



ADDICTION, RECOVERY, AND THE RIGHT TO HOUSING

THE IMPORTANT INTERSECTION BETWEEN SOBER LIVING HOMES

AND THE FAIR HOUSING ACT¹

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I. INTRODUCTION

Municipalities and counties across the country are familiar with the Fair Housing Act (“FHA”). Generally speaking, the FHA forbids discrimination in housing based upon disabilities. Because “disability” has been interpreted as including individuals recovering from drug and/or alcohol addiction, discriminatory housing practices involving recovering addicts is forbidden. “Sober living homes” function under the belief that housing addicts in an environment that fosters recovery, such as low-crime, single family neighborhoods, is essential to the success of any addict’s treatment. Practically speaking, this creates conflict among community residents desiring to keep their communities safe. Regardless of these concerns, the FHA requires recovering addicts be afforded an equal opportunity to live in these clean, safe, and drug free neighborhoods.

Prompted by complaints by neighbors, outrage by city council members, and legitimate public safety concerns from police, municipalities and counties are forced into a difficult position, which prompts several questions: how should individuals undergo rehabilitation for alcohol and drug addiction?; where should rehabilitation be provided?; and how does the Fair

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Housing Act affect local government's authority to regulate and restrict alcohol and drug recovery facilities?

This article summarizes the legal characteristics of sober living homes and their relation with the FHA. In particular, this article illustrates how the FHA can be used by owners of sober living homes to lawfully operate a facility, neighbors and concerned residents to control the growth of sober living homes, and local governments to balance the interests of both interests.

II. WHAT IS A SOBER LIVING HOME?

The facilities and operators of individual sober living homes vary greatly, but it is often argued that the location of the home in a single-family neighborhood is critical for fostering addiction recovery by avoiding the temptations other environments can create.¹ Similarly, the neighborhoods where sober living homes are located vary, ranging from high-end beach locales to low-income and high crime neighborhoods. Depending on the neighborhood, the community reaction and support for these facilities also varies. The organizational design of sober living facilities also differ, ranging from the private landlord renting his home to recovering addicts, to corporations operating several full-time treatment centers across the country and employing professional staff. Among the best-known sober living facilities is Oxford House, a network homes operating throughout the United States and internationally. Each Oxford House facility is an independent organization, but the umbrella organization serves as a network connecting approximately 1,200 self-sustaining homes and serving 9,500 people at any one time.²

Because of the vast diversity in location and structure, the sober living model can be easily abused by profit seeking landlords seeking to maximize rents. Because nearly any single family home can become a "sober living home" by adopting that label, some single family



homes house upwards of twenty or thirty individuals under the guise of “sober living;” in reality, they provide little in the way of actual treatment. This makes regulation of sober living homes by public agencies difficult, as they are forced to differentiate between legitimate homes and those abusing the system. Additionally, public agencies are forced to deal with public outrage often inspired by homes located in their communities. Complications are compounded by various state licensing provisions that regulate facilities providing care for the disabled or for those recovering from addiction.

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

As amended in 1988, the FHA prohibits housing discrimination on the basis of “handicap,” which is defined as:

- “(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
- (2) a record of having such an impairment, or
- (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance.”³

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

A. Establishing Alcohol Or Drug Addiction As A Disability Under The FHA

Demonstrating a disability under the FHA requires a plaintiff to show: (1) a physical or



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

B. Nexus Between the Addiction Disability and Housing Need

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

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

However, despite the broad application of FHA protections, there are some limitations to the Act. First, the FHA only applies to "dwellings," which includes "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families."⁹ This definition is important because while "dwellings" are protection, "shelters" and other temporary housing are not. Thus, because of the short term care provided at



sober living facilitates and the high turnover rate at the facilities, facilities resembling “shelters” rather than “dwellings” and are not protected.

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

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

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

A. Disparate Impact

To establish a disparate impact a plaintiff must demonstrate the challenged practice or policy actually or predictably resulted in discrimination.¹⁵ If this is established, the burden shifts to the defendant to prove their actions further a legitimate government interest with no alternative, less discriminatory means to serve that purpose.¹⁶ Additionally, a more substantial government justification is required to deny plaintiffs requesting mere removal of an obstacle to



housing, as opposed to some affirmative action.¹⁷ Sober living homes often have difficulty proving a disparate impact in areas zoned to exclude other group living arrangements such as fraternity or sorority houses. To prevail, the sober living home would have to prove the exclusion disparately impacts substance abusers more so than those living under different group arrangements.¹⁸

Regardless of this barrier, evidence of discriminatory intent makes proving a disparate impact substantially easier. Records of council meetings containing discriminatory statements against alcoholics have been found to be sufficient evidence of intent to discriminate.¹⁹ In such situations, courts are quick to find in favor of sober living homes asserting disparate impact claims.²⁰

B. Reasonable Accommodation

“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”²¹ is also required under the FHA. An accommodation is reasonable if it does not cause undue hardship, fiscal, or administrative burdens on the municipality, or does not undermine the basic purpose a zoning ordinance seeks to achieve.²² A three-part test is applied to 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.²³ Courts also consider the governmental purposes of the existing ordinance or action, and the benefits or accommodation to the handicapped individual.²⁴

Under this scheme, municipalities must change, waive or make exceptions in their zoning rules to afford people with disabilities the same access to housing as those who are without



disabilities.²⁵ However, fundamental or substantial modifications from municipal or zoning codes are not required.²⁶

C. Standing and Exhaustion of Remedies

The first hurdle plaintiffs must establish when challenging an ordinance or decision by a government body is whether the plaintiff has *standing*. Any “aggrieved person” - one who has been injured by a discriminatory housing practice - may bring suit to seek relief for a discriminatory housing practice.²⁷ An organization can also bring a suit under the FHA when its purpose is frustrated and when it expends resources because of a discriminatory action.²⁸ For example, if a discriminatory practice has injured an organizations outreach program, the organization would have standing to sue on its own behalf.²⁹ Additionally, traditional organization standing exists to allow suits on behalf of organization members.³⁰

In addition, there is another barrier to asserting claims under the FHA. “Plaintiffs must first provide the governmental entity an opportunity to accommodate them through the entity’s established procedures used to adjust the neutral policy in question.”³¹ However, a plaintiff is not required to appeal a decision through the local body appellate processes, and may bring suit when accommodation is first denied.³²

V. PITFALLS AND POSSIBILITIES IN REGULATING SOBER LIVING SITES

The interests of individuals recovering from addiction and the interests of community residents seeking to preserve the “family-friendly” character of their neighborhoods are pitted against each other in any FHA case. Faced with these competing interests, local jurisdictions must use discretion in making decisions to regulate sober living home so as not to violate FHA restrictions. The authority to regulate sober living facilities is from the local government’s



general police powers. However, that police power is preempted by the interests and regulates advanced by the FHA.

The first challenge facing local agencies seeking to regulate sober living homes is the lack of a standard land use definition for such facilities. Local agencies must categorize the facilities within existing land use definitions such as “boarding houses,” “rooming houses,” or other types of “group living facilities.” These land uses often require Conditional Use Permits or other discretionary approval from the city or county. However, zoning restrictions of this type are subject to limitations.³³ Municipalities faced with a problematic sober living home may, depending upon the zoning restriction in place, classify the facility as an unpermitted zoning house, assert the facility is an unlawful multi-family use, or claim the facility operates a “business” akin to a hotel or hostel which is prohibited in residential zones. Another option is to attempt to use local or State building and housing codes, or other “technicalities” associated with land use laws and regulations to restrict the facility’s operation.

In response to such local government action, sober living facilities may assert disparate impact or reasonable accommodation claims under the FHA, and plaintiffs often assert both claims simultaneously.³⁴ However, the success of these claims may be affected by specific exemptions contained in the FHA. For example, local, state and federal restrictions regarding the maximum number of occupants permitted in a dwelling are specifically allowed.³⁵ The occupancy limits considered reasonable are often determined by building inspectors or health and safety inspectors.³⁶ An additional exemption in the FHA allows developments for older persons (“HOP”) and discrimination based upon family status.³⁷ If the housing development meets the qualifications of an HOP established by congress, ordinances discriminating based



upon age are valid.³⁸

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.³⁹

VI. CONCLUSION - QUESTIONS THAT 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.⁴⁰

Perhaps more importantly, no cases have addressed whether the FHA applies to "specialized" residential sites, such as locations which exclusively house parolees or probationers, locations which house sex offenders, or locations commonly known as "reentry facilities," which serve as transitional housing for those recently released from prison who are seeking to transition into "normal" life. Such facilities have 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. Additionally, the downturn in the economy may also cause a dramatic increase in the number of facilities. Because sober living homes provide a "safe haven" for such individuals, a rise in sober living facilities can be expected.

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.

¹ *Oxford House v. Township of Cherry Hill* (N.J. 1992) 799 F.Supp. 450, 453.

² http://www.oxfordhouse.org/userfiles/file/oxford_house_history.php.

³ 42 U.S.C. § 3602(h).

⁴ See, *Oxford House v. Township of Cherry Hill*, 799 F.Supp. 450, 459 (D.N.J. 1992).

⁵ *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1219.

⁶ *Regional Economic Community Action Program v. City of Middletown* (2d Dist. 2001) 294 F.3d 35, 46.

⁷ *Id.* at 47.

⁸ *Id.*

⁹ 42 U.S.C. § 3602(b).

¹⁰ *Lakeside Resort Enterprises v. Board of Supervisors of Palmyra* (3d Cir. 2006) 455 F.3d 154, 158.

¹¹ *Id.* at 159.

¹² *Schwarz v. City of Treasure Island* (11th Cir. 2008) 544 F.3d 1201, 1214.

¹³ *Johnson v. Dixon* (D.D.C. 1991) 786 F.Supp. 1, 4.

¹⁴ *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1219.

¹⁵ *Oxford House v. Town of Babylon* (E.D.N.Y. 1993) 819 F.Supp. 1179, 1182.

¹⁶ *Id.*

¹⁷ *Id.* at 1185.

¹⁸ *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1220.

¹⁹ *Oxford House v. Town of Babylon* (E.D.N.Y. 1993) 819 F.Supp. 1179, 1181.

²⁰ *Id.*

²¹ *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).

²² *Township of Cherry Hill*, 799 F.Supp. at 463-66.

²³ *The Corporation of the Episcopal Church of Utah v. West Valley City* (D. Utah 2000) 119 F.Supp.2d 1215, 1221.

²⁴ *Id.*

²⁵ *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.

²⁶ *Sanghvi v. City of Claremont* (9th Cir. 2003) 328 F.3d 532.

²⁷ Gov't Code § 12989.1.

²⁸ *Fair Housing of Marin v. Combs* (9th Cir. 2002) 285 F.3d 899.

²⁹ *Id.* at 905.

³⁰ *Smith v. Pacific Properties and Development Corp.* (9th Cir. 2004) 358 F.3d 1097, 1101.

³¹ *Tsombanidis v. West Haven Fire Dept.* (2d Cir. 2003) 352 F.3d 565, 578.

³² *Bryant Woods Inn v. Howard County* (4th Cir. 1997) 124 F.3d 597, 601-602.

³³ *Turning Point, Inc., v. City of Caldwell* (1996) 74 F.3d 941.

³⁴ *Oxford House v. Township of Cherry Hill* (D.N.J. 1992) 799 F.Supp. 450.

³⁵ 42 U.S.C. 3607(b)(1).

³⁶ *Turning Point, Inc., v. City of Caldwell* (1996) 74 F.3d 941.

³⁷ *Gibson v. County of Riverside* (2002) 181 F.Supp.2d 1057, 1072.

³⁸ *Id.* at 1075, 1076.

³⁹ *City of Edmonds v. Oxford House, Inc.* (1995) 514 U.S. 725, 731.

⁴⁰ California Housing Development Law, Gov't Code § 65913, *et seq.*; California Housing Element Law, Gov't Code § 65580, *et seq.*