HEBER CITY CORPORATION
75 North Main Street
Heber City, Utah
Planning Commission Meeting
Thursday, March 27, 2014

6:00 p.m. – Special Joint Meeting with City Council

TIME AND ORDER OF ITEMS ARE APPROXIMATE AND MAY BE CHANGED AS TIME PERMITS

Public notice is hereby given that the monthly meeting of the Heber City Planning Commission will be in the Heber City Office Building, 75 North Main, South door, in the Council Chambers upstairs.

Pledge of Allegiance:	By Invitation
Minutes:	February 27, 2014, Regular Meeting

Item 1 Joint Meeting with the City Council to discuss potential amendments to the Zoning Ordinance, Subdivision Ordinance, and the Sign Ordinance.

Item 2 Discuss proposed amendment to Section 18.68.601 through 606 regarding Residential Facilities for Handicapped Persons.

Administrative Items:

Those interested in the above items are encouraged to attend. Order of items may vary if needed. In compliance with the Americans with Disabilities Act, those needing special accommodations during this meeting or who are non-English speaking should contact Karen Tozier or the Heber City Planning and Zoning Department (435-654-4830) at least eight hours prior to the meeting.

Posted on March 20, 2014 in the Wasatch County Community Development Building, Wasatch County Library, Heber City Hall, the Heber City Website at www.ci.heber.ut.us and on the Utah Public Notice Website at http://pmn.utah.gov. Notice provided to the Wasatch Wave on March 20, 2014.
Karen Tozier, Planning Commission Secretary

HEBER CITY CORPORATION
75 North Main Street
Heber City, Utah
Planning Commission Meeting
Thursday, February 27, 2014

6:00 p.m. - Special Meeting

Present:	Planning Commission:	Darryl Glissmeyer
		David Richards
		Harry Zane
		Kieth Rawlings
		Mark Webb
		Michael Thurber
		Stacie Ferguson
Absent:		Clayton Vance
Staff Present:	Planning Director	Anthony Kohler
	Planning Secretary	Karen Tozier
	City Engineer	Bart Mumford

Others Present: Reid Dickson and Nick Blayden,

Chairman Rawlings convened the meeting at 6:06 p.m. with a quorum present. Commissioner Webb and Commissioner Ferguson were not present at 6:06 p.m.

Pledge of Allegiance: Commissioner Richards

PUBLIC HEARINGS:

Item 1 **Proposed amendment to the Zoning Map to rezone the rear portion of Block 43, located at 301 South Main Street, from R-3 Residential to C-2 Commercial and remove the Infill Overlay Zone from said Block 43.**

REQUEST

Anthony Kohler indicated this was the block that the future Public Safety Building is planned to be located on and that the proposed amendment would make the whole block zoned C-2 Commercial. The proposed plan did not designate any residential area on the back of the block and would also remove the Infill Overlay Zone.

Chairman Rawlings opened the public hearing. No members of the public were present who wished to comment on this issue and Chairman Rawlings closed the public hearing. There were no further questions or discussion.

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MOTION

Commissioner Zane moved that we recommend approval for changing the Block 43 on South Main Street from R-3 Residential to C-2 Commercial and removing the Infill Overlay Zone from said Block 43. Commissioner Thurber seconded the motion.

VOTE

	AYE:	NAY:	ABSTAINING:
Darryl Glissmeyer	☒	☐	☐
Kieth Rawlings	☒	☐	☐
David Richards	☒	☐	☐
Michael Thurber	☒	☐	☐
Harry Zane	☒	☐	☐

The motion carried.

Item 2 **Proposed amendment to Section 103 "Building Setbacks" of the C-2 and C-4 Commercial Design Criteria, altering the required street setback requirements for civic buildings including government and non-profit buildings.**

Commissioner Webb arrived to the meeting at 6:15 p.m. and Commissioner Ferguson arrived at 6:17 p.m.

REQUEST

The proposed amendment would alter the required street setback requirements for civic buildings including government and non-profit buildings. Section 103 of the C-2 & C-4 Design Criteria requires a minimum 20 foot setback and maximum 40 foot street setback. The design criteria is attempting to establish a street presence for commercial buildings, but typically civic buildings such as churches, government buildings, and non-profit buildings should be setback more to give distinction to their street presence and provide for a large gathering location along the street.

DISCUSSION

The Planning Commission discussed the following points:

- Civil Buildings should be set back 40 feet but don't have to be, the keyword in the amendment is "shall";
- Minimum setback should be 10 feet not 20 feet;
- Trees are an asset to the property;
- There was debate on signage. The Commissioners thought that sites that use a wall sign or blade sign as the primary signage with no free standing signs on the site may have a 10 foot minimum setback from the street property line. Some Commissioners thought that a monument sign is acceptable.

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- Regarding the size of monument signs; the Commission thought that primary signage should be no taller than six feet and no more than 32 square feet in area and anything outside those boundaries could be done on a conditional permit basis.
    - Certain types of statues on the monument sign are acceptable.

Chairman Rawlings opened the public hearing. There were no comments and Chairman Rawlings closed the public hearing.

MOTION

Commissioner Thurber moved that the ordinance be amended to 10 foot setback minimum from street property line to building face and forty foot (40') setback minimum from street property line to building face. Sites that use a wall sign or blade (projecting) sign, or a monument sign no taller than 6 feet and no more than 32 square feet in area as the primary signage excluding design elements with no reader boards as part of that sign, with no other free standing signs on the site may have a 10 foot minimum setback from the street property line. (illustration will have to change). Decorative, non-advertising elements of the monument sign may exceed the 15 square foot and 6 foot height limitation, with approval of the Planning Department. Commissioner Thurber rescinded the motion.

Commissioner Thurber moved that the Commission continue this to the next meeting. The motion died for lack of a second.

Commissioner Richards moved, I make a motion to recommend approval for the proposed amendment of Section 103 "Building Setbacks" of the C-2 and C-4 (Commercial) Design Criteria as read by what is on the Board, reading: 20 foot setback minimum from street property line to building face and 40 foot setback maximum from street property line to building face. Sites that use a wall sign or blade projecting sign as the primary sign may have a 10 foot minimum setback from the street property line upon approval from the Planning Department. Commissioner Webb seconded the motion.

VOTE

	AYE:	NAY:	ABSTAINING:
Stacie Ferguson	☒	☐	☐
Darryl Glissmeyer	☒	☐	☐
Kieth Rawlings	☒	☐	☐
David Richards	☒	☐	☐
Michael Thurber	☒	☐	☐
Mark Webb	☒	☐	☐
Harry Zane	☒	☐	☐

The motion carried.

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Item 3 **T.S.C. requests Commercial Development Approval - Final for a building located at 1200 South 380 East in the Heber Gateway Plaza**

REQUEST

The petitioner is requesting approval of a 21,930 square foot retail center at 400 East 1200 South. The property is located within the C-2 Commercial Zone. The proposed development involves unsubdivided land adjacent to Heber Gateway Plaza Phase 1 and utilizes the eastern entrance to that subdivision.

Proposed parking consists of 94 stalls, addressing the need for five spaces per net 1,000 square feet per the city code. The petitioner would like to discuss the possibility of submitting a time-use study to evaluate having fewer parking spaces, as there are numerous TSC stores throughout the United States with parking ratios of less than 5 spaces per 1,000 square feet. The proposed elevations include a minimum of 30% of the vertical wall surface with a masonry brick and 100% of along the western (front) elevation. The building is proposed to be covered with fiber cement siding to be consistent with the Design Criteria. Faux windows and awnings have been included along the western and north elevations (along 1200 South). Crookneck lighting has been utilized on the building on the primary elevations.

Reid Dickson of Infinity Consultants and Nick Blayden, the architect for the project were present representing the Petitioner. They indicated that rotating the orientation of the building would entirely change the site plan. Reid Dickson indicated that in respect to the parking study that five spaces probably were not needed and that four spaces work well. The parking plan had been changed for the truck turning area which they had added back in. They also asked for a shrub screen instead of concrete at the east side of building.

Nick Blayden indicated that real windows will show the back of shelves and storage area. They planned to place monument signs at each entrance.

DISCUSSION

The Planning Commission discussed the following points:

- The site plan was discussed at length.
- **Site Design and Building Elevations:**
  - Some of the Commissioners thought the building should be rotated 90 degrees to have the front of the store face 1200 South and to place parking in the front (1200 South);
  - Modify so that the store front wraps around; windows would wrap around the building on the street side (1200 South) to create street presence. Corrugated metal is acceptable as long as these design elements on 1200 South and the entrance are implemented;
  - Because there are racks on the interior of the store put in frosted windows so racks can not be viewed from the outside;
  - Trash enclosure; would rather see vegetation than a wall;
  - Landscaping of detention basin; needs to be grassed and maintained. Other design elements discussed were the rear loading zone, outdoor storage and display areas having matching stone/brick and wrought iron, planting honey locust tees along 1200 South frontage, and crookneck lighting.

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- **Parking:**
  - Most people parking are pulling trailers; provide more spaces for them to park. Commissioner Richards recommended more than four trailer parking spaces;
  - Make s sure the turning radius for a truck is possible to get into the first parking spot ;
  - The Petitioner had not provided a parking study yet. If the Petitioner desires a parking ratio less than five to one, the Petitioner needs to provide a parking study showing how less parking stalls will work.
- **Other:**
  - Motion needs to be for concept approval, and needs to require a development agreement with Heber Gateway Plaza, and the dark store agreement.
  - City does not have a master planned 400 East; this street is part of the Heber Gateway Plaza.
  - The plan on the overhead projector was different than what was put in the packets.

MOTION

Commissioner Richards moved, I'd like to motion that we recommend concept approval with the Petitioner returning for final approval to address the following: (listing each six of those items).

1. Section 307 of the design criteria (this section requires a 24 inch modulation in the building for each 50 feet of horizontal wall area)
2. Provide a landscaping plan, for non-parking areas, including 3" caliper Honey Locust or similar street trees be planted each 50 feet of frontage along 1200 South.
3. Developer submit evidence of authorization for utilization of the Heber Gateway Plaza Phase I Driveway.
4. The design criteria prohibits metal standing seam and limits metal shingles for the wall surface; the proposed door elevation includes a corrugated metal, and the Planning Commission should determine if the design criteria requirement is met with the proposal.
5. Developer enter into a vacancy, development and maintenance agreement between the property/building owner and the City consistent with Section 111 of the DESIGN CRITERIA requires for all building larger than 15,000 square feet.
6. Developer submitting time use parking study for parking, if desired.

In addition to that that the concept approval include the finding that the proposed site plan is consistent with the C-2 Commercial Zone, and the C-2 and C-4 Design Criteria, and Title 17 Subdivisions, conditional upon the following 1-5:

1. Trash enclosure be screened on all four sides with brick material from building.
2. Rear loading zone be screened from 1200 South and property to east with brick material from building and/or with evergreen shrubbery.
3. Outdoor storage and display areas be screened with wrought iron and brick pillar fencing.
4. Sidewalk connection be provided from building to 1200 South as proposed.
5. Crookneck lighting be utilized as proposed on the building elevations.

In addition we'd like to have the Petitioner also include in their final the agreement between Heber Gateway Plaza and the Petitioner for the improvements and ongoing maintenance of the easement to their said property. Commissioner Glissmeyer seconded the motion. Discussion to reference Horrocks' Report and wrapping the entrance to the front of the building.

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Commissioner Richards made an addendum to his motion. He moved that in addition to the agreement with the developer also add all of the notes pertaining to the north elevation of the structure as well as the letters by Horrocks (Engineers).

VOTE

	AYE:	NAY:	ABSTAINING:
Stacie Ferguson	☒	☐	☐
Darryl Glissmeyer	☒	☐	☐
Kieth Rawlings	☒	☐	☐
David Richards	☒	☐	☐
Michael Thurber	☒	☐	☐
Mark Webb	☒	☐	☐
Harry Zane	☒	☐	☐

The motion carried.

Item 4 **Proposed amendment to the Heber City Municipal Code, Section 18.72.030 G. "Government Building Parking Requirements", altering the required off-street parking requirements for government buildings.**

DISCUSSION

The intended size of the Public Safety Building is about 22,000 square feet. The Municipal Code requires five parking stalls per 1,000 square feet plus one space for each employee, which translates into 151 off-street parking stalls, necessitating a parking lot of over an acre in size. This amount greatly exceeds the need for parking on the site. In the downtown C-3 Commercial Zone, buildings can utilize a parking ratio of three spaces per 1,000 square feet, which is about the parking ratio of City-County Square.

Parking Comparison at 3 Spaces per 1,000 Square Feet			
	Area (sf)	**Employees**	**Off-Street Parking Stalls**
City-County Square	31,800	51	97
Public Safety Building	22,000	41	66

PUBLIC HEARING COMMENTS

Chairman Rawlings opened the public hearing, there were no members of the public present to comment. Chairman Rawlings closed the public hearing.

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MOTION

Commissioner Zane moved that we change the parking code to reflect Tony's downsizing to three per 1000 instead of five per 1000. Commissioner Glissmeyer seconded the motion.

VOTE

	AYE:	NAY:	ABSTAINING:
Stacie Ferguson	☒	☐	☐
Darryl Glissmeyer	☒	☐	☐
Kieth Rawlings	☒	☐	☐
David Richards	☒	☐	☐
Michael Thurber	☒	☐	☐
Mark Webb	☒	☐	☐
Harry Zane	☒	☐	☐

The motion carried.

Item 5 **Proposed amendment to Section 306 Building Height of the C-2 & C-4 Commercial Design Criteria requiring Civic Buildings to be at least two stories in height.**

REQUEST

In discussing the potential design of the proposed Public Safety Building, the question has come up as to whether it should be a one story building or a two story building. As shown in Figure 1 and Figure 2, a two story building more efficiently utilizes space, providing more room for a future building and more room for open space around the building. Many of the historically and architecturally significant buildings in Heber City are two stories.

DISCUSSION

The Planning Commission discussed the following points:

- This lot and block makes sense to be zoned C-3 Commercial Zone;
- Aesthetics, function, and budget are the key factors in determining what direction to go in reference to building height;
- Aesthetics are necessary to preserve what Heber City is; the building needs to be functional for its intended purpose as a public safety building. Discussion on the basic design and the usage of the building. One option was to change the appearance of the front façade to appear to be two stories in height.
- Location / option of selling property and building someplace else. The Commission felt Block 43 was the best location for this facility.
- Have the architects qualify the number and breakdown on what the costs are on the basement, 1st floor, 2nd floor, etc.

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- Look at costs for a basement;
- In discussing the proposed amendment the Commission asked for the word "shall" to be changed to "should".

PUBLIC HEARING COMMENTS

Chairman Rawlings opened the public hearing. No members of the public were present and the public hearing was closed.

MOTION

Commissioner Richards moved that we recommend approval for the proposed amendment, Section 306 Building Height of C-2/C-4 Design Criteria with exception of, going to the first paragraph, Civil Buildings, including government and non-profit buildings, should be at least two stories in appearance and height to match the style of the turn of the century Civic Buildings, and the rest as stated. (the rest) in Heber City, such as the Wasatch County School District Offices, Heber Bank Block, Hatch Building, Fire Station and the Tabernacle, two story buildings more efficiently utilize space and allow for more common area around the buildings than a 1 story building. Commissioner Webb seconded the motion. Discussion that the reason the words, "in appearance", were added was that so a façade could be used. As an example a building of a story and a half could be built but the façade would make the building appear to be two stories in height.

VOTE

	AYE:	NAY:	ABSTAINING:
Stacie Ferguson	☒	☐	☐
Darryl Glissmeyer	☒	☐	☐
Kieth Rawlings	☒	☐	☐
David Richards	☒	☐	☐
Michael Thurber	☒	☐	☐
Mark Webb	☒	☐	☐
Harry Zane	☐	☒	☐

The motion passed.

<u>Administrative Items:</u>

Commissioner Richards voiced his concern over the time it takes to get a building permit. He feels that the Building Official is overworked. Anthony Kohler indicated that he thought Richards should express this concern to the City Council. Anthony Kohler reminded the Commission of the joint meeting with the City Council on March 27th.

Commissioner Glissmeyer moved to adjourn the meeting and Commissioner Webb seconded the motion. Voting Aye: Commissioners Ferguson, Glissmeyer, Rawlings, Richards, Thurber, Webb and Zane. The motion carried and the meeting adjourned.

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eber City Planning Commission
Meeting date: March 27, 2014
Report by: Anthony L. Kohler

Re: Residential Facilities for Disabled Persons

Heber City has been approached by the Chateau Recovery Center for locating a group home in Heber City. Attached please find a copy of letter dated February 24, 2014. This letter asserts that Heber City's ordinance is illegal in its regulation of group homes for several reasons. Many of the points made by Mr. Warner of the Chateau Recover Center are correct and have been validated by Heber City Attorney Mark Smedley and Craig Chambers of the Wasatch County Attorney's Office. Attached is a draft ordinance for review by the Planning Commission in an attempt to remedy the problems with the existing ordinance.

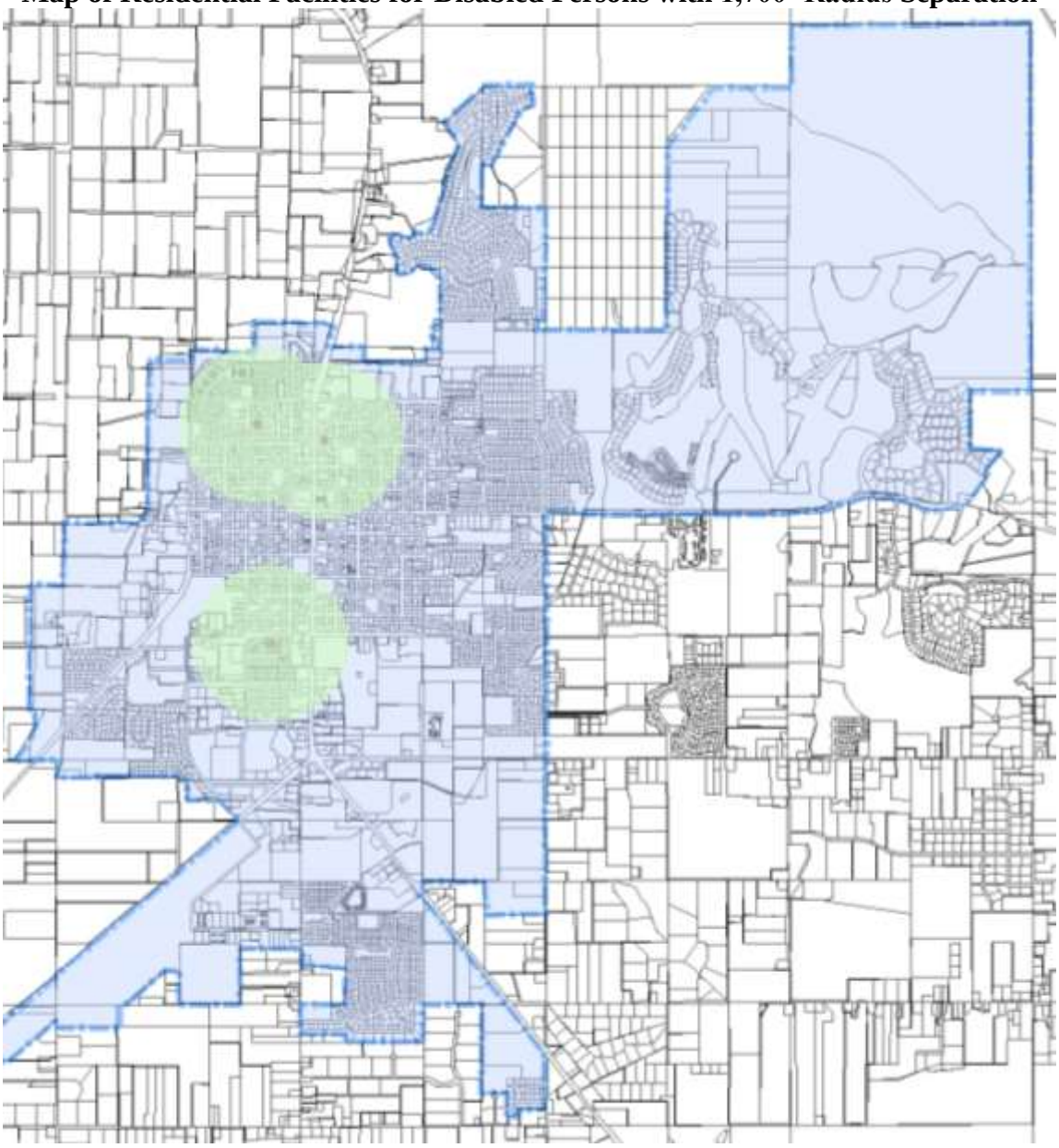
The map on the next page shows existing residential facilities for the disabled with a green 1,700 foot average walking radius, indicating there is still room left for 12 to 18 additional facilities in Heber City. The 1,700 foot radius is the assumed average radius for the 2,000 foot walkability separation. The suggested 300 feet separation would allow 2 facilities to be located on each block, which seems to be concentrating the facilities. The literature available on dispersal of these facilities recommends enough dispersal of the facilities so disabled individuals can be better integrated into the community. The same literature also recommends not dispersing the facilities so much that it is impossible to locate a facility within a community. 2,000 feet has been chosen because there is much supporting literature that concludes most people will only walk up to about 1,500 feet (about a ¼ mile). By having the separation distance established just over the walkable distance should help ensure the facilities will not be unduly concentrated and will be able to be integrated into the community, and as the map illustrates, several additional locations will be available for future facilities.

Attached, please find a presentation given to the city by Mr. Chambers from a conference he attended on group homes. This presentation discusses the Federal Fair Housing Act and should answer many of the questions the Planning Commission may have about this issue. Also attached please find literature from the Public Law Journal and American Planning Association on this subject.

Quarter-mile Walkability Sources

http://www.bikewalk.org/pdfs/ncbwpubwalkablecomm.pdf
http://www.walkscore.com/walkable-neighborhoods.shtml
http://www.transect.org/

Map of Residential Facilities for Disabled Persons with 1,700' Radius Separation



February 24, 2014

Mark Smedley
Heber City Attorney
90 West 200 South #4
Heber City, UT 84032

RE: Heber City Municipal Code
Request for changes to bring Code into compliance with laws regarding Group Homes for certain Disabled Persons

Dear Mark,

I have been speaking with Anthony Kohler, Heber's Planning Director, regarding my plans to open some group homes for people recovering from addiction to substances. Anthony asked me to write you regarding certain Heber City Municipal Code ("Code") sections regarding Residential Facilities for Disabled Persons ("Residential Facility") that do not conform to the requirements regarding accommodation of disabled persons contained in the Utah Fair Housing Act, the Fair Housing Act of 1988, the American Disabilities Act and the Rehabilitation Act of 1973 because they fail to reasonably accommodate disabled persons or they create a disparate impact on disabled persons. I am requesting that the City review and revise the Code sections which relate to the location and operation of Residential Facilities within Heber City to more fully comply with those laws. In particular I believe that the City must review the following issues contained in the Code:

1. Conditional Use within Single Family Dwelling Zones. Section 18.68.604 of the Code contains provisions that require a Conditional Use Permit be obtained prior to operating a Residential Facility in an area that has been zoned exclusively for Single Family Dwellings. The provisions of these sections of the Code require the authorization of the Permit as long as the facility complies with "Handicapped Facility" provisions contained in the Code, but the conditional use permit is non-transferable. In addition, it prohibits the reasonable alterations that may be necessary to the structure or the landscaping to accommodate the disability of persons who may wish to live at the proposed Residential Facility. I am requesting that the Code be modified to allow Residential Facilities as a permitted use in areas that have been zoned for single family dwellings.

2. Alcoholism and Drug Abuse prohibitions. Sections 18.64.602(B)(7) and 18.64.604(A) prohibits disabled persons due to alcoholism or drug abuse to reside in a Residential Facility. Both alcoholism and drug abuse are recognized disabilities and the prohibitions violate the above-referenced laws. These prohibitions must be removed from the Code.

3. Artificial Occupant Limitation. Section 18.68.601(B)(1) of the Code limits the number of disabled individuals who are able to live in a single Residential Facility to eight (8). This is an

The Chateau Recovery Center
375 Rainbow Lane, PO Box 1000 Midway, Utah 84049 Telephone (435) 654-1082 Facsimile (435) 654-1485

artificial limitation without regard to any objective standard which has a disparate impact on disabled persons wishing to live in a Residential Facility. This limitation of disabled individuals should be removed. Any limitation on the number of individuals living in a group home should be based on the adequacy of the property to properly accommodate the individuals taking into account their health and safety and based on the applicable standards and requirements of the Utah Division of Human Services.

4. On-Site Management. Section 18.68.601(B)(1) of the Code requires supervision of a Residential Facility by a "house family or manager". The section is vague as to whether the supervision provision requires the twenty four (24) hour on-site presence. This provision should clarify that supervision of a Residential Facility will be in compliance with contract with the Department of Human Services.

5. Municipal Advisory Committee Requirement. Section 18.68.602(B)(3) of the Code requires that a Residential Facility establish a municipal advisory committee through which all complaints and concerns of neighbors may be addressed. This requirement has been found in many cases to be discriminatory on it face and should be removed.

6. Concentration Limitations. Section 18.68.602(B)(6) of the Code allows only one Residential Facility within a three quarter (3/4) mile radius. No objective basis exists for this limitations. Excluding additional housing options within this radius of any Residential Facility in Heber City creates a disparate impact on disabled persons by limiting the number of Residential Facilities available to disabled persons who wish to live in Heber City in a Residential Facility arrangement. This requirement should be removed or at least significantly reduced to no greater than a three hundred (300) foot radius.

An update of the Code to more fully comply with the laws relating to the accommodation of disabled persons will improve Heber City and continue to make the City desirable and diversified place to live. I await your advice on how the City should proceed in making these Code modifications.

Sincerely,

Danny Warner
Chief Executive Officer
danny@chateaurecovery.com
435.654.1082

PROPOSED AMENDMENT TO RESIDENTIAL FACILITIES FOR DISABLED PERSONS

Heber City, Utah

Draft: March 19, 2014

Section 18.68.601 Residential Facilities for Disabled Persons.

A. **Definitions**. For the purpose of Section 18.68.601:
   1. "Disabled Person" means an individual with a disability as defined by the Federal Americans with Disabilities Act as amended (ADA), US Housing and Urban Development (HUD), and/or the Utah Fair Housing Act.
   2. "Residential facility for disabled persons" or "facility" means a single-family or multiple-family dwelling unit that provides a family-type living environment for disabled persons and meets the requirements of Section 18.68.601 "Residential Facilities for Disabled Persons".

B. **Facility as a Permitted Use.** Each facility is a permitted use within any Zone where residential dwellings are permitted. The granting of a permit to operate a facility rests with the Zoning Administrator or his or her designee, with appeals going to the Board of Adjustment.

C. **License and Permits Required.** Each facility shall:
   1. Obtain any applicable state, federal, and local licenses or permits;
   2. Meet all municipal building, safety, and health ordinances applicable to similar dwellings;
   3. Conform to all applicable requirements of the Department of Human Services and shall be operated by or operated under contract with that department; and
   4. Provide evidence of required licensure upon application for a local business license.

D. **Facility Requirements.** Each facility shall:
   1. Establish and maintain adequate off-street parking spaces;
   2. Be established and maintained in a manner consistent with the character and scale of the surrounding residential neighborhood;
   3. Be occupied by sixteen (16) or fewer handicapped persons in a family-type arrangement under the supervision of a house family or manager in accordance with the requirements of the Department of Human Services;
   4. Accept individuals within the facility on a strictly voluntary basis and shall not include placement of individuals as part of, or in lieu of, confinement, rehabilitation, or treatment in a correctional facility; and
   5. Not be established or maintained within 2,000 feet of an existing facility, as measured from the front entrance of the proposed facility by following the shortest route of ordinary pedestrian travel to the front entrance of an existing facility.

E. **Reasonable Accommodations.** The Zoning Administrator may grant reasonable accommodations to this Section upon written request, provided the request is reasonable and does not fundamentally alter the zoning ordinance and character of the neighborhood.

F. **Severability.** If any part of this Section is found to be unlawful by a court of law, applicable State or Federal regulations shall govern that situation, and the remainder of this Section shall remain in full effect.

EXISTING CODE FOR RESIDENTIAL FACILITIES FOR HANDICAPPED PERSONS

Section 18.68.601 Residential Facility for Handicapped Persons.

A. A residential facility for handicapped persons shall be consistent with existing zoning of the desired location.

B. A residential facility for handicapped persons shall:

1. be occupied on a 24-hour-per-day basis by eight or fewer handicapped persons in a family-type arrangement under the supervision of a house family or manager;

2. conform to all applicable standards and requirements of the Department of Human Services; and

3. be operated by or operated under contract with that department.

Section 18.68.602 Handicapped Residential facilities as a Permitted Use.

A. A residential facility for handicapped persons is a permitted use in any area where residential dwellings are allowed, except an area zoned to permit exclusively single-family dwellings.

B. A permit to establish a residential facility for handicapped persons shall be granted only if:

1. the facility meets all municipal building, safety, and health ordinances applicable to similar dwellings;

2. the operator of the facility provides assurances that the residents of the facility will be properly supervised on a 24-hour basis;

3. the operator of the facility establishes a municipal advisory committee through which all complaints and concerns of neighbors may be addressed;

4. the operator of the facility provides adequate off-street parking space;

5. the facility is capable of use as a residential facility for handicapped persons without structural or landscaping alterations that would change the structure's residential character;

6. is not established or maintained within three-quarters mile of another residential facility for handicapped persons;

7. no person being treated for alcoholism or drug abuse is placed in a residential facility for handicapped persons;

8. no person who is violent is placed in a residential facility for handicapped persons; and

9. placement in a residential facility for handicapped persons is on a strictly voluntary basis and not a part of, or in lieu of, confinement, rehabilitation, or treatment in a correctional facility.

Section 18.68.603 Approval of Handicapped Residential Facilities.

A. Upon application for a permit to establish a residential facility for handicapped persons in any area where residential dwellings are allowed, except an area zoned to permit exclusively single-family dwellings, Heber City may decide only whether or not the residential facility for handicapped persons conforms to the ordinances under 18.68.602(B); and

1. if the residential facility for handicapped persons is in compliance with the ordinances under 18.68.602(B), Heber City shall grant the requested permit to that facility.

B. The use granted and permitted by this section is nontransferable and terminates if the structure is devoted to use other than as a residential facility for handicapped persons or if the structure fails to comply with the ordinances under 18.68.602(B)

Section 18.68.604 Handicapped Residential facilities in Areas Zoned Exclusively for Single-Family Dwellings.

For purposes of this section:

A. No person who is being treated for alcoholism or drug abuse may be placed in a residential facility for handicapped persons.

B. No person who is violent may be placed in a residential facility for Handicapped persons; and

1. placement in a residential facility for handicapped persons shall be on a strictly voluntary basis and may not be a part of, or in lieu of confinement, rehabilitation, or treatment in a correctional institution.

C. Subject to the granting of a conditional use permit, a residential facility for handicapped persons shall be allowed in a zoning district that is zoned to permit exclusively single-family dwelling use, if that facility:

1. conforms to all applicable health, safety and building codes;

2. is capable of use as a residential facility for handicapped persons without structural or

landscaping alterations that would change the structure's residential character;

3. conforms to Heber City's criteria, adopted by ordinance, governing residential facilities for handicapped persons in areas zoned to permit exclusively single-family dwellings; and

4. is not established or maintained within three-quarters mile of another existing residential facility for handicapped persons.

D. The use granted and permitted by this subsection is nontransferable and terminates if the structure is devoted to a use other than as a residential facility for handicapped persons or, if the structure fails to comply with applicable health, safety, and building codes.

E. Discrimination against handicapped persons and against residential facilities for handicapped persons is prohibited.

F. Decisions of Heber City regarding the application for a permit by a residential facility for handicapped persons shall be based on legitimate land use criteria, and not based on the handicapping conditions of the facility's residents.

Section 18.68.605 Review and Approval.

The granting of permits and decisions relating to the administration of the provisions of Chapter 18.68 rests with the Heber City Planning Commission, with appeals going to the Board of Adjustment.

Section 18.68.606 Definitions.

As used in this chapter:

A. "Conditional Use" means a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.

B. "Handicapped person" means a person who:

1. has a severe, chronic disability attributable to a mental or physical impairment or to a combination of mental and physical impairments that is likely to continue indefinitely and that results in a substantial functional limitation in three or more of the following areas of major life activity:

a. self-care;
b. receptive and expressive language;
c. learning;
d. mobility;
e. self-direction;
f. capacity for independent living; and
g. economic self-sufficiency; and

2. requires a combination or sequence of special interdisciplinary or generic care, treatment, or other services that are individually planned and coordinated to allow the person to function in, and contribute to, a residential neighborhood.

C. "Residential facility for handicapped persons" means a single-family or multiple-family dwelling unit that meets the requirements of the 600 series of Chapter 18.68 of this ordinance.

§ 3604. Discrimination in the sale or rental of housing and other prohibited practices.

(f) (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 so sold, rented, or made available; or

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

(2) To discriminate against any person in the terms, 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;

FEDERAL FAIR HOUSING ACT

PROTECTIONS FOR PERSONS WITH DISABILITIES

HUD DISPARATE IMPACT CONTINUED

- The eleven federal courts of appeals that have ruled on this issue agree with this interpretation. While HUD and every federal appellate court to have ruled on the issue have determined that liability under the Act may be established through proof of discriminatory effects, the statute itself does not specify a standard for proving a discriminatory effects violation."

NEW HUD REGULATION ON DISPARATE IMPACT

- The regulation states: "HUD, which is statutorily charged with the authority and responsibility for interpreting and enforcing the Fair Housing Act and with the power to make rules implementing the Act, has long interpreted the Act to prohibit practices with an unjustified discriminatory effect, regardless of whether there was an intent to discriminate.

HUD DISPARATE IMPACT CONTINUED

- Even if defendant proves that its practice is legitimate, the plaintiff can still come back and establish liability by proving that substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect.

NEW HUD REGULATION ON DISPARATE IMPACT'S REQUIREMENTS

- HUD REGULATION ON DISPARATE IMPACT WENT INTO EFFECT ON MARCH 18, 2013
- Under the test, the plaintiff first bears the burden of proving disparate impact. The plaintiff has the burden of "prima facie" case. This basically means that the plaintiff is giving enough evidence in round one to allude that disparate treatment exists.
- Once the plaintiff proves "prima facie" then the burden of proof shifts to the defendant. When this happens you have to prove that the practice of yours, that the plaintiff is challenging, is necessary.

HOW DO GROUP HOME ISSUES ARISE

- COMPLAINTS BY NEIGHBORS
- CODE ENFORCEMENT INVESTIGATION
- NOTICES OF VIOLATION
  - EXCESS NUMBER OF UNRELATED PERSONS
  - RUNNING A BUSINESS IN A RESIDENTIAL ZONE
  - NON PERMITTED USE IN A RESIDENTIAL ZONE BASED ON CLASSIFICATION

DEFINTION OF DISABILITY

- The Fair Housing Act (FHA) provides that "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. 42 U.S.C.S. § 3602(h). Persons recovering from alcoholism or drug addiction, and who are thereby substantially limited in a major life activity, are considered disabled under the FHA. Such individuals who need the support of a halfway house to avoid a relapse to alcoholism or drug addiction qualify as disabled. Individuals can be considered disabled for the purposes of the FHA if they are recovering from substance abuse issues, even if they are not current users. The statutory language of the Fair Housing Act makes clear that only those recovering from addiction, as opposed to current users, are considered disabled. 42 U.S.C.S. § 3602(h).

WHAT HAPPENS WHEN A FAIR HOUSING ATTORNEY GETS INVOLVED

- MAKES A WRITTEN REQUEST FOR A REASONABLE ACCOMMODATION
- WAIVER OF UNRELATED PERSONS
- TREAT AS SINGLE FAMILY USE
- TREAT RESIDENTS AS THE FUNCTIONAL EQUIVALENT OF A FAMILY
- FILE A HOUSING DISCRIMINATION COMPLAINT WITH HUD
- FILE A LAWSUIT IN FEDERAL COURT

CLASSIFICATIONS OF GROUP HOMES THAT CAUSE ATTORNEYS TO GET INVOLVED

- HALFWAY HOUSE
- GROUP HOME
- RESIDENTIAL CARE FACILITY
- CONGREGATE CARE FACILTY
- SUBSTANCE ABUSE TREATMENT FACILITY, ETC

REASONABLE ACCOMMODATION REQUIREMENTS

- IS THE REQUEST REASONABLE?
- DOES THE REQUEST CAUSE AN UNDUE BURDEN ADMINISTRATIVELY OR FINANCIALLY?
- DOES THE REQUEST CAUSE A FUNDAMENTAL ALTERATION TO THE ZONING SCHEME?
- IS THE REQUEST NECESSARY, I.E. WILL THE REQUEST AMELIORIATE OR BENEFIT THE RESIDENTS WITH THE DISABILITY
- DOES THE REQUEST PROVIDE AN EQUAL OPPORTUNITY TO USE AND ENJOY A DWELLING?
  - DOES THE ACCOMMDOATION LEVEL THE PLAYING FIELD?
  - DOES THE ACCOMMODATION ALLOW THE USE OF THE DWELLING OF CHOICE

RESPONSE BY MUNICIPAL OFFICIALS TO REASONABLE ACCOMMODATION REQUEST

- COMMUNITIES THAT DON'T HAVE A REASONABLE ACCOMMODATION PROCESS
- SUBMIT A ZONING APPLICATION, I.E. CONDITIONAL USE PERMIT, SPECIAL USE PERMIT, VARIANCE, OR TEXT AMENDMENT
- USE A REASONABLE ACCOMMODATION PROCEDURE ALREADY IN PLACE

LEGISLATE OR REGULATE GROUP HOMES

- ANOTHER RESPONSE IS TO ENACT LEGISLATION REGULATING GROUP HOMES
- ANY LEGISLATION MUST COMPLY WITH THE REQUIREMENTS OF THE FAIR HOUSING ACT
  - CREATION OF CLASSIFICATION THAT PERTAIN ONLY TO GROUP HOMES FOR PERSONS WITH DISABILITIES MAY BE ILLEGAL
  - DID THE DECISION MAKERS "REVERSE ENGINEER" THE ORDINANCE

RESPONSES TO REASONABLE ACCOMMODATION REQUEST

- GRANT THE REQUEST AS PRESENTED
- GRANT THE REQUEST WITH CONDITIONS
- DENY THE REQUEST
- REASONABLE ACCOMMODATION REQEUSTS MUST BE HANDLED PROMPTLY
- FAILURE TO RESPOND IS A DENIAL
- DELAY IN RESPONDING IS A DENIAL
- EXHAUSTION OF REMEDIES NOT REQUIRED
- NO REQUIREMENT TO SEEK ACCOMMODATION IF IT WOULD BE FUTILE

FAIR HOUSING ANALYSIS OF GROUP HOME ORDINANCES

- REVIEW OF THE ORDINANCE FOR NON NEUTRAL LANGUAGE, I.E. DOES THE ORDINANCE SINGLE OUT A PARTICULAR CLASS OF DISABLED PERSONS
- REVIEW OF INTENT OF THE LEGISLATORS
- REVIEW LEGISLATIVE HISTORY OF THE ORDINANCE, I.E. IS THERE COMMUNITY PRESSURE
- IS DISABILITY A MOTIVATING FACTOR IN THE DECISION MAKING

CONDITIONS OR RESTRICTIONS WHICH MAY VIOLATE THE FAIR HOUSING ACT

- LICENSING OR REGISTRATION REQUIREMENTS
- TURNOVER RESTRICTIONS
- RESIDENCY BASED ON NON-TRANSCIENCY
- SPACING REQUIREMENTS
- PAYMENT OF FEES
- BACKGROUND CHECKS
- PROHIBITION OF PROBATIONERS OR PAROLEES
- RESTRICTIONS ON SITING IN SINGLE FAMILY ZONES VS. MULTI FAMILY OR INDUSTRIAL OR COMMERCIAL ZONES

ORDINANCES WHICH HAVE BEEN HELD TO VIOLATE THE FAIR HOUSING ACT

- BOCA RATON – RESTRICTIONS ON SITING OF HOUSING FOR PERSONS IN RECOVERY BY CLASSIFICATION OTHER THAN FAMILY
- DELRAY BEACH – ATTEMPT TO REDEFINE FAMILY BY REDUCTION OF NUMBER OF UNRELATED PERSONS COUPLED WITH TURNOVER OR TRANSCIENY RESTRICTIONS
- BATON ROUGE- REASONABLE ACCOMMODATION PROCESS THAT IS AVAILABLE ONLY TO STATE LICENSED AND AROUND THE CLOCK STAFFED HOUSES
- SUFFOLK COUNTY, NY- (1) a notice requirement and approval procedure to assess the desirability of a proposed substance abuse recovery house in an area, (2) a requirement that each substance abuse recovery house must have a certified site manager living on-site, (3) a limitation of six individuals receiving substance abuse services in the house, and (4) a licensing requirement.

OTHER FACTORS IN FAIR HOUSING ANALYSIS OF GROUP HOME ORDINANCES

- DOES STATE LAW MANDATE THAT STATE LICENSED PROGRAMS BE TREATED AS SINGLE FAMILY USES? IF SO, HOW DOES MUNICIPALITY TREAT UNLICENSED HOMES?
- DOES THE ORDINANCE HAVE THE EFFECT OF MAKING HOUSING UNAVAILABLE FOR PERSONS WITH DISABILITES, SEE § 3604
- WERE THE DECISION MAKERS INFLUENCED BY THE DISCRIMINATORY ANIMUS OF THE CITIZENS
- IF A ZONING APPLICATION OR REASONABLE ACCOMMODTION REQUEST, WERE THE REASONS FOR DENAIL PRETEXTUAL

PROBLEMATIC REQUIREMENTS CONTINUED

- THE CALIFORNIA APPROACH:

THE UNITARY LEASE: if the unit is rented, all adult residents have chosen to jointly occupy the entire premises of the dwelling unit, *under a single written lease* with joint use and responsibility for the premises, *and the makeup of the household occupying the unit is determined by the residents of the unit rather than the landlord or property manager.*

RESTRICTED TO MULTI FAMILY ZONES WITH A USE PERMIT

ADDITIONAL CONDITIONS AND REQUIREMENTS FOR OBTAINING A REASONABLE ACCOMMODATION

PROBLEMATIC REQUIREMENTS IN ENACTED OR PROPOSED ORDINANCES

- BOYNTON BEACH – Hearing officer is empowered to **impose conditions upon the grant of the request as he/she deems necessary and appropriate to mitigate any public safety concerns which pose a significant risk to children under age 18 or neighboring residential communities or the residential character of those communities**
- **Revocation of grant of reasonable accommodation upon receipt of other code violations**

THE SIMPLER THE BETTER

- CHARLESTON, WV DEFINTION OF FAMILY:
- One or more persons occupying a single dwelling unit, provided that unless all members are related by blood, marriage or legal adoption, no such family contain more than five non-transient unrelated persons, ***except where disability requires that more than five unrelated persons reside together; in such cases there shall be no requirement for persons with disabilities to petition, apply or experience a process to obtain approval to live in any zoning district in the City***.

PROBLEMATIC REQUIREMENS CONTINUED

- THE TEXAS EXPERIENCE
- CITIES SUCH AS DALLAS AND SAN ANTONIO HAVE ENACTED BOARDING HOUSE ORDINANCES WHICH CLASSIFY HOUSING FOR PERSONS WITH DISABILITIES AS BOARDING HOUSES
- CONDITIONS SUCH AS REGISTRATION, INSPECTIONS, SPACING, BACKGROUND CHECKS, EXEMPTIONS FOR UNLICENSED FAITH BASED HOUSING, PRODUCTION OF RECORDS DEMONSTRATING DISABILITY

COSTS TO TAXPAYERS FOR FAIR HOUSING VIOLATIONS

- TRACI P. V. SARASOTA COUNTY, FL - $700,00 TO PLAINTIFFS, LEGAL COST TO COUNTY $3.2 MILLION
- SCHWARZ V. CITY OF TREASURE ISLAND - $3.725 MILLION TO PLAINTIFFS
- ST. PAUL SOBER LIVING V. GARFIELD COUNTY, CO, JURY AWARD OF $400,000, PENDING PETITION FOR ATTORNEYS FEES AND COST OF NEARLY $500,000
- JEFFREY O. V. CITY OF BOCA RATON – PLAINTIFFS ATTORNEYS FEES APPROX. $600,000- LEGAL COST TO CITY APPROX. $500,000
- ALAMAR RANCH, LLC. V. BOISE COUNTY, IDAHO, JURY AWARD OF $4 MILLION, ATTORNEYS FEES $1.4 MILLION

SIMPLER CONTINUED

- DAYTON BEACH, FLORIDA DEFINITION OF FAMILY
- *Family.* Any one of the following when living together in a dwelling unit or using it as a common place of abode for 30 days or more in any three-month period:
- (a) A natural family of one or more persons who are all related to each other by law, blood, marriage, or adoption.
- (b) Six or fewer persons living together in a facility licensed by the Florida Department of Children and Family Services in accordance with F.S. § 419.001(2) or amendments thereto.
- (c) A maximum of two unrelated persons.
- (d) ***A group of two or more unrelated persons, where necessary to provide reasonable accommodations for handicapped individuals in accordance with applicable federal law.***

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American Planning Association

Making Great Communities Happen

Policy Guide on Community Residences

Adopted by Special Delegate Assembly, September 21, 1997
Ratified by Board of Directors, September 22, 1997

Municipalities and counties throughout the nation continue to use zoning to exclude community residences from the single-family residential districts despite 25 years of planning standards[1] and the vast majority of court decisions[2] that recognize community residences for people with disabilities as a residential use. Misconceptions about their nature and impacts abound although there is a wealth of scientific evidence that community residences for people with disabilities generate no adverse impacts on the surrounding community and function as residential uses. More recently the Fair Housing Amendments Act of 1988[3] prohibited zoning regulations of community residences that are based on unfounded myths and fears about the residents, and appeared to explicitly disallow the use of special use permits as the primary means of regulating community residences. Yet this misclassification and exclusion continues unabated throughout most of the nation.

During the 1970s and 1980s, every state, as well as the federal government, started to reshape its policies toward people with severe disabilities. States recognized that warehousing people with disabilities in institutions was not only extremely costly, but also ineffective. A large proportion of those who were institutionalized could live in much less restrictive environments such as a familylike environment in a house or apartment surrounded by other residential uses. They did not require the high level of care furnished by an institution. Overwhelming evidence showed that allowing individuals with disabilities to live in a familylike setting in the community in a community residence was not only much less expensive than consigning them to institutions, but also substantially more effective. In a familylike setting, people with disabilities could learn the life skills we teach our own children on a daily basis. Living in a community residence, namely a group home or halfway house, fosters normalization in which these individuals learn to lead as normal a life as possible. As the courts have noted time and again, community residences are the very opposite of an institution in terms of how they function and perform, and in terms of how they use the land. To achieve a familylike setting, these community residences need to be located in the same residential zoning districts as dwellings occupied by biological families.

Definitions

Because there is so much misunderstanding of this subject, it is essential to first define several terms.

Group Home

A dwelling unit occupied as a single housekeeping unit in a familylike environment by up to approximately 12 to 15 persons with disabilities plus support staff. Residents are supervised by a sponsoring entity or its staff which furnishes habilitative services to the group home residents. A group home is owned or operated under the auspices of a nonprofit association, private care provider, government agency, or other legal entity, other than the residents themselves or their parents or other individuals who are their legal guardians. Interrelationships between residents are an essential component of a group home. A group home imposes no time limit on how long an individual can reside in the group home. A group home is a relatively permanent living arrangement where tenancy is measured in years.

The group home constitutes a *family, a single housekeeping unit* where residents share responsibilities, meals, and recreational activities as in any family. The intention is for group home residents, like members of a biological family, to develop ties in the community. Like people without disabilities, these individuals attend schools, work, and may receive other support services in the community. The group home staff is specially trained to help the residents achieve the goals of independence, productivity, and integration into the community. Together, the staff and residents constitute a *functional family.*[4] The group home's staff teaches the residents with disabilities the same life activities taught in conventional homes. They learn personal hygiene; shopping cleaning, laundry, and recreational skills; how to handle money; how to take public transportation; how to use community facilities. They learn how to live as a family. *The group home fosters the very same family values our most exclusive residential zoning districts advance.*

The primary purpose of the group home is to provide a familylike setting with ongoing supervision and support for persons unable to live independently in the community. It is *not a clinic where treatment is the principal or essential service provided.* A treatment regime may be incorporated into the daily routine of persons with disabilities wherever they may live, whether with their families, in an institution, or in a group home. So, just like the person with a disability who lives with her family, the group home resident may have a daily habilitation regime to follow. *Any treatment received at home is incidental to the group home's primary purpose.*[5]

Residency in a group home is long term relatively permanent and measured in years, not months or weeks. There is no limit on how long an individual can live in a group home. A group home can house people with developmental disabilities (mental retardation, autism, etc.), mental illness, physical disabilities, or addiction to drugs or alcohol. When the residents have a drug or alcohol addiction, the group home is called a recovery home.

The number of individuals who live in a group home varies from just two or three to as many as 12 to 15, or in rare cases as many as 20. For people with developmental disabilities, it is felt that smaller homes are more productive. Group homes for people with mental illness tend to house six to 15 residents for both therapeutic and financial reasons. Group homes for the frail elderly can require as many as 20 residents to be financially and therapeutically sound. The maximum number of residents is determined by applying a jurisdictions housing code for residential uses to the property.

Some group home residents graduate from this type of community living arrangement to live on their own with only occasional visits from professional staff. Most, however, will live out their lives in a group home.

Recovery homes for people with drug or alcohol addictions are another type of group home. Occupants typically sign an annual lease and can live in a recovery home for years.

A singlefamily residential district is essential for most group homes to succeed, although for some, a multiplefamily district can work. Group home operators want to establish group homes in the same sort of pleasant, safe neighborhoods you and I strive to live in, for the same reasons we seek them.

Halfway house or recovery community

A temporary residential living arrangement for persons leaving an institutional setting and in need of a supportive living arrangement in order to readjust to living outside the institution. These are persons who are receiving therapy and counseling from support staff who are present when residents are present, for the following purposes: (a) to help them recuperate from the effects of drug or alcohol addiction (a disability); (b) to help them reenter society while housed under supervision while under the constraints of alternatives to imprisonment including, but not limited to, prerelease, work release, or probationary programs (not a disability); or (c) to help persons with family or school adjustment problems that require specialized attention and care in order to achieve personal independence (not a disability). Interrelationships between residents is an essential component of a halfway house. Residency is limited to a specific number of weeks or months.

People with drug or alcohol addictions often need to live in a halfway house as a transitional living arrangement before they can live more independently in the community or return to their homes. The key for them is to learn to abstain completely from using drugs or alcohol. Treatment usually consists of an initial withdrawal period followed by intensive counseling and support both through treatment programs and through residential living arrangements. Such community residences are based on the group home model with some significant differences with implications for proper zoning regulation.

The halfway house or recovery community helps people with drug or alcohol addictions readjust to a normal life before moving out on their own. A person with an addiction is admitted only after completing detoxification. The halfway house staff helps residents adjust to a drugfree lifestyle, learn how to take control of their lives, and learn how to live without drugs. Nearly all halfway houses place a limit, measured in months, how long someone can live there. Unlike a group home, the halfway house aims to place all its residents into independent living situations upon graduation. For both therapeutic and financial reasons, most halfway houses need 10 to 15 residents to be successful. Because the number of residents in a halfway house is greater than in a group home and their length of tenancy shorter, halfway houses more closely resemble multiplefamily housing than singlefamily residences, although, like group homes, they work best in singlefamily neighborhoods.[6]

Disability

A physical or mental impairment that substantially limits one or more of a persons major life activities, impairs their ability to live independently, or a record of having such an impairment, or being regarded as having such an impairment. Prison preparolees, for example, do not, as a class, fit this definition.

Most people with disabilities do not require a community residence to live in the community. More than 80 percent of them live with their families or on their own with some support services.[7] Still, in 1990 over 3.9 million Americans had disabilities so severe that they were prevented from working at a job or doing housework or they required assistance with daily tasks like getting in and out of bed, dressing, bathing, shopping, or light housework, or had a developmental disability, Alzheimers disease, or senility making many of them appropriate candidates to dwell in a community residence.[8]

This set of policy guidelines of the American Planning Association does not advocate for or against community residences, the broad term that includes group homes and halfway houses. It does not include hospices, emergency shelters, residences for victims of abuse, or other group living arrangements.[9] This policy guideline seeks to establish the maximum level of zoning regulation permissible for community residences for people with disabilities in accord with sound planning principles, the Fair Housing Amendments Act of 1988 (FHAA), and case law. These policy guidelines do not suggest that any community or state with less restrictive zoning provisions should make their zoning provisions more restrictive.

Exclusionary zoning practices

Limiting the number of unrelated individuals who can dwell together has been one of the most commonly used zoning techniques to exclude community residences from singlefamily districts.

The definition of family in most zoning codes allow no more than three, four, or five unrelated individuals to occupy a dwelling unit. Some allow no unrelated people to live together, even as roommates.[10] The U.S. Supreme Court upheld these restrictive definitions in *Village of Belle Terre v. Borass*[11]. Since most community residences need six or more residents to succeed therapeutically and financially, this restriction has effectively blocked most community residences from locating in the residential areas in which they need to locate.

Another common technique has been to require a special use permit for a community residence to locate in a residential district.[12] At a public hearing, an applicant must demonstrate that its proposed land use meets the criteria for granting a special use permit. In the case of community residences, neighbors commonly claim that the proposed community residence will reduce property values and introduce crime and congestion to the neighborhood. Many opponents assert that the

community residence is a business rather than a dwelling. In many allwhite communities, opposition is driven by a fear of racial integration, namely that group home residents and staff may be of African ancestry. All of these objections reflect false impressions of community residences and their occupants.

City officials quite often yield to objections by neighbors and reject the application of the community residence even when the applicant demonstrates it meets the criteria for awarding the special use permit. This was the scenario that led to the U.S. Supreme Courts 1985 decision in *City of Cleburne v. Cleburne Living Center* where the Court ruled the city had illegally denied the group homes special use permit based on the neighbors unfounded fears and myths about the group home and its residents.[13]

This technique is extremely effective at limiting the housing opportunities for people with disabilities who need a community residence to live in. When a special use permit is required, the buyer usually seeks to purchase the property with a clause that makes the sale contingent on receiving the special use permit. That sort of provision is quite common in the sale of commercial property, but extremely rare in the sale of owneroccupied residential property. Few homeowners can afford to sell their houses subject such a contingency clause. Most homeowners need the proceeds from the sale of their current house to buy a new one. Consequently, few homeowners are willing to sell to a group home operator who insists on this kind of contingency clause and few group home operators can afford to take the risk that their special use permit application will be denied and theyll be stuck with a house they cannot use as a group home.

In 1974 the American Society of Planning Officials (one of APAs predecessor organizations) surveyed 400 U.S. cities and found that the zoning ordinances of fewer than 25 percent provided specifically for community residences. Of those that mentioned group homes or halfway houses, the vast majority either prohibited them from singlefamily districts or required them to obtain a special use permit to locate in such residential zones.[14]

Ten years later, the zoning picture for community residences was still grim. The General Accounting Office found that 65.5 percent of the time local zoning ordinances or practices prevented or made it difficult for group homes for people with developmental disabilities to locate in the singlefamily districts their operators preferred.[15] Subsequent recent research prior to adoption of the Fair Housing Amendments Act of 1988 found that little had changed.[16]

Role of the Fair Housing Amendments Act of 1988

Rather than simply add people with disabilities to the list of protected classes under the Fair Housing Act, Congress added a new section to the act that declared 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.[17]

Much of the FHAA litigation has revolved around the issue of reasonable accommodation. Given this statutory language, it is hard to see how anybody can contend that the FHAA requires that community residences be treated the *exactly the same* as singlefamily residences. The statute requires only that a reasonable accommodation be made in a citys zoning ordinance to give people with disabilities an equal opportunity to use and enjoy a dwelling. This does not mean that they have a right to dwellings they cannot afford to buy or rent. It does not mean that a city must change its zoning to allow communes, boarding houses, or fraternities in its most exclusive singlefamily districts.

But this provision does mean that a city is required to bend its zoning rules to enable *members of the protected class,* many of whom need a community residence living arrangement to live outside an institution, to establish such residences in singlefamily and multiplefamily zoning districts. And it means that *a city cannot impose additional barriers to community residences for people with disabilities.*

Consequently, if a zoning ordinance defines family as any number of unrelated persons living together as a singlehousekeeping unit, the locality cannot impose any additional restrictions on community residences. A community residence which, of course, constitutes a singlehousekeeping unit with 12 unrelated residents complies with this definition of family.

However, if a zoning ordinance places a cap on the number of unrelated people who can dwell together, the FHAA requires the local ordinance to make a reasonable accommodation to enable community residences for people with disabilities to locate in every zoning district where residences are allowed. While the FHAA does not mention zoning or group homes, its legislative history provides a clear picture of what the FHAA sought to accomplish:

These new subsections would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. 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 or imposition of health, safety or landuse requirements on congregate living arrangements among nonrelated 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 discriminating against persons with disabilities.

The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. *The Act is intended to prohibit the application of special requirements through landuse regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.*[18] [emphasis added]

The legislative history goes on to suggest that restrictions on community residences that are based on fact, not fiction, may be legal. The paragraph that follows in the House Committee Report suggests that municipalities can impose rationallybased zoning regulations on community residences:

Another method of making housing unavailable has been the application or enforcement of otherwise neutral rules and regulations on health, safety, and landuse 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.[19]

The FHAA essentially codified the majority opinion of the courts regarding community residences. For more than 20 years, the vast majority of court decisions involving attempts to locate community residences in singlefamily zoning districts found community residences to be akin to the traditional family[20] and constitute functional families that belong in singlefamily zones unlike fraternities and sororities, communes, and other loose, temporary group living arrangements.[21]

It is clear from court decisions under the FHAA that when a jurisdictions definition of family does not cap or limit the number of unrelated individuals who may occupy a dwelling unit the FHAA prohibits imposing additional zoning requirements on community residences for people with disabilities.[22]

Unlike capless communities, jurisdictions that place a limit on the number of unrelated persons who can live together, can regulate community residences to an extent. Court decisions strongly suggest that zoning restrictions on community residences can be legal if you can answer yes to all three of the following questions:

- Is the proposed zoning restriction intended to achieve a legitimate government purpose?
- Does the proposed zoning restriction actually achieve that legitimate government purpose?
- Is the proposed zoning restriction the least drastic means necessary to achieve that legitimate government purpose?

In *Bangerter v. Orem City Corporation,* the Tenth Circuit articulated these questions a bit differently. The court stated that [r]estrictions that are narrowly tailored to the particular individuals affected could be acceptable under the FHAA if the benefits to the handicapped in their housing opportunities clearly outweigh whatever burden may result to them.[23]

Findings

1 Community residences are a residential use of land.

For zoning purposes, community residences are much closer in terms of land use to a residence ordinarily occupied by a conventional family than any other land use. The majority of courts have ruled that are a community residence is the opposite of an institution, boarding house, or a commercial use.

2 Community residences have no effect on the value of neighboring properties.

More than 50 studies have examined their impact on property values probably more than for any other small land use. Although they use a variety of methodologies, all researchers have discovered that group homes and halfway houses do *not* affect property values of even the house next door. They have no effect on how long it takes to sell neighboring property, including the house next door. They have learned that community residences are often the best maintained properties on the block. And they have ascertained that community residences function so much like a conventional family that most neighbors within one to two blocks of the home don't even know there is a group home or halfway house nearby.[24]

3 Community residences have no effect on neighborhood safety.

A handful of studies have also looked at whether community residences compromise neighborhood safety. The most thorough study, conducted for the State of Illinois, concluded that the residents of group homes are much less likely to commit a crime of any sort than the average resident of Illinois. It revealed a crime rate of 18 per 1,000 people living in group homes compared to 112 per 1,000 for the general population.[25]

4 Community residences do not generate adverse impacts on the surrounding community.

Other studies have found that group homes and halfway houses for persons with disabilities do not generate undue amounts of traffic, noise, parking demand, or any other adverse impacts.[26]

5 Community residences should be scattered throughout residential districts rather than concentrated in any single neighborhood or on a single block.

For a group home to enable its residents to achieve normalization and integration into the community, it should be located in a normal residential neighborhood. If several group homes were to locate next to one another, or be placed on the same block, the ability of the group homes to advance their residents' normalization would be compromised. Such clustering would create a *de facto* social service district in which many facets of an institutional atmosphere would be recreated and would change the character of the neighborhood.

Normalization and community integration require that persons with disabilities be absorbed into the neighborhood's social structure. The existing social structure of a neighborhood can accommodate no more than one or two group homes on a single block. Neighborhoods seem to have a limited absorption capacity for servicedependent people that should not be exceeded.[27] Social scientists note that this level exists, but they can't quite determine a precise level. Writing about servicedependent populations in general, Jennifer Wolch notes, At some level of concentration, a community may become saturated by services and populations and evolve into a servicedependent ghetto.[28]

According to one leading planning study, While it is difficult to precisely identify or explain, saturation is the point at which a community's existing social structure is unable to properly support additional residential care facilities [group homes]. Overconcentration is not a constant but varies according to a community's population density, socioeconomic level, quantity and quality of municipal services and other characteristics. There are no universally accepted criteria for determining how many group homes are appropriate for a given area.[29]

Nobody knows the precise absorption levels of different neighborhoods. However, the research strongly suggests that as the density of a neighborhood increases, so does its capacity to absorb people with disabilities into its social structure. Higher density neighborhoods presumably have a higher absorption level that could permit group homes to locate closer to one another than in lower density neighborhoods that have a lower absorption level.[30]

This research demonstrates there is a legitimate government interest to assure that group homes do not cluster. While the research on the impact of group homes makes it abundantly clear that group homes a block or more apart produce no negative impacts, there is concern that group homes located more closely together can generate adverse impacts on both the surrounding neighborhood and on the ability of the group homes to facilitate the normalization of their residents, which is, after all, their raison dtre.

6 Community residences should be licensed or certified to protect the welfare of their residents.

The individuals who occupy a community residence constitute a vulnerable population unable to fully care for themselves. Licensing helps ensure that the operator is qualified to furnish the requisite care and support services the group home residents need. It helps assure that staff is qualified and properly trained, and sets a minimum standard of care. The welfare of the residents of a community residence constitutes a legitimate government interest, narrowly tailored to the individuals who live in a group home, and whose benefits clearly outweigh whatever burden may result.

Policy Positions

Zoning is essentially performance oriented. When officials select the uses that are permitted as of right in each zoning district, they make the implicit assumption that these land uses belong in the district and do not generate adverse impacts on the surrounding properties. Special or conditional uses are those that belong in a district, but are known to produce adverse impacts under certain conditions unless precautions are taken. The extensive research on the impacts of community residences shows that they generate no adverse impacts on the surrounding neighborhood as long as they are licensed and not clustered on a block. There is no need to subject community residences to special use permit procedures because the licensing and spacing threshold issues are purely factual questions that can be determined administratively and do not require the extra scrutiny of a special use permit hearing.

General Policy Position

Based on sound planning and zoning principles, the American Planning Association recognizes that community residences for people with disabilities are residential uses that should be allowed as of right in all zoning districts where other residences are permitted uses. When the proposed community residence complies with the jurisdictions zoning code definition of family, no additional restrictions can be imposed. When the number of residents in the home exceeds the cap on the number of unrelated individuals set in the definition of family, the jurisdiction should amend its zoning code to make a reasonable accommodation to provide for community residences in all residential districts within the capacity of the jurisdiction to absorb additional community residences into its social structure.

Specific Policy Positions Supported by the American Planning Association and its chapters

POLICY 1: **A proposed community residence for people with disabilities that complies with the jurisdictions definition of family should be allowed as of right in all residential districts under the definition of family. (Additional) Zoning requirements that are more restrictive than those applicable to residential uses in the underlying district are not permitted**.

By adding people with disabilities to coverage of the Fair Housing Act, the Fair Housing Amendments Act of 1988 effectively prohibits placing additional zoning requirements on a community residence for people with disabilities that otherwise meets the zoning code requirements for other residential uses.

POLICY 2: **When a proposed group home for persons with disabilities does not comply with the jurisdictions definition of family, then the jurisdiction is required to make a reasonable accommodation in its zoning code to allow group homes for people with disabilities as of right in all residential districts if it meets these two requirements:**

1. That a rationally based spacing requirement be provided to avoid an undue concentration of community residences and
2. When the proposed group home or its operator must be licensed or certified by the appropriate state, national, regional, or local licensing or certification body.

If a proposed group home fails to meet both tests, then a zoning ordinance should allow the operator to apply for a special use permit.

The Fair Housing Amendments Act of 1988 requires jurisdictions to make a reasonable accommodation to enable community residences for people with disabilities to locate in residential districts. Such accommodations must be the least drastic necessary to actually achieve a legitimate government purpose. Based on sound planning principles and the extensive evidence found by studies on the impacts of community residences, the American Planning Association believes that this approach outlined here constitutes the *maximum* permissible degree of zoning restrictions.

A oneblock spacing distance appears to be long enough to assure that community residences achieve the normalization they seek for their residents and help preserve the residential character of a neighborhood. Concentrating or clustering several community residences on a block can recreate an institutional atmosphere exactly the opposite of what community residences seek to achieve.

Since the residents of a community residence are a vulnerable population, requiring licensing or certification helps assure their welfare and safety in the least intrusive manner.

Group homes include recovery homes for people with drug or alcohol addictions. Like other group homes, recovery homes are longterm residences that do not limit how long individuals may live there. They should not be confused with halfway houses for people with disabilities, including drug or alcohol addiction.

POLICY 3: **When a proposed halfway house for persons with disabilities does not comply with the jurisdiction's definition of family, then the jurisdiction is required to make a reasonable accommodation in its zoning code to allow halfway houses for people with disabilities as of right in all multiplefamily residential districts if the proposed halfway house meets these two requirements:**

1. That a rationally based spacing requirement be provided to avoid an undue concentration of community residences and
2. When the proposed group home or its operator must be licensed or certified by the appropriate state, national, regional, or local licensing or certification body.

If a proposed group home fails to meet both tests, then a zoning ordinance should allow the operator to apply for a special use permit.

From a zoning perspective, halfway houses perform more like multiplefamily housing than singlefamily housing. They don't emulate a family quite as closely as a group home does. They billet many more people. They place a limit on length of residency, unlike a group home which is a more permanent living arrangement akin to singlefamily housing.

POLICY 4: **Halfway houses should be allowed in all singlefamily zones by special use permit due to their multiplefamily characteristics that warrant the extra scrutiny provided by the special use permit or comparable review process when locating in a singlefamily district.**

On many occasions the operator of a halfway house may prefer to locate it in a singlefamily district. Halfway houses are not, per se, incompatible with singlefamily homes. However, the heightened scrutiny of a conditional use permit hearing is warranted to assure that a proposed halfway house will be compatible with the other land uses in a singlefamily district. The standards to apply are the same ones used for other special uses.

POLICY 5: **Local planners should, on an informal basis, seek to facilitate communication between the operators of proposed community residences and the surrounding community to help foster full integration of the residents of a community residence into the community. Planners should help neighbors learn how each proposed community residence emulates a family and how it serves as a residence that is properly located in a residential zone, not an institutional use that belongs outside residential districts. They should disseminate to neighbors and public officials the findings of the extensive research on the absence of adverse impacts of community residences on the surrounding community**.

Authority

1. *See* M. Jaffe and T. Smith, *Siting Group Homes for Developmentally Disabled Persons* (American Planning Association Planning Advisory Service Report No. 397 (1986); D. Lauber and F. Bangs, Jr., *Zoning for Family and Group Care Facilities* (American Society of Planning Officials PAS Rep. No. 300, 1974); and N. Williams, *American Land Planning Law* 12, 17, 25 (1988, Supp. 1994).

2. *See* N. Williams, *American Land Planning Law* 12, 17, 25 (1988, Supp. 1994).

3. Fair Housing Amendments Act of 1988, 42 U.S.C. 3604(f)(1) et. seq.

4. Gailey at 9798.

5. H. R. Turnbull, III, *CommunityBased Residences for Mentally Handicapped People* 12 (1980). Some courts have found this distinction to be crucial when determining that group homes function as families and are residential uses allowable in residential zoning districts.

6. Oxford House, which has been the subject of so much FHAA litigation falls somewhere between the group home and halfway house. Unlike the halfway house, Oxford House places no limit on the length of stay. Unlike a group home, or even halfway house, Oxford House has no staff. The residence is run by its officers who are elected periodically from among its residents. Unlike a group home, Oxford House needs 10 to 15 residents to function successfully, both therapeutically and financially. The courts have generally construed Oxford House to be a group home.

7. See D. Braddock, R. Hemp, L. Bachelder, G. Fujiura, *The State of the States in Developmental Disabilities* 8 (4th ed. 1994); Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 et. seq.

8. Id. at 12.

9. This policy guideline focuses solely on the zoning treatment for group homes and halfway houses for people with disabilities, the two most common types of community residences. Other types of community residences may warrant zoning treatment different from that recommended here.

10 D. Lauber, Group Think, in *Planning* 11, at 12 (October 1995).

11. 416 U.S. 1 (1974).

12. Also known as a conditional use permit, the special use permit was designed to allow for extra scrutiny to be applied to land uses that belong in a zoning district, but that may generate adverse impacts unless certain conditions were observed. Robert Leary, *Zoning*, 439 William Goodman and Eric Fruend, eds., *Principles and Practices of Urban Planning* (International City Management Association, 1968).

13. 105 S. Ct. 3249 (1985).

14. D. Lauber and F. Bangs, Jr., *Zoning for Family and Group Care Facilities* 9 (American Society of Planning Officials PAS Rep. No. 300, 1974).

15. General Accounting Office, *Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled* 61 (1983). Several regional studies have also found that few municipal zoning ordinances provided for community residences. In 1983 it was found that only four of the 31 municipalities in the Seattle, Washington, area defined the term group home and that only three allowed them as a permitted use in even one residential district. Eighteen allowed them by special use permit in at least one zoning district, not necessarily residential, and 13 did not provide for them at M. RitzdorfBrozovsky, *Impact of Family Definitions in American Municipal Zoning Ordinances* 119, 214215 (1983) (unpublished dissertation, University of Washington). A California study found that not a single municipality in suburban San Francisco allowed group homes for more than five residents as a permitted use in residential districts; only one allowed group homes for five or less residents as a permitted use in all residential districts; two allowed them as a permitted use in some residential districts; nine allowed them as special uses in some residential districts; and seven did not allow group homes at all. Bay Area Social Planning Council, *Effect of Zoning Regulations on Residential Care Facilities in San Mateo County: Report and Recommendations of the Study Committee C7* (March 1970) . In New Yorks suburban Westchester County, only one of 33 communities allowed group homes as of right in residential districts. S. Hettinger, *A Place They Call Home: Planning for Residential Care Facilities* 33 (Westchester County Dept. of Planning 1983).

16. M. Jaffe and T. Smith, *Siting Group Homes for Developmentally Disabled Persons* (American Planning Association Planning Advisory Service Report No. 397 (1986).

17. 42 U.S.C. 3504(f)(3)(B).

18. H.R. Rep. No. 711, 100th Congress 2d Session, reprinted in 1988 U.S.C.C.A.N. 2173, (1988).

19. H.R. Rep. No. 711, 100th Congress 2d Session, reprinted in 1988 U.S.C.C.A.N. 2173, (1988) (emphasis added).

20. *City of White Plains v. Ferraioli,* 313 N.E.2d, 756, 758 (citation omitted).

21. Norman Williams has kept a running tally of these cases in his treatise, 2 Williams, American Land Planning Law 52.12 (1987, Supp. 1994). Over 90 judicial decisions involving community residences for people with disabilities and definitions of family and other zoning restrictions are cited there. Pre1988 decisions run three to one in favor of allowing community residences for people with disabilities in singlefamily districts despite restrictive definitions of family or requirements for a special use permit. This figure includes only those cases that involved community residences for people with disabilities, not other populations not subsequently covered by the 1988 amendments to the Fair Housing Act.

22. See, *Oxford HouseEvergreen v. City of Plainfield,* 769 F. Supp. 1329 (D.N.J. 1991) (since Oxford House complied with citys capless definition of family and there is no state license required to operate an Oxford House the city could not disallow the Oxford House from the singlefamily district in which it located); *Support Ministries for Persons with AIDs v. Village of Waterford,* New York, 808 F. Supp. 120 (N.D. N.Y. 1992) (city must issue the permits sought to establish home for persons with AIDS under definition of familyas opposed to boarding house); *Merritt v. City of Dayton,* No. C391448 (S.D. Ohio, April 7, 1994) (3,000foot spacing requirement struck down where home met definition of family); *Marbrunak, Inc. v. City of Stow, Ohio,* 1992 U.S. App. LEXIS 20455 (parents of four grown women with developmental disabilities established a family consortiumhouse as a permanent residence for their daughters with support staff in s singlefamily district; city sought to require special use permit as a boarding house and to require additional safety code requirements because the residences had developmental disabilities; court rules that the home complied with the citys capless definition of familyand, since no state license was required to operate it, the house must be treated the same as other residences.

23. 1995 WL 10478 (10th Cir. Utah).

24. For a comprehensive compilation of descriptions of over 50 of these studies, see 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 (CPL Bibliography No. 259, April 1990); M. Jaffe and T. Smith, *Siting Group Homes for Developmentally Disabled Persons* (Am. Plan. A. Plan. Advisory Serv. Rep. No. 397 (1986). See e.g., City of Lansing Planning Department, *Influence of Halfway Houses and Foster Care Facilities Upon Property Values* (monograph 1976) (found no negative impacts on selling price of houses near or adjacent to halfway houses for people with alcohol addictions, adult exoffenders, juvenile exoffenders).

25. Daniel Lauber, *Impacts on the Surrounding Neighborhood of Group Homes for Persons with Developmental Disabilities,* 15 Illinois Planning Council on Developmental Disabilities (1986).

26. Daniel Lauber, *Zoning for Family and Group Care Facilities* at 10.

27. Kurt Wehbring, *Alternative Residential Facilities for the Mentally Retarded and Mentally Ill* 14 (no date) (mimeographed).

28. Jennifer Wolch, "Residential Location of the Service Dependent Poor," 70 *Annals of the Association of American Geographers*, at 330, 332 (Sept. 1982).

29. S. Hettinger, *A Place They Call Home: Planning for Residential Care Facilities* 43 (Westchester County Department of Planning 1983). See also D. Lauber, *Zoning for Family and Group Care Facilities* at 25.

30. Lauber, *Zoning for Family and Group Care Homes* at 25.

First published in the California Real Property Journal, a quarterly publication of the Real Property Law Section of the State Bar of California.

Alcoholism, Drug Addiction, and the Right to Fair Housing:

How The Fair Housing Act Applies To Sober Living Homes

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

I. INTRODUCTION

In 2007, staff working at a city in east Los Angeles County was notified that a small single family home in a quaint residential neighborhood was occupied by more than ten unemployed drug addicts, most of whom were on parole, with little or no supervision by authorities or others. Investigation of the home revealed that its two bedrooms had been illegally subdivided and furnished with bunk beds. The living room had been divided with drywall and make-shift plumbing had been installed for an extra toilet. A tent had been pitched in the backyard to house additional occupants, and the garage had been furnished with carpet, a toilet, a shower, and beds. In fact, all occupants were found to be parolees with alcohol or drug addictions, most were unemployed, and many had lived there for only a few days or more due to the frequency in turnover. To make matters worse, the home was located next door to a family with three children, across the street from another family with four children, and within walking distance of an elementary school bus stop.

Prompted by neighbor complaints, city councilmember outrage, and public safety concerns from police, the city took steps to vacate the home. These efforts met resistance. The property owner claimed that the residents were "disabled individuals" protected from dislocation under the Federal Fair Housing Act ("FHA" or the "Act"),[1] and that they were entitled to continue residing at that house because it was a "***sober living home***" which provided an environment of support and sobriety necessary for recovery.

Miles away, a multi-million dollar mansion is charging wealthy occupants thousands of dollars to reside in a serene environment, free of alcohol and drugs, to assist in recovery from addiction. When faced by complaints of neighboring properties, the operators of this facility also claimed that it was a "***sober living home***," protected from regulation pursuant to the FHA.

While in Orange County, whole sections of beachfront neighborhoods have been converted to so-called "***sober living homes***." The operators object to city and neighborhood complaints on the ground that their operations are protected by the FHA.

These scenarios may sound strange, but they are certainly true. They illustrate a challenging issue in residential land use and Fair Housing Act jurisprudence: Where should individuals undergo rehabilitation for alcohol and drug addiction? How does the Fair Housing Act affect local government's authority to regulate and restrict alcohol and drug recovery facilities? With the advent of "sober living homes" – homes designed to incorporate alcohol and drug addiction recovery into normal residential life – these issues have been pushed to the forefront in many communities and will likely face increasing attention as the popularity of sober living treatment advances.

This article summarizes the legal characteristics of sober living homes and how they are regulated under their relation with the FHA. In particular, this article illustrates how the FHA is being used by owners and residents of sober living homes to advance their establishment and operation, and it explores what local jurisdictions can do to regulate sober living homes in light of FHA requirements.

II. WHAT IS A SOBER LIVING HOME?

There are many variations among sober living facilities and operators; however, all emphasize the same facets of life under their roofs. The location of a sober living or alcohol recovery home in a drug free, single family neighborhood plays a crucial role in an individual's recovery by providing a supportive environment that promotes self esteem, helps create an incentive not to relapse, and avoids the temptations that the presence of drug use can create.[2]

A plethora of for-profit and non-profit organizations operate sober living facilities, ranging from the single landlord who rents his/her home to individuals with alcohol or drug addictions to the corporation that employs a full-time staff of treatment professionals and owns multiple facilities across numerous cities or states. A good example of the "sober living model" is Oxford House, a well-known network of sober living facilities that operate throughout the United States and internationally. Although each residence is an independent organization, the umbrella organization, Oxford House, serves as a network connecting other sober living homes in the area. According to Oxford House, 1,200 self-sustaining homes operate on its model, serving 9,500 people at any one time, totaling more than 24,000 annually.[3] Oxford House operates on the theory that those recovering from drug and alcohol addictions will remain sober if they live in a supportive environment with those suffering similar addictions.[4]

Whether sober living facilities follow the Oxford House model or some other approach, their locations vary from high end beach communities that mirror resort living, to dilapidated single family homes located in high crime neighborhoods plagued by poverty. Reactions to sober living facilities can be similarly varied. Some view sober living facilities as service providers, providing much-needed support to individuals recovering from addictions. For others, sober living facilities are viewed as blight in the community, often becoming most problematic when neighbors and nearby residents learn that large numbers of alcohol and drug addicts reside together near them.

Nearly any single family home can become a "sober living home" by adopting that label and renting rooms to individuals with alcohol or drug addictions. It is not uncommon for landlords seeking to maximize their rents to adopt the sober living moniker even though no actual sober living programs are implemented at the site. Abuses of the sober living model abound, with some single family homes housing upwards of twenty or thirty individuals under the guise of

"sober living" when, in fact, these homes provide no meaningful program for recovery and do not adhere to "legitimate" sober living guidelines.

This creates significant confusion for cities, counties, and other agencies charged with regulating residential land use and assisting disabled individuals. In perhaps the most well-known jurisdiction facing problems posed by sober living facilities, the City of Newport Beach has experienced an extreme concentration of sober living facilities, which have transformed neighborhoods from a relaxed beach going atmosphere to a quasi-clinical community providing services from a patchwork of residential buildings. In this context, neighborhood outrage prompted regulation by the city, ultimately precipitating an FHA lawsuit by sober living operators.[5]

Indeed, it is difficult for those agencies to discern between "legitimate" sober living facilities, which employ good faith measures to assist individuals in their alcohol or drug addiction recovery, from "illegitimate" facilities which use the "sober living" title as a front for questionable rental practices. This confusion can be complicated by the various state licensing provisions that regulate facilities providing care for the disabled or for those recovering from addiction. In California, the Department of Social Services[6] and the Department of Alcohol and Drug Programs,[7] are responsible for licensing and supervising specified facilities which may operate as sober living programs, or which may provide housing or services similar to that provided by unlicensed sober living facilities.[8] The California Attorney General has noted the difference between licensed facilities and non-licensed sober living homes. Licensed facilities are different "from facilities that simply provide a cooperative living arrangement for persons recovering from alcohol and other drug problems. The latter 'sober living environments' are not subject to licensing from the Department."[9] Such licensed facilities enjoy substantial protections from local regulation and therefore make it difficult for local agencies to police sober living homes and to prohibit "illegitimate" sites from operating.

III. HOW DOES THE FHA APPLY TO SOBER LIVING HOMES?

A. HISTORIC ROOTS DEFINING DRUG AND ALCOHOL ADDICTION AS A DISABILITY

The crux of the FHA's application to sober living facilities is based on the definition of a "disability." The FEHA does not address alcoholism or drug abuse as disabilities that would be protected under FEHA; however, it includes the definition of a "disability" found in the Americans with Disabilities Act ("ADA") if it provides results in "broader protection of the civil rights of individuals with a mental disability or physical disability . . . or would include any medical condition not included."[10] As amended in 1988, the FHA prohibits discrimination in housing on the basis of handicap. As amended, the Act defines "handicap" 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."[11]

In determining whether substance abuse would be considered a handicap, Congress' intent is important to discern.[12] Such intent was first formed when Congress first formed its intent when it adopted the Rehabilitation Act a few years prior to the FHA.[13] Under the Rehabilitation Act:

> "[I]ndividuals who have a record of drug use or addiction but who are not currently using illegal drugs would continue to be protected if they fell under the definition of handicap.... Just like any other person with a disability, such as cancer or tuberculosis, former drug-dependent persons do not pose a threat to a dwelling or its inhabitants simply on the basis of status. Depriving such individuals of housing, or evicting them, would constitute irrational discrimination that may seriously jeopardize their continued recovery."[14]

Ultimately, Congress determined that many terms of the Rehabilitation Act should apply to the FHA, and courts have later found that the term "physical or mental impairment" under the FHA includes diseases such as drug addiction (when it is not caused by current illegal use of a controlled substance) and alcoholism.[15] Thus, although many would not, at first glance, realize that a handicapped person includes one suffering from alcoholism or drug addiction; in fact the FHA extends its protections to such persons. In 2000, the Ninth Circuit held: "It is well established that individuals recovering from drug or alcohol addiction are handicapped under the Act [FHA]."[16]

B. ESTABLISHING ALCOHOL OR DRUG ADDICTION AS A DISABILITY UNDER THE FHA

To demonstrate a disability under the FHA, a plaintiff must show: (1) a physical or mental impairment that substantially limits one or major life activities, (2) a record of having such an impairment, and (3) that the plaintiffs are regarded as having such an impairment.[17] However, a plaintiff must show not only that he was an alcoholic in the past, but also that his past alcoholism substantially limited one or more major life activities.[18] 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.[19]

However, to qualify as a handicap under the FHA, the person must not be currently abusing alcohol and/or drugs. The FHA expressly limits protection to not include "current, illegal use of or addiction to a controlled substance."[20] Although the FHA does not define what it means to be a current drug user, courts rely upon the ADA and the Rehabilitation Act to determine what is "current drug use." At the time of the alleged discrimination the plaintiff must prove he was not using illegal drugs – even if the person later uses illegal drugs again at the time the complaint is filed or at the time of trial.[21] Thus, an individual with an alcohol or drug addiction may qualify for preferential housing rights pursuant to the FHA.

C. NEXUS BETWEEN THE ADDICTION DISABILITY AND HOUSING NEED

Of course, disability due to an alcohol or drug addiction does not immediately entitle an individual to live wherever he or she wants. To qualify as disabled under the FHA, there must be a ***nexus*** that links the treatment of the disability with the need for housing. In the context of sober living homes this nexus arguably exists when living at a particular location is, in and of itself, a means of treating the alcohol or drug disability.

Typically, this nexus is shown by asserting that a supportive, sober residential environment is necessary for sobriety and addiction recovery. Individuals with alcohol or drug addiction allege that such environments foster sobriety, and encourage trust and camaraderie between residents that is necessary for recovery. Plaintiffs argue that they would suffer substantial limitations and risk "falling off the wagon" if not for living in a sober living environment. Courts have agreed with this theory.[22]

Sober living advocates assert this nexus when claiming FHA protection over sober living facilities. For example, when recovering alcohol and drug addicts live together, "house rules" prohibiting the consumption of alcohol and drugs, requiring attendance at "house meetings" to encourage sobriety, mutual support are established. House rules are intended to maximize efforts to cope with, and overcome addiction. Merely living in a sober house may be viewed as a necessary means of accommodating one's disability such that the FHA essentially entitles the right to live there.

Applying the FHA in this way opens the door to any number of living arrangements intended to assist those recovering from alcohol or drug addiction. Essentially, anywhere a sober environment is provided, or where support for addiction recovery is encouraged, might be viewed as location where an alcohol or drug addict may assert FHA protections.

For example, in 2007, the City of Newport Beach attempted to address the "clustering" of multiple unlicensed sober living homes by imposing restrictions on the establishment and operation of "group residential uses," aimed at curbing a perceived saturation of sober living facilities in neighborhoods.[23] Such efforts prompted a lawsuit by an operator, "Sober Living by the Sea," alleging FHA violations and other claims.[24] In addition, Sober Living by the Sea filed a complaint with the U.S. Department of Housing and Urban Development alleging violations of the Federal housing laws. According to the City's website, the City has since settled the lawsuit with Sober Living by the Sea and other sober living home operators.[25] However, certain sober living facilities remain in operation despite continued opposition from residents, and recent reports have indicated that lawsuits by other sober living operators continue.[26] Such events illustrate that FHA may significantly complicate local agencies' efforts to regulate sober living operations, and highlight the means by which sober living operators can challenge local regulation.

D. WHAT LOCATIONS MAY QUALIFY AS SOBER LIVING HOMES PROTECTED BY THE FHA?

Despite the broad application of FHA requirements to locations claiming to offer a sober living experience, there are some limits to applying the Act.

First, the FHA itself is limited to "dwellings." The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[27] A dwelling 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."[28] Although the FHA does not define what a residence is, courts have interpreted the definition of a residence to be the ordinary meaning of the term.[29]

The definition of a dwelling is important because many sober living homes offer short term residencies and experience high turnover rates. Because tenancies at sober living homes vary dramatically the way residents treat their facilities and how they view these facilities are important indicators for whether the structure will be considered a dwelling under the FHA.

Although a dwelling is covered by the FHA, temporary shelters are not. Dwellings must be intended for use as a residence. Two factors determine whether a facility is a dwelling under the FHA: first is whether the facility is intended or designed for occupants who intend to remain at the facility for a significant period; and second is whether the occupants of the facility would view it as a place to return to during that period.[30] Courts typically find that a "significant period of time" is longer than one would normally stay in a motel and can be for as short as two weeks.[31]

Locations viewed as "temporary dwellings," such as boarding homes, halfway houses, flop houses, and similar locations, have been found to be "dwellings" under the FHA.[32] Notably, however, a homeless shelter is ***not*** considered a "dwelling" protected under the FHA because it only provides emergency, overnight shelter.[33] Thus, application of the FHA to such "temporary" sober living establishments may be of limited use in some contexts.

Similarly, in reviewing the differences between a "home" and a "hotel," the more occupants treat the structure like their home by performing tasks such as cooking their own meals, cleaning their own rooms and the premises, doing their own laundry, and spending free time in the common areas the more likely courts will determine that a structure is a dwelling for purposes of the FHA.[34]

Under these definitions, a sober living home may qualify as a home or a hotel depending on how the living situation is arranged. Often, a sober living home does not provide anything more than a bed, while other homes provide actual care, such as prepared meals and cleaning services. Although many sober living homes provide some form of counseling and guidance, sparse supervision is not uncommon and residents who can care for themselves are often allowed a high degree of independence.

IV. HOW DOES A SOBER LIVING HOME ASSERT THE FHA?

FHA violations may be established either by (1) showing ***disparate impact*** based upon a practice or policy of a particular group; or (2) by "showing that the defendant failed to make ***reasonable accommodations*** in rules, policies, or practices so as to afford people with disabilities an equal opportunity to live in a dwelling."[35]

A. DISPARATE IMPACT

To prove disparate impact under the FHA, a plaintiff must demonstrate that the challenged practice actually or predictably results in discrimination.[36] If a plaintiff is able to establish discrimination, the defendant must then prove his or her action further a legitimate government interest and that there is no alternative available to serve the interest would have a less discriminatory effect.[37] Further, when plaintiffs are merely requesting to remove an obstacle to housing, rather than creating new housing units, a local government must establish a more substantial justification for its conduct.[38]

In the context of sober living homes, it is often difficult to prove a disparate impact because similar group living arrangements such as fraternity or sorority houses and other group homes may also be excluded from a particular zone, so a sober living home would have to prove that the exclusion disparately impacts substance abusers more so than those living under different group arrangements.[39] Other types of land use or building regulations, such as building codes, may also be of little value to plaintiffs asserting disparate impact claims because such regulatory measures are applied uniformly.[40]

However, disparate impact analysis is easier to prove when there is evidence of discriminatory intent. For example, in *Oxford House v. Town of Babylon*, the town attempted to evict residents of a sober living home from a single family home because the town code defined a single family home as a building established for the residency of not more than one family.[41] In *Town of Babylon*, an Oxford House was established in a single family neighborhood. Soon thereafter nearby residents complained that they did not want recovering alcoholics and drug addicts living in their neighborhood.[42] Because the record of town council meetings contained discriminatory statements against alcoholics, the court found the town had evicted a sober living home from a single family neighborhood because it disliked alcoholics.[43]

Plaintiffs requested that the town modify the definition of a family. Although the court agreed that the town's interest in its zoning ordinance was substantial, it found that evicting the residents from a sober living home did not further that interest because evidence showed that the house was well maintained, the town had not received many complaints from neighbors, and the house did not alter the residential character of the neighborhood.[44] Relying on the FHA, the court balanced plaintiff's claim of discriminatory impact against the City's justification.[45] When balancing the interests, the discriminatory impact was far greater than the town's interests which may not have been supported by substantial evidence. Further, the court found that two factors weighed heavily in plaintiff's favor. First, evidence of discriminatory intent by the town; and second, evidence that plaintiff wanted the town to eliminate an obstacle to housing rather than suing the city to compel the city to building housing.[46] Consequently, plaintiff had proven a disparate impact under the FHA because the town's policy of preventing a sober living home from being established in a single family neighborhood disparately impacted individuals with alcohol and drug addiction.[47]

B. REASONABLE ACCOMMODATION

Under the FHA, it is a discriminatory practice to refuse to make "a 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."[48] Under the FHA, a handicap is defined as a physical or mental impairment which substantially limits one or more major life activities of a person.[49] As stated by the Central District of California in *Behavioral Health Services v. City of Gardena*:

> "[A city] must accommodate plaintiffs when the accommodation is necessary [i.e., when plaintiffs' disability prevents them from use of the property unless exceptions are granted] and does not impose undue financial or administrative burdens, or require a fundamental alteration of the zoning program."[50]

An accommodation is reasonable under the FHA if it does not cause undue hardship, fiscal or administrative burdens on the municipality, or does not undermine the basic purpose that the zoning ordinance seeks to achieve.[51] Courts have applied the reasonable accommodations requirements to zoning ordinances and other land use regulations and practices thereby requiring cities to make reasonable accommodations for those disabled under the FHA's definition.[52] Under similar laws, courts have held that even one incident of a denial of reasonable accommodation is sufficient to trigger a violation.[53] Thus, a three-part test is applied in determining whether a reasonable accommodation is necessary: (1) the accommodation must be reasonable and (2) necessary, and must, (3) allow a substance abuser equal opportunity to use and enjoy a particular dwelling.[54] To determine if an accommodation is reasonable the Court must determine whether the accommodation would undermine a legitimate governmental purpose and effect of an existing zoning ordinance, and must consider the benefit to the handicapped person, and the costs associated with such an accommodation.[55] In particular, an accommodation is unreasonable if it would cause an undue financial and administrative burden on the local jurisdiction.[56] In sum, a reasonable accommodation changes a rule of general applicability to make it less burdensome on a handicapped person.

Consequently, courts have held that 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.[57] However, a municipality is not required to make fundamental or substantial modifications from its municipal or zoning code to accommodate a disabled person.[58] The crux of the issue often becomes what is considered a reasonable versus a substantial modification.

A local government or private entity must make an accommodation if it is reasonable and necessary to afford handicapped persons equal opportunity to use and enjoy housing.[59] A court will look at many factors to determine whether or not an accommodation would be reasonable, including whether the accommodation would undermine the legitimate purposes of zoning regulations and the benefits that the accommodation would provide to the handicapped person.[60] Further, a reasonable accommodation cannot require an undue financial and administrative burden on a local government.[61] However, the city may not impose unreasonable restrictions if it grants a reasonable accommodation.[62]

C. STANDING AND EXHAUSTION OF REMEDIES

One who seeks a reasonable accommodation from a governmental regulation, ordinance or practice must do so through the agency's established procedure to obtain the relief that he/she seeks. A plaintiff must first provide the governmental entity an opportunity to accommodate the plaintiff through the entity's established procedures used to adjust the neutral policy in question.[63]

The first hurdle plaintiffs must establish when challenging an ordinance or decision by a government body is whether the plaintiff has ***standing***. Issues concerning standing under the FHA are similar to those under other laws for the disabled, such as the ADA. In general, those rules permit non-disabled persons to assert claims under the law on behalf of individuals who are disabled.[64] Under the FHA, one has standing if one would have standing under Article III of the U.S. Constitution.[65] Under the FEHA, any "aggrieved person" may bring suit to seek relief for a discriminatory housing practice.[66] An "aggrieved person" is one who has been injured by a discriminatory housing practice.[67]

An organization is allowed to bring a suit on its own under the FHA when its purpose is frustrated and when it expends resources because of a discriminatory action.[68] For example, in *Fair Housing of Marin v. Combs*, Fair Housing of Marin ("FHM") filed suit alleging discrimination against African-Americans which caused the group to suffer injury to its ability to provide outreach and education to end unlawful discrimination practices and alleging it had to spend additional resources in response to defendant's discriminatory actions.[69] The Ninth Circuit held that FHM established standing to sue under the FHA because the defendant's illegal housing discrimination injured FHM's outreach programs, requiring it to implement alternate programs in the community to compensate for the discrimination.[70]

In addition, an organization is allowed to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interest it seeks to vindicate is germane to the organization's interests; and (3) neither the claim asserted nor the relief requested requires the individual participation of its members.[71]

Perhaps more important than who may bring a lawsuit is whether the lawsuit is ***ripe***. "To prevail on a reasonable accommodation claim, 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."[72] In *Oxford House v. City of St. Louis*, the Eighth Circuit found that plaintiff did not have a claim of failure to make a reasonable accommodation when plaintiff had not applied for a variance even after the city had requested that plaintiff (a sober living home with eight residents) first apply for a variance.[73] The court stated, "The Oxford Houses must give the City a chance to accommodate them through the City's established procedures for adjusting the zoning code."[74] However, a plaintiff is not first required to appeal a decision through the local body and may file suit once a reasonable accommodation is first denied.[75] The first approval may require a public hearing which is not considered unreasonable if applied evenly to the handicapped and non-handicapped.[76] Therefore, a public hearing may be required to receive a reasonable accommodation and that alone is not considered unreasonable.

Accordingly, although a disabled individual must first request a reasonable accommodation and follow the local jurisdiction's procedures to receive a reasonable accommodation, it may not have to follow the appeal procedure once the first denial occurs. It is important to note this because a lawsuit is subject to dismissal without a determination of the merits if there is no standing or the issue is not ripe for review.

V. PITFALLS AND POSSIBILITIES IN REGULATING SOBER LIVING SITES

As the foregoing makes clear, FHA claims involving sober living facilities typically involve two competing interests: (1) the interests of individuals recovering from addition, often represented by landowners or organizations which provide addiction recovery services; versus (2) the interests of residents who seek to preserve the "family-friendly" character of their neighborhoods, often represented by city attorneys, county counsel, or other public agency attorneys (or attorneys hired by citizen groups opposed to sober living facilities in their neighborhoods). These disputes arise after a claimed sober living home is established in a single family residential neighborhood bringing with it unfamiliar and seemingly unrelated faces living together, congregating on porches and front yards, or wandering nearby streets. Disturbances arise, eventually leading to phone calls to the police, complaints to the local officials, and ultimately for demands by the city or county to intervene and shut down the sober living home.

It is at this point where FHA requirements may first become a concern. Faced with such claims, local jurisdictions may determine that a sober living site does not operate as a "single family home," but rather constitutes a "board-and-care facility," "rooming house," or similar type of group living facility which may not be permitted in a single family neighborhood, or which my be subject to land use or business permit requirements in order to lawfully operate. Typically, code enforcement citations are issued or other legal steps are taken to enforce such provisions against the facility, in response to which the facility operator or owner raises the FHA as a basis for challenge, asserting that enforcement is unlawful because doing so would infringe upon the fair housing rights of residents, each of which are "disabled" due to their alcohol or drug addiction.

A. THE LEGAL ENVIRONMENT IN WHICH FHA CLAIMS ARE MADE

A local jurisdiction's authority to regulate sober living facilities is derived from its general police powers. Article XI, Section 7, of the California Constitution grants local governments the authority to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[77] Additionally, the Planning and Zoning Law[78] authorizes cities and counties to regulate the use of buildings and land for residential purposes,[79] and numerous other provisions vest in local agencies broad authority to regulate residential uses and housing within their jurisdictions.[80] When disputes involving sober living facilities arise, cities and counties often seek to regulate the facility's operations or prohibit its existence entirely. *FHA claims are therefore pitted against these authorities. As such, issues triggered by sober living sites often concern local government's legitimate state law powers, and whether they are preempted by the interests sought to be advanced by the FHA.

Significantly, because sober living facilities are a relatively new form of residential use, and because they involve the interplay of unique and technical legal provisions, most local jurisdictions lack a standard land use definition for such facilities in their zoning and regulatory codes. Thus, when problems with sober living facilities arise, municipalities must categorize the facilities within existing land use definitions in order to regulate them. Many local codes define "boarding houses," "rooming houses," or similar types of "group living facilities" as unique residential use which are regulated according to established zoning provisions, often requiring the owner to obtain a Conditional Use Permit or other discretionary approval for the use to occur.

Therefore, a municipality faced with a problematic sober living facility may, for example, assert that the facility is an un-permitted boarding house, and may cite the owner or pursue legal action to shut the facility down based on such authority. Alternatively, where the sober living facility is located in single family zone, a municipality may assert that the sober living facility is an unlawful multi-family use which is prohibited in that location. Similarly, it may claim that that the facility operates as a residential "business," akin to a residential hotel or hostel rather than a residence, and therefore is prohibited in residential zones. Municipalities may also discover building code, housing code, and other technical problems with facilities that have been illegally remodeled to accommodate occupancies beyond that for which the structure was originally designed.

In response to such claims, the sober living operator may rely on the FHA to assert that the city's authorities are unlawful because they either: (a) create a ***disparate impact***, so as to discriminate against disabled individuals (i.e., those with an alcohol or drug addiction); or (b) require ***reasonable accommodation***, so as to grant the site an exemption from strict application of the city's authorities. Plaintiffs filing suit under the FHA often bring actions alleging both ***disparate impact*** and ***reasonable accommodation*** theories.[81] Of course, the analyses for each theory are different. Disparate impact analysis focuses on neutral policies that disparately impact handicapped persons,[82] whereas reasonable accommodation analysis focuses on whether a local jurisdiction could make an exemption to a policy to allow a handicapped person to use and enjoy a dwelling.[83]

Despite the restrictions imposed on a municipality's ability to enforce otherwise generally applicable zoning restrictions, there are some exemptions created by the FHA. Application of these exemptions, however, is often complicated. For example, in *City of Edmonds v. Oxford House,* the Supreme Court dealt with an FHA exemption allowing "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.[84] Specifically, the Court analyzed a provision of the City's zoning code governing areas zoned for "single family residences."[85] The section at issue defined "family as "persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons."[86] The Court held that the exemption did not apply to provisions designed to "foster the family character of a neighborhood," and instead applied only to occupancy limits seeking to prevent overcrowding in living quarters.[87] As such, the City's single family residence zoning requirement was not exempt from the FHA, and the City was required to permit operation of the facility.

The maximum occupancy exemption was also at issue in *Turning Point, Inc. v. City of Caldwell.*[88] After receiving complaints from its citizens regarding a dwelling that was housing homeless individuals suffering from disabilities, the City imposed a 15 person occupancy limit on the dwelling.[89] The City imposed the limitation "to preserve the integrity of the neighborhood."[90] However, the court invalidated the limitation after finding it "unreasonable."[91] Instead, the court ordered the occupancy set at 25, a number supported by the City Building Inspector's analysis of the dwelling.[92]

Another FHA exemption was analyzed in *Gibson v. County of Riverside*, which dealt with a City ordinance imposing age restrictions on persons occupying dwelling units in the zoned area.[93] Pursuant to the FHA, developments qualifying as housing for older persons ("HOP") can discriminate based on family status.[94] Analyzing the ordinance at issue, the court cited three requirements, recognized by congress, that must be met by housing developments seeking to qualify as a HOP: 1) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons; 2) the occupation of at least 80 percent of the units by at least one person 55 years of age or older and; 3) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.[95] While the individuals challenging the ordinance were not handicapped in *Gibson*, this exemption does apply to sober living homes, and is valid if the three requirements are met.

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.[96]

B. PRACTICE POINTERS FOR AGENCY COUNSEL AND SOBER LIVING ADVOCATES

Concerns are often greatest when the sober living operator is perceived as "illegitimate." For example, some operators offer housing to individuals with alcohol or drug addiction in "flophouses" or boarding homes designed to house as many individuals as possible where residents do not follow any sober living regimen and might not be in treatment for addiction. Indeed, the residents may themselves be viewed as vulnerable, emotionally or mentally disturbed individuals who are being taken advantage of because they have few other places to find housing; or they may be viewed as social deviants who feign disability in order to "work the system."

The problems such facilities pose to a neighborhood can be enormous because their residents often do suffer from one or more emotional or mental disabilities, are often unemployed, or loiter in and around the premises, congregate in yards, or create a fearful presence in the neighborhood which disrupts the "family-friendly" character of a traditional single family neighborhood. The outrage voiced by residents and neighbors in such circumstances can be extreme, and the operator may raise the FHA not as a legitimate basis for defense, but as a tactic to remain operating without governmental challenge.

Because of the deference, courts have shown to the FHA operators of "illegitimate" facilities have used the FHA and their residents' disabilities as a tool to avoid local government oversight. An operator facing city enforcement may, for example, assert the FHA's reasonable accommodation requirements as a shield to avoid liability and to coerce the city to allow the facility to remain operating. This stands in stark contrast to "legitimate" sober living facilities, some of which may be licensed by the state or affiliated with hospitals or respected clinics. Such "legitimate" facilities may face similar public outcry, and may likewise assert the protections of the FHA to avoid local government regulation.

For practitioners who represent cities, counties, or interest groups concerned about the potential impact that a sober living facility will have on a neighborhood, facing such claims can be challenging, as passionate residents and public officials demand prompt action ,while concern for potential liability for violating the FHA requires counsel to proceed very cautiously.

Often, applying the FHA's requirements strictly, methodically, and uniformly will "ferret-out" the legitimate sober living sites from those that merely use the FHA as a mask for otherwise unprotected operations. Counsel should consider answering the following questions:

1. Are the residents truly "disabled?" Only those with a disability are protected under the FHA. Counsel should verify the claimed disability prior to considering FHA claims. For example, merely claiming that a house is used for "sober living" is insufficient to establish protections under the FHA. Residents must actually be "disabled" meaning they must actually be recovering from alcohol or drug addiction. While an operator may have standing to assert FHA protections on their behalf, this does not waive the obligation to show that residents are in fact disabled. Sites which claim to be "sober living homes," but are fronts for flop-houses, may be unable to establish FHA protection. Residents' disabilities should be verified.

2. Is the site a "dwelling?" The FHA applies to "dwellings" only, and while it may be difficult to differentiate between a site which provides in-and-out transitional housing from a true "dwelling," courts have found that merely providing a place for someone to sleep for the night is insufficient. For example, motels are not dwellings, even though some other short term rental situations such as boarding houses, halfway homes, and flop houses are considered dwellings. Investigating the actual living conditions and terms of occupancy may help determine whether the site is a "dwelling" under the FHA, or a transitional facility outside the FHA's protections.[97]

3. Does mere "occupancy" at a site make it a "residence?" While case law has not addressed this point, a colorable argument could be made that the FHA applies only to "residences," and not to occupancies which are temporary or transitional in nature. If, for example, a sober living site has a weekly turnover of occupants, it may be a stretch to argue that the FHA was intended to apply to such sites because they do not function as true housing which the FHA was adopted to protect. "Legitimate" sober living facilities typically provide long-term residencies in order to provide a sufficient period for recovery. Focusing on the length of occupancy may be helpful in determining the legitimacy of the facility. Additionally, there is authority to support the proposition that such impermanent occupancies may be excluded from single family residential zones because they do not adhere to the "residential" character of those areas.[98] Although this issue has not been clearly delineated by the courts, excluding sober living sites on this basis may be proper both under the FHA and principles of zoning.

4. Has the ***nexus*** between the disability and the need for housing been established? The FHA applies where housing is needed in order to accommodate disability. Even when reasonable accommodation is sought, it must be "necessary" to address the disability.[99] Thus, in the context of sober living, it must be determined why living at a particular site serves the residents' alcohol or drug addiction. "Legitimate" sober living sites should be able to demonstrate this connection through group living arrangements that support sobriety, encourage recovery through mutual support of housemates, and provide services that help residents cope with their addictions. "Illegitimate" facilities may be unable to show such factors, or may have such routine turnover in occupancy that the connection is too tenuous to be valid.

5. Even if the FHA applies, must ***reasonable accommodation*** be granted? As noted previously, while disabled individuals are entitled to reasonable accommodation from government restrictions which impact their use or enjoyment of housing, such does not automatically exempt all contrary provisions. Rather, accommodation from government restrictions may be denied if it imposes undue financial or administrative burdens on the agency or requires a fundamental alteration of an agency's zoning provisions.[100] Therefore, rather than "rubber stamp" all requests for reasonable accommodation, a city or county may undertake a formal review of the request and weigh the financial, administrative, and zoning impacts that approving the request would have on the jurisdiction and surrounding community.

6. Can other agency procedures or entitlements resolve the problem? As noted previously, a disabled individual may not pursue reasonable accommodation unless he/she has first sought "traditional" approvals to alleviate barriers to equal use and enjoyment of a dwelling. Thus, where an agency requires an operator to obtain a Conditional Use Permit prior to establishing a sober living facility, the operator must apply for, and be denied, the CUP before he/she may request reasonable accommodation from the CUP requirement. Counsel for the agency may, in such circumstance, advise that the CUP be crafted so as to address the accommodations that the operator otherwise seeks, thus avoiding any FHA issues from arising. Alternatively, counsel may advise the agency to consider reasonable accommodation requests in conjunction with the CUP application, such that requested accommodations can become conditions within the CUP itself. Because these steps require the facility to submit information for agency evaluation, and culminating in a public hearing, employing such procedures may help identify "legitimate" sober living operators. Additionally, such procedures will create a record that will be useful in future proceedings involving the facility.

How an agency responds to a sober living facility often depends, in large part, on the politics of the community. Certain municipalities are known for their "progressive" stance toward accommodating individuals recovering from drug or alcohol addiction. Other municipalities may disfavor such facilities, and may seek to exclude all but the most exclusive sober living facilities from their jurisdictions. When facing those in the latter category, practitioners representing sober living operators, residents in sober living programs, or advocates for sober living facilities would be well served to answer the following:

1. Has verification of disabilities been provided? For FHA protections to apply, true disabilities must be established. Sober living advocates should be prepared to provide proof that residents at a sober living site have been diagnosed with an alcohol or drug addiction, are undergoing treatment for such addiction, or to provide such other evidence to substantiate residents' disabled status. When representing an organization asserting FHA protection on others' behalf, counsel may consider soliciting residents' consent to provide records of medical evaluation or treatment to substantiate disability status. However, counsel should be aware of privacy concerns and the laws governing privacy of health information, including the Federal Health Insurance Portability and Accountability Act (HIPAA).[101] Providing such evidence may go far to "legitimize" the facility and differentiate it from "illegitimate" sites disfavored by cities and counties.

2. Has a ***nexus*** between the disability and the accommodation been articulated? Courts have recognized that mutually-supportive group living arrangements may be an important accommodation for individuals with alcohol or drug addictions.[102] In order to demonstrate the importance of a sober living environment in recovery, sober living advocates should be prepared to produce evidence demonstrating the connection sober living arrangements have with treating residents' disabilities. Based on well-established precedent applying the FHA, if this showing is established, restrictions on operation may be difficult for a city or county to justify, and the legitimacy of the facility may be enhanced in the eyes of public officials charged with reviewing the site.

3. Is there evidence of ***disparate impact*** in application or enforcement? There is legal authority to support FHA claims where a city or county enforces its police or zoning powers in a manner that bans or unfairly discriminates against sober living facilities.[103] Thus, sober living advocates should consider whether local zoning and regulatory codes establish unacceptable barriers to the operation of sober living facilities, and whether the jurisdiction has a history of excluding sober living facilities from operating. If such disparate treatment is evident, sober living advocates may be able to persuade the local agency that further exclusions will violate the FHA. Additionally, to the extent that a sober living site causes impacts which are no different than other normal residences in the area, prohibiting the site from operating may be problematic. "Legitimate" sober living sites should fall within this category and enjoy a relatively strong position in negotiating with cities and counties over their operations.

4. Does zoning improperly define "family" when restricting residency? In the context of land use regulation, case law prohibits

government agencies from limiting the definition of a "family" to those related by blood, marriage or adoption.[104] Rather, courts have held that the concept of "family" must be broadly construed to include numerous types of "non-traditional" living arrangements, including group living among individuals who are not related.[105] While not necessarily an FHA concern, such authorities empower sober living operators by enabling them to assert that residents of sober living homes are just as much a "family" as are a husband, wife, and children. Jurisdictions which exclude such living arrangements from the definition of a "family," or which prohibit such arrangements in single family zones where traditional families are otherwise welcome, may be subject to legal challenge. Sober living advocates who can demonstrate that residents, even though unrelated, act as a cooperative "family unit," may be significantly advantaged when facing such challenges by local agencies.

5. Is due consideration given to requests for ***reasonable accommodation***? A local agency is required to grant disabled individuals ***reasonable accommodation*** from agency restrictions when necessary for equal use or enjoyment of a dwelling.[106] Where local zoning or regulatory restrictions prohibit group living arrangements, sober living advocates should request reasonable accommodation from such restrictions. Because reasonable accommodation must be granted unless it causes undue financial or administrative burdens to the agency or fundamentally alters an agency's zoning provisions, sober living advocates start with an advantage when presenting reasonable accommodation requests to cities and counties. However, prudent advocates should be prepared to substantiate the requests by demonstrating that the facility will not be burdensome to the agency. For example, submitting evidence as to the facility's internal policies and procedures which are intended to minimize impacts and smoothly integrate the facility into the surrounding neighborhood may go far in any request for reasonable accommodation. Additionally, providing such evidence will demonstrate the "legitimacy" of the site and distinguish it from "illegitimate" facilities which may be problematic for the agency. In short, the FHA provides a number of options which can be helpful in ensuring that communities remain protected without infringing on individuals' rights to fair housing. Practitioners representing local agencies may undertake a number of steps when faced with FHA scenarios which may help to screen "legitimate" facilities from those which use the FHA to mask their motives. Conversely, those representing sober living operators, residents, and advocates should not take the FHA for granted, but should be aware that its provisions must be properly utilized to protect legitimate sober living facilities.

VI. CONCLUSION-QUESTIONSTHAT REMAIN UNANSWERED

While cases have done much to flush 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.[107]

Perhaps more importantly, however, 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 been increasing over the past several years, and may increase dramatically in the near future, given the Governor's plans to reduce prison overcrowding and federal court-ordered reductions in prison populations.

Thus, while precedent construing the FHA and its application to sober living facilities is helpful to public agency counsel and sober living advocates, the future promises to pose even more questions about the FHA's requirements, and the scope of its protections.

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ENDNOTES

1. The federal Fair Housing Act is codified at 42 U.S.C. § 3601, *et seq.* California's State law counterpart, the California Fair Employment and Housing Act, is codified at Gov't Code § 12900, *et seq.* This article focuses on the requirements of the federal Act, although the California Act is interpreted according to federal law precedent.
2. *Oxford House v. Township of Cherry Hill* (N.J. 1992) 799 F.Supp. 450, 453.
3. http://www.oxfordhouse.org/userfiles/file/oxford_house_history.php.
4. *Tsombanidis v. West Haven Fire Dept.* (2d Dist. 2003) 352 F.3d 565, 570.
5. *See* fn. 24, *ante.*
6. Health & Safety Code § 1500, *et seq.*
7. Health & Safety Code § 11834.01, *et seq.*
8. *See, e.g.*, Health & Safety Code § 11834.01(a) (alcohol or drug abuse recovery or treatment facilities licensed by the Department of Alcohol and Drug Programs are defined as: "any premises, place, or building that provides 24-hour residential non-medical services to adults who are recovering from problems related to alcohol, drug, or alcohol and drug recovery treatment or detoxification services.").
9. Cal. Op. Atty. Gen. 07-601.
10. Cal. Govt. § 12926.
11. 42 U.S.C. § 3602(h).
12. *Oxford House v. Township of Cherry Hill*, (D.N.J. 1992) 799 F.Supp. 450, 459 ("Congress contemplated alcoholism and drug addiction as being among the kinds of "impairments" covered under this definition.").
13. *Id.*
14. See, *Oxford House v. Township of Cherry Hill*, 799 F.Supp. 450, 459 (D.N.J. 1992).
15. 24 CFR § 100.201(a)(2).
16. *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1219.
17. *Regional Economic Community Action Program v. City of Middletown* (2d Dist. 2001) 294 F.3d 35, 46.
18. *Id.*
19. *Id.* at 47.
20. 42 U.S.C. § 3602(h).
21. *Fowler v. Borough of Westville* (N.J. 2000) 97 F.Supp.2d 602, 609.
22. *Id.*
23. City of Newport Beach Ordinance No.'s 2007-8, 2008-05.
24. Claims were brought pursuant to the FHA, the Americans with Disabilities Act, the Rehabilitation Act of 1974 (29 U.S.C. § 794 et seq.), 42 U.S.C. § 1983, California Fair Employment & Housing Act, the California Alcohol & Drug Program (Health & Safety Code § 11834 et seq.), California Civil Code § 52.1, and federal and state causes of action for inverse condemnation.
25. Settlement agreement available at www.newportbeachca.gov.
26. *See, e.g.*, Brianna Bailey, *Daily Pilot*, "Civic Center Costs Mulled" (Oct. 27, 2009) (describing City of Newport Beach City Council hearing approving continued operation of Pacific Shores Recovery, a sober living facility which underwent City review, and noting additional sober living operators which either have lawsuits against the City or are pursuing administrative review pursuant to the City regulatory provisions).

27. 42 U.S.C. § 3604(a) (emphasis added).
28. 42 U.S.C. § 36502(b).
29. *Mills Music, Inc. v. Snyder* (1985) 468 U.S. 153, 164.
30. *Lakeside Resort Enterprises v. Board of Supervisors of Palmyra* (3d Cir. 2006) 455 F.3d 154, 158.
31. *Id.* at 159.
32. *Schwarz v. City of Treasure Island* (11th Cir. 2008) 544 F.3d 1201, 1214.
33. *Johnson v. Dixon* (D.D.C. 1991) 786 F.Supp. 1, 4.
34. *Schwarz v. City of Treasure Island*, 544 F.3d at 1214-1215.
35. *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1219.
36. *Oxford House v. Town of Babylon* (E.D.N.Y. 1993) 819 F.Supp. 1179, 1182.
37. *Id.*
38. *Id.* at 1185.
39. *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1220.
40. *Tsombanidis v. West Haven Fire Dept.* (2d Dist. 2003) 352 F.3d 565, 574-75.
41. *Oxford House v. Town of Babylon* (E.D.N.Y. 1993) 819 F.Supp. 1179, 1181.
42. *Id.*
43. *Id.*
44. *Oxford House v. Town of Babylon* (E.D.N.Y. 1993) 819 F.Supp. 1179, 1181
45. *Id.* at 1183.
46. *Id.*
47. *Id.*
48. *Oxford House, Inc., v. Town of Babylon*, 819 F.Supp. 1179, 1185 (E.D.N.Y. 1993), *citing* 42 U.S.C. § 3604(f)(3)(B).
49. 42 U.S.C. § 3602(h).
50. *Behavioral Health Services v. City of Gardena* (C.D. Cal. Feb. 26, 2003) No. CV 01-07183, 2003 WL 21750852.
51. *Township of Cherry Hill*, 799 F.Supp. at 463-66.
52. See, *Township of Cherry Hill*, 799 F.Supp. at 462-63; *Horizon House Developmental Service Inc., v. Town of Upper Southampton*, 804 F. Supp 683, 699-670 (E.D.Pa. 1992); *Stewart B. McKinney Foundation, Inc., v. Town Plan & Zoning Commission of the Town of Fairfield*, 790 F.Supp. 1197, 1221 (D.Conn. 1992).
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57. *Oxford House, Inc., v. Town of Babylon*, 819 F.Supp. 1179, 1186 (E.D.N.Y. 1993); *Horizon House Developmental Service Inc., v. Town of Upper Southampton* (E.D.Pa. 1992) 804 F. Supp 683, 699.
58. *Sanghvi v. City of Claremont* (9th Cir. 2003) 328 F.3d 532.
59. 42 U.S.C. § 3604(f)(3).
60. *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1221.
61. *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1221.
62. *Behavioral Health Services v. City of Gardena* (C.D. Cal. February 26, 2003) No. CV 01-07183, 2003 WL 21750852.
63. *Tsombanidis v. West Haven Fire Dept.* (2d Cir. 2003) 352 F.3d 565, 578.
64. In a recent case, for example, a teacher who was retaliated against after advocating for disabled students has standing to sue under the Rehabilitation Act and the ADA. *Barker v. Riverside County Office of Education* (9th Cir. Cal. 2009) 2009 DJDAR 15159.
65. *Smith v. Pacific Properties* (9th Cir. 2004) 358 F.3d 1097,1102.
66. Gov't Code § 12989.1.
67. Gov't Code § 12927(g).
68. *Fair Housing of Marin v. Combs* (9th Cir. 2002) 285 F.3d 899.
69. *Id.* at 905.
70. *Id.*
71. *Smith v. Pacific Properties and Development Corp.* (9th Cir. 2004) 358 F.3d 1097, 1101.
72. *Tsombanidis v. West Haven Fire Dept.* (2d Cir. 2003) 352 F.3d 565, 578.
73. *Oxford House v. City of St. Louis* (8th Cir. 1996) 77 F.3d 249.
74. *Id.* at 253.
75. *Bryant Woods Inn v. Howard County* (4th Cir. 1997) 124 F.3d 597, 601-602.
76. *U.S. v. Village of Palatine* (7th Cir. 1994) 37 F.3d 1230, 1234.
77. Cal. Const. Article XI, § 7.
78. Gov't code 65000, *et seq.*
79. Gov't Code 65850.
80. Gov't Code 65103 (regulation pursuant to general plan designations); Gov't Code 66410, *et seq.* (regulation through implementation of Subdivision Map Act).
81. *Oxford House v. Township of Cherry Hill* (D.N.J. 1992) 799 F.Supp. 450.
82. *Tsombanidis v. West Haven Fire Dept.* (2d Cir. 2003) 352 F.3d 565, 574-75.
83. *Id.* at 578.
84. 42 U.S.C. 3607(b)(1).
85. City of Edmonds v. Oxford House. (1995) 514 U.S. 725, 728.
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87. *Id.*
88. *Turning Point, Inc., v. City of Caldwell* (1996) 74 F.3d 941.
89. *Id.* at 943.
90. *Id.*
91. *Id.* at 944.
92. *Id.*
93. *Gibson v. County of Riverside* (2002) 181 F.Supp.2d 1057, 1072.
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97. *Schwarz v. City of Treasure Island* (11th Cir. 2008) 544 F.3d 1201.
98. *Ewing v. City Carmel-by-the-Sea* (1991) 234 Cal.App.3d 1579, 1593.
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101. 45 CFR §§ 160, 162, 164; Health Insurance Portability and Accountability Act of 1996, Public Law 104-191.
102. *Oxford House v. Township of Cherry Hill* (D. N.J. 1992) 799 F.Supp. 450, 460.
103. *Oxford House v. Town of Babylon* (E.D.N.Y. 1993) 819 F.Supp. 1179, 1182-1185.
104. *City of Santa Barbara v. Adamson* (1980) 27 Cal. 3d 123, 132-33; *City of Chula Vista v. Pagard* (1981) 115 Cal.App.3d 785, 795; *College Area Renters & Landlord Assn. v. City of San Diego* (1996) 43 Cal.App.4th 677, 687-88.
105. *Id.*
106. *Tsombanidis v. West Haven Fire Dept.* (2d Cir. 2003) 352 F.3d 565, 578.
107. California Housing Development Law, Gov't Code § 65913, *et seq.*; California Housing Element Law, Gov't Code § 65580, *et seq.*

Fair housing laws, zoning and land use regulations and how they impact residential alcohol and drug treatment programs and sober living residences.

FREQUENTLY ASKED QUESTIONS (FAQ) • August 2008

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 community resistance escalated against the establishment of residential treatment and other housing 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.

> ***"Repeatedly, the courts have ruled that local governments denying CUPs based on stereotypical negative projections are discriminatory . . ."***

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 affect residential treatment programs and sober living.

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 or "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 making decisions about zoning and land use regarding housing for persons with disabilities. (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 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 community resistance as a basis for its decision to deny a conditional use permit (CUP) to a residential program for persons with disabilities is in violation of those laws.

Repeatedly, the courts have ruled that local governments denying CUPs based on stereotypical negative projections are discriminatory in that their effect is to restrict where persons with disabilities can live. Furthermore, courts have stated that such negative 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 group home or residential treatment program is a threat to neighborhood health and safety must be made on an individualized basis using specific criteria applied only to the residence under consideration and 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 CUP for a residential alcohol and drug treatment program on community resistance to such programs, why does it remain today the most effective means communities have to prevent their local governments from issuing CUPs to these programs?

A. It is commonly known in local governments that fair housing laws make it illegal to discriminate in housing sales, rentals or lending practices on the basis of race, national origin, religion or gender. What is not as commonly known is how fair housing laws also apply to zoning and land use decisions regarding residential treatment programs that house persons with disabilities 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 a small percentage of the housing and building concerns that come before local governments. For instance, in San Diego County, compare the number 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 CUP 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 zoning and land use issues depend upon local conditions, do local regulations automatically pre-empt 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. Former 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 CUPs 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, building size or design, or outdoor lighting.

There is good litmus test to apply as to whether or not a zoning or land use regulation or practice is discriminatory. It can be considered discriminatory if it focuses on persons with disabilities—in other words focuses on "WHO" is being served by the residence, not "WHAT" type of residence it is.

Q 5. How can residential alcohol and drug treatment providers ensure that they can get a CUP ?

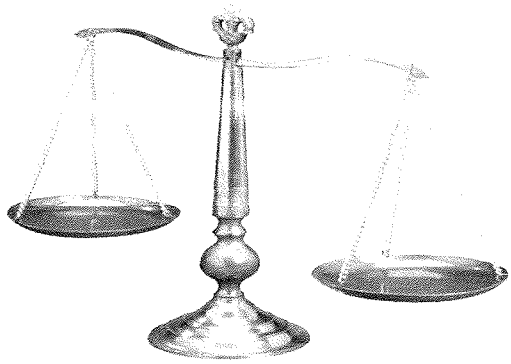
A. There are no guarantees that treatment providers will be granted a CUP, but fair housing laws definitely improve the odds for providers over what they have been in the past. When a residential provider submits a CUP application it is important to include a request for reasonable accommodation. Specifically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

- Identifying the category of persons with disabili-

ties per fair housing law (substance abusers) that the proposed residential program will be serving.

- Specifying the accommodations in zoning 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 program in a facility no larger than other residences in the neighborhood, or a treatment program with six beds or fewer seeking a small 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.



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

A. No. Sober living residences are housing where people abstinent from alcohol and drugs seek a clean and sober living environment. There are no treatment or counseling services given, although they may hire a house manager. They are considered the same as any other residential rental. Local governments cannot require restrictions or permits for one residence without requiring the same for all. They exist by right, just as any single family dwelling unit, whether it is a single family home, a unit in a duplex, a large apartment complex, or other types of dwelling units.

Single family dwellings are regulated under one of two different categories: "Occupancy limits" and "definition of family." "Occupancy" regulations limit the number of people allowed per square footage and is considered non-discriminatory because the standards apply equally to everyone and are, therefore, generally 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 commonly used regulation is how a local jurisdiction defines "family." In California no local government may limit the number of adults who choose to live together. This is due to a 1980 case, *City of Santa Barbara v. Adamson*, in which the California Supreme Court, based on California privacy laws, ruled that people that want to live together have the right to do so. Therefore, no California local government can restrict the number of unrelated adults choosing to live together. Many local governments still have a restrictive definition of family that limits the number of unrelated people that can live together, but such regulations are not in compliance with the law.

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 zoning and land use decisions for residential alcohol and drug treatment programs?

A local government can be sued by a provider or potential residents of a residential facility if it is perceived that local government decision makers intentionally discriminated against them, or the effect of their acts was discriminatory, or they failed 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 violation of the FHAA in a local government's zoning or 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.

It should be noted that an actionable act by a local government in zoning and land use decisions against persons with disabilities can only be committed at the final step of the decision making process by elected officials who are the ones legally responsible for those decisions. For more information on this and other related subjects please see the Tool Kit and other publications at http://futuresassociates.org/step.html. To learn how to become involved locally in removing zoning and land use barriers for residential treatment providers and other housing for persons with disabilities, please see the STEP issue briefing on how to use Housing Element Plan updates which will be posted at this site in September, 2008.

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

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Solutions for Treatment Expansion Project is funded by The California Endowment.

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;

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

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Reprinted from the Journal of the Section on Local Government Law of the Virginia State Bar, Vol. III, No, 1, September 1997

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.

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). On a second appeal, Smith & Lee Associates, Inc. v. Taylor, Michigan, 102 F.3d 781 (6th Cir. 1996), the court of appeals held that the trial judge had erred in finding discriminatory intent, but that he had been correct to find that the City had failed to make reasonable accommodation by adapting its processes to accommodate the group home. The court said that although Taylor had no duty to approve Smith & Lee's zoning application, it could not lawfully deny that application because of the demonstrated hostility of the City government to the handicapped. The FHAA is concerned with achieving equal results and not just formal equality, and imposes an affirmative duty to reasonably accommodate handicapped people.

Conclusion. This article has only touched on major issues that are presented by local regulation of group homes. But the message is clear: local regulation cannot discriminate against the handicapped, and, moreover, localities must take affirmative steps to accommodate them. Finally, localities must steel themselves to the opposition that the location of group homes almost invariably attracts. To accede to political pressures growing out of ignorance and bias can lead to judicial intervention at the best, and substantial civil penalties at the worst.