2005); *MX Group*, 293 F.3d at 331-36; *Innovative Health Sys.*, 117 F.3d at 46-48. We too find that prudential considerations do not bar the Clinic's claims under Title II of the ADA, and the Clinic has alleged a sufficient association with individuals with disabilities to state a claim under the ADA.[4]

But this hardly ends our inquiry.

365 *365 **B.**

Even if the Clinic has standing to bring its ADA claims, the County maintains that the district court erred in granting a Rule 50 motion to the Clinic. Specifically the County contends that the district court erred in holding that, as a matter of law, the Clinic had established that its clients were "regarded as" disabled within the meaning of the ADA.

To be eligible for any protection under the ADA, an individual must be disabled within the meaning of the Act. The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) *being regarded as* having such an impairment." 42 U.S.C. § 12102(2) (emphasis added). Under the third prong of this definition, the prong on which the district court granted the Rule 50 motion, an individual is disabled if regarded as such, whether or not he in fact has a substantially limiting impairment. *See Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 302 (4th Cir.1998).

Once the district court had made its ruling that the Clinic had established disability as a matter of law under the "regarded as" prong, the Clinic rested on this ruling and did not contend that its clients were also disabled under the first two prongs. Because the ADA protects only those individuals who are disabled within the meaning of the Act, the district court's ruling thus provided a necessary element of the Clinic's disparate impact claim *and* its intentional discrimination claim. Accordingly, if the district court erred in its "regarded as" ruling, we must reverse its judgment in favor of the Clinic on *both* ADA claims.

We review the district court's grant of a Rule 50 motion *de novo*, viewing the evidence in the light most favorable to the party opposing the motion, here the County, and drawing all reasonable inferences in its favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 644-45 (4th Cir.2002). We must affirm if a reasonable jury could only rule in favor of the Clinic; if reasonable minds could differ, we must reverse. *See Dennis*, 290 F.3d at 644-45.

1.

366 The County initially argues that the district court erroneously based its Rule 50 *366 "regarded as" ruling on the views of community members, not those of the County itself. Moreover, according to the County, no record evidence indicates that the County itself (i.e., the seven-member governing County Council) even knew of the community opposition. These arguments ignore both controlling law and uncontroverted record evidence.

First, contrary to the County's apparent contentions, it is well-established that community views may be attributed to government bodies when the government acts in response to these views. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Marks v. City of Chesapeake*, 883 F.2d 308, 311-12 (4th Cir.1989) (citing numerous cases). Second, in this case, the record contains abundant uncontroverted evidence that the County Council knew of and legislated in response to community opposition to the Clinic.

Uncontroverted circumstantial evidence strongly indicates that the members of the County Council must have known of the community opposition. To prevent establishment of the Clinic, community associations distributed flyers, held public demonstrations, established and kept current a website, and organized writing and telephone campaigns. The local media extensively publicized these activities. Opposition to the Clinic became so vociferous one evening that the County had to detail police officers to quell it. Moreover, all of this occurred within months of the County's well-publicized loss of a federal court case resulting from its attempt to outlaw another methadone clinic through zoning. Furthermore, the County admits that it included a study on methadone use in Baltimore City in the Bill file, suggesting that the members of the Council knew that the opposition to the Clinic motivated the Bill's introduction.

But the Clinic did not need to rely only on this circumstantial evidence because it also had uncontroverted direct evidence that the Baltimore County Council knew of the community opposition to the Clinic. One of the seven County Council members, Kevin Kamenetz, himself became actively involved in the opposition to the Clinic. Councilman Kamenetz not only met with community groups, he also contacted state officials to enlist their support in this effort. Clearly, Councilman Kamenetz was well aware of the community's views.

Finally, it is undisputed that the County held an open work session on the Bill shortly after its introduction. There, the entire County Council heard several members of the community voice strong opposition to the Clinic and strong support for the new legislation, after which the Council voted to adopt the new legislation. Under our precedent, this fact alone would be enough to find that the Council enacted the Bill in response to community opposition. *See*

Marks, 883 F.2d at 309-11, 313 (holding a city council's refusal "[w]ithout further discussion" to grant permit, after hearing community opposition to its grant, provided sufficient evidence that council denied permit based on those same "impermissible . . . considerations").

Given these undisputed facts, we agree with the district court that no reasonable juror could conclude that the County Council did not know of—and legislate in response to—the community's opposition to the Clinic.

2.

The far more difficult question is whether the record evidence also establishes, as a matter of law, that the community (and therefore the County) regarded the Clinic's clients as disabled. An individual is "regarded as" disabled within the meaning of the ADA if he:

367 *367 (i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation; [or]

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment. . . .

28 C.F.R. § 35.104; *see also* *Cline*, 144 F.3d at 302.

Unquestionably, drug addiction constitutes an impairment under the ADA. *See* *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 919 & n. 3 (4th Cir.1992); *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435, 439 (8th Cir.2007) (citing *Thompson v. Davis*, 295 F.3d 890, 896 (9th Cir.2002)); *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46 (2d Cir.2002); H.R.Rep. No. 101-485(11), at 51, *as reprinted in* 1990 U.S.C.C.A.N. 303, 333 ("physical or mental impairment" includes "drug addiction[] and alcoholism"). Moreover, the County makes no argument that the Clinic's clients were not addicted to opiates.

However, "[m]erely having an impairment does not make one disabled for purposes of the ADA." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002). An ADA claimant must also demonstrate that drug addiction was regarded as "substantially limit[ing]" one or more "major life activities" or that drug addiction actually substantially limited one or more "major life activities" because of the attitudes of others towards the addiction. 28 C.F.R. § 35.104. The Supreme Court has emphasized that the terms "substantially limits" and "major life activities" "need to be interpreted strictly to create a demanding standard for qualifying as disabled." *Toyota Motor*, 534 U.S. at 197, 122 S.Ct. 681.

The ADA does not define "major life activities." The regulations do provide a representative, but nonexhaustive, list of "major life activities" that includes "caring for one's self, . . . learning, and working." 28 C.F.R. § 35.104. The touchstone for determining whether an activity constitutes a major life activity is its "significance" or "importance." *See* *Bragdon*, 524 U.S. at 638-39, 118 S.Ct. 2196. "Major life activities" "refer[] to those activities that are of central importance to daily life." *Toyota Motor*, 534 U.S. at 197, 122 S.Ct. 681.

The district court held that the County regarded the Clinic's clients as significantly impaired in the major life activities of working or obtaining employment, learning, thinking, caring for one's self, and interacting with others. The County only contends that this last category—interacting with others—is not a major life activity and that the district court erred in so holding. Although some courts have held that interacting with others does constitute a major life activity, *e.g.*, *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234-35 (9th Cir.1999), we have expressed skepticism on that point. *See* *Rohan v. Networks Presentations, LLC*, 375 F.3d 266, 274 (4th Cir.2004). We need not decide the question here, however, because drawing all reasonable inferences in favor of the County, we cannot conclude, as a matter of law, that the clients of the Clinic were regarded as significantly impaired in a major life activity, even assuming that interacting with others constitutes such an activity.

The record does contain substantial evidence that the Clinic's clients were regarded as criminals and generally undesirable neighbors and, further, that this perception accords with the stigma that, often attaches to recovering drug addicts. That the Clinic's clients were
368 regarded as criminals *368 and undesirables, however, does not mean that they were necessarily regarded as significantly impaired in their ability to work, learn, care for themselves, or interact with others. A jury could reasonably infer that the community believed that the clients turned to crime as the way to support their drug habits and so regarded the clients as impaired in their ability to maintain legitimate employment. However, a person can maintain a legitimate job while addicted to opiates and engaged in criminal conduct. Thus, a jury could also reasonably infer that the clients, even though regarded as criminals, were not regarded as significantly impaired in their ability to work or obtain a job. Similarly, it does not necessarily follow that because the clients were regarded as criminals and undesirable neighbors, they were also regarded as unable to learn, interact with others, or care for themselves—again, a jury could permissibly draw these inferences, but it need not do so.

To be sure, the record contains evidence that *some* members of the community did regard the Clinic's clients as unable to hold down legitimate jobs or interact normally with others. Although record evidence indicates that this view accorded with common perceptions of recovering drug addicts, the record does not establish, as a matter of law, that a jury could only infer that this perception was widespread in this case. Similarly, some record evidence supports the conclusion that the Clinic's clients were significantly impaired in their ability to

work or obtain a job because of the negative attitudes of others. *See* 28 C.F.R. § 35.104. Once again, however, this is not the only inference a reasonable jury could draw.

In sum, although we have no difficulty concluding that a reasonable jury could have found that the community regarded the Clinic's clients as significantly impaired in one or more major life activities, we cannot conclude that this is the only outcome a reasonable jury could have reached. Rather, drawing all reasonable inferences in favor of the County, we must hold that the district court erred in granting judgment as a matter of law on this issue. Because this ruling provided a necessary element of *both* ADA claims, we must reverse the order of the district court granting judgment to the Clinic and Doe plaintiffs on these claims.[5]

III.

In addition to its ADA claims, the Clinic alleged and the jury found that the County violated the Clinic's substantive due process rights. To prevail on a substantive due process claim, a party must establish "(1) that it had property or a property interest; (2) that the state deprived it of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir.2002) (quoting *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995)) (alterations omitted); *see also Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (local governments are subject to suit for constitutional violations under 42 U.S.C. § 1983).

A.

369 The County principally contends that the district court erred in certain respects in its due process jury instructions. Before addressing those arguments, however, *369 we explain why we do not and cannot consider other arguments the County briefly asserts as to the due process claim.

First, the County raised only its jury instructions arguments in its opening brief; it did not raise these other arguments until its reply brief. "It is a well settled rule that contentions not raised in the argument section of the *opening brief* are abandoned." *United States v. Al-Hamdi*, 356 F.3d 564, 571 n. 8 (4th Cir. 2004) (emphasis added); *see also* Fed. R.App. P. 28(a)(9); *United States v. Leeson*, 453 F.3d 631, 638 n. 4 (4th Cir.2006) (collecting cases). We recognize, however, that in rare circumstances, appellate courts, in their discretion, may overlook this rule and others like it if they determine that a "miscarriage of justice" would otherwise result. *See Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 421 (4th Cir.2005). But here the County has not even explained why it failed to raise these arguments earlier, let alone explained why, absent our consideration, a miscarriage of justice would result.[6]

One argument made in the reply brief, however, merits further discussion. That is the contention that the due process claim "should never have been submitted to the jury" because the evidence offered at trial was insufficient to support such a claim. *See* Reply Br. at 27. Prevention of a "miscarriage of justice" might lead us to consider this argument if the only barrier to such consideration was counsel's failure to present it clearly in its principal brief. But, in fact, another—and insurmountable—barrier prevents our consideration of this contention. The County failed to move for judgment under Rule 50(b) in the district court and so did not preserve this challenge to the sufficiency of the evidence for appellate review.

At the close of evidence, but prior to any jury deliberations, the County did move, pursuant to Rule 50(a), for judgment as a matter of law on all claims. The district court expressly reserved the County's preverdict Rule 50(a) motion with respect to the Clinic's substantive due process claim. After the jury returned a verdict for the Clinic on the due process claim, the court denied the motion that it had previously reserved under Rule 50(a). The district court also advised the parties that they had ten days to renew their motions for judgment. The County, however, *never* renewed its motion; that is, it never made a post-verdict motion for judgment pursuant to Rule 50(b).

The Supreme Court has held time and again that "a party's failure to file a post-verdict motion under Rule 50(b)" leaves an appellate court "'without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.'" *Unitherm Food Sys., Inc. v.*
370 *Swift-Eckrich, Inc.*, 546 U.S. 394, 400-01, *370 126 S.Ct. 980, 163 L.Ed.2d 974 (2006) (quoting *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218, 67 S.Ct. 752, 91 L.Ed. 849 (1947)). Most recently, the Court clarified that an appellate court lacks the power even to order a new trial if a party has failed to file a Rule 50(b) motion following a jury verdict. *Id.* at 401-02, 126 S.Ct. 980.

Moreover, a properly-filed Rule 50(b) motion is equally necessary when, as here, "the district court [has] expressly reserved a party's preverdict motion for a directed verdict and then denied that motion after the [jury] verdict was returned." *Id.* at 401, 126 S.Ct. 980 (citing *Johnson v. N.Y., New Haven & Hartford R.R.*, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952)). As Justice Thomas explained for the Court in *Unitherm*, a district court's denial of a party's Rule 50(a) motion provides no basis for an appeal based on sufficiency of the evidence because:

> [W]hile a district court is permitted to enter judgment as a matter of law when it concludes [under Rule 50(a)] that the evidence is legally insufficient, it is not required to do so. . . .

. . . .

> Thus, the District Court's denial of [a] preverdict motion cannot form the basis of [an] appeal, because the denial of that motion was not error. It was merely an exercise of the District Court's discretion, in accordance with the text of . . . Rule [50(a)] and the accepted practice of permitting the jury to make an initial judgment about the sufficiency of the evidence. The only error here was counsel's failure to file a postverdict motion pursuant to Rule 50(b).

Id. at 405-06, 126 S.Ct. 980.

Like the appellant in *Unitherm,* the County "failed to renew its pre-verdict motion as specified in Rule 50(b)," and so, like the appellate court in *Unitherm,* we have "no basis for review." *Id.* at 407, 126 S. Ct. 980. We are thus foreclosed from considering the County's challenge to the sufficiency of the evidence on the substantive due process claim. We therefore turn to the County's contentions with respect to the jury instructions without reaching the merits of its sufficiency challenge.

B.

The County appeals two aspects of the district court's jury instructions on the Clinic's substantive due process claim.[7] We review the district court's jury instructions for abuse of discretion. *See Johnson v. MBNA Am. Bank, NA,* 357 F.3d 426, 432 (4th Cir.2004). An error of law constitutes an abuse of discretion. *See Coll. Loan Corp. v. SLM Corp.,* 396 F.3d 588, 595 (4th Cir.2005).

1.

First, the County contends that the district court erred in instructing the jury that the Clinic had a property interest in its continued operation at the Slade Avenue location. We look to state law to determine whether the Clinic had a cognizable property interest that could trigger federal due process guarantees. *Scott v. Greenville County,* 716 F.2d 1409, 1418 (4th Cir.1983); *cf. Town of Castle Rock v. Gonzales,* 545 U.S. 748, 756, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005).

Under Maryland law,

> it is established that in order to obtain a `vested right' in the existing zoning use
> 371 which will be constitutionally protected *371 against a subsequent change in the zoning ordinance prohibiting or limiting that use, the owner must (1) obtain a permit or occupancy certificate where required by the applicable ordinance and (2) must proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use.

Powell v. Calvert County, 368 Md. 400, 795 A.2d 96, 102 (2002) (quoting *Richmond Corp. v. Bd. of County Comm'rs for Prince George's County,* 254 Md. 244, 255 A.2d 398, 404 (1969)); *see also Feldstein v. La-Vale Zoning Bd.,* 246 Md. 204, 227 A.2d 731, 734 (1967).

As of the morning of April 15, the Clinic had satisfied both requirements for a vested property right under Maryland law. First, by that date, the Clinic had "obtain[ed] a permit . . . [as] required by the applicable [zoning] ordinance." *See Powell,* 795 A.2d at 102. Indeed, in the district court, the County's lawyers conceded that the Clinic had a permit and "a property right," but argued that the County could legally divest the Clinic of that permit and thus of its property interest. *See* Joint Appendix 1778 (agreeing with the district court that the Clinic had a property interest in the zoning permit).

Moreover, as of April 15, the Clinic had also met the second requirement for a vested right under Maryland law—that the permit be "exercise[d] . . . on the land involved so that the [surrounding] neighborhood" is advised of the use. *Powell,* 795 A.2d at 102; *see also Feldstein,* 227 A.2d at 734. The record contains abundant, uncontroverted evidence that the surrounding neighborhood had been advised of the proposed use. The Clinic's open house for neighbors, the public meetings and letter writing, the newspaper coverage, and the demonstrations all amply attest to this. In fact, the County does not even contend that the "surrounding neighborhood" had not been advised of the proposed use.[8]

According to the County, however, the district court erred in instructing the jury that the Clinic had a vested property interest in its continued operation at the Slade Avenue site because "under Maryland law, a person has no vested rights in a permit that is the subject of continuing litigation." The County accurately quotes this principle. *See Powell,* 795 A.2d at 101; *Antwerpen v. Baltimore County,* 163 Md.App. 194, 877 A.2d 1166, 1175 (2005). But the principle is irrelevant here because the Clinic obtained a valid permit vesting it with property rights on the morning of April 15; neither the issuance of the permit nor the ordinance pursuant to which it was issued is the subject of ongoing litigation. *See Powell,* 795 A.2d at 103. Rather, this litigation concerns the County's attempt to change the zoning ordinance to preclude the Clinic from operating. *See id.* at 102, 103. The very cases on which the County relies make clear that the ongoing litigation rule means only that a person has no vested property right in a permit that has not *yet been issued* and is the subject of ongoing litigation.
> 372 *See id.* at 105; *Antwerpen,* 877 A.2d at 1171-75.[9] *372 The County's arguments that the

present litigation defeats the Clinic's property interest in its permit are thus meritless. The undisputed trial evidence demonstrates that under applicable state law the Clinic had a property interest in continued operation at its Slade Avenue location; the district court did not err in so instructing the jury.

2.

The County also argues that the district court erred when instructing the jury on the standard for establishing a substantive due process claim.

The district court instructed the jury:

> Now deprivation of a property interest violates a plaintiff's due process rights if it was clearly arbitrary and unreasonable, with no substantial relationship to a legitimate governmental purpose.

The County argues that the district court should have instructed the jury:

> [A] claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning.

The formulation provided the jury by the district court is nearly identical to the language that the Supreme Court used in the seminal case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926). The Court there held that municipal zoning ordinances survive substantive due process challenges unless they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* Two years later, the Court repeated this formulation in holding that a municipal zoning ordinance that "[did] *not* bear a substantial relation to the public health, safety, morals, or general welfare" could not be sustained under the Fourteenth Amendment. *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89, 48 S.Ct. 447, 72 L.Ed. 842 (1928)(emphasis added).

Moreover, in a more recent case the Court has reiterated this precise formulation with approval. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 498 & n. 6, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (quoting this language and describing *Euclid* as "this Court's leading land-use case"). Indeed, as recently as 2005, just a year before the district court instructed the jury in this case, the Supreme Court quoted this exact language from *Euclid* and *Nectow* and described these two cases as the Court's "seminal zoning precedents." *See Lingle*, 544 U.S. at 540-41, 125 S.Ct. 2074. We too have recently noted that *Euclid* sets forth "the traditional lenient standard for reviewing local zoning decisions under the Due Process . . . Clause[]." *AT & T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 426 (4th Cir.1998); *see also Tri-County Paving*, 281 F.3d at 441 (discussing our precedent holding that government action that is "manifest[ly] arbitrar[y] and unfair[]" and "not related to any legitimate [government] interest" creates a substantive due process claim); *Sylvia Dev. Corp.*, 48 F.3d at 827 (quoting *Euclid* and *Nectow*). In light of this controlling precedent, we cannot say that the district court abused its discretion in instructing the jury.

373 This is not to say that the County's proffered instruction incorrectly states *373 the law. Some cases do articulate the standard for substantive due process using different language than the classic formulation articulated in *Euclid*, and the language the County proffered also has a foundation in our precedent. *See, e.g., Sylvia Dev. Corp.*, 48 F.3d at 827. But a district Court does not err by refusing to grant a party's requested jury instruction, even if it is a proper statement of the law, when, as here, the requested instruction was covered by the charge the court gave to the jury. *See United States v. Lewis*, 53 F.3d 29,32-33 (4th Cir.1995) (collecting cases).[10]

In sum, we find no grounds on which to disturb the jury's verdict on the Clinic's due process claim. The County failed to preserve its challenge to the sufficiency of the evidence by neglecting to file a Rule 50(b) motion, and the district court did not abuse its discretion in instructing the jury; therefore, we must uphold the jury's verdict that the County denied the Clinic due process of law.

IV.

To recapitulate, we hold that the Clinic had standing to assert its ADA claims, but the district court erred in holding, as a matter of law, that the Clinic had established that its clients were "regarded as" disabled. For this reason, we reverse the judgment to the Clinic and Doe plaintiffs on both ADA claims and remand for a new trial, should the Clinic or the Doe plaintiffs choose to continue to pursue these claims. We affirm the judgment rendered to the Clinic on its substantive due process claim. We therefore vacate the award of declaratory relief under the ADA and affirm the award of declaratory relief under the Due Process Clause.

The district court enjoined the County from discriminating against the Clinic on the basis of its patients' disabilities, from enforcing Bill 39-02 against the Clinic, and from enforcing the Bill against any existing or future methadone treatment centers in Baltimore County. We vacate the injunction. In so far as the injunction rests on the now-reversed ADA judgments, it can no longer stand. We recognize that the award of judgment to the Clinic on the due process claim, which we have affirmed, may provide the basis for a portion of the injunctive relief granted. We must vacate the entire injunction, however, because it is unclear whether the

district court in fact based any portion of the injunction on this ground. *See* Fed.R.Civ.P. 65 (d); *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir.1967). On remand, the court will have to determine the appropriate injunctive relief on the basis of the due process claim alone.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED

[1] On March 7, 2002, Councilman Kamenetz had written to two state senators enlisting their help in preventing the Clinic "from coming to Pikesville." Kamenetz explained that State help was necessary because leitforts by the County to address this issue through zoning were rejected by the Federal Courts, which ruled that methadone clinics must be treated the same as any other type of medical clinic or doctor's office when choosing a location."

[2] Other courts have so held. *See, e.g., Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 750 (7th Cir.2006); *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 574 (2d Cir.2003); *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730-32 (9th Cir.1999). Moreover, the Supreme Court has cited irrational zoning decisions as one example of disability discrimination that supported the need for Title II's prophylactic measures. *Lane*, 541 U.S. at 525, 124 S.Ct. 1978; *see also Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 487 (4th Cir.2005).

[3] The County mixes together and confuses an ADA cause of action based on associational discrimination with the doctrines of third party standing and associational standing. The doctrine of third-party standing permits a plaintiff to bring suit on behalf of a third party *for injury done to the third party* in certain circumstances when the third party cannot effectively protect its own, interests. *See Kowalski*, 543 U.S. at 129-30, 125 S.Ct. 564. The doctrine of associational standing permits an organization to bring suit on behalf of its members *for injury done to its members* when (among other requirements) its members would have standing to sue in their own right. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551-53, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996). Although these two standing doctrines differ, they are similar in that they both allow a plaintiff to bring suit based not on injury to itself but on injury to another.

In contrast, a cause of action based on ADA associational discrimination permits a plaintiff to bring suit on its own behalf *for injury it itself suffers* because of its association with an ADA-protected third party. *See MX Group, Inc. v. City of Covington*, 293 F.3d 326, 335 (6th Cir.2002). The only standing question at issue in this appeal is whether the Clinic can bring claims *on its own behalf* for injury it suffered because of its association with ADA-protected persons; therefore we need not consider whether the Clinic has third-party or associational standing to bring suit on behalf of its clients.

[4] Contrary to the County's insistence, we did not hold to the contrary in *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205 (4th Cir.2002). Indeed, to the extent *Freilich* is relevant here, it entirely accords with our present holding. In *Freilich*, we initially addressed a question not at issue here—whether the plaintiff doctor had third-party standing to bring a Title II ADA claim on *behalf of her patients*. We held that she did not because she had not alleged "sufficient obstacles to the patients bringing suit themselves." *Id.* at 215. Dr. Freilich alleged *no Title II associational discrimination claim*, like the claims asserted by the Clinic here. The doctor did allege a Title III associational discrimination claim based on her "patient advocacy." *Id.* We also rejected this claim—but not because we questioned the existance of associational discrimination claims or because we (like the County in the case at hand) equated an associational discrimination claim to one of third-party or associational standing. Rather, we had no trouble recognizing that Title III provided for associational discrimination claims, but concluded that Dr. Freilich's complaint did not state such a claim because she alleged only "a loose association with disabled patients." *Id.* at 216. We properly reasoned that "generalized references to association with disabled persons or to advocacy for a group of disabled persons are not sufficient to state a claim for associational discrimination under the ADA." *Id.* We do not in any way retract those words. The Clinic, however, has alleged and offered overwhelming (indeed, undisputed) evidence of far more than a "loose association with disabled patients"; the Clinic's sole raison deters is the full-time provision of treatment and services to recovering drug addicts.

[5] Given our reversal of the district court's judgment with respect to both ADA claims, we need not reach the Counts other arguments with respect to those claims.

[6] We also note that, with the exception of the argument discussed *infra* in text, the arguments raised in the reply brief are meritless. For example, in its reply brief, the County asserts that no substantive due process claim "lies in the context of economic and property rights disputes" because takings claims have "supplanted—in a sense preempted—substantive due process claims when land and property rights are at issue." In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-43, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), however, the Supreme Court explicitly distinguished between takings and substantive due process claims in this context, noting that a challenge to a governmental action that does not "substantially advance[]" legitimate government interests is a substantive due process claim, not a takings claim. As Judge Rymer recently explained, *Lingle* thus "pulls the rug out" from an argument that takings claims "preclud[e] substantive due process [property] claims based on arbitrary or unreasonable conduct." *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir.2007).

[7] Although we cannot consider any of the County's challenges to the sufficiency of the evidence, we may review whether the court erred when instructing the jury. *See, e.g., Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 199-201 (2d Cir.2004).

[8] Tellingly, when assisting Councilman Kamenetz in drafting the Bill, the County Council's Legislative Counsel/Secretary warned him in writing on March 27, 2002, that "[t]he Law Office is still concerned about the vesting issue, particularly with regard to the facility that does not require a use and occupancy permit and has already . . . held an 'open house' for the community."

[9] Somewhat mystifyingly, the County heavily relies on *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003). In *Buckeye*, however, the Court expressly did "*not* decide whether [the permit applicant] possessed a property interest in the building permits" which had *not yet issued* prior to litigation. *Id.* at 198, 123 S.Ct. 1389 (emphasis added). Nothing in *Buckeye* supports the County's view that the Clinic lacked a property interest in its zoning permit, which *had been validly issued* prior to any litigation.

[10] The County also contends that the district court erred when it instructed the jury that

Indications that a governmental body's action is arbitrary, unreasonable and not substantially related to a legitimate governmental interest include, but are not limited to, one, the action is tainted with fundamental procedural irregularity. Two, the action is targeted at a single party. Three, the action deviates from or is inconsistent with the defendant's regular practice.

These are precisely the factors that we considered in holding that a substantive due process claim existed in Scott, 716 F.2d at 1419-21; the district court did not err in instructing the jury to consider them here.

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JOINT STATEMENT OF THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

GROUP HOMES, LOCAL LAND USE, AND THE FAIR HOUSING ACT

Since the federal Fair Housing Act ("the Act") was amended by Congress in 1988 to add protections for persons with disabilities and families with children, there has been a great deal of litigation concerning the Act's effect on the ability of local governments to exercise control over group living arrangements, particularly for persons with disabilities. The Department of Justice has taken an active part in much of this litigation, often following referral of a matter by the Department of Housing and Urban Development ("HUD"). This joint statement provides an overview of the Fair Housing Act's requirements in this area. Specific topics are addressed in more depth in the attached Questions and Answers.

The Fair Housing Act prohibits a broad range of practices that discriminate against individuals on the basis of race, color, religion, sex, national origin, familial status, and disability.[1] The Act does not pre-empt local zoning laws. However, the Act applies to municipalities and other local government entities and prohibits them from making zoning or land use decisions or implementing land use policies that exclude or otherwise discriminate against protected persons, including individuals with disabilities.

The Fair Housing Act makes it unlawful --

- To utilize land use policies or actions that treat groups of persons with disabilities less favorably than groups of non-disabled persons. An example would be an ordinance prohibiting housing for persons with disabilities or a specific type of disability, such as mental illness, from locating in a particular area, while allowing other groups of unrelated individuals to live together in that area.

- To take action against, or deny a permit, for a home because of the disability of individuals who live or would live there. An example would be denying a building permit for a home because it was intended to provide housing for persons with mental retardation.

- To refuse to make reasonable accommodations in land use and zoning policies and procedures where such accommodations may be necessary to afford persons or groups of persons with disabilities an equal opportunity to use and enjoy housing.

- What constitutes a reasonable accommodation is a case-by-case determination.

- Not all requested modifications of rules or policies are reasonable. If a requested modification imposes an undue financial or administrative burden on a local government, or if a modification creates a fundamental alteration in a local government's land use and zoning scheme, it is not a "reasonable" accommodation.

The disability discrimination provisions of the Fair Housing Act do <u>not</u> extend to persons who claim to be disabled solely on the basis of having been adjudicated a juvenile delinquent, having a criminal record,

or being a sex offender. Furthermore, the Fair Housing Act does not protect persons who currently use illegal drugs, persons who have been convicted of the manufacture or sale of illegal drugs, or persons with or without disabilities who present a direct threat to the persons or property of others.

HUD and the Department of Justice encourage parties to group home disputes to explore all reasonable dispute resolution procedures, like mediation, as alternatives to litigation.

DATE: AUGUST 18, 1999

Questions and Answers

on the Fair Housing Act and Zoning

Q. Does the Fair Housing Act pre-empt local zoning laws?

No. "Pre-emption" is a legal term meaning that one level of government has taken over a field and left no room for government at any other level to pass laws or exercise authority in that area. The Fair Housing Act is not a land use or zoning statute; it does not pre-empt local land use and zoning laws. This is an area where state law typically gives local governments primary power. However, if that power is exercised in a specific instance in a way that is inconsistent with a federal law such as the Fair Housing Act, the federal law will control. Long before the 1988 amendments, the courts had held that the Fair Housing Act prohibited local governments from exercising their land use and zoning powers in a discriminatory way.

Q. What is a group home within the meaning of the Fair Housing Act?

The term "group home" does not have a specific legal meaning. In this statement, the term "group home" refers to housing occupied by groups of unrelated individuals with disabilities.[2] Sometimes, but not always, housing is provided by organizations that also offer various services for individuals with disabilities living in the group homes. Sometimes it is this group home operator, rather than the individuals who live in the home, that interacts with local government in seeking permits and making requests for reasonable accommodations on behalf of those individuals.

The term "group home" is also sometimes applied to any group of unrelated persons who live together in a dwelling -- such as a group of students who voluntarily agree to share the rent on a house. The Act does not generally affect the ability of local governments to regulate housing of this kind, as long as they do not discriminate against the residents on the basis of race, color, national origin, religion, sex, handicap (disability) or familial status (families with minor children).

Q. Who are persons with disabilities within the meaning of the Fair Housing Act?

The Fair Housing Act prohibits discrimination on the basis of handicap. "Handicap" has the same legal meaning as the term "disability" which is used in other federal civil rights laws. Persons with disabilities (handicaps) are individuals with mental or physical impairments which substantially limit one or more major life activities. The term mental or physical impairment may include conditions such as blindness,

hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness. The term major life activity may include seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, or working. The Fair Housing Act also protects persons who have a record of such an impairment, or are regarded as having such an impairment.

Current users of illegal controlled substances, persons convicted for illegal manufacture or distribution of a controlled substance, sex offenders, and juvenile offenders, are not considered disabled under the Fair Housing Act, by virtue of that status.

The Fair Housing Act affords no protections to individuals with or without disabilities who present a direct threat to the persons or property of others. Determining whether someone poses such a direct threat must be made on an individualized basis, however, and cannot be based on general assumptions or speculation about the nature of a disability.

Q. What kinds of local zoning and land use laws relating to group homes violate the Fair Housing Act?

Local zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the Fair Housing Act. For example, suppose a city's zoning ordinance defines a "family" to include up to six unrelated persons living together as a household unit, and gives such a group of unrelated persons the right to live in any zoning district without special permission. If that ordinance also disallows a group home for six or fewer people with disabilities in a certain district or requires this home to seek a use permit, such requirements would conflict with the Fair Housing Act. The ordinance treats persons with disabilities worse than persons without disabilities.

A local government may generally restrict the ability of groups of unrelated persons to live together as long as the restrictions are imposed on all such groups. Thus, in the case where a family is defined to include up to six unrelated people, an ordinance would not, on its face, violate the Act if a group home for seven people with disabilities was not allowed to locate in a single family zoned neighborhood, because a group of seven unrelated people without disabilities would also be disallowed. However, as discussed below, because persons with disabilities are also entitled to request reasonable accommodations in rules and policies, the group home for seven persons with disabilities would have to be given the opportunity to seek an exception or waiver. If the criteria for reasonable accommodation are met, the permit would have to be given in that instance, but the ordinance would not be invalid in all circumstances.

Q. What is a reasonable accommodation under the Fair Housing Act?

As a general rule, the Fair Housing Act makes it unlawful to refuse to make "reasonable accommodations" (modifications or exceptions) to rules, policies, practices, or services, when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use or enjoy a dwelling.

Even though a zoning ordinance imposes on group homes the same restrictions it imposes on other groups of unrelated people, a local government may be required, in individual cases and when requested to do so, to grant a reasonable accommodation to a group home for persons with disabilities. For example, it may be a reasonable accommodation to waive a setback requirement so that a paved path of travel can be provided to residents who have mobility impairments. A similar waiver might not be required for a different type of group home where residents do not have difficulty negotiating steps and do not need a setback in order to have an equal opportunity to use and enjoy a dwelling.

Not all requested modifications of rules or policies are reasonable. Whether a particular accommodation is reasonable depends on the facts, and must be decided on a case-by-case basis. The determination of what is reasonable depends on the answers to two questions: First, does the request impose an undue burden or expense on the local government? Second, does the proposed use create a fundamental alteration in the zoning scheme? If the answer to either question is "yes," the requested accommodation is unreasonable.

What is "reasonable" in one circumstance may not be "reasonable" in another. For example, suppose a local government does not allow groups of four or more unrelated people to live together in a single-family neighborhood. A group home for four adults with mental retardation would very likely be able to show that it will have no more impact on parking, traffic, noise, utility use, and other typical concerns of zoning than an "ordinary family." In this circumstance, there would be no undue burden or expense for the local government nor would the single-family character of the neighborhood be fundamentally altered. Granting an exception or waiver to the group home in this circumstance does not invalidate the ordinance. The local government would still be able to keep groups of unrelated persons without disabilities from living in single-family neighborhoods.

By contrast, a fifty-bed nursing home would not ordinarily be considered an appropriate use in a single-family neighborhood, for obvious reasons having nothing to do with the disabilities of its residents. Such a facility might or might not impose significant burdens and expense on the community, but it would likely create a fundamental change in the single-family character of the neighborhood. On the other hand, a nursing home might not create a "fundamental change" in a neighborhood zoned for multi-family housing. The scope and magnitude of the modification requested, and the features of the surrounding neighborhood are among the factors that will be taken into account in determining whether a requested accommodation is reasonable.

Q. What is the procedure for requesting a reasonable accommodation?

Where a local zoning scheme specifies procedures for seeking a departure from the general rule, courts have decided, and the Department of Justice and HUD agree, that these procedures must ordinarily be followed. If no procedure is specified, persons with disabilities may, nevertheless, request a reasonable accommodation in some other way, and a local government is obligated to grant it if it meets the criteria discussed above. A local government's failure to respond to a request for reasonable accommodation or an inordinate delay in responding could also violate the Act.

Whether a procedure for requesting accommodations is provided or not, if local government officials have previously made statements or otherwise indicated that an application would not receive fair consideration, or if the procedure itself is discriminatory, then individuals with disabilities living in a group home (and/or its operator) might be able to go directly into court to request an order for an accommodation.

Local governments are encouraged to provide mechanisms for requesting reasonable accommodations that operate promptly and efficiently, without imposing significant costs or delays. The local government should also make efforts to insure that the availability of such mechanisms is well known within the community.

Q. When, if ever, can a local government limit the number of group homes that can locate in a certain area?

A concern expressed by some local government officials and neighborhood residents is that certain jurisdictions, governments, or particular neighborhoods within a jurisdiction, may come to have more than their "fair share" of group homes. There are legal ways to address this concern. The Fair Housing Act does not prohibit most governmental programs designed to encourage people of a particular race to move to neighborhoods occupied predominantly by people of another race. A local government that believes a particular area within its boundaries has its "fair share" of group homes, could offer incentives to providers to locate future homes in other neighborhoods.

However, some state and local governments have tried to address this concern by enacting laws requiring that group homes be at a certain minimum distance from one another. The Department of Justice and HUD take the position, and most courts that have addressed the issue agree, that density restrictions are generally inconsistent with the Fair Housing Act. We also believe, however, that if a neighborhood came to be composed largely of group homes, that could adversely affect individuals with disabilities and would be inconsistent with the objective of integrating persons with disabilities into the community. Especially in the licensing and regulatory process, it is appropriate to be concerned about the setting for a group home. A consideration of over-concentration could be considered in this context. This objective does not, however, justify requiring separations which have the effect of foreclosing group homes from locating in entire neighborhoods.

Q. What kinds of health and safety regulations can be imposed upon group homes?

The great majority of group homes for persons with disabilities are subject to state regulations intended to protect the health and safety of their residents. The Department of Justice and HUD believe, as do responsible group home operators, that such licensing schemes are necessary and legitimate. Neighbors who have concerns that a particular group home is being operated inappropriately should be able to bring their concerns to the attention of the responsible licensing agency. We encourage the states

to commit the resources needed to make these systems responsive to resident and community needs and concerns.

Regulation and licensing requirements for group homes are themselves subject to scrutiny under the Fair Housing Act. Such requirements based on health and safety concerns can be discriminatory themselves or may be cited sometimes to disguise discriminatory motives behind attempts to exclude group homes from a community. Regulators must also recognize that not all individuals with disabilities living in group home settings desire or need the same level of services or protection. For example, it may be appropriate to require heightened fire safety measures in a group home for people who are unable to move about without assistance. But for another group of persons with disabilities who do not desire or need such assistance, it would not be appropriate to require fire safety measures beyond those normally imposed on the size and type of residential building involved.

Q. Can a local government consider the feelings of neighbors in making a decision about granting a permit to a group home to locate in a residential neighborhood?

In the same way a local government would break the law if it rejected low-income housing in a community because of neighbors' fears that such housing would be occupied by racial minorities, a local government can violate the Fair Housing Act if it blocks a group home or denies a requested reasonable accommodation in response to neighbors' stereotypical fears or prejudices about persons with disabilities. This is so even if the individual government decision-makers are not themselves personally prejudiced against persons with disabilities. If the evidence shows that the decision-makers were responding to the wishes of their constituents, and that the constituents were motivated in substantial part by discriminatory concerns, that could be enough to prove a violation.

Of course, a city council or zoning board is not bound by everything that is said by every person who speaks out at a public hearing. It is the record as a whole that will be determinative. If the record shows that there were valid reasons for denying an application that were not related to the disability of the prospective residents, the courts will give little weight to isolated discriminatory statements. If, however, the purportedly legitimate reasons advanced to support the action are not objectively valid, the courts are likely to treat them as pretextual, and to find that there has been discrimination.

For example, neighbors and local government officials may be legitimately concerned that a group home for adults in certain circumstances may create more demand for on-street parking than would a typical family. It is not a violation of the Fair Housing Act for neighbors or officials to raise this concern and to ask the provider to respond. A valid unaddressed concern about inadequate parking facilities could justify denying the application, if another type of facility would ordinarily be denied a permit for such parking problems. However, if a group of individuals with disabilities or a group home operator shows by credible and unrebutted evidence that the home will not create a need for more parking spaces, or submits a plan to provide whatever off-street parking may be needed, then parking concerns would not support a decision to deny the home a permit.

Q. What is the status of group living arrangements for children under the Fair Housing Act?

In the course of litigation addressing group homes for persons with disabilities, the issue has arisen whether the Fair Housing Act also provides protections for group living arrangements for children. Such living arrangements are covered by the Fair Housing Act's provisions prohibiting discrimination against

families with children. For example, a local government may not enforce a zoning ordinance which treats group living arrangements for children less favorably than it treats a similar group living arrangement for unrelated adults. Thus, an ordinance that defined a group of up to six unrelated adult persons as a family, but specifically disallowed a group living arrangement for six or fewer children, would, on its face, discriminate on the basis of familial status. Likewise, a local government might violate the Act if it denied a permit to such a home because neighbors did not want to have a group facility for children next to them.

The law generally recognizes that children require adult supervision. Imposing a reasonable requirement for adequate supervision in group living facilities for children would not violate the familial status provisions of the Fair Housing Act.

Q. How are zoning and land use matters handled by HUD and the Department of Justice?

The Fair Housing Act gives the Department of Housing and Urban Development the power to receive and investigate complaints of discrimination, including complaints that a local government has discriminated in exercising its land use and zoning powers. HUD is also obligated by statute to attempt to conciliate the complaints that it receives, even before it completes an investigation.

In matters involving zoning and land use, HUD does not issue a charge of discrimination. Instead, HUD refers matters it believes may be meritorious to the Department of Justice which, in its discretion, may decide to bring suit against the respondent in such a case. The Department of Justice may also bring suit in a case that has not been the subject of a HUD complaint by exercising its power to initiate litigation alleging a "pattern or practice" of discrimination or a denial of rights to a group of persons which raises an issue of general public importance.

The Department of Justice's principal objective in a suit of this kind is to remove significant barriers to the housing opportunities available for persons with disabilities. The Department ordinarily will not participate in litigation to challenge discriminatory ordinances which are not being enforced, unless there is evidence that the mere existence of the provisions are preventing or discouraging the development of needed housing.

If HUD determines that there is no reasonable basis to believe that there may be a violation, it will close an investigation without referring the matter to the Department of Justice. Although the Department of Justice would still have independent "pattern or practice" authority to take enforcement action in the matter that was the subject of the closed HUD investigation, that would be an unlikely event. A HUD or Department of Justice decision not to proceed with a zoning or land use matter does not foreclose private plaintiffs from pursuing a claim.

Litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and the Department of Justice encourage parties to group home disputes to explore all reasonable alternatives to litigation, including alternative dispute resolution procedures, like mediation. HUD attempts to conciliate all Fair Housing Act complaints that it receives. In addition, it is the Department of Justice's

policy to offer prospective defendants the opportunity to engage in pre-suit settlement negotiations, except in the most unusual circumstances.

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1. The Fair Housing Act uses the term "handicap." This document uses the term "disability" which has exactly the same legal meaning.

2. There are groups of unrelated persons with disabilities who choose to live together who do not consider their living arrangements "group homes," and it is inappropriate to consider them "group homes" as that concept is discussed in this statement.

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NOTES

THE FAIR HOUSING ACT, OXFORD HOUSE, AND THE LIMITS OF LOCAL CONTROL OVER THE REGULATION OF GROUP HOMES FOR RECOVERING ADDICTS

When group home operators, Oxford House, Inc., challenged a zoning ordinance in the Chicago suburb of Palatine, Illinois, in March 1993, Mayor Rita Mullins thought her town was being singled out as a test case. During a summer trip to a meeting of the United States Conference of Mayors, however, Mullins found Palatine was not alone.[1] Many of her counterparts noted similar experiences with Oxford Houses in their own jurisdictions.[2]

The Palatine ordinance at issue limited the number of unrelated people in a single-family residence to three and required "group homes"[3] to have around-the-clock professional staffing.[4]

1. Karen C. Krause, *Group Home Dispute Expands: Palatine Not the Only Target of Housing Complaints*, CHI. TRIB., Aug. 11, 1993, at 1.

2. *Id.* ("I found in that one room at least one third of them had problems with this one particular agency.'") (quoting Mullins); Joyce Price, *HUD Investigations Questioned: Agency Goes to Bat for Rehab Centers That Challenge Zoning Laws*, WASH. TIMES, Aug. 22, 1994, at A3. With more than 500 homes in 36 states, Oxford House has been involved in 80 disputes with local officials across the country. *Id.*

3. The term "group home" describes a diverse range of facilities for the care and treatment of a special population in a residential or normalized setting. *See* PETER W. SALSICH, JR., LAND USE REGULATION § 7.07 (1991). Disparities in staffing, regulation, and services among homes for the many different populations that can benefit from such residential treatment account for many of the problems inherent in their regulation. This Note is concerned primarily with loosely structured recovery homes, which facilitate drug and alcohol rehabilitation with no professional staff and minimal regulatory supervision.

4. United States v. Village of Palatine, 845 F. Supp. 540 (N.D. Ill. 1993) (denying village motion to dismiss). The Palatine litigation is variously reported as follows: United States v. Village of Palatine, 3 Am. Disabilities Dec. (Law. Co-op) 271 (N.D. Ill. 1993) (magistrate judge's recommended findings of fact and conclusions of law), *adopted*, No. 93-C-2154, 1993 WL 462848 (N.D. Ill. Nov. 9, 1993) (adopting magistrate's recommendation and grant of Oxford House request for preliminary

The recovery home established by Oxford House required twelve recovering addicts to pay the rent, and its charter required the residents to be self-sufficient in their pursuit of a sober lifestyle, thus precluding the use of paid staff.[5]

Oxford House, Inc. is an umbrella organization for a network of independent Oxford Houses around the country. Its home in Palatine, like the hundreds of others it has helped start, is not a treatment facility but a group residence for recovering alcoholics and drug addicts.[6] The self-governing, unsupervised homes enforce a strict alcohol- and drug-free lifestyle to support the residents in their recovery.[7]

Boosted by the inclusion of substance abusers as a protected class under the Fair Housing Act[8] (FHA) and federally mandated start-up grants under the Anti-Drug Abuse Act of 1988,[9] Oxford House helped create nearly 500 group homes for recovering addicts and alcoholics between 1988 and 1994.[10] The concept, however, has spawned imitations, particularly in California where many such homes are little more than flophouses run by welfare profiteers.[11] Although group homes chartered by Oxford House generally have been well managed, government start-up loans are available to any person or group who seeks to estab-

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injunction), *vacated*, 37 F.3d 1230 (7th Cir. 1994).

5. *Palatine*, 845 F. Supp. at 541; *see infra* notes 58-63 and accompanying text.

6. Carey Q. Gelernter, *Oxford House*, SEATTLE TIMES, Apr. 17, 1994, at M1.

7. *Oxford House: A Success Story*, WASH. POST, May 15, 1993, at A24.

8. 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993). The Act was amended by the Fair Housing Amendments Act of 1988 to add handicapped people as a protected class. *See infra* notes 43-54 and accompanying text.

9. Pub. L. No. 100-690, § 2036, 102 Stat. 4181, 4202 (current version at 42 U.S.C. § 300x-25 (Supp. V 1993)). The provision was reauthorized in the ADAMHA Reorganization Act, Pub. L. No. 102-321, § 1925, 106 Stat. 323, 393-94 (codified at 42 U.S.C. § 300x-25 (Supp. V 1993)). It requires states to establish revolving loan funds of at least $100,000 to help start homes in the Oxford House model. *Id.*; *see infra* note 65 and accompanying text.

10. *See* Gelernter, *supra* note 6, at M1. A thorough review of the Oxford House history is available in detailed findings of fact accompanying Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1562-64 (E.D. Mo. 1994).

11. Pamela Warrick & Claire Spiegel, *Paying a Price to Stay Sober*, L.A. TIMES, Oct. 21, 1992, at A1. Spiegel and Warrick describe horrendous conditions in some of California's so-called "sober-living homes" started with state money under the federally mandated revolving loan program created by the Anti-Drug Abuse Act of 1988. *Id.*; *see infra* notes 239-40.

lish an unsupervised home.[12] Moreover, the precedents being set through aggressive litigation[13] in the federal courts will apply to unsupervised recovery homes with or without Oxford House guidance.

This Note will assess the impact of the amended Fair Housing Act, and its interpretation by the federal courts, on local control over the regulation and site selection for these unsupervised recovery homes. In particular it will examine the conflict between the federal policy of endorsing the concept of unsupervised residential treatment and municipalities' interest in preserving the residential character of single-family neighborhoods. Unlike foster homes or group homes for the mentally disabled, unsupervised recovery homes can present problems not based on unfounded fears and prejudices, but on the realties of drug and alcohol recovery and the legitimate concerns of residents forced to bear the burden of a potentially detrimental land use.[14]

This Note first will review the nature of single-family zoning, the development and legislative history of the FHA, and the corresponding rise in popularity of residential treatment under the Oxford House model.[15] The Note then will review the language of the amended FHA and the principal cases that have thus far defined the federal statute's limits on control of group homes through local zoning. Oxford House and similar groups

12. J. PAUL MOLLOY, SELF-RUN, SELF-SUPPORTED HOUSES FOR MORE EFFECTIVE RECOVERY FROM ALCOHOL AND DRUG ADDICTION 13 (1990).

13. *See, e.g.*, United States v. Village of Palatine, 37 F.3d 1230 (7th Cir. 1994); City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802 (9th Cir.), *cert. granted*, 115 S. Ct. 417 (1994); *St. Louis*, 843 F. Supp. 1556; Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168 (N.D.N.Y. 1993); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993); Oxford House, Inc. v. City of Va. Beach, 825 F. Supp. 1251 (E.D. Va. 1993); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992); Oxford House—Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D.N.J. 1991).

14. Ordinarily group homes are distinguished from typical residential housing by three characteristics: (1) residents are unrelated, (2) supervision by live-in caretakers or professional staff, and (3) on-site support services. SALSICH, *supra* note 3, § 7.07. This Note focuses on the narrower, but rapidly growing, field of unsupervised recovery homes that provide neither staffing nor professional support services. The cases discussed mostly involve homes for recovering substance abusers. Many were brought by Oxford House, Inc. or by the Justice Department on behalf of a local Oxford House.

15. *See infra* notes 19-74 and accompanying text.

have attacked a central principle of local ordinances aimed at preserving single-family neighborhoods—limits on the number of unrelated people that constitutes a "single family."[16]

Finally, the Note analyzes the conflicting policy arguments: a policy favoring residential treatment as an effective and economical aid to the recovery of reformed addicts versus a locality's interest in maintaining reasonable restrictions in residential districts.[17] The Note concludes with recommendations for appropriate local regulation designed to permit structured group homes as of-right uses without eviscerating local zoning codes directed at promoting the single-family character of neighborhoods.[18]

BACKGROUND

Single-Family Zoning

Since the advent of zoning, one of its principal purposes has been the preservation of the single-family neighborhood as one of the highest uses of land.[19] A frequently-quoted passage from Justice Douglas describes the virtues of the single-family neighborhood:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[20]

The first single-family restrictions were aimed mainly at limiting the proliferation of apartments and other multi-family dwellings. Indeed, early zoning definitions of family frequently

16. *See infra* notes 75-210 and accompanying text.
17. *See infra* notes 211-58 and accompanying text.
18. *See infra* notes 259-311 and accompanying text.
19. Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926). Justice Sutherland wrote that the crux of zoning legislation was the "creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded." *Id.* at 390.
20. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

did not require kinship or other association.[21] Instead the focus was on occupants living as a single housekeeping unit.[22] As lifestyles changed, however, an increasing number of localities sought to limit the definition by excluding or restricting the number of unrelated people who could constitute a family.[23] The Supreme Court upheld such restrictive definitions in *Village of Belle Terre v. Boraas*,[24] finding the distinction between related and unrelated people rationally related to the government's proffered objective of maintaining the single-family character of a neighborhood. Later, in *Moore v. City of East Cleveland*,[25] the Court struck a restrictive definition of family which purported to limit the types of relations that constituted a "family" under the local ordinance.[26] The plaintiff had been prosecuted for housing an illegal occupant—her grandson.[27] The plurality opinion found that such restrictions cut too deeply into the sanctity of the family and did little to further the community objectives of preventing overcrowding and congestion.[28]

With this distinction in place, localities crafted definitions of family comporting with the Supreme Court's holding.[29] Al-

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21. 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 9.30 (2d ed. 1976).

22. *Id.*

23. *Id.* A typical ordinance limits the family to "one or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers or sisters of the owner or tenant." *Id.* (citing White Plains v. Ferraioli, 34 N.Y.2d 300 (1974)).

24. *Belle Terre*, 416 U.S. at 9. The ordinance approved in *Belle Terre* limited the number of unrelated people who could constitute a family to two. *Id.* at 2. The Court reviewed the ordinance under the rational basis test and found it to be rationally related to the goal of preserving the single-family character of the neighborhood. *Id.* at 8-9.

25. 431 U.S. 494 (1977).

26. *Id.* at 496 n.2.

27. *Id.* at 497.

28. *Id.* at 499-500.

29. The distinction is typically codified in a municipality's zoning code. For example, in Virginia Beach, Virginia, a family is defined as:

> (a) An individual living alone in a dwelling unit; or
>
> (b) Any of the following groups of persons, living together and sharing living areas in a dwelling unit:
>
> (1) Two (2) or more persons related by blood, marriage, adoption, or approved foster care;
>
> (2) A group of not more than four (4) persons (including servants) who need not be related by blood, marriage, adoption or approved foster care.

though restrictions on family relationships violated fundamental rights, the Court clearly supported the use of zoning to exclude congregate living arrangements that were deemed detrimental to the single-family character of neighborhoods.[30]

More restrictive statutes limit the impact of communal living arrangements among college students and younger people sharing homes in resort areas.[31] They also promote permanency and stability, enhancing the residential character of single family neighborhoods.[32] Unfortunately, localities also use restrictive ordinances to exclude a variety of beneficial uses, including group homes for the disabled.[33] In response to this exclusionary pressure, advocates for the disabled began to lobby Congress to amend the FHA to add the handicapped as a protected class.[34]

Before Congress could act, the Supreme Court decided *City of Cleburne v. Cleburne Living Center, Inc.*[35] The case involved the denial of a use permit to operate a group home for mentally retarded adults.[36] The Fifth Circuit had invalidated the use

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VIRGINIA BEACH, VA., CODE app. A § 111 (1994); *see also* Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1568 (E.D. Mo. 1994) (citing ST. LOUIS, MO., CODE § 26.08.160 (1992)).

30. The Court reaffirmed its support for an unrelated persons restriction in 1984, dismissing an appeal by group home operators for want of a federal question in Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and Zoning Comm'n, 469 U.S. 802, *dismissing appeal from* 314 S.E.2d 218 (Ga. 1984). The Macon home, designed to house four unrelated mentally disabled residents, was found not to constitute a single-family use by the lower court.

31. 2 ANDERSON, *supra* note 21, § 9.30.

32. *St. Louis*, 843 F. Supp. at 1579 ("[S]ingle-family-zoning districts in particular, promote the legitimate governmental interest of maintaining the residential character of a neighborhood and segregating single families from rooming houses, multi-family apartments, and commercial or industrial uses in that same area."); *see also* Harold A. Ellis, Comment, *Neighborhood Opposition and the Permissible Purposes of Zoning*, 7 J. LAND USE & ENVTL. L. 275 (1992) (observing that zoning disputes often center on maintaining neighborhood "character").

33. Lester D. Steinman, *The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study*, 19 URB. LAW. 1, 2 (1987).

34. In 1980, the House of Representatives passed the first amendment to propose adding the handicapped as a protected class under the FHA. The bill failed in the Senate, however, and languished for nearly a decade until passed by the 100th Congress in 1988. H.R. REP. NO. 711, 100th Cong., 2d Sess. 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2175.

35. 473 U.S. 432 (1985).

36. *Id.* at 435.

permit restriction, finding that the mentally retarded were a "'quasi-suspect' class"[37] and thus entitled to an intermediate level of judicial scrutiny.[38] The Supreme Court affirmed the decision, but refused to find the classification suspect. Instead, the majority's rigorous application of rational basis review rejected all seven proffered justifications for the use permit denial.[39]

Although clearly committed to the plight of the mentally disabled, and to overcoming the "irrational prejudice" that denied them housing, the Court's decision in *Cleburne* created confusion over the proper standard to be applied in equal protection challenges.[40] The deliberate finding that the disabled were not a "suspect class" deprived them of heightened scrutiny,[41] but the searching analysis of the city's motives gave new teeth to the rational basis standard.[42] As a result of this confusion, pressure for congressional action increased, and legislators responded with the Fair Housing Amendments Act of 1988.

The Fair Housing Act

The Fair Housing Act was originally passed as Title VIII of the Civil Rights Act of 1968.[43] It provided protection from discrimination in housing on the basis of race, color, religion, gender, or national origin.[44] The Act was amended in 1988 to extend protection to the handicapped.[45] The amended FHA makes it unlawful

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37. Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191, 198 (5th Cir. 1984).

38. *Id.*

39. *Cleburne*, 473 U.S. at 447-50.

40. Patrick T. Bergin, Note, *Exclusionary Zoning Laws: Irrationally-Based Barriers to Normalization of Mentally Retarded Citizens*, 3 J. LAND USE & ENVTL. L. 237, 255 (1987).

41. *Cleburne*, 473 U.S. at 446; Bergin, *supra* note 40, at 255.

42. Bergin, *supra* note 40, at 255-56; David O. Stewart, *A Growing Equal Protection Clause?*, A.B.A. J., Oct. 1985, at 108, 109-12.

43. 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993).

44. Gender was added as a protected class by the 1974 Amendments to the Fair Housing Act, Pub. L. No. 93-383, § 808(b)(1)-(3), 88 Stat. 729 (1974) (amending 42 U.S.C. §§ 3604-3606 (1988)).

45. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (current version at 42 U.S.C. §§ 3601-3631 (1988 & Supp. V 1993)).

> (1) to discriminate in the sale or rental, or to *otherwise make unavailable or deny*, a dwelling to any buyer or renter because of a handicap of—
>
> (A) that buyer or renter,
>
> (B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or
>
> (C) any person associated with that buyer or renter.[46]

The statutory definition of discrimination includes "a refusal 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. . . ."[47] Both the language of the prohibition and the definition of discrimination indicate an intention that the law apply to local zoning decisions.[48]

In drafting the amendments, Congress relied heavily on the Rehabilitation Act of 1973.[49] It also expressed an intent for courts to apply the two statutes consistently.[50] Not surprisingly, the courts subsequently extended the coverage of the FHA to include recovering substance abusers as a protected class.[51] In addition to case law, the legislative history explicitly supports the FHA's application to recovering drug addicts and alcoholics.[52]

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46. 42 U.S.C. § 3604(f)(1)-(2) (1988) (emphasis added).

47. *Id.* § 3604(f)(3)(B) (emphasis added).

48. If the language were not plain enough, the report of the House Judiciary Committee was unequivocal: "The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices." H.R. REP. NO. 711, *supra* note 34, at 24, *reprinted in* 1988 U.S.C.C.A.N. at 2185.

49. 29 U.S.C. § 701 (1988 & Supp. V 1993).

50. H.R. REP. NO. 711, *supra* note 34, at 22, *reprinted in* 1988 U.S.C.C.A.N. at 2183 ("The Committee intends that the definition be interpreted consistent with regulations clarifying the meaning of the similar provision found in Section 504 of the Rehabilitation Act.") (footnote omitted).

51. United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992); Oxford House—Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1342; *see infra* notes 101-17 and accompanying text.

52. The House Report specifically stated that the definition of handicap included "individuals who have recovered from an addition [sic] or are participating in a treatment program or self-help group such as Narcotics Anonymous. . . . Depriving such individuals housing, or evicting them, would constitute irrational discrimination that may seriously jeopardize their continued recovery." H.R. REP. NO. 711, *supra* note 34, at 22, *reprinted in* 1988 U.S.C.C.A.N. at 2183.

The passage of the amendments gave group-home operators a potent new weapon in their fight against restrictive zoning statutes.[53] It also capped a movement toward the mainstreaming of the disabled that began decades earlier and proved instrumental in the implementation of a legislative policy specifically directed at providing low-cost group housing as a partial solution to the country's growing substance abuse problem.[54]

The Oxford House Experiment

Deinstitutionalization, or normalization, of the disabled has been accepted policy since the 1950s.[55] According to this theory, disabled people who cannot live with their families should live together in a household unit of normal size that provides opportunities for social interaction in a setting that closely approximates that of a typical household.[56]

Such community-based living arrangements have been part of the effort to treat recovering substance abusers since 1958.[57] Such homes have several advantages over traditional in-patient treatment facilities. The residential setting, usually in quiet neighborhoods, reduces the temptation to relapse by removing the addicts from areas of drug trafficking.[58] In addition, the

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53. *See* William Graham, Comment, *There Goes the Neighborhood: The Evolution of "Family" in Local Zoning Ordinances*, 9 TOURO L. REV. 699, 715-18 (1993) (discussing the increased use of FHA remedies by group home advocates in New York courts).

54. *Id.*

55. Peter W. Salsich, Jr., *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP. PROB. TR. J. 413, 416 n.17 (1986).

56. Cindy L. Soper, Note, *The Fair Housing Act Amendments of 1988: New Zoning Rules for Group Homes for the Handicapped*, 37 ST. LOUIS U. L.J. 1033, 1040-41 (1993).

57. *See* LEWIS YABLONSKY, THE THERAPEUTIC COMMUNITY 17 (1989). The first therapeutic community, or TC, called Synanon, was established in a Santa Monica, California, beach house. Like modern recovery homes, it relied on the ability of recovering addicts to help themselves through group therapy and a peer-to-peer structure which gave the patients responsibility for the operation and maintenance of the home. *Id.* at 17-26. Unfortunately, the Synanon movement itself was discredited widely in the 1970s for the cult-like practices of its leader and allegedly exploitative commercial ventures. *See* Synanon Church v. United States, 579 F. Supp. 967, 970-71 (D.C. Cir. 1984) (upholding the revocation of the group's tax-exempt status).

58. MOLLOY, *supra* note 12, at 16 n.12.

social structure of the home fosters the interdependence that is a large factor in the successful recovery programs of Alcoholics Anonymous and Narcotics Anonymous.[59]

Oxford House is the country's largest developer of unsupervised recovery homes. It was founded in 1975 by Paul Molloy, a lawyer and recovering alcoholic.[60] Molloy started the first Oxford House out of necessity. After the half-way house facilitating his own recovery was threatened with closure for lack of funds, the residents decided to take over the home themselves.[61] They established two simple rules: No resident could drink or take drugs, and each had to work and pay rent to stay.[62] There were no curfews, no mandatory meetings, no treatment regimen, and no staff.[63]

Despite their success, the growth of group homes under the Oxford House model was limited mainly to the suburbs around Washington, D.C., with fewer than twenty homes established in the first fifteen years after Oxford House's founding.[64] Then, in 1988, Molloy, with the help of friends in Congress, succeeded in getting federal block grants made contingent on state support for self-governing group homes patterned after the Oxford House model.[65]

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59. Both groups follow the "twelve-step" method of recovery, involving admitting powerlessness over drugs and alcohol and committing to total abstinence. The main instrument of their success is the weekly AA or NA meeting, at which recovering addicts support one another in the recovery process. ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., ALCOHOLICS ANONYMOUS 59 (3d ed. 1976).

60. *The Oxford House Experiment*, WASH. POST, Nov. 12, 1989, (Magazine), at W15.

61. *Id.*

62. *Id.* The basic tenets of Oxford House are remarkably unchanged. The main principles are self-governance, absolute prohibition of alcohol and drugs, and self-sufficiency. *See* OXFORD HOUSE MANUAL 8-14, *reprinted in* MOLLOY, *supra* note 12, at app. C.

63. The fewer the rules, the more likely it will be that a house will be successful. . . . In many alcoholic rehabilitation units, there are rules covering . . . curfew hours; clean-up details; mandatory attendance at AA meetings; and other rules almost inherent in institutional living. Oxford House is not an institution. It is more analogous to a family situation or a college fraternity or sorority.

OXFORD HOUSE MANUAL, *supra* note 62, at 13.

64. MOLLOY, *supra* note 12, at 3-4.

65. 42 U.S.C. § 300x-25 (Supp. V 1993). The act provides that block grants under

With the support of state start-up grants, and the recent inclusion of the handicapped as a protected class under the FHA, Oxford House experienced tremendous growth and expansion between 1988 and 1994. More than 500 unsupervised group homes were established in thirty-five states.[66] As the network grew, so too did the disputes over the proper location of recovery homes under local zoning codes.

Residents opposed to the facilities have used restrictive family definitions and safety-related use permit requirements in local zoning codes to exclude group homes from their neighborhoods.[67] Molloy, who runs the national organization, contends that the definitions should not operate against local Oxford Houses. In a "Technical Manual" written to help individuals and organizations interested in starting a recovery home, he claims that a recovery home is "no different from a biological family."[68] "'Family'" he argues, "is the proper characterization of an Oxford House. The members . . . behave just like a family and should be treated as such by every jurisdiction."[69] As a result, the new homes "[a]s a matter of practice, . . . do[] not seek prior approval of zoning regulations before moving into a residential neighborhood."[70]

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the Anti Drug Abuse Act are given only to those states that establish a $100,000 revolving loan fund for the establishment of group homes made to private, non-profit entities where

> (A) the use of alcohol or any illegal drug in the housing program provided by the program will be prohibited;
>
> (B) any resident of the housing who violates such prohibition will be expelled from the housing;
>
> (C) the costs of the housing, including fees for rent and utilities, will be paid by the residents of the housing; and
>
> (D) the residents of the housing will, through a majority vote of the residents, otherwise establish policies governing residence in the housing, including the manner in which applications for residence in the housing are approved.

Id. § 300x-25(a)(6). The fund must provide loans of up to $4000 per home and the loans must be repaid within two years. *Id.* § 300x-25(a)(4).

66. Gelernter, *supra* note 6, at M1.

67. City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994); Oxford House—C v. City of St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994); Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168 (N.D.N.Y. 1993); Oxford House, Inc. v. City of Va. Beach, 825 F. Supp. 1251 (E.D. Va. 1993).

68. MOLLOY, *supra* note 12, at 30.

69. *Id.*

70. *Id.*; *see* United States v. Village of Palatine, 37 F.3d 1230, 1234 (7th Cir.

Not surprisingly, residents in prospective Oxford House neighborhoods view the situation differently.[71] Although some have objected on clearly improper grounds,[72] others raise legitimate objections based on the character of the recovery home use and the surreptitious procedure by which the homes locate.[73] Notwithstanding the mandate of the amended FHA, these localities argue that recovery home operators do not have a blanket exemption from local regulation.[74] The following discussion considers the limits on that local regulation through an analysis of the language and interpretation of the relevant provisions of the FHA.

THE LIMITS OF LOCAL CONTROL

In the recent past, arguments about what constitutes a single-family use, and how sites for group homes ought to be selected, have moved from local city council and zoning board meetings into the federal courts. Prior to the inclusion of the handicapped as a protected class under the FHA, group home operators who were defeated at the local level had to challenge restrictive zoning ordinances on constitutional grounds.[75] Because zoning ordinances traditionally are accorded a very deferential review by

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1994) (Manion, J. concurring).

71. *See, e.g.*, Tom Kennedy, *West University and Drug Rehab*, HOUS. POST, June 12, 1994, at C1; Sara Talalay, *Town Says Oxford House Doesn't Obey Zoning Rules*, CHI. TRIB., Apr. 19, 1994, at 3; *Group Homes Spark Debate over Locations*, ST. LOUIS POST DISPATCH, Mar. 17, 1994, at 1A; *Home Stands Alone: House for Recovering Addicts Is Opposed by Neighbors, Officials*, NEWSDAY, Oct. 6, 1991, at 1; *Audobon Residents Oppose Home for Recovering Alcoholics, Addicts*, PHILA. INQUIRER, Sept. 19, 1990, at B5.

72. *See infra* notes 127-33 and accompanying text (citing cases).

73. *Palatine*, 37 F.3d at 1235 (Manion, J., concurring) (recognizing localities' legitimate interests in safety, property rights, and the rights of other group home residents); Oxford House, Inc. v. City of Va. Beach, 825 F. Supp. 1251, 1262 n.4 (E.D. Va. 1993); *see also* Kennedy, *supra* note 71, at C1 (describing neighbor's surprise at learning of a local Oxford House by observing a resident who had relapsed running naked down the street).

74. *Palatine*, 37 F.3d at 1233-34.

75. Graham, *supra* note 53, at 700. Most cases were brought on either due process or equal protection grounds. *Id.*

the courts, these early challenges were difficult to win.[76] With the expansion of FHA protection, Oxford House and other home operators have proceeded directly to the federal courts for temporary and permanent injunctive relief and, in some cases, damages.[77]

This section of the Note will review the impact of the amended FHA on local control of recovery home regulation. After a review of the statutory language itself, it will discuss judicial interpretations of the FHA by the federal courts. The early interpretations of lower courts have resolved some of the ambiguity in the FHA and clarified the limits of local zoning power to control recovery home expansion.

The Statutory Language

Group home operators viewed the amended FHA as a useful tool to combat exclusionary zoning of group homes.[78] In fact, Congress clearly stated its intention that the statute prohibit special restrictions and criteria that localities apply to exclude group homes.[79]

What is less clear is the extent to which the FHA prohibits the application of neutral laws that have the effect of making it difficult for recovery homes to operate.[80] One area of confusion

76. *Id.* The Supreme Court, in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), held that zoning regulations did not violate the Due Process Clause unless they were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Id.* at 395.

77. Until the Supreme Court's decision in City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985), and the amendments to the Fair Housing Act, control over the location of group homes was almost exclusively a local and state question. *See* SALSICH, *supra* note 3, § 7.07; *see also supra* notes 33-45 and accompanying text.

78. *See* William D. McElyea, *The Fair Housing Act Amendments of 1988: Potential Impact on Zoning Practices Regarding Group Homes for the Handicapped*, *in* 1990 ZONING AND PLANNING LAW HANDBOOK 359 (Mark S. Dennison ed., 1990); Keith Aoki, *Recent Developments—Fair Housing Amendments Act of 1988*, 24 HARV. C.R.-C.L. L. REV. 249 (1989).

79. H.R. REP. NO. 711, *supra* note 34, at 23, *reprinted in* 1988 U.S.C.C.A.N. at 2184 (stating that the Committee "intend[s] to prohibit special . . . terms or conditions, or denials of service because of an individual's handicap and which have the effect of excluding, for example, congregate living arrangements for persons with handicaps").

80. McElyea, *supra* note 78, at 363.

involves the interpretation of the statute's numerous exemptions.[81] A few of these exemptions have been asserted in attempts to deny FHA protection to recovery home residents.[82] For example, the statute excludes from the definition of handicap the "current, illegal use of or addiction to a controlled substance."[83] It also exempts from coverage persons who have been convicted of the illegal manufacture or distribution of a controlled substance.[84] These exemptions have been asserted by localities seeking to restrict recovery home access to residential neighborhoods by denying the residents protected status.[85]

The exemption that has been relied upon most frequently by local officials permits "reasonable . . . restrictions regarding the maximum number of occupants' permitted to occupy a dwelling."[86] The meaning of that exemption, however, is subject to disagreement. The Eleventh Circuit concluded that the exemption applied to family definitions that limited the number of unrelated people who could occupy a dwelling.[87] But the Ninth Circuit disagreed,[88] and the Eleventh Circuit's decision has been distinguished[89] and criticized[90] in district court cases

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81. 42 U.S.C. § 3607 (1988). This statute exempts certain housing provided by religious groups and private clubs, *id.* § 3607(a), allows restrictions based on maximum occupancy, *id.* § 3607(b)(1), and excludes from coverage persons who "ha[ve] been convicted . . . of the illegal manufacture or distribution of a controlled substance," *id.* § 3607(4).

82. United States v. Southern Management Corp., 955 F.2d 914, 918 (4th Cir. 1992); Oxford House—Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1342 (D.N.J. 1991).

83. 42 U.S.C. § 3602(h).

84. *Id.* § 3607(4).

85. *See infra* notes 105-20 and accompanying text.

86. 42 U.S.C. § 3607(b).

87. Elliott v. City of Athens, 960 F.2d 975 (11th Cir. 1992); *see infra* notes 193-98 and accompanying text.

88. City of Edmonds v. Washington St. Bldg. Code Council, 18 F.3d 802 (9th Cir.), *cert. granted*, 115 S. Ct. 417 (1994); *see infra* notes 204-08 and accompanying text.

89. Oxford House v. Town of Babylon, 819 F. Supp. 1179, 1182 n.4 (E.D.N.Y. 1993) (finding *Elliott* "inapposite" because the family definition did not use a numerical limit but required a showing of "a relatively permanent household, not a framework for transients or transient living").

90. Oxford House, Inc. v. City of Va. Beach, 825 F. Supp. 1251, 1259 & n.3 (E.D. Va. 1993) (finding the "reasoning of *Elliott* unpersuasive" and agreeing with the *Elliott* dissent that "it is not possible to interpret the maximum occupancy limitation provision to cover unrelated persons restrictions"); *see* Oxford House—C v. City of St.

with very similar facts. The Supreme Court agreed to resolve the dispute in its current term.[91]

In addition to confusion over the purpose of the exemptions, the language of the statute is also ambiguous as to the showing required to prove discrimination. Republican lawmakers, anticipating the statute's impact on local zoning, attempted to amend it in committee to require a showing of discriminatory intent to invalidate a zoning ordinance.[92] The amendment was defeated, however, and the Act went into effect with no specified standard.[93] As a consequence, three different tests have emerged.[94] Most courts hold that a showing of either discriminatory intent or discriminatory impact will suffice to prove discrimination.[95] A third standard, borrowed from the Rehabilitation Act and applicable only to the handicapped, is "reasonable accommodation."[96]

Louis, 843 F. Supp. 1556 (E.D. Mo. 1994).

91. City of Edmonds v. Washington State Bldg. Code Council, 115 S. Ct. 417 (1994); *see Arguments Before the Court*, 63 U.S.L.W. 3679 (Mar. 21, 1995) (noting oral argument in the *Edmonds* case was presented on Mar. 1, 1995).

92. H.R. REP. NO. 711, *supra* note 34, at 89, *reprinted in* 1988 U.S.C.C.A.N. at 2224 (additional views of Rep. Swindall et al.: "I vote against H.R. 1158 [because] in its present form, the bill may be used by advocacy groups, federal judges or bureaucrats to bust local zoning."). President Reagan also voiced his support for the discriminatory intent standard in remarks made during the signing of the legislation.

> [T]his bill does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [FHA] violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent. [The FHA] speaks only to intentional discrimination.

Remarks on signing the Fair Housing Amendments Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1140, 1141 (Sept. 13, 1988).

93. The language of the Act is silent with regard to the standard of proof required to show discrimination. The provisions relating to the handicapped, however, require a "reasonable accommodation" to promote access to housing. 42 U.S.C. § 3604 (1988).

94. *St. Louis*, 843 F. Supp. at 1575; *see* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW & LITIGATION § 11.5(3)(c) (1994).

95. Doe v. City of Butler, 892 F.2d 315, 323 (3d Cir. 1989); Oxford House—Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1343 (D.N.J. 1991); Baxter v. City of Belleville, 720 F. Supp. 720, 732 (S.D. Ill. 1989). The standard is a familiar one from actions under Title VII of the Civil Rights Act. *See, e.g.*, Keith v. Volpe, 858 F.2d 467, 482-84 (9th Cir. 1988); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934-37 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988). It had been applied under the FHA in cases of racial discrimination and is thus compatible with congressional intent that the statute be interpreted consistently with earlier statutes.

96. Reasonable accommodation has a well-developed history in the case law and

The lack of clarity regarding the applicable standard, coupled with the ambiguous language of the exception provisions,[97] has made the area of zoning for group homes one of the most frequently litigated aspects of the expanded coverage for the handicapped under the FHA.[98] The drafters' decision to delegate enforcement responsibility for zoning and land-use cases to the Justice Department, rather than the Department of Housing and Urban Development (HUD), further clouds the interpretation.[99] Because HUD regulations issued to cover the implementation of the rest of the FHA deliberately excluded zoning challenges, the need for judicial interpretation is particularly acute.[100]

The Oxford House Cases

Litigation to interpret the limits that the amended FHA places on unsupervised recovery homes has addressed three basic questions with varying degrees of clarity. The first question is whether the residents are handicapped within the meaning of the FHA. Although courts generally agree that the Act protects recovering addicts, the exemptions and exclusions related to current and former drug problems raise questions about the extent of drug-related disabilities.

Next, courts have considered the required showing to support a finding of discrimination under the amended FHA. This analysis involves a review of challenged zoning practices under the discriminatory intent, discriminatory impact, and reasonable

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the journals. *See, e.g.*, Southeastern Community College v. Davis, 442 U.S. 397 (1979); Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19 (1st Cir. 1991); Denny Chin, *Discrimination Against the Handicapped: The Duty of Reasonable Accomodation* [sic], *in* PROCEEDINGS OF NEW YORK UNIVERSITY, FORTY-SECOND ANNUAL NATIONAL CONFERENCE ON LABOR §§ 14.01-.05 (Bruno Stein ed., 1989); Andrew Waugh, Case Comment, 25 SUFFOLK U. L. REV. 186 (1991).

97. *See supra* note 81 and accompanying text.

98. SCHWEMM, *supra* note 94, § 11.5(3)(c).

99. 42 U.S.C. § 3610(g)(2)(c) (requiring the Secretary of HUD to refer land-use and zoning matters directly to the Attorney General for investigation and prosecution).

100. SCHWEMM, *supra* note 94, § 11.5(3)(c) n.287 (noting that the statute's provision for Justice Department prosecution of land-use cases rendered HUD regulations inappropriate for this area).

accommodation tests. Finally, courts are divided over the interpretation of the statute's exemption for maximum occupancy restrictions. Because restrictive definitions of family are an important obstacle for recovery homes seeking unrestricted access to single-family districts, the interpretation of this exemption is critical to a proper application of the statute.

Recovering Alcoholics and Addicts Are a Protected Class

The federal courts have little difficulty finding that recovery home residents are a protected class under the amended FHA.[101] This interpretation is consistent with the clear intent of Congress, both by specific reference in the report of the House Judiciary Committee[102] and by the provision that the Act be interpreted consistently with the Rehabilitation Act.[103] Courts also apply the definition of handicap in the statute to find recovering alcoholics "substantially limit[ed in] one or more of such person's major life activities."[104] Parties seeking to limit the Act's application, however, argue that recovery home residents are not protected because of current or former drug problems. To date, courts have not been receptive to this argument.

In *United States v. Southern Management Corp.*,[105] for example, after finding residents of a recovery home "handicapped" within the meaning of the statute,[106] the Fourth Circuit con-

101. United States v. Southern Management Corp., 955 F.2d 914, 918 (4th Cir. 1992); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 459 (D.N.J. 1991); United States v. Borough of Audobon, 797 F. Supp. 353, 358 (D.N.J. 1991).

102. H.R. REP. NO. 711, *supra* note 34, at 22, *reprinted in* 1988 U.S.C.C.A.N. at 2183 ("[I]ndividuals who have a record of drug use or addiction but who do not currently use illegal drugs would continue to be protected . . . .").

103. The Rehabilitation Act had been extended to cover recovering substance abusers before the FHA was amended. *See, e.g.*, Rodgers v. Lehman, 869 F.2d 253, 258 (4th Cir. 1989); Sullivan v. City of Pittsburgh, 811 F.2d 171, 182 (3d Cir. 1987); Crewe v. United States Office of Personnel Management, 834 F.2d 140, 141-42 (8th Cir. 1987).

104. 42 U.S.C. § 3602(h)(1) (1988).

105. 955 F.2d 914 (4th Cir. 1992).

106. A bootstrapping argument succeeded in *Southern Management*. The court held that recovery home residents were handicapped because they were denied housing as a result of their status. The denial of housing that formed the basis of the suit constituted a "substantial impairment" of their ability to care for themselves. *Id.* at 918; *cf.* United States v. Borough of Audobon, 797 F. Supp. 353 (D.N.J. 1991) (find-

three of the city's arguments and suggested the accusations themselves could be evidence of discriminatory intent.[115]

These cases indicate the courts' reluctance to apply the exemptions to defeat sincere attempts at recovery by former drug and alcohol abusers. Although this result is understandable, perhaps even laudable, it presents issues of interpretation that complicate the regulation of recovery homes. For example, because the statute exempts from coverage those with prior convictions for the sale or manufacture of illegal drugs, should a locality be permitted to inquire into such convictions among proposed recovery home residents?[116]

In addition, because addiction is not as readily identifiable as other handicaps, does a locality have an interest in documenting the extent of prior treatment?[117] A related and more difficult issue is raised when a disabled recovery home resident makes the transition out of protected status. As one court has observed, "[w]hether *former* addiction to drugs or alcohol qualifies as a handicap is not open to as easy a determination as [Oxford House] would have this court believe."[118] By extension of the Fourth Circuit's reasoning in *Southern Management*, it may be that as long as a resident derives benefit from a group living arrangement, she will remain handicapped within the meaning of the Act. Moreover, because the Act protects those who are merely "regarded as having"[119] a disability, defining who is entitled to its protection (and for how long) presents even more difficult challenges for local regulators. Later decisions accept that the FHA covers recovering addicts and alcoholics.[120] Un-

115. *Id.* at 1343 n.16.

116. *See* United States v. Southern Management Corp., 955 F.2d 914, 917 (4th Cir. 1992). The district court in *Southern Management* authorized discovery on this issue but limited the inquiry to the convictions specified in the exemption and redacted individual names to foreclose independent investigation by the defendant.

117. The ADA definition of drug-related disability relied upon by the Fourth Circuit in *Southern Management* provides that addicts who currently are not using drugs are part of a protected class if (1) they have completed a rehabilitation program, (2) they are enrolled in a rehabilitation program, or (3) they are erroneously regarded as continuing to use drugs. *Id.* at 922 (citing 29 U.S.C. § 706(8)(c) (Supp. III 1991)).

118. Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168, 1175 n.5 (N.D.N.Y. 1993).

119. 42 U.S.C. § 3602(h)(3) (1988).

120. *See, e.g.*, Oxford House, Inc. v. City of Va. Beach, 825 F. Supp. 1251, 1257

fortunately, the courts have provided little guidance in defining the limits of the disability.

Proving Discrimination under the FHA

Because recovering drug addicts and alcoholics are newly protected classes under the amended FHA, their ability to win zoning challenges has increased dramatically. Instead of showing that the regulation in question is not rationally related to a legitimate state interest,[121] recovery home residents need only show that it discriminates against them as a result of their status. This section of the Note considers how such discrimination is measured. The statutory language is ambiguous with regard to the specific showing required to prove discrimination,[122] and courts have applied any of three tests to scrutinize local regulations: discriminatory intent, discriminatory impact, and failure to make reasonable accommodation.

Discriminatory Intent

Statutes passed or enforced solely for the purpose of excluding individuals based on their handicap violate the FHA.[123] "Intentional discrimination can include actions motivated by stereotypes, unfounded fears, misperceptions, and 'archaic attitudes,' as well as simple prejudice about people with disabilities."[124]

(E.D. Va. 1993) ("In light of [*Southern Management*'s] holding that recovering former alcohol and drug abusers who were denied housing opportunities qualified as 'handicapped' under the Fair Housing Act, the parties do not dispute that the Fair Housing Act applies to plaintiffs and the members of the group homes they operate."); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993) ("It is well established that individuals recovering from drug or alcohol addiction are handicapped under the FHA.") (citations omitted).

121. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985). Although the Court in *Cleburne* struck the zoning ordinance, as applied to restrict a group home for the mentally ill, they refused to grant protected class status to the disabled. *Id.* at 439-46. Instead they subjected the ordinance to rigorous application of the rational basis test. *Id.* at 448-50; *see also supra* notes 35-42 and accompanying text.

122. *See supra* notes 92-96 and accompanying text.

123. 42 U.S.C. § 3615 (1988) ("[A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.").

124. Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1575-76 (E.D. Mo.

Discriminatory intent is alleged most frequently when local officials selectively enforce use permit requirements to exclude groups of handicapped individuals.[125] Denial of those permits based, even partially, on discriminatory motives violates the statute.[126]

Sometimes recovery homes face blatant discrimination, evidenced by comments of officials during public hearings or meetings or indicated by public enforcement action taken solely in response to local opposition arising from unfounded fears or prejudice. In a New Jersey case brought by the operator of a proposed home for mentally ill chemical abusers,[127] after the plaintiff's appeal of the zoning denial was deferred, the mayor of the township was quoted as saying: "The war continues. An adjournment like this is a victory. Just like last month when they didn't get their papers in on time. Every month that we last and that doesn't proceed we're ahead."[128] The Town newsletter was even more explicit:

> The Township is supporting the efforts of more than 300 area residents who have joined forces to stop the State of New Jersey and Easter Seal from opening a half-way house for mentally ill drug addicts. . . . Neighbors and town officials believe it is morally wrong and have vowed to stop this half-way house from opening.[129]

1994) (citing School Bd. v. Arline, 480 U.S. 273, 279 (1987)).

125. *See, e.g.*, Oxford House—Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D.N.J. 1991). Most of the litigation involves permits that are required for all similar uses by unrelated people (boarding houses, group homes, fraternities, sororities, and other congregate living arrangements). The plain language of the statute indicates that a permit requirement focused solely on the protected status would be invalid. *See also* H.R. REP. NO. 711, *supra* note 34, at 24, *reprinted in* 1988 U.S.C.C.A.N. at 2185 ("Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety, and land-use in a manner which discriminates against people with disabilities. . . . [T]hese and similar practices would be prohibited.").

126. *St. Louis*, 843 F. Supp. at 1576 ("[I]t is not necessary that plaintiffs prove that defendant's actions were motivated by a malicious desire to discriminate. It is enough that the actions were motivated by or based on consideration of the protected status itself."); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1184-85 (E.D.N.Y. 1993); *Plainfield*, 769 F. Supp. at 1343.

127. Easter Seal Soc'y v. Township of N. Bergen, 798 F. Supp. 228 (D.N.J. 1992).

128. *Id.* at 232.

129. *Id.*

Cases like this are easy for the federal courts enforcing the FHA. Unfortunately, they are not uncommon.[130]

Discriminatory intent also is alleged when group homes are denied use permits as a result of community protest. In *Oxford House—C v. City of St. Louis*,[131] for example, the court found the city's enforcement actions were carried out "in response to neighborhood and community fears and concerns about 'some sort of drug rehab' house . . . ."[132] Despite testimony from city officials sympathetic to the recovery home mission, the court concluded the city's enforcement was discriminatory, holding specifically: "Intentional discrimination does not require personal animosity or ill will—it is sufficient that defendant treated plaintiffs unfavorably because of their handicap."[133]

This broad interpretation of discriminatory intent poses special problems for local zoning officials in light of the Oxford House policy of evading local restrictions. Because the new home operators are encouraged to locate facilities without regard to local zoning restrictions,[134] neighbors understandably complain and notify government officials. Subsequent enforcement efforts are branded discriminatory based on the motivation of complaining neighbors, despite the fact that local authorities were preempted from appropriate regulation by the surreptitious location of the facility.[135]

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130. *See, e.g.*, *Plainfield*, 769 F. Supp. at 1343 (zoning officer first permitted home, then reversed determination after citizen complaints at council meeting); United States v. Borough of Audobon, 797 F. Supp. 353, 360 (D.N.J. 1991) (quoting the mayor: "[T]here is nothing more that I would like to do than to just come in and just tell these people you have until noon to get out of town."); *Babylon*, 819 F. Supp. at 1184 (quoting a citizen of East Farmingdale: "I don't want [my son] subjected to irrational, unpredicted [sic] behavior from people.").

131. 843 F. Supp. 1556 (E.D. Mo. 1994).

132. *Id.* at 1576.

133. *Id.* at 1577.

134. MOLLOY, *supra* note 12, at 30; *see also* United States v. Village of Palatine, 37 F.3d 1230, 1234-35 (7th Cir. 1994) (Manion, J., concurring).

135. *Palatine*, 37 F.3d at 1235.

Discriminatory Impact

The second standard applied by courts for proof of discrimination under the Act involves facially-neutral[136] ordinances that are enforced uniformly but are alleged to violate the FHA by having a discriminatory effect on a protected class. In order to prevail on a discriminatory impact theory, the party challenging the ordinance first must show a discriminatory impact on the protected class. The burden then shifts to the locality to show that the impact is necessary to meet a legitimate state interest.[137]

Many local zoning restrictions place disparate burdens on congregate living arrangements, most commonly in the form of restrictive family definitions[138] and building codes that impose special burdens on group-living arrangements regardless of handicap status.[139] These restrictions have been invalidated widely by federal courts interpreting the FHA in the recovery home context.

In Albany, New York, the city's so called Grouper Law limits to three the number of unrelated people who can constitute a family.[140] In a suit for a preliminary injunction prohibiting its enforcement against a local Oxford House, the district judge, without deciding the issue, found sufficient evidence of discrimi-

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136. Occasionally, statutes are found facially discriminatory. *See* Horizon House Developmental Servs., Inc. v. Township of Upper Southampton, 804 F. Supp. 683 (E.D. Pa. 1992). In *Horizon House*, the challenged ordinance imposed a 1000 foot separation requirement between group homes where "permanent care or professional supervision" was present. *Id.* at 694. The court found that this requirement created an explicit classification because only disabled people would require such special care. As a result the statute was facially discriminatory. The court also rejected the city's justification for the ordinance—the avoidance of group home "clustering"—as not rationally related to any legitimate interest. *Id.* at 694-95. *But see* Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991) (upholding a similar spacing requirement).

137. Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1577 (E.D. Mo. 1994).

138. *See supra* notes 21-32 and accompanying text.

139. *E.g.*, United States v. Village of Palatine, 3 Am. Disabilities Dec. (Law. Co-op) 271 (N.D. Ill. 1993), *adopted*, No. 93-C-2154, 1993 WL 462848 (N.D. Ill. Nov. 9, 1993), *vacated*, 37 F.3d 1230 (7th Cir. 1994).

140. Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168, 1176 (N.D.N.Y. 1993).

natory impact to award relief "on this ground alone."[141] The city had argued that the limit did not have a disparate impact because the residents could live next door or in a multi-family dwelling to achieve the six persons necessary for an Oxford House charter.[142] Beyond that, their need to live in larger groups was asserted to be financial and unrelated to their handicap.[143]

In *Oxford House—C v. City of St. Louis*[144] the court easily found the city's three-person limit on unrelated householders had a disparate impact on Oxford House residents.[145] There, however, the city had recently passed a group home exception to the zoning ordinance permitting group homes of up to eight to operate as of-right uses.[146] The court found the new law did not cure the discrimination "[b]ecause Oxford Houses typically require more than eight residents . . . to operate viably from both a financial and therapeutic viewpoint."[147] After concluding that the St. Louis ordinances at issue did have a disparate impact, and that the city had a legitimate interest in preserving "the residential character of [the] neighborhood,"[148] the court nonetheless found both ordinances discriminatory because they were not "necessary" to meet the goal of preserving residential character.[149] Specifically, the court found that alternative means for meeting the goal would have had a less discriminatory effect. It suggested a dispersion requirement and the creation of a conditional use for homes exceeding the city's eight-person limit.[150]

Non-numerical, "functional" definitions of family also have been challenged under a disparate impact theory. In *Oxford*

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141. *Id.*
142. *Id.* at 1170.
143. *Id.* at 1171; *see also Palatine*, 3 Am. Disabilities Dec. at 298 (finding six to eight residents sufficient to fulfill Oxford House's therapeutic mission).
144. 843 F. Supp. 1556 (E.D. Mo. 1994).
145. *Id.* at 1578.
146. *Id.* at 1578-79.
147. *Id.*
148. *Id.* at 1579.
149. *Id.* at 1579-80.
150. *Id.* Both suggestions are incorporated in this Note's proposed recovery home licensing scheme. *See infra* notes 263-311 and accompanying text.

House—Evergreen v. City of Plainfield,[151] for example, the family definition required unrelated people to meet a "functional equivalent" definition of family that focused on permanency and stability.[152] In addition to evidence of intentional discrimination in its enforcement, the district court found it had a disparate impact because recovering alcoholics and addicts may "never be perceived as 'stable' or 'permanent' by communities that object to their presence."[153] In a footnote, the court questioned whether furthering "permanence" was a legitimate goal for zoning ordinances to further.[154] Likewise, in *Oxford House, Inc. v. Township of Cherry Hill*,[155] the court found discriminatory a definition of family that required unrelated groups to apply for a Certificate of Occupancy and defend their "permanency and stability."[156] Both courts concluded the localities failed to establish that their enforcement actions were based on legitimate, non-discriminatory reasons.[157]

In *United States v. Village of Palatine*,[158] the village maintained restrictions for group homes that required them to meet certain heightened, building-safety guidelines including self-clos-

151. 769 F. Supp. 1329 (D.N.J. 1991).

152. *Id.* at 1333. The Plainfield ordinance described a family as:

> One (1) or more persons living together as a single non-profit housekeeping unit whose relationship is of a permanent and domestic character, as distinguished from fraternities, sororities, societies, clubs, associations . . . . All commercial residences, non-familial institutional uses, boarding homes and other such occupancies shall be excluded from one-family zones.

Id. (citing PLAINFIELD, N.J., ZONING CODE § 17.3-1(17)).

153. *Id.* at 1344.

154. *Id.* at 1336 n.6.

155. 799 F. Supp. 450 (D.N.J. 1992); *see also* Cherry Hill Township v. Oxford House, Inc., 621 A.2d 952 (N.J. Super. Ct. App. Div. 1993) (reaching a similar result).

156. *Cherry Hill*, 799 F. Supp. at 462.

157. The cases were both brought in New Jersey, where the Supreme Court of New Jersey has specifically approved the concept of permanency and stability as a legitimate goal for zoning. Berger v. State, 364 A.2d 993 (N.J. 1976). In these cases, however, the courts concluded that the local process implementing that policy was impermissible. *Plainfield*, 769 F. Supp. at 1344 (finding permanence a "pretext" for underlying discrimination); *Cherry Hill*, 799 F. Supp. at 462 (finding family definition discriminatorily applied).

158. 3 Am. Disabilities Dec. (Law. Co-op) 271 (N.D. Ill. 1993), *adopted*, No. 93-C-2154, 1993 WL 462848 (N.D. Ill. Nov. 9, 1993), *vacated*, 37 F.2d 1230 (7th Cir. 1994).

ing doors, deadbolt locks, and fire-safety enhancements.[159] The district court[160] found that, as applied to Oxford House, the rules had a discriminatory impact because Oxford House residents were required to live in group arrangements to facilitate their recovery.[161] The court went on to conclude that the village had not met its burden of showing the restrictions were necessary to meet the legitimate safety interests that justified the statutes.[162] According to the court, the code requirements were not necessary in Oxford House's case because the residents "share a great deal more responsibility for one another than do typical rooming house residents. Similarly, because the residents . . . make and enforce house rules, concerns about such matters . . . might be addressed short of treating the residence as a rooming house for fire code purposes."[163]

These cases illustrate the broad sweep of the amended FHA in recovery home cases. Although courts do not question the legitimacy of governmental interests in neighborhood character[164] and residential safety,[165] the means chosen to achieve those goals will be scrutinized carefully. In the recovery home context, rules designed for traditional group homes or other congregate living arrangements frequently do not advance governmental interests. Local regulators seeking to regain some measure of control must establish a framework for regulation consistent with the population being regulated or find themselves without an enforcement vehicle.

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159. *Id.* at 287.

160. Although the district court opinion was vacated by the Seventh Circuit, *Palatine*, 37 F.3d 1230, the detailed findings of fact accompanying the lower court's grant of a preliminary injunction are still useful for an analysis of the special problems posed by building code requirements created for other congregate living arrangements, *see Palatine*, 3 Am. Disabilities Dec. at 274-89.

161. *Palatine*, 3 Am. Disabilities Dec. at 294.

162. *Id.* at 299. The village pointed out that such regulations were imposed on group living arrangements where the residents were likely to be less familiar with the building. But the court relied on the Oxford House structure and testimony at trial that indicated the recovery home residents were not likely to view their safety responsibilities any less seriously than the nuclear family.

163. *Id.* at 296.

164. Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1579 (E.D. Mo. 1994).

165. *Palatine*, 3 Am. Disabilities Dec. at 295-96.

Reasonable Accommodation

The third aspect of the recovery home argument for protection under the FHA is unique to the protected class of the handicapped. The FHA requires a "reasonable accommodation" if such is necessary to afford an equal opportunity to use and enjoy a dwelling.[166] The phrase "reasonable accommodation" is frequently invoked by Oxford House. When faced with a local zoning challenge, instead of applying for a use permit or variance, it requests a "reasonable accommodation" in the local ordinance to permit them to continue to operate.[167]

Reasonable accommodation is the strongest of the three standards, as it purports to grant to the handicapped not only equal protection but a preferred status in housing discrimination claims.[168] The district court in *Oxford House—C v. City of St. Louis*[169] held that an accommodation is reasonable if it would not require a fundamental alteration in the nature of a program and would not impose undue financial or administrative burdens on a municipality.[170]

In those decisions that have addressed reasonable accommodation, the grant of a use permit or variance to allow a group home to operate is usually the objective.[171] In *St. Louis*, for example, the court found that Oxford House residents could not "lawfully be required to attempt those procedures."[172] The hearing process associated with variance and conditional use applications required notice and an opportunity for public comment that, according to the court, "stigmatizes [residents], perpetuates their self-contempt, and increases the stress which can

166. 42 U.S.C. § 3604(f)(3)(B) (1988).
167. *See* Oxford House v. City of Va. Beach, 825 F. Supp. 1251, 1256 (E.D. Va. 1993); Oxford House v. Township of Babylon, 819 F. Supp. 1179, 1185 (E.D.N.Y. 1993); Oxford House v. City of Albany, 819 F. Supp. 1168, 1171 (N.D.N.Y. 1993).
168. *See* Elliott v. City of Athens, 960 F.2d 975, 987 (11th Cir. 1992) (Kravitch, J., dissenting); SCHWEMM, *supra* note 94, § 11.5(3)(c).
169. 843 F. Supp. 1556 (E.D. Mo. 1994).
170. *Id.* at 1581 (citing Southeastern Community College v. Davis, 442 U.S. 397 (1979)).
171. *See* United States v. Village of Palatine, 37 F.3d 1230 (7th Cir. 1994); *Virginia Beach*, 825 F. Supp. at 1254; *St. Louis*, 843 F. Supp. at 1581.
172. *St. Louis*, 843 F. Supp. at 1581.

so easily trigger relapse."[173]

A similar result was reached on identical facts by the district court in *United States v. Village of Palatine*.[174] In *Palatine*, the trial court reluctantly found the enforcement of the village's application procedure was potentially futile, and its refusal to waive the process was sufficient to warrant a preliminary injunction.[175] On appeal, however, the Seventh Circuit vacated the preliminary injunction granted by the lower court and ordered the case dismissed.[176] The circuit court agreed with village officials that the special use permit process was not, in itself, a failure to make reasonable accommodation.[177] It noted the finding of the magistrate judge below that there was no requirement that residents actually attend the hearing.[178] More importantly, the court recognized that "[p]ublic input is an important aspect of municipal decision making,"[179] and the FHA did not require courts to impose a "blanket requirement that cities waive their public notice and hearing requirements in all cases involving the handicapped."[180]

The Seventh Circuit relied, in part, on precedent from an Oxford House case in the eastern district of Virginia. There the district court refused to consider Oxford House's claims because of lack of ripeness.[181] Oxford House had alleged that the city's use permit requirement, which was imposed on all groups of unrelated people larger than four,[182] should be waived as a reasonable accommodation under the Act. It argued that the mere requirement of applying for such a permit would subject

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173. *Id.* at 1582 (citations omitted).
174. 3 Am. Disabilities Dec. (Law. Co-op) 271, 297 (N.D. Ill. 1993).
175. *Id.* at 299-300.
176. United States v. Village of Palatine, 37 F.3d 1230, 1234 (7th Cir. 1994).
177. *Id.*
178. *Id.* at 1233.
179. *Id.* at 1234.
180. *Id.* In a concurring opinion, Judge Manion chastised Oxford House for its "high handed" policy of ignoring local zoning requirements. *Id.* at 1235 (Manion, J., concurring).
181. Oxford House v. City of Va. Beach, 825 F. Supp. 1251, 1253 (E.D. Va. 1993).
182. The Virginia Beach zoning ordinance, like others in Virginia, contained an exception for group homes of eight or fewer residents that were licensed by the state. VIRGINIA BEACH, VA., CODE § 111 app. A (1994).

residents to public humiliation detrimental to their recovery.[183] The court disagreed. As in *Palatine*, the case was dismissed without prejudice until the city was given the opportunity to rule on a permit application.[184]

District Judge Payne elaborated on the concept of reasonable accommodation:

> [I]nherent in the concept of "reasonable accommodation," . . . is that the interest of, and benefit to, handicapped individuals in securing equal access to housing must be balanced against the interest of, and burden to, municipalities in making the requested accommodation . . . . In requiring reasonable accommodation, therefore, Congress surely did not mandate a blanket waiver of all facially neutral zoning policies and rules. . . . Moreover, the need for such balancing is evident in the context of land use and zoning ordinances, where cities have important interests in regulating traffic, population density and services to ensure the safety and comfort of all citizens . . . .[185]

The courts in *Palatine* and *Virginia Beach* correctly concluded that the requested "accommodation" is not the summary admission of a group home, which may or may not be required by the FHA, but, rather, a fundamental alteration of the notice and comment decision making which has characterized zoning procedure for decades.[186] Both decisions recognize localities' legitimate interest in accountability. Whether or not a jurisdiction may restrict the placement of a recovery home, it should be allowed to impose some level of regulation to ensure that recovery home residents are entitled to their special status and to protect the legitimate interests of the surrounding community.

The Meaning of "Maximum Occupancy"

The final important judicial interpretation concerns the meaning of an FHA statutory exemption for "maximum occupancy" restrictions. The first federal appellate court to interpret the

183. *Virginia Beach*, 825 F. Supp. at 1262.
184. *Id.* at 1265.
185. *Id.* at 1261.
186. DANIEL R. MANDELKER, LAND USE LAW § 6.69 (3d ed. 1993).

rule concluded it would apply to sustain restrictive family definitions in zoning codes that prohibited unrelated individuals from sharing a single-family home.[187] The Ninth Circuit, however, has reached the opposite conclusion, and other district court decisions exploring the legislative history of the act agree.[188] The Supreme Court agreed to resolve the issue in its Spring 1995 Term.[189]

The dispute centers on the meaning of section 3607(b)(1) of the FHA, which provides that the statute shall not limit "the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[190] The legislative history is not specific with regard to the meaning of this exemption,[191] and two contrary interpretations have been proposed. The question is important because much of the legitimate dispute over the regulation of recovery homes centers around the intensive use made by residents. The typical Oxford House, for example, has ten or more adult residents, sleeping two to a room.[192]

The Eleventh Circuit was the first appellate court to interpret

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187. Elliott v. City of Athens, 960 F.2d 975 (11th Cir. 1992).

188. *See infra* text accompanying notes 200-08.

189. The Court accepted the *Edmonds* case for review in October, 1994. City of Edmonds v. Washington State Bldg. Code Council, 115 S. Ct. 417 (1994). Oral argument was presented on March 1, 1995. *See Arguments Before the Court*, 63 U.S.L.W. 3679 (Mar. 21, 1995).

190. 42 U.S.C. § 3607(b)(1) (1988).

191. The House Report states: "*Section 6(d)* amends Section 807 to make additional exemptions *relating to the familial status provisions*. These provisions are not intended to limit the applicability of any reasonable local, State or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit." H.R. REP. NO. 711, *supra* note 34, at 31, *reprinted in* 1988 U.S.C.C.A.N. at 2192 (second emphasis added). This is almost exactly how the statute reads. The report continues:

> A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.

Id.

192. *See* Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1563-64 (E.D. Mo. 1994). Although the average number is ten, over 80% of the Oxford Houses contain more than eight residents, and some have as many as 20 residents. *See* MOLLOY, *supra* note 12, at 13.

the maximum occupancy exemption. In *Elliott v. City of Athens*,[193] the court upheld a local ordinance that limited the number of unrelated people constituting a single family to four.[194] The case involved an application by a recovery-home operator, Potter's House, to run a home for twelve recovering addicts.[195] The majority found the local ordinance, which was passed to reduce overcrowding in the college town, a "reasonable" maximum occupancy regulation exempt from the statute.[196]

The majority opinion relied on the distinction drawn by the Supreme Court in *Belle Terre* and *Moore*,[197] between restrictions on occupancy by unrelated people and those on related families. It concluded that Congress could not have intended to invalidate the numerous ordinances that included such restrictions in their zoning code as a legitimate means of controlling density.[198]

The court in *Elliott*, however, has not been followed, and lower courts in other circuits have criticized its rationale.[199] In Virginia Beach, Virginia, when Oxford House tried to establish four recovery homes in violation of the city's unrelated persons restriction, the court, in dicta, dismissed the reasoning of *Elliott* as unpersuasive.[200] It cited the *Elliott* dissent of Judge Kravitch as the more compelling interpretation.[201]

> Whether restrictions on the number of unrelated persons are constitutional does not control whether such restrictions constitute maximum occupancy limitations under the Fair Housing Act. Moreover, in discussing the relevant legislative history, the majority in *Elliott* ignores the unambiguous statement that maximum occupancy limitations are permissible if "applied to *all* occupants," without qualification.[202]

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193. 960 F.2d 975 (11th Cir. 1992).
194. *Id.* at 983.
195. *Id.* at 977.
196. *Id.* at 984.
197. *Id.* at 980; *see supra* notes 24-30 and accompanying text.
198. *Elliott*, 960 F.2d at 980.
199. Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1574 (E.D. Mo. 1994); Oxford House v. City of Va. Beach, 825 F. Supp. 1251, 1259 (E.D. Va. 1993).
200. *Virginia Beach*, 825 F. Supp. at 1259.
201. *Id.* at 1259 n.3.
202. *Id.* at 1259 (emphasis added) (citations omitted).

The case ultimately was dismissed without prejudice because the Oxford House claim was not ripe for adjudication as a result of its failure to apply for special use permits, which, if granted, would allow the homes to operate.[203]

The Ninth Circuit also refused to follow the *Elliott* opinion. In *City of Edmonds v. Washington State Building Code Council*,[204] Oxford House successfully challenged the city's limit of five unrelated persons in single-family districts. The district court had applied the exemption to uphold the city's zoning enforcement,[205] but on appeal, the circuit court concluded that the restriction must be interpreted to include only those restrictions that apply to all occupants, regardless of their family status.[206] In effect, the Ninth Circuit reached precisely the opposite conclusion from the court in *Elliott*, although both purported to rely on congressional intent. In *Elliott*, the court concluded that Congress could not have intended to invalidate the hundreds of family definitions that restricted unrelated householders.[207] In *Edmonds*, the court found legislators could not possibly have intended to exempt such a pervasive restriction on the ability of the disabled to share congregate living arrangements.[208]

The *Edmonds* interpretation is probably correct. In *Elliott*, the court placed too much emphasis on the Supreme Court's distinction in *Belle Terre* between related and unrelated householders. Although the opinion persuasively concludes that Congress, within the bounds of the Constitution, could have exempted restrictions on unrelated householders, it offers scant evidence that they did.

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203. *Id.* at 1261-62.
204. 18 F.3d 802 (9th Cir. 1994).
205. *Id.* at 803.
206. *Id.* at 805.
207. [I]n light of the prevalence of zoning regulations which limit unrelated persons without a simultaneous limitation upon related persons . . . . [w]e do not believe that Congress intended that the maximum occupancy limitation exemption would apply only to a limitation on the maximum number of persons per square foot of dwelling space.

Elliott, 960 F.2d at 980.
208. *Edmonds*, 18 F.3d at 806 ("Many cities in this country have adopted similar use restrictions. . . . Applying the exemption would insulate these single-family residential zones from the sweep of [FHA] requirements.") (citations omitted).

The Legislative history clearly supports the narrower reading. In fact, the prefatory language to the oft-cited discussion of the exemption indicates that it was intended to exempt restrictions related to the family-status protection provided by the Act.[209] The inclusion of this discussion negates any argument that the exemptions would apply to unrelated occupants.

Given the explicit congressional references to accommodating group-living arrangements and the widespread use of restrictive family definitions, the exemption likely applies only to square footage limits. This view also appears to be the majority position among the district courts that have faced the issue.[210]

If the Supreme Court adopts this view, such numerical restrictions will be subject to the same three pronged anti-discrimination attack as other local regulation under the statute. Absent legislative relief in the form of an amendment including unrelated-persons restrictions in the exemption, localities seeking to regulate recovery homes will need to focus on solutions that can withstand disparate impact and reasonable accommodation attacks under the anti-discrimination provisions of the FHA.

COMPETING INTERESTS OF MUNICIPALITIES AND RECOVERY HOME ADVOCATES

The remainder of this Note is devoted to identifying the legitimate, competing concerns of recovery home advocates and municipalities and devising a proposed definition of recovery home as a new use category in an attempt to provide a solution. Such a definition, combined with a licensing procedure for recovery home operators, offers a means of maintaining local control without squelching the development of an effective treatment

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209. H.R. REP. NO. 711, *supra* note 34, at 31, *reprinted in* 1988 U.S.C.C.A.N. at 2192. (*"Section 6(d)* amends Section 807 to make additional exceptions *relating to the familial status provisions."*) (second emphasis added).

210. *See* Oxford House—C v. City of St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994); Oxford House v. City of Va. Beach, 825 F. Supp. 1251 (E.D. Va. 1993); Parish of Jefferson v. Allied Health Care, No. 91-1199, 1992 U.S. Dist. LEXIS 9124 (E.D. La. June 10, 1992). For an opinion following the *Elliott* position, see City of St. Joseph v. Preferred Family Healthcare, Inc., 859 S.W.2d 723 (Mo. Ct. App. 1993). The district court in *St. Louis* acknowledged the contrary authority and disagreed with the Missouri appellate court.

model. It is a small step towards reconciling the disparate interests of local planners and recovery home advocates.

Policy Conflict

As the cases indicate, the dispute between recovery home operators and neighborhood opponents often is portrayed as the classic case of the "Not In My Back Yard" (NIMBY) syndrome.[211] The issues are actually much more far reaching. In fact, the inclusion of the handicapped as a protected class, and the broad definition of discriminatory intent under the FHA, has made the cases of simple neighborhood discrimination easy for the federal courts.[212] The more complicated issues involve the basic division of regulatory power between the federal government and municipalities seeking to maintain control over a quintessentially local function.

Federal support of recovery homes is evidenced by their inclusion in the FHA and the Anti-Drug Abuse Act of 1988.[213] Many states have announced similar policies through state legislation attempting to curtail local, exclusionary-zoning practices.[214] Yet municipalities, whose interests lie in preserving the "blessings of quiet seclusion"[215] continue to resist attempts to usurp their control over the regulation of recovery homes. Both sides have legitimate objectives, which are explored in this section of the Note.

The Efficacy and Economy of Recovery Homes

Abuse of drugs and alcohol is one of the most critical problems facing the nation. In fiscal year 1990, more than 800,000 Americans were treated for drug or alcohol abuse[216]—more than

211. For a thorough discussion of NIMBY, see Ellis, *supra* note 32; Salsich, *supra* note 55.

212. *See supra* notes 123-65 and accompanying text.

213. *See supra* notes 43-54, 65 and accompanying text.

214. *See* Steinman, *supra* note 33, at 18-24 (summarizing state legislation on the subject). Though state laws vary widely, nearly all were established to support "an overriding state policy [favoring deinstitutionalization]." *Id.* at 17-18.

215. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

216. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1993, at 136.

200,000 had both problems.[217] Estimates of the number of Americans who abuse drugs or alcohol without treatment run into the tens of millions.[218] The combined cost of treatment in government-funded facilities alone was nearly three billion dollars.[219] But that amount is a pittance compared with the overall cost to society in lost productivity, increased crime, and the tragic price paid by families whose loved ones are victims of drug- or alcohol-related violence. Though estimates of such costs vary, reliable figures place the societal cost of alcohol abuse alone at roughly $100 billion.[220] The bill for both drug and alcohol problems has been calculated at $273 billion.[221]

Recovery homes, like those established by Oxford House, serve an important function in combatting drug and alcohol abuse: the avoidance of relapse.[222] Therapist Milton Trachtenberg described the challenges facing the newly sober in his book on treating addicted persons:

> [I]n the early phases of recovery, the addicted person is most susceptible to relapse . . . .
>
> [U]nderlying values and attitudes that have been built up over a period of years do not just depart with the removal of the abused substance.
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> . . . .
>
> [T]he system in which the individual is functioning . . . is often in a subtle conspiracy to regain the prior status quo.

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217. *Id.*

218. In a 1991 survey, 12.6 million Americans reported using illegal drugs in the prior month, and 2.4 million reported using cocaine or crack. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUGS, CRIME, AND THE JUSTICE SYSTEM 26 (1992).

219. U.S. DEP'T OF HEALTH & HUMAN SERVICES, STATE RESOURCES RELATED TO ALCOHOL & OTHER DRUG ABUSE PROBLEMS: FISCAL YEAR 1990, at 6.

220. U. S. DEP'T OF HEALTH & HUMAN SERVICES, EIGHTH SPECIAL REPORT TO THE UNITED STATES CONGRESS ON ALCOHOL AND HEALTH 11-3 (1993).

221. DOROTHY P. RICE ET AL., THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS: 1985, at 2.

222. For a survey of studies on relapse rates among recovering addicts and alcoholics, see TREATING THE CHEMICALLY DEPENDENT AND THEIR FAMILIES 131-33 (Dennis C. Daley & Miriam S. Raskin eds., 1992) [hereinafter TREATING THE CHEMICALLY DEPENDENT]. Daley and Raskin cite studies indicating relapse rates from 60% to 90%. They caution, however, that these rates may slightly overstate the problem by failing to measure the cumulative result of many attempts at recovery, of which only the last is fully successful. *Id.* at 132.

> The significant others in the life of an addicted individual have learned to cope with the addiction, and often they have reached a point . . . where the addiction has become a necessary part of their behavioral repertoire.[223]

Fellowship, therefore, is an important element of relapse prevention.[224] The support gained from sharing experiences with other recovering addicts is only one benefit. In addition, group activities help addicts develop positive social and recreational activities that do not involve drinking or drugs.[225] The variation in seniority among group members provides models for the newly sober and incentives to stick with their recovery program.[226]

Many studies have documented the importance of these social support systems in reducing relapse rates.[227] Relapse frequently occurs when addicts who have completed a detoxification program are unable to get into effective out-patient treatment or a recovery-home setting due to overcrowding.[228] Although not studied widely, it appears that the Oxford House model is an effective solution to this problem.[229] The rapidly increasing number of Oxford House facilities in the years since government startup loans became available is testament to the need for expansion of such opportunities.[230]

Recovery homes also have an advantage over traditional inpatient forms of therapy from an economic standpoint. Part of the recovery model requires the homes to be self-sufficient.[231] Under the Oxford House plan, residents must be employed and

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223. MILTON TRACHTENBERG, JOURNEYS TO RECOVERY: THERAPY WITH ADDICTED CLIENTS 12 (1990).
224. TREATING THE CHEMICALLY DEPENDENT, *supra* note 222, at 119.
225. *Id.* at 166.
226. *Id.*
227. *Id.* at 155 (summarizing studies).
228. *Id.* at 154.
229. Gelernter, *supra* note 6, at M1 (quoting DePaul University researcher Leonard Jason, who calls Oxford House "an amazing grassroots phenomenon" and "an incredible system of health care delivery" and marvels at the lack of scholarly assessment of the relatively new program's efficacy).
230. *See The Oxford House Experiment*, *supra* note 60, at W15 (describing the application process when a rare opening occurs at one of the Washington, D.C., Oxford Houses).
231. MOLLOY, *supra* note 12, at 1.

pay rent to support the house, limiting the level of government support and building vital self-esteem for the residents.[232] Unfortunately, government loans to start recovery homes are not conditioned on the adoption of all the Oxford House guidelines.[233]

Potential Pitfalls of the Government Version of Oxford House

Despite support from the treatment community and the relatively low cost of implementation, there are some serious problems with the rapidly expanding network of recovery homes. First, the homes permit no professional staff.[234] This requirement is consistent with the Oxford House theory of self-reliance[235] and serves to minimize costs. At the same time, however, it eliminates the critical elements of permanence and stability that distinguish other types of congregate housing.[236] Absent some type of permanent staff, paid or unpaid, the only difference between a recovery home and a fraternity house is that the former shelters recovering alcoholics and the latter frequently shelters practicing ones. Both are protected from housing discrimination under the amended FHA.[237]

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232. *See id.*
233. *See* Guidelines—Group Homes for Recovering Substance Abusers, 54 Fed. Reg. 15,808 (1989) [hereinafter Federal Guidelines].
234. *See id.*
235. MOLLOY, *supra* note 12, at 23-24.
236. This factor is important from a zoning standpoint. Most jurisdictions that do not limit unrelated persons numerically, structure a definition that allows them to live together as long as they are the "functional equivalent" of a family. Usually this involves some assessment of permanence and stability. The recovery house model, which forbids professional staff and requires expulsion of any member who relapses, is antithetical to such a definition of family. *See, e.g.*, Oxford House v. City of Albany, 819 F. Supp. 1168, 1177 n.6 (N.D.N.Y. 1993); Oxford House—Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1335 (D.N.J. 1991).
237. *See* H.R. REP. NO. 711, *supra* note 34, at 94, *reprinted in* 1988 U.S.C.C.A.N. at 2228-29. This amendment excludes from protection those persons currently using or addicted to a controlled substance; however, the House Judiciary Committee turned back attempts to exclude persons with existing alcohol abuse problems. *Id.* Therefore, under the FHA even current alcoholics are covered unless they fall under one of the statute's other exclusions. This decision prompted dissenting comments from several legislators who viewed such an inclusive approach as conflicting with the national goal of reducing alcohol abuse. *Id.* at 86, 94, *reprinted in* 1988 U.S.C.C.A.N. at 2221, 2228-29.

Second, the federal regulations designed to implement the startup loan program place no restrictions on the origin of the "self-support" funds.[238] By eliminating the Oxford House tenet that residents must work to pay rent, the legislation undercuts the treatment philosophy. It also has spawned a cottage industry of imitators who can pack recovering addicts into a home and deduct their weekly rent from welfare or disability payments.[239] Unfortunately, the autonomy sought by Oxford House as a vehicle for recovery can be replaced by anarchy when a home is started without the proper guidance or motive.[240]

The Oxford House litigators have an outstanding track record, in part because they are able to fill the record with anecdotal evidence of success[241] and statistical evidence of the need for treatment.[242] As a result, federal court precedent is overwhelm-

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238. Federal Guidelines, *supra* note 233, at 15,808. The federal guidelines for establishing a qualifying recovery home are surprisingly limited:

> (A) the use of alcohol or any illegal drug in the housing provided by the program will be prohibited;
>
> (B) any resident of the housing who violates such prohibition will be expelled from the housing;
>
> (C) the costs of the housing, including fees for rent and utilities, will be paid by the residents of the housing, and
>
> (D) the residents of the housing will, through a majority vote of the residents, otherwise establish policies governing residence in the housing, including the manner in which applications for residence in the housing are approved.

Id.

239. *See* Warrick & Spiegel, *supra* note 11, at A1.

> To fill their facilities with addicts, some operators pay "finders" fees or bonuses for referrals. A Marina del Rey realty agent who owns a South Central Los Angeles home pays his residents $50 each for every new resident they bring in. A consulting firm charges $1000 to set up a new sober-living house and fill it.

Id.

240. *Id.* In California, as many as 55 recovering addicts are living in a single home, some packed 10 to a room, others squeezed into attic crawl spaces or closets. "Operators sometimes maximize revenue by renting beds in dining rooms, garages, camper trailers, even old cars—anywhere a body can fit. They typically charge $300 a month per person." *Id.*

241. *See* United States v. Village of Palatine, 3 Am. Disabilities Dec. (Law. Co-op) 271, 279-80 (N.D. Ill. 1993) (recounting testimony of "Tom": After suffering a six-year relapse and undergoing inpatient treatment a second time, Tom "moved directly into Oxford House and has been drug and alcohol free ever since"; testimony of "Steve": Oxford House is "'a recovering community that acts like a family'").

242. *See* Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1564 (E.D. Mo.

ing local ability to regulate group homes. Several courts have construed as discrimantory mere application procedures for obtaining use permits.[243] Such cases threaten to open the door to less benevolent operators who seek to exploit the disabled at government expense. Oxford House officials contend that new home residents still must demonstrate that they are handicapped within the meaning of the statute,[244] but they argue simultaneously that any application or permitting process violates their right to "reasonable accommodation" in zoning practices.[245] Their nationwide practice of evading local zoning enforcement defeats legitimate attempts to verify that recovery home residents are, in fact, entitled to protection under the FHA and to make reasonable accommodations in local ordinances for such homes.

The Permissible Purposes of Zoning

Much of the substantive zoning law derives from common law nuisance doctrines that were, of course, derived from disputes between neighboring landowners over the proper uses of land in a common district.[246] Neighborhood opposition, therefore, is not a per se indication of impermissible discrimination.[247] Indeed, as the discussion above illustrates, the establishment of unsupervised group homes in residential districts raises legitimate concerns.[248] Unfortunately, illegitimate concerns often motivate neighborhood opposition.[249]

1994) (relating testimony of the Director of Missouri Division of Alcohol and Drug Abuse: with more than 300,000 individuals fighting drug and alcohol problems in the state, "there is a tremendous need for Oxford House in the treatment continuum").

243. *See id.* at 1581-82; Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).

244. Telephone Interview with Steve Polin, Chief Counsel, Oxford House, Inc. (Mar. 9, 1994).

245. Oxford House, Inc. v. City of Va. Beach, 825 F. Supp. 1251, 1255-56 (E.D. Va. 1993); *see* United States v. Village of Palatine, 37 F.3d 1230, 1234 (7th Cir. 1994); Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168, 1177-78 (N.D.N.Y. 1993).

246. *See* ANDERSON, *supra* note 21, § 8.01.

247. *See* Ellis, *supra* note 32, at 275-76.

248. *See supra* notes 234-40 and accompanying text.

249. *See* Ellis, *supra* note 32, at 289-91. Motivation is key, because it affects the presumption of validity afforded local zoning decisions. Valid zoning decisions face the reversal of that presumption if made with discriminatory animus. *Id.*

Before reviewing a possible system to accommodate both recovery home operators and home neighbors, it is helpful to consider some of the valid reasons for local regulation of recovery homes. First, the more intense use, namely increased traffic and noise, is a nuisance for surrounding homeowners. The Supreme Court has recognized the nuisance presented by a more intensive use: "More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds."[250] Several of the complaints against recovery homes have involved increased noise and traffic.[251] Unlike group homes for the disabled, or foster homes for children, recovery homes house adults, with adult relationships, needs for transportation, and social habits.[252] The fact that residents are recovering alcoholics does not diminish the greatly increased demands placed on a home and neighborhood by ten adult men or women living in one place.[253]

Second, local officials have a legitimate interest in documenting and regulating nonconforming uses, regardless of their ability to reject such uses. Oxford House contends that even application requirements in zoning codes violate their right to a reasonable accommodation, and some courts have agreed.[254] Their conclusion ignores a basic prerequisite to the application of the FHA—the determination that a protected class is involved. By removing the mechanism through which localities ensure compliance with the FHA, the federal courts would require local planners to sue in federal court in order to establish that recovery home residents were, in fact, entitled to favored status. In addition, the policy preempts a reasonable accommodation

250. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

251. *See id.*; United States v. Borough of Audobon, 797 F. Supp. 353, 356 (D.N.J. 1991), *aff'd*, 968 F.2d 14 (3d Cir. 1992).

252. Oxford House, Inc. has recognized some of the problems associated with traffic and intensity of use, as noted in its technical manual: "[T]he only threat of an Oxford House being less than a good neighbor is the automobile." MOLLOY, *supra* note 12, at 17.

253. The average number of residents in a chartered Oxford House is ten. *Id.* at 13. The homes are all single sex. *Id.*

254. *See* Oxford House—C v. City of St. Louis, 843 F. Supp 1556, 1579 (E.D. Mo. 1994); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).

through the process established by the locality.

A more complicated question is whether permanency and stability are legitimate goals for zoning to pursue. A few of the cases turn on definitions of family that require such permanency.[255] In *Oxford House, Inc. v. Township of Cherry Hill*,[256] for example, the township's zoning ordinance defined "family" as "a collective body of persons doing their own cooking and living together upon the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bond."[257] Such functional definitions attempt to codify those elements of a biological family that provide for harmonious relationships among residential neighbors. Oxford House contends that residents in its homes meet this functional definition. Although recovery homes are supposed to simulate the structure of a family to aid in recovery, the rule requiring expulsion of any member who relapses is antithetical to the concept of permanency attached to functional definitions of family.[258]

Many of these concerns can be addressed by a slight modification to local zoning practices that accounts for the special concerns of both sides. Local regulators must recognize the impact of the federal mandate, expressed through inclusion in the FHA and the startup loan provisions. Recovery home operators must realize that this mandate does not create a blanket waiver of local regulation. The final section of this Note attempts to offer a regulatory middle ground based on the legislatively- and judicially-created boundaries for local control.

TOWARD A SOLUTION

> [W]hat this matter truly needs is not judicial action, whether it be state or federal, but for the parties to search their consciences, recognize the needs and hopes of the plaintiffs and the concerns and fears of the neighbors, and arrive at an

255. *Cherry Hill*, 799 F. Supp. at 454; Oxford House—Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1333 (D.N.J. 1991); Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168, 1170 (N.D.N.Y. 1993).
256. 799 F. Supp. at 450.
257. *Id.* at 455.
258. *See Albany*, 819 F. Supp. at 1177 n.6.

> accommodation which serves and enriches all who are involved in and affected by it.[259]

"The right to 'establish a home' is an essential part of the liberty guaranteed by the Fourteenth Amendment."[260] In recovery home disputes, however, both parties' rights to establish a home conflict in fundamental ways.

In addition to resolving the individual claims, the litigation arising from these conflicts provides a useful basis for establishing the limits of each party's legitimate objections. For instance, recovery home operators have asserted that any use permit requirement is an unacceptable burden because of the threat of public humiliation attendant with the hearing process, which may threaten the residents' recovery.[261] Most courts, however, have held that an application process for such permits is not per se discriminatory as long as applications are required of other similarly-situated groups of unrelated people.[262] These decisions impliedly approve of some type of registration, licensing, or permitting scheme as a legitimate means of control over unsupervised group homes. This view is consistent with the majority of state statutes on the subject.[263]

Recovery home operators also contend that maximum occupancy limitations should not apply to recovery homes because an individual's recovery process depends on socialization within a group home. This claim has not been entirely successful. In *Elliott v. City of Athens*,[264] the Eleventh Circuit upheld a local limit of four unrelated persons as reasonable in light of the city's

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259. *Plainfield*, 769 F. Supp. at 1331.

260. Village of Belle Terre v. Boraas, 416 U.S. 1, 15 (1973) (Marshall, J., dissenting).

261. *See* Oxford House, Inc. v. City of Va. Beach, 825 F. Supp. 1251, 1255 (E.D. Va. 1993).

262. *See* United States v. Village of Palatine, 37 F.3d 1230 (7th Cir. 1994); *Virginia Beach*, 825 F. Supp. at 1257; *Albany* 819 F. Supp. at 1178. *But see* Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1581-82 (E.D. Mo. 1994) (holding that a recovery home could not "lawfully be required" to undergo a public hearing and other variance procedures in order to qualify for an accommodation).

263. Of the 36 states that have passed legislation to preempt local zoning and allow traditional group homes as of-right uses, nearly all require the homes to be licensed by the state. *See* Steinman, *supra* note 33, at 25-36.

264. 960 F.2d 975 (11th Cir. 1992).

asserted interest in preventing overcrowding.[265] Other courts, including the Ninth Circuit, have reached different conclusions.[266] Regardless of how the Supreme Court rules on the issue, the language of the FHA exemption for reasonable occupancy limitations, suggests that numerical limitations of some sort expressly are allowed.[267] Moreover, even if the exemption is not applied to a numerical family definition, it does not follow that numerical regulation of any sort is forbidden. The FHA prohibits discrimination not regulation. Both Oxford House and the federal guidelines for start-up loans permit the establishment of recovery homes with as few as six residents.[268] Beyond this number, the assertion that residents must share housing is economic, not implicating therapeutic concerns.[269]

The Oxford House cases also establish that localities may not make distinctions based on arbitrary classifications. Use permits required only for disabled groups seeking congregate housing, suspect since the *Cleburne* decision,[270] are now clearly invalid.[271]

Discriminatory motives will no longer be tolerated. The presumption of validity granted to local zoning ordinances is reversed when those ordinances are passed or enforced for discriminatory purposes.[272] Although the Supreme Court was hesitant to extend suspect class status to the handicapped in *Cleburne*,[273] the FHA effectively raised the standard by which

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265. *Id.* at 982-83.

266. *See* City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994) (denying FHA exemption for ordinance that imposed maximum occupancy limitations solely on group recovery homes), *cert. granted*, 115 S. Ct. 417 (1994).

267. *See Elliott*, 960 F.2d at 978-79.

268. *See* Federal Guidelines, *supra* note 233, at 15,808; MOLLOY, *supra* note 12, at 13.

269. United States v. Village of Palatine, 3 Am. Disabilities Dec. (Law. Co-op) 271, 298 (N.D. Ill. 1993) ("Suffice it to say that it is clear on the record that all of Oxford House's rehabilitative purposes could be served with six or eight residents."), *adopted*, No. 93-C-2154, 1993 WL 462848 (N.D. Ill. Nov. 9, 1993), *vacated*, 37 F.3d 1230 (7th Cir. 1994).

270. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447-48 (1984).

271. *See* 42 U.S.C. § 3615; *supra* note 123 and accompanying text.

272. *See* Ellis, *supra* note 32, at 276.

273. *See Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); *supra* notes 35-39 and

barriers to their equal access to housing are reviewed. Moreover, the broad interpretation of discriminatory intent under the FHA requires scrupulously nondiscriminatory zoning enforcement.[274]

A useful regulatory scheme begins to emerge within these judicially-established criteria. A recent attempt to design an ordinance for traditional group homes by the ABA Land Use Regulation Committee identified the components of such a scheme.[275] They included (1) specific acceptance of residential treatment, (2) density limits concerning occupancy, parking, and group home dispersion, (3) objective standards and licensing requirements to ensure compliance with health and safety requirements, and (4) opportunities for community input.[276]

Many of these issues already have been addressed by statutes governing more traditional, supervised and licensed group homes.[277] These statutes frequently declare a state policy favoring residential treatment and allow moderate-sized group homes as of-right uses if certain licensing procedures are met.[278]

Unlike regular group homes, which frequently are supervised treatment facilities, recovery homes present special problems for local lawmakers. Under the federal statute, recovery homes receiving startup grants can have no professional staff.[279] There is also no licensing procedure in place for homes not operating under the Oxford House umbrella.[280] Moreover, the tran-

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accompanying text.

274. *See supra* notes 121-35 and accompanying text.

275. Peter W. Salsich Jr., *A Model Ordinance for Group Homes and Shared Housing*, PROB. & PROP., Nov.-Dec. 1989, at 32, 34; *see also*, Salsich, *supra* note 55, at 432.

276. *See* Salsich, *supra* note 55, at 432-33.

277. Steinman, *supra* note 33, at 18-20.

278. Usually group homes of six to eight residents are allowed in most residential districts, subject to their license and inspection by a state health department or agency. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 36-581 to -582 (1993); CAL. WELF. & INST. CODE §§ 5115-5117 (West 1984); FLA. STAT. ANN. § 163.3177(6)(f) (West Supp. 1994); MD. CODE ANN., HEALTH-GEN. §§ 7-601 to -612 (1994); MICH. COMP. LAWS ANN. §§ 125.216a, 125.286a, 125.583b (West 1986 & Supp. 1994); N.Y. MENTAL HYG. LAW § 41.34 (Consol. 1989 & Supp. 1993); N.C. GEN. STAT. §§ 168-21 to -23 (1987 & Supp. 1994); VA. CODE. ANN. § 15.1-486.3 (Michie Supp. 1994); W. VA. CODE §§ 27-17-1 to -4, 8-24-50b (1992).

279. Federal Guidelines, *supra* note 233, at 15,509.

280. *Id.*

siency, inherent in recovery homes as a result of the policy of evicting residents who relapse, presents problems of stability and accountability that generally are not present under the typical group-home setting.[281] While many recovery homes affiliate with local non-profit corporations, or with Oxford House itself, there is no requirement that they do so.[282]

The remainder of this Note will address these differences in an attempt to create a statutory definition of a recovery home.[283] The goal is to structure a definition that would allow the effective use of the recovery home model while retaining some measure of local control over regulation of such homes.

Several modifications to traditional group home statutes would recognize the legitimate concerns of both parties to the recovery home dispute. First, because most states,[284] and the federal government,[285] already have declared a policy favoring residential treatment of the disabled, specific acceptance and announcement of that goal would serve a useful educational purpose for potential group home neighbors. The fact that the Oxford House model has proven a successful aid in the prevention of relapse provides evidence that the expansion of that system should be encouraged. The announcement, whether formal or informal, might be accompanied by the delegation of supervisory authority over recovery home regulation to an existing or newly-created local agency. The agency should administer a program of registration and licensing for recovery homes seeking to locate within the jurisdiction.

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281. Of course, the idea of the homes is to prevent relapse, but they are not always successful. In Plainfield, New Jersey, for example, the evidence showed that 13 of the 20 people admitted to the local Oxford House had left, nine due to relapse. Oxford House—Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1342 (D.N.J. 1991). The average length of stay for an Oxford House resident is 13 to 15 months. Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1563 (E.D. Mo. 1994).

282. Federal Guidelines, *supra* note 233, at 15,808.

283. A statutory definition is the simplest way to modify local zoning ordinances. Most zoning codes include a definitions section, which defines prescribed uses, at the beginning and then list those uses in the relevant zoning districts where they are either permitted as a matter of right or subject to conditions. *See, e.g.*, ROANOKE, VA., CODE § 36.1-25 (1993); VIRGINIA BEACH, VA., CODE app. A § 111 (1994).

284. *See* Steinman, *supra* note 33, at 18-20.

285. *See* H.R. REP. NO. 711, *supra* note 34, at 23, *reprinted in* 1988 U.S.C.C.A.N. at 2184.

Density limits, both in terms of occupancy and spacing requirements between group homes, are probably the most divisive of the group home issues. Although appellate courts have recognized the legitimacy of maximum occupancy limits[286] and spacing requirements,[287] group home operators also have defeated attempts to exclude residents based on both numerical[288] and functional[289] definitions of family and turned back dispersion requirements.[290] Recognition of recovery homes by definition in the zoning code will provide a useful basis for determining the exact limits of numerical and functional family definitions. Many of the disputes can be resolved by creating a new zoning use with the particular needs of recovery homes in mind.

The most difficult element of any provision authorizing congregate housing in a single-family residential area is the number of residents permitted.[291] In the state statutes governing traditional group homes, nearly all allow group homes of between six and eight residents as of-right uses.[292] A recovery home of similar size places no greater burden on the neighborhood and also should be allowed of-right. However, most recovery homes are substantially larger,[293] housing as many as eigh-

286. Elliott v. City of Athens, 960 F.2d 975, 983 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 376 (1992).

287. Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991).

288. City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994) (holding unrelated persons limit not exempt from FHA), *cert. granted*, 115 S. Ct. 417 (1994); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993) (holding that under FHA, town's refusal to modify definition of "family" in zoning ordinance that limited number of unrelated people who could live in residence was discriminatory); Oxford House—C v. St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994) (holding that ordinance restricting dwellings in single-family zone was classic "unrelated persons" provision and did not fall within exemption to FHA).

289. Oxford House—Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1343 (D.N.J. 1991); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 461 (D.N.J. 1992).

290. Horizon House Dev. Servs. v. Township of Upper Southampton, 804 F. Supp. 683, 693 (E.D. Pa. 1992).

291. In *St. Louis* the court commented that "a great deal of evidence at trial was devoted to the appropriate size of an Oxford House, both from a therapeutic and from a financial viewpoint." *St. Louis*, 843 F. Supp. at 1571.

292. *See* Steinman, *supra* note 33, at 18-20; statutes cited *supra* note 278.

293. MOLLOY, *supra* note 12, at 13. The average number of residents per Oxford House is ten. Many of the homes not affiliated with Oxford House are even larger. There are no maximum limits imposed by the Federal Guidelines. *See* Federal

teen to twenty recovering addicts. These larger homes should be subjected to a permitting process to assess the legitimate interests of neighboring property owners.

A definition that allowed recovery homes of ten or fewer residents as an of-right use would comport with most state laws, as they frequently allow eight unrelated individuals and two unrelated staff members.[294] Because the recovery home residents serve the dual role of patient and counselor in one another's recovery, the limit of ten is consistent with state-imposed group home mandates for other populations. More important, this definition would permit homes of sufficient size to be both economically and therapeutically viable.

A second tier of the definition, called a conditional recovery home, should be created to accommodate group homes of greater than ten.[295] At this level, recovery home operators should be required to submit to the traditional form of public hearing required for a conditional use by the local jurisdiction.[296]

Oxford House has challenged such hearings on two points. First, they contend the large number of residents is crucial to the economic and therapeutic viability of recovery homes.[297] The therapeutic argument, however, is disputed by their own guidelines,[298] and those of the federal program,[299] which re-

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Guidelines, *supra* note 233.

294. *See, e.g.*, ALA. CODE. § 11-52-75.1 (1994) (allowing ten residents plus two staff); COLO. REV. STAT. § 30-28-115 (1993) (allowing eight residents plus staff); KAN. STAT. ANN. § 12-736 (1991) (allowing eight residents plus two staff); MONT. CODE ANN. § 89.020(2) (1993) (allowing eight residents plus two staff).

295. Although the average Oxford House has ten residents, many are larger, and the federal guidelines for startup loans do not place an upper limit on the number of recovery home residents. *See* Federal Guidelines, *supra* note 233.

296. Note that the larger homes are still permitted uses, subject to proper permitting and perhaps the imposition of certain conditions (parking, safety improvements, etc.). Such conditional uses should be distinguished from variances, which seek exemption from certain specific requirements such as setbacks, or occupancy limits. The variance process should not be used to "spot zone" certain homes as adequate for recovery home purposes. *See* Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1569-70 (E.D. Mo. 1994) (discussing the difference between conditional uses and variances).

297. *See St. Louis*, 843 F. Supp. at 1564 n.2; Oxford House—Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1334 (D.N.J. 1991).

298. MOLLOY, *supra* note 12, at 13.

299. Federal Guidelines, *supra* note 233, at 15,808.

quire no less than four residents to constitute a recovery home. The economic argument is not relevant to the disability and should not be a factor in allowing a nonconforming use unless it can be shown that smaller, less expensive homes are unavailable. Such a showing properly can be made before local officials during the conditional use review process.

Second, recovery home operators argue the permit process itself is discriminatory because it may subject residents to community scorn and jeopardize their rehabilitation. Courts disagree, however, and have required participation in the local review process as a precondition to suit under the FHA.[300]

The purpose of the reasonable accommodation clause in the statute is to balance the interests of the handicapped against those of the other members of the community. As one district court has pointed out, this balance is particularly important in the context of land-use cases.[301] A definition that distinguishes between recovery homes of ten or fewer and larger homes does not necessarily exclude the latter.[302] By requiring recovery home operators to meet with local residents, the distinction facilitates the type of balancing called for under a reasonable accommodation test.

Another element of consideration should be the proximity of other group homes. Many of the state statutes covering traditional group homes include spacing or dispersion guidelines.[303] Such guidelines serve to avoid an unhealthy concentration of group homes, which results in a "ghettoization" of the disabled that is contrary to the normalization principles group homes

300. United States v. Village of Palatine, 37 F.3d 1230, 1234 (7th Cir. 1994); Oxford House, Inc. v. City of Va. Beach, 825 F. Supp. 1251, 1261 (E.D. Va. 1993); Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168, 1178 (N.D.N.Y. 1993); *see supra* notes 175-84.

301. *See Virginia Beach*, 825 F. Supp at 1261.

302. *St. Louis*, 843 F. Supp. at 1580 (acknowledging the desirability of permitting larger recovery homes as "conditional uses").

303. *See, e.g.*, DEL. CODE ANN. tit. 9, § 4923 (1989) (requiring that no similar group homes be within a 5000-foot radius of the home); MINN. STAT. ANN. § 462.357(7) (West 1991) (excessive concentration prohibited); N.Y. MENTAL HYG. LAW § 41.34 (Consol. 1989 & Supp. 1993) (concentration cannot substantially alter the character of the area); N.C. GEN. STAT. § 168-21 to -23 (1987 & Supp. 1994) (one mile radius); W. VA. CODE §§ 27-17-1 to -4, 8-24-50b (1990 & 1992) (1200 feet outside municipality, one per block within the municipality).

seek to promote.

The third element of model group home regulation is objective standards for group homes. This area overlaps somewhat with the licensing requirement because frequently, licensing is dependent on the application of some objective set of criteria. Nearly all state statutes designed to permit the establishment of group homes require licensing, usually by some state authority, in order to qualify as an of-right use.[304] Recovery homes, however, differ fundamentally from these more traditional forms of community-based treatment. The cause of alcohol and drug addiction is as much a factor of environment as physical or mental condition. Recovering addicts' ability to care for themselves and for property is not impaired,[305] nor does their disability place any greater burden on a building than that of a typical group of unrelated adults.[306] Therefore, a cumbersome system of inspection and licensing, while necessary to protect the safety interests of group home residents with more severe physical disabilities, would cause hardship for recovery homes not legitimately related to the land use.

Nonetheless, localities have legitimate interests in regulating nonconforming land uses. Oxford House's policy of moving in unannounced, waiting for zoning enforcement action, and then seeking relief in the federal courts removes any opportunity for local officials to act. It may be, as Oxford House litigators suggest,[307] that the locality is powerless to exclude them, but the

304. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 8-3e, -3f (West 1989 & Supp. 1994) (Department of Mental Retardation); MD. CODE ANN., HEALTH-GEN. §§ 7-601 to -612 (1994) (Department of Health and Mental Hygiene); N.J. STAT. ANN. §§ 40:55D-66.1 to -66.2 (West 1993) (Department of Human Services); N.Y. MENTAL HYG. LAW § 41.34 (Consol. 1989 & Supp. 1993) (Office of Mental Health); VA. CODE ANN. § 15.1-486.3 (Michie Supp. 1994) (Department of Social Services); W. VA. CODE §§ 27-17-1 to -4, 8-24-50b (1990 & 1992) (Department of Health); WIS. STAT. ANN. §§ 46.03(22) (West 1987 & Supp. 1994) (Department of Health and Social Services).

305. United States v. Borough of Audobon, 797 F. Supp. 353, 358 (D.N.J. 1991). The local regulators in *Audobon* asserted, and Oxford House did not dispute, that the residents were not physically disabled. Rather, their handicap was based on an inability to live independently. *Id.* at 359.

306. United States v. Village of Palatine, 3 Am. Disabilities Dec. (Law. Co-op) 271, 295-96 (N.D. Ill.) (concluding Oxford House residents were more like a family for purpose of increased fire safety regulations), *adopted*, No. 93-C-2154, 1993 WL 462848 (N.D. Ill. Nov. 9, 1993), *vacated*, 37 F.3d 1230 (7th Cir. 1994).

307. *See* Oxford House, Inc. v. City of Va. Beach, 825 F. Supp. 1251, 1261 (E.D.

locality should not be powerless to know who and where they are and require some evidence or declaration that the residents indeed are handicapped within the meaning of the FHA.

Accordingly, a permitting system should be required for recovery homes of all sizes. Proposed operators would fill out relatively simple paperwork as a condition of receiving the recovery home designation. The principle elements of the registration or license would be the identification of a responsible party,[308] the location and size of the proposed home, the number of residents, their names, and the nature of their disabilities. In addition, the statute would permit the request of assurances that none of the residents suffered from "current, illegal use of or addiction to a controlled substance,"[309] or had prior convictions that would exempt them from protection under the Act.[310]

Such a form would not expose the prospective residents to any public ridicule or contempt that could jeopardize their recovery. Indeed, it would be a far less intrusive means of establishing their right to reasonable accommodation than litigating their claims in federal court. Of course, conditional recovery homes of greater than ten residents could still be required to apply for a conditional use permit.

Opportunities for community input are critical to the success of a system of recovery home regulation. The federal courts have threatened to expropriate this right in cases where the application and hearing process was held to be invalid under the FHA.[311] The conditional use permitting process provides opportunities to consider community concerns as well as involve potential neighbors in the work of recovery homes. Because smaller recovery homes present less of an intrusion, a municipality should exclude them from the conditional use permitting

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Va. 1993).

308. Most Oxford Houses are leased either to the group itself or to a number of individual residents. The prospective residents should be required to designate either the owner, one or more leaseholders, or a local recovery home leader or non-profit officer as the principle contact for zoning complaints.

309. 42 U.S.C. § 3602(h) (1988).

310. *Id.* § 3607(4).

311. Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1581 (E.D. Mo. 1994); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).

requirement, but some form of community involvement should be encouraged, perhaps through a board of directors or neighborhood association to aid in the home's funding and maintenance. For larger homes, a permit hearing gives neighbors the chance to voice appropriate concerns and gives recovery home residents an opportunity to address those concerns.

Considering the elements of local permitting or registration and numerical limits on the number of residents, a model definition of a recovery home might provide the following:

> *Recovery Home* - A dwelling or facility housing ten or fewer persons unrelated by blood, marriage, adoption, or guardianship, and registered with [the appropriate local authority] for the purpose of the residents' joint rehabilitation from alcohol or drug addiction.
>
> *Conditional Recovery Home* - A dwelling or facility housing more than ten persons, unrelated by blood, marriage, adoption, or guardianship, and registered with [the appropriate local authority] for the purpose of the residents' joint rehabilitation from alcohol or drug addiction.

Recovery homes, so defined, would be of-right uses in all residential districts. Conditional recovery homes would be permitted in all residential districts subject to the conditional-use permitting process of the local jurisdiction. The factors to be considered in awarding such a permit would include the size of the home, the financial viability of alternative sites, and the proximity of other group-home uses.

CONCLUSION

This Note has explored the conflict between local homeowners, their municipal governments, and operators of unsupervised, group homes for recovering alcoholics and drug addicts. Although the amended FHA and successful arguments by recovery home operators in the federal courts have limited greatly the ability of localities to control the placement of these homes, this Note has argued such interpretations should not be extended to eliminate legitimate local interests. In light of the rapid expansion of such homes and the special regulatory problems they present, this Note offers modifications to the typical group home

definition that will help alleviate the genuine concerns of local residents while still allowing the development of this effective and economical recovery program.

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