

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

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

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I. What is a Sober Living Home?

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

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

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

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

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

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

3. 42 U.S.C. § 3602(h) (2009).

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

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

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

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

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

4. See *Oxford House*, 799 F. Supp. at 459.

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

6. *Reg’l Econ. Cmty. Action Program v. City of Middletown*, 294 F.3d 35, 46 (2d Cir. 2001).

7. See *id.* at 47.

8. *Id.*

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

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

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

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

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

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

9. 42 U.S.C. § 3602(b) (2009).

10. See *Lakeside Resort Enters., LP v. Bd. of Supervisors*, 455 F.3d 154, 158 (3d Cir. 2006).

11. See *id.* at 159.

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

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

14. *Corp. of the Episcopal Church in Utah v. W. Valley City*, 119 F. Supp. 2d 1215, 1219 (D. Utah 2000) (emphasis added).

A. *Disparate Impact*

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

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

B. *Reasonable Accommodation*

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

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

16. *Id.*

17. *Id.* at 1185.

18. *See id.*

19. *Corp. of the Episcopal Church in Utah*, 119 F. Supp. 2d at 1215, 1220.

20. *Town of Babylon*, 819 F. Supp. at 1179, 1181.

21. *Id.*

22. *Id.* at 1185 (citing 42 U.S.C. § 3604(f)(3)(B)).

23. *Oxford House, Inc. v. Twp. of Cherry Hill*, 799 F. Supp. 450, 463-66 (D.N.J. 1992).

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

C. *Standing and Exhaustion of Remedies*

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

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

24. *Corporation of Episcopal Church in Utah*, 119 F. Supp. 2d at 1221.

25. *Id.*

26. *Town of Babylon*, 819 F. Supp. at 1186; *Horizon House Developmental Serv. Inc., v. Twp. of Upper Southampton*, 804 F. Supp. 683, 699 (E.D. Pa. 1992).

27. *Sanghvi v. City of Claremont*, 328 F.3d 532 (9th Cir. 2003) (ruling that the plaintiffs presented no evidence from which the jury could conclude that the requested accommodation was required for Alzheimer’s patients); *see also City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802, 806 (9th Cir. 1994).

28. CAL. GOV’T. CODE § 12989.1 (West 2010).

29. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 903 (9th Cir. 2002).

30. *Id.* at 905.

31. *Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004).

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

33. *Bryant Woods Inn v. Howard County*, 124 F.3d 597, 601-02 (4th Cir. 1997).

IV. Pitfalls and Possibilities in Regulating Sober Living Sites

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

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

34. *Turning Point, Inc., v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996).

35. *Oxford House, Inc. v. Twp. of Cherry Hill*, 799 F. Supp. 450, 450 (D.N.J. 1992).

36. 42 U.S.C. § 3607(b)(1) (2009).

37. *Turning Point, Inc.*, 74 F.3d at 941.

38. *Gibson v. County of Riverside*, 181 F. Supp. 2d 1057, 1072 (C.D. Cal. 2002) (holding county did not qualify for 55-or-over HOP exception and therefore its actions in enacting ordinance imposing age restrictions on persons occupying dwelling units in certain areas violated the FHA prohibition on familial-status based discrimination).

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

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

V. Unanswered Questions

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

Perhaps more importantly, no cases have addressed whether the FHA applies to "specialized" residential sites, such as locations which exclusively house parolees or probationers, locations which house sex offenders, or locations commonly known as "reentry facilities," which serve as transitional housing for those recently released from prison who are seeking to transition into "normal" life. Such facilities have increased over the past several years, and may increase dramatically in the near future, given the government plans to reduce prison overcrowding⁴² and federal court-ordered reductions in prison populations. Additionally, the downturn in the economy may also cause a dramatic increase in the number of facilities. Because sober living homes provide a "safe haven" for such individuals, a rise in sober living facilities can be expected.

39. *Id.* at 1075-76.

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

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

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