Addiction, Recovery, and the Right to Housing: The Important Intersection Between Sober Living Homes and the Fair Housing Act

by Matthew M. Gorman, Anthony Marinaccio, and Christopher Cardinale



Municipalities and counties across the country are familiar with the Fair Housing Act[1] ("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 that recovering addicts be afforded an equal opportunity to live in these clean, safe, and drug-free neighborhoods.

Fueled 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 FHA affect a 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 relationship with the FHA, and illustrates how the FHA can be used by the 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 these competing interests.

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 removing the temptations that other environments can create.[2] 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 vary. The organizational design of sober living faculties also differs, ranging from the private landlord who rents a 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 of 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.[3]

Given this vast diversity in location and structure, the sober living model can be easily abused by profit-seeking landlords wanting 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 20 or 30 individuals under the guise of "sober living," but in reality, 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 facilities and those abusing the system. In addition, public agencies are forced to deal with the 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.

How Does the FHA Apply?

The FHA prohibits housing discrimination on the basis of "handicap," 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.[4]

Congress had enacted the Rehabilitation Act a few years prior to the FHA and had clearly included "[i]ndividuals who have a record of drug use or addiction" in their definition of "disabled" under the Act.[5] 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. By 2000, one federal court noted that it is "well established that individuals recovering from drug or alcohol addiction are handicapped under the [FHA]."[6]

Addiction as a FHA "Disability"

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 impairment, and (3) that the plaintiff is regarded as having such impairment.[7] 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 of a long-term duration.[8] Current drug or alcohol use, judged at the time the alleged discrimination occurred, is specifically excluded from protection under the FHA.

In addition to establishing a disability, to qualify for FHA protection, 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 the home's residents. Courts have routinely agreed with this theory.[9] This broad application of the FHA opens the door to any 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.

What Locations Qualify for FHA Protection?

Despite its broad application, there are some limitations to the scope of FHA protection. First, the Act 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."[10] This definition is important because, while "dwellings" are protected, "shelters" and other kinds of temporary housing are not. Thus, because of the short-term care provided at sober living facilities and their high turnover rate, facilities resembling "shelters" rather than "dwellings" are not protected.

There are two factors for determining whether a facility constitutes a "dwelling:" first, whether the facility is intended or designed for occupants intending to remain for a significant period; and second, whether the occupants of the facility view it as a place to return to.[11] 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.[12] Courts also analyze the extent to which the occupants treat the facility as their home and whether they perform household tasks (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,[13] homeless shelters and other similar locations are not protected.[14]

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."[15]

To establish a disparate impact, a plaintiff must demonstrate that the challenged practice or policy actually or predictably resulted in discrimination.[16] If this is done, the burden shifts to the defendant to prove that its actions further a legitimate government interest with no alternative, less discriminatory means to serve that purpose.[17] A more substantial government justification is

continued on page 26



Matthew M. Gorman, a partner at the California law firm of Alvarez-Glasman & Colvin, represents public agencies and private-sector clients in public agency law, land development, redevelopment, public housing, environmental compliance, affordable housing development, and landlord-tenant law. As legal counsel to cities, planning agencies, and other local governmental agencies, he has been at the forefront of efforts to expand housing opportunities for low-income and disabled individuals and is active in community revitalization efforts. He is a graduate of the University of California, Davis and earned his J.D. from Loyola Law School in Los Angeles.



Anthony Marinaccio is an associate at Alvarez-Glasman & Colvin, where he counsels both public agency and private entity clients on real estate matters, landlord-tenant matters, construction defect issues, and redevelopment issues, including providing guidance on projects in redevelopment areas, affordable housing developments, and multi-family housing. He practices in municipal law with a particular emphasis on land use, redevelopment law, and real estate litigation. He earned his J.D. at Whittier Law School, where he participated in the *Whittier Law Review* and graduated Magna Cum Laude.



Christopher Cardinale is an associate with Alvarez-Glasman & Colvin, specializing in public agency litigation and transactional matters, including land use, redevelopment, contracts, civil rights litigation, environmental, and constitutional law. In addition, he has co-authored a number of articles discussing California's solar laws. He received a B.A. in Communication Studies from Azusa Pacific University.

required to deny plaintiffs who request the mere removal of an obstacle to housing, as opposed to those seeking some affirmative action.[18] 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 has to prove that its exclusion disparately impacts substance abusers; that is, 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 the intent to discriminate.[20] In such situations, courts are quick to find in favor of sober living homes asserting disparate impact claims.[21]

"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] 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.[23] A three-part test is used to determine whether a reasonable accommodation is necessary: (1) the accommodation must be reasonable, and (2) necessary, and (3) must allow a substance abuser an 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 that provided to the non-disabled.[26] However, fundamental or substantial modifications from municipal or zoning codes are not required.[27]

Standing and Exhaustion of Remedies

The first hurdle a plaintiff 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 against a discriminatory housing practice. An organization may 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 organization's outreach program[29]). Additionally, traditional organizational standing allows suits on behalf of organization members.[30]

The first challenge facing local agencies seeking to regulate sober living homes is the lack of a standard land-use definition for such facilities.

Another barrier to asserting claims under the FHA requires that plaintiffs "first provide the governmental entity [with] 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's appellate processes, and may bring suit when accommodation is first denied.[32]

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 a sober living home so as not to violate FHA restrictions. The authority to regulate sober living facilities comes from the local government's general police power; however, that power is preempted by the interests 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." Such uses often require conditional use permits or other discretionary approval from the local government, and 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 that the facility is an unlawful multi-family use, or claim that the facility operates a "business," akin to a hotel or hostel, that is prohibited in residential zones. Others may 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 (or both) under the FHA.[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 housing for older persons ("HOP") and discrimination based upon family status.[37] If the housing development meets the qualifications of a HOP established by Congress, ordinances discriminating based upon age are valid.[38]

Exemptions under the FHA also give municipalities some leeway in enforcing zoning and planning schemes. However, because these are exceptions to the general rule prohibiting discrimination, the exceptions are construed narrowly.[39]

Conclusion

While cases have done much to flesh out the application of the FHA in the context of regulating sober living facilities, 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 any obligations to maintain adequate affordable housing and to meet regional housing needs allocations. Perhaps more importantly, no cases have addressed whether the FHA applies to "specialized" residential sites: locations which exclusively house parolees or probationers, sex offenders, or locations known as "reentry facilities" (transitional housing for those recently released from prison who are seeking to transition into "normal" life). These facilities have increased in the past several years, and may increase even more dramatically in the near future due to federal court-ordered reductions in prison populations and plans to reduce prison overcrowding.

Accordingly, while precedents construing the FHA and its application to sober living facilities are helpful to public agency attorneys and sober living advocates, the future promises to pose even more questions about the FHA's requirements and the scope of its protections.

Editor's Note: An earlier version of this article was published in the American Bar Association's publication, 42 Urban Lawyer 607 (No. 3, Summer 2010).

Notes

1. 42 U.S.C. § 3601 *et seq*. (West 2011).
2. Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 453 (D. N.J. 1992).
3. For more information about Oxford House, see http://www.oxfordhouse.org/userfiles/file/oxford_house_history.php (last visited Feb. 23, 2011).
4. 42 U.S.C. § 3602(h) (West 2011).
5. Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq*. (West 2011). *See Township of Cherry Hill*, 799 F. Supp. at 459.
6. Corp. of the Episcopal Church in Utah v. West Valley City, 119 F. Supp. 2d 1215, 1219 (D. Utah 2000) (citing *U.S. v. Southern Management Corp*., 955 F.2d 914, 917-23 (4th Cir. 1992)); Elliott v. City of Athens, 960 F.2d 975, 977 (11th Cir.1992); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1182 (E.D.N.Y.1993); and *Township of Cherry Hill*, 799 F. Supp. at 458-60).
7. Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 46 (2d Cir. 2002), citing 42 U.S.C. § 3602(h).
8. *Id*. at 47.
9. *Id*.
10. 42 U.S.C. § 3602(b) (West 2011).
11. Lakeside Resort Enter., LP v. Bd. of Supervisors of Palmyra Twp., 455 F.3d 154, 158 (3d Cir. 2006) (property intended to be operated as drug- and alcohol-treatment center qualified as "dwelling" under FHA).
12. *Id*. at 159.
13. Schwarz v. City of Treasure Island, 544 F.3d 1201, 1214 (11th Cir. 2008).
14. Johnson v. Dixon, 786 F. Supp. 1, 4 (D.D.C. 1991) (closure of emergency overnight shelters operated by the District would not violate FHA as they were not "dwellings," despite fact that facilities were used by recovering alcoholics and drug abusers).
15. Corp. of the Episcopal Church in Utah v. West Valley City, 119 F. Supp. 2d 1215, 1219 (D. Utah 2000).
16. *See* Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1183 (E.D.N.Y. 1993).
17. *Id*.
18. *Id*. at 1185.
19. Corp. of the Episcopal Church in Utah, 119 F. Supp. 2d at 1220.
20. *Town of Babylon*, 819 F. Supp. at 1181.
21. *Id*.
22. *Id*. at 1185, citing 42 U.S.C. § 3604(f)(3)(B) (West 2011).
23. Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 463-66 (D.N.J. 1992).
24. Corp. of the 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. Town 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) (city's refusal to provide sewer connection without annexation to residential Alzheimer's care facility did not violate FHA's reasonable accommodation provision).
28. Fair Housing of Marin v. Combs, 285 F.3d 899 (9th Cir. 2002).
29. *Id*. at 905.
30. Smith v. Pacific Properties & Dev. Corp., 358 F.3d 1097, 1101(9th Cir. 2004).
31. Tsombanidis v. West Haven Fire Dept., 352 F.3d 565, 578 (2d Cir. 2003) (city's fire code did not have disparate impact on residents of a group home for recovering alcoholics and drug addicts).
32. Bryant Woods Inn, Inc. v. Howard County, Md., 124 F.3d 597, 601-02 (4th Cir. 1997) (denial of zoning variance to allow expansion of group home was not appealed to County board of appeals or to the circuit court; claim ripe under FHA).
33. Turning Point Inc. v. City of Caldwell, 74 F.3d 941 (9th Cir. 1996).
34. Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992).
35. 42 U.S.C. 3607(b)(1) (West 2011).
36. In one case, the occupancy limit, as determined by the building inspector, was in dispute on the basis that the occupancy limitations discriminated against the handicapped in violation of the Fair Housing Act. *See Turning Point, Inc*., 74 F.3d at 943.
37. Gibson v. County of Riverside, 181 F. Supp.2d 1057, 1072 (C.D. Cal. 2002), citing 42 U.S.C. § 3607(b)(1) ("[No] provision in this subchapter regarding familial status appl[ies] with respect to housing for older persons") and § 3607(b)(2)(B).
38. *Id*. at 1075, 1076.
39. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995). ML