Group Homes, Sober Living

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Presenters

William “Mick” McKamie
Partner
Taylor Olson Adkins Sralla & Elam

Miles Risley
City Attorney
City of Corpus Christi, Texas

Todd Sheeran
City Attorney
City of Herriman, Utah

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Outline

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Statutory Framework

- History of the Fair Housing Act (FHA)
- 1988 Amendment to the Fair Housing Act (FHAA)
- Americans With Disability Act (ADA) and Rehabilitation Act (RA)
- Zoning Regulations

History of the Fair Housing Act

- The Civil Rights Act of 1866 provided that all citizens have the same rights to real property as white citizens.
- Racial injustice continued, however, and as a result President Johnson signed the Fair Housing Act of 1968 (FHA), which expanded the Civil Rights Act and prohibited housing discrimination on the basis of race, gender, and national origin.
- In its original form, however, the FHA did not expand it protections to disabled persons.

1988 Amendment to the Fair Housing Act

- On September 13, 1988, the Fair Housing Amendments Act (FHAA) was signed into law.
- The FHAA formally recognized the discrimination and difficulty of disabled persons searching for housing.
- The FHAA added disabled persons to the list of protected classes in the FHA.

Americans with Disabilities Act and the Rehabilitation Act

- The Americans with Disabilities Act (ADA) and Sec. 504 of the Rehabilitation Act (RA) can also be used to challenge discriminatory land use regulation, and will often be plead in cases brought on behalf of disabled persons.
- But the broad reach of the FHA make it the favored tool.

Zoning Regulations

- As early as 1885, cities started experimenting with zoning regulations through their nuisance and police powers.
- Over the years, cities have restricted the number of unrelated people that live in a single-family dwelling and the United States Supreme Court recognized that group living "presents urban problem" such as "more cars rather continuously pass by; more cars are parked; noise travel with crowds. A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs."
- The 8th Circuit found, "Cities have a legitimate interest in decreasing congestion, traffic, and noise in residential areas."

Recovery and Treatment Facilities

- Definition and Examples
- The Need for RTFs
- The Types of RTFs

Definition and Examples

- **Recovery and Treatment Facilities (RTFs)**: A place where a group of unrelated persons live together while being treated for, or recovering from, a disability.
- **Examples**:
  - Sober living homes
  - Halfway houses
  - Oxford houses
  - Residential treatment facilities
  - Detox centers

The Need for RTFs

- When people suffer from behavioral problems or substance abuse, being placed in a safe and supportive environment can increase their chances of sustaining long-term life changes.
- People living in RTFs often make treatment gains between admission and discharge. RTFs can give its clients the tools to maintain those gains post-discharge.

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The Types of RTFs

- There are generally three different types of RTFs that request a reasonable accommodation from zoning restrictions:
  - **Detoxification Center**: A facility that medically supervised facility to handle symptoms related to drug detox. The initial detox process is physically challenging and takes a significant toll on an addict's mind and body.
  - **Short-Term In-Patient Treatment Facility**: A facility that typically provides 24/7 monitoring that can help manage and sustain the gains made in detox without any distractions. Patients are totally immersed in their rehab programs and generally don't have much dependence. (Typically, short-term.)
  - **Sober Living**: A facility that bridges in-patient and independent living. Residents practice full autonomy while peers and/or supervising staff keep them accountable. A typical stay is usually a year or more.

The Fair Housing Act Amendment

- Federal Regulations
- Types of Discrimination Claims
- Weighing Resident Complaints

Federal Regulations

- The FHAA makes it unlawful to:
  - Discriminate in the sale or rental or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of handicap, or anyone associated with such a person.
  - Discriminate against any person in the terms, conditions or privileges, of sale or rental of a dwelling because of handicap, or anyone associated with a handicapped person.
  - Refuse to make reasonable accommodations in rules, policies, practices or services to afford equal opportunity to use and enjoy a dwelling.
  - "[C]oerce, intimidate, threaten, or interfere with" a person's right to enjoy fair housing.

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Types of Disability Discrimination Claims

- **Disparate Treatment** (intentional discrimination): A handicap person is deliberately treated differently in a procedure or law. Examples:
  - Dispersion or spacing requirements
  - Additional Fire Code requirements
  - 24-hour supervision requirements
  - Requirement for certificate of occupancy
- **Disparate Impact** (unintentional discrimination): A procedure or law is the same for everyone, but the impacts of the procedure or law negatively affects the handicapped. Used to attack definition of term "family" in defining who may live in a "single-family residence" on basis of disparate impact on persons with disabilities because many disabled individuals need to live in group homes with residential character for recovery and treatment programs and for financial reasons.

Safe Place: General Allegations of Discrimination

- *Cody Smithers v. Corpus Christi* (2008): Smithers (Safe Place) ran an unpermitted 4,216 sq/ft single-family home for 18 recovering addicts. City determined Safe Place was a boarding home & threatened daily fines. Safe Place than applied for a 20-person reasonable accommodation but was denied. Safe Place sued for "discrimination" but failed to "provide evidence that group of 20 persons in a single home constituted a critical mass for effective recovery from addiction" and the transience of the residents undermined concept that they were a " therapeutic family."



Lessons Learned from Safe Place

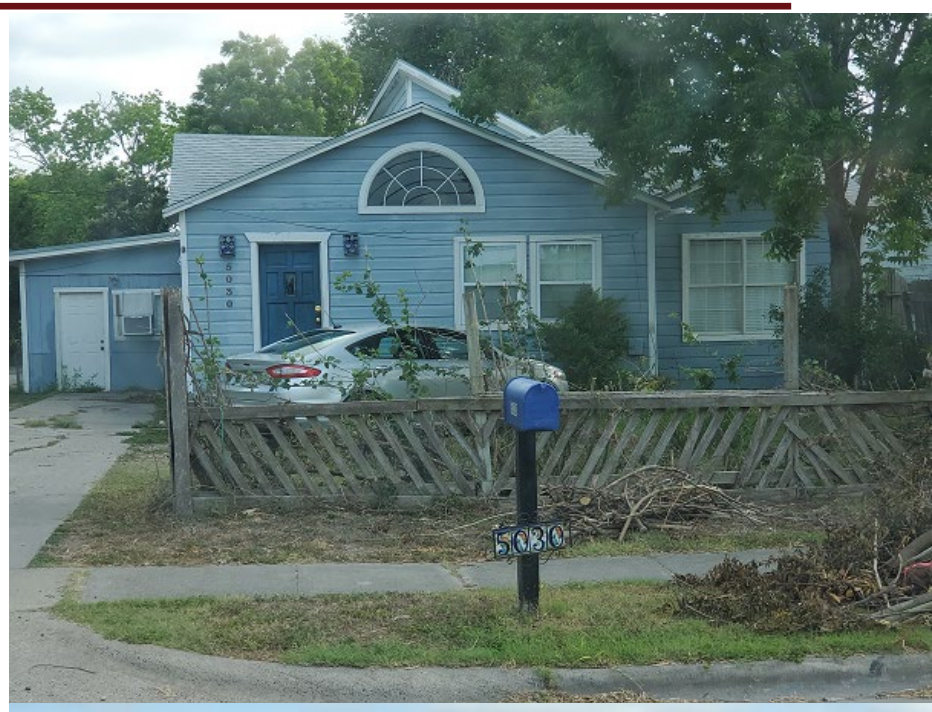
- Safe Place showed that discrimination cases are winnable at the Court level, but reasonable accommodation requests are much harder to win. Despite winning the judgment in the Safe Place discrimination case, the City of Corpus Christi then provided a proposed accommodation allowing up to 6 residents.
- DOJ is much more likely to see a publicly compelling case if the discrimination is express than implied—such as in its 2017 case against City of Springfield, Illinois, where it attacked a dispersion requirement for group homes for people with disabilities that was housing only three persons.

Resident Complaints

- **Danger–** Plaintiff will attempt to use insensitive communications of citizens against the City to get past summary judgment in a discrimination claim.---It is important to keep the record clear of such communications and make independent findings in support of City determinations.
- If the evidence shows that the decision-makers were responding to the wishes of their constituents, *and* that the constituents were motivated **in substantial part by discriminatory concerns**, that could . . . prove a violation. . .
- While citizens at the Safe Place hearing directed harsh and distasteful language to applicants and WESL, the City cannot be held responsible for what those citizens said at the public hearing. Further, there was no evidence that any councilmember directed any such language at the applicant.

"Traffic" Concerns

- **Danger-** Citizens will make exaggerations in their claims of neighborhood devastation (e.g., traffic). Actual traffic impacts of most group homes is usually over-predicted by neighborhood advocates because sober living homes tend to house persons with fewer cars and licenses.
- Examples of resident traffic concerns in Corpus Christi:





Failure-to-Accommodate Claim

- Burden
- Elements
  - Handicap Definition and Exceptions
  - Necessary and Equal Opportunity
  - Reasonable

Burden and Elements

- Burden varies by circuit courts, but the burden usually starts with the plaintiff and then shifts to the defendant.
- Elements:
  - It is unlawful to "discriminate in the sale or rental, ***or to otherwise make unavailable or deny***, a dwelling to any buyer or renter because of a handicap."
  - "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."

Handicap Definition and Exception

- Handicap is defined as a person who has "a physical or mental ***impairment*** which ***substantially limits*** one or more of such person's ***major life activities***."
- This definition does not "include current, illegal use of or addiction to a controlled substance."
  - The term "current, illegal drug use" is not defined in the FHA.

Impairment

- There is no dispute in the circuit courts that a person recovering from drug and alcohol addiction constitutes an “impairment” within the meaning of the FHA.
- See e.g., Oxford House, Inc. v. Cherry Hill, 799 F. Supp. 450, 459 (D.N.J. 1992) (“we are confident in saying as a matter of law that alcoholism and drug addiction (excluding current drug use) constitute “impairments” under the Act.”).

Major Life Activity

- The term “major life activity” is not defined by the FHA.
- The definition is generally borrowed from the ADA definition section, which states, “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”
- In determining major life activities, “the court takes into account the following factors: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”

Substantially Limited

- The term “substantially limited” is not defined by the FHA.
- The term is usually borrowed from the ADA and is understood to mean that a person is “substantially limited” in a major life activity if he or she is: (i) **unable to perform** a major life activity that the **average person** in the general population can perform; or (ii) **significantly restricted** as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the **average person** in the general population can perform that same major life activity.

Example Arguments

Substance abuse disorder is widely considered a disability under all applicable laws. All of the protections provided for any other minority group are available to disabled persons.

. . .

Numerous statutes and case law provide protection for disabled persons. There is no question whether or not individuals who are battling substance abuse disorder are considered disabled under both state and federal law.

Analysis

- Remember, the applicant has the burden to prove this element.
- The applicant is usually a business operator, and they can usually prove this element by (1) expert testimony from a sample of its clients, (2) providing the admission criteria showing that it will only accept handicap clients, or (3) rely on state regulations that require RTFs to house the handicapped.
  - If the RTF did not provide this proof, the element is not met.
- Don’t accept conclusory legal statements.
- Concede on the “impairment” element and review “major life activity” and “substantially limited” accordingly.
- If in doubt on proof, lean on the side that the element was met. The level of proof is a low bar for this element.

Necessary and Equal Opportunity

- “The statute requires accommodations that are necessary (or indispensable or essential) to achieving the objective of equal housing opportunities between those with disabilities and those without.”
- “While the FHA requires accommodations necessary to ensure the disabled receive the same housing opportunities as everybody else, it does not require more or better opportunities.”
- There are typically three ‘necessity’ arguments recognized by circuit courts are:
  - Financial Necessity
  - Market Necessity
  - Therapeutic Necessity

Financial Necessity

- The basic argument is this:
  - it costs a lot of money to provide treatment and housing, therefore we need [xx] number of people to live in the home to make it pencil.
- There is a circuit split as to whether individual economic necessity should ever be considered. For example, the 9th Circuit in *Giebeler* takes a decidedly more liberal approach that allows consideration of economic and financial concerns so long as the Applicant can demonstrate that the costs are different from those borne by the non-disabled and are disability-created costs.

Financial Necessity

- Where financial necessity is allowed, it is difficult to argue:
- Plaintiffs argue that it is financially *necessary* for more residents to live in the Home. It makes little sense for Plaintiffs to purchase a large property and *subsequently* seek an exemption from municipal zoning regulations simply because more residents are necessary to remain in the black—this theory of self-inflicted economic necessity is unavailing. *Cf.* *Zimmerman v. City of Austin, Tex.*, 881 F.3d 378, 389 (5th Cir. 2018).

Swanson v. City of Plano (2021)

- Swanston operated a 5-bedroom 5,890 square foot sober living home. Swanston requested an occupancy of 15 persons (instead of 8). The Court allowed the plaintiff's expert testimony of the financial and therapeutic necessity of allowing 15, rather than 8, residents. The court also stated that the availability of other residences was not determinative because the Fair Housing Act protected the disabled person's right to live in the "residence of their choice." Nonetheless, the Court cloaked its finding on therapeutic, rather than purely financial, necessity



Response

- Remember, it is the applicant's burden to prove financial necessity.
- Determine whether this argument is viable in your jurisdiction.
- Require evidence that the facility could not function at the requested number of residents.
- Determine if other facilities are, or could, operate with a lower number of residents for a similar type of treatment program.
- Determine whether the requested number of residents due to lack of business acumen.
- Experienced plaintiffs will survive by reframing financial necessity as therapeutic necessity.

Market Necessity

- The basic argument is this:
  - there are a lot of people who need help and not enough facilities to serve them.
- There is a split of authority with regard to the "market necessity" approach, which originated in the Sixth and Fourth Circuits.
- Those decisions held that "the proper inquiry is not whether 'a particular profit-making company needs such an accommodation, but, rather do such businesses as a whole need this accommodation.'"

Examples

- Bryant Woods Inn v. Howard County: “The unrefuted evidence is that the **vacancy rate [in the county]** was between 18 to 23% within Howard County”
- Smith & Lee Assocs. V. City of Taylor: “[E]vidence was introduced that a competing facility had a waiting list for potential disabled residents. … [And there was also] **expert testimony** that, over the next thirty-five years, the number of older adults living in the State … who suffer from dementia would increase by seventy-seven percent.”

Analysis

- Remember, it is the applicant's burden to prove market necessity.
- Determine whether this argument is viable in your jurisdiction.
- Really look at the evidence being submitted and determine whether it is specific to the general area.

Therapeutic Necessity

- The basic argument is this: science shows that treatment in a group setting and in a residential neighborhood helps facilitate the persons "continued recovery from alcoholism and drug addiction."
- This is a two-step process:
  - The applicant demonstrate the "degree" to which they need an accommodation (i.e., what it is about their disabilities that requires precisely [xx] residents, as opposed to some other number.)
  - Then, the applicant must show that there is something about their disabilities that requires group living *in a residential neighborhood*.
- There is a legal difference between therapeutic *benefit* vs therapeutic *necessity*. "[T]he law does not require defendants the best possible accommodation."

The increased number of residents to 16 is required to provide for the special group counseling component of the program and the residents to receive the care they need. This component contributes to successful treatment of the disabled individuals. The increased number allows the staff to arrange for appropriate group sessions. It also allows the staff to selectively place the residents in groups that are designed to facilitate their successful treatment and housing. The smaller the number of residents, the more difficult it is for these critical counseling opportunities to be arranged. (See Exhibit 1 and 2). A large enough number of residents is necessary to allow the staff to structure the various group settings to accommodate the needs of the residents.

3. Outside of this letter I have no affiliation with Liberty, I write this affidavit in support of their request to increase their residential treatment licensing to 16 adults, who are engaged in a ASAM 3.3 residential substance use disorder program. This request is predicated on optimizing therapeutic effectiveness and clinical efficiencies by increasing the number of patients who participate in group therapy. The State of Utah has long demanded providers to utilize evidence-based and research-supported interventions. This is an ethical and professional requirement that Liberty takes seriously and strives to meet.

Analysis

- Remember, it is the applicant's burden to prove therapeutic necessity.
- Determine whether science and research is *necessary* at the number of people they are requesting and what research they supplied to support that number.
  - (Several articles support therapeutic group sizes between 5 and 12.)
- Determine whether the facility needs to be located in a residential neighborhood.
  - (Are the residents interacting with the community and able to leave the home?)
  - This is mostly a factor for short-term inpatient facilities, not sober living like Oxford Houses.

Reasonable

- Ordinarily, an accommodation is not reasonable if it imposes undue financial or administrative burdens or results in a fundamental alteration in the nature of a program.
- "[O]rdering a municipality to waive a zoning rule would ordinarily cause a 'fundamental alteration' of its zoning scheme if the proposed use was incompatible with surrounding land uses[.]"
- "On the other hand, if the proposed use is quite similar to surrounding uses expressly permitted by the zoning code, it will be more difficult to show that a waiver of the rule would cause a 'fundamental alteration' of the zoning scheme."

Traditional Definition of "Family"

- Zoning codes often define "family" as an unlimited number of blood related individuals plus a fixed number of unrelated person.



Group Living as “Family”

- Traditional zoning definition of “family” would exclude this group that defines lives in a single dwelling unit as an “Oxford House” and defines itself as a “family.”
- Sobriety-oriented group homes typically assert that they need the presence of a group of persons that is not encompassed within the typical zoning definition of “family” for residence in a single-family zoned house. Therefore, group homes often request accommodation to be treated as a family.



Issues with Congregate Living

- In upholding the definition of a "family" that limited the number of unrelated people who could live together at two, the Court, in *Boraas*, recognized the problems that congregate living arrangements create (regardless of disability) such as parking, traffic, and noise.
- However, in a joint statement of the US Dept. of Justice and HUD, they stated, "A group home for four adults with mental retardation would very likely be able to show that it will have no more impact on parking, traffic, noise, utility use, and other typical concerns of zoning than an "ordinary family." … By contrast a 50-bed nursing home would not ordinarily be considered an appropriate use in a single-family neighborhood."

Thank you!!

- If there is interest in understanding disparate impact and disparate treatment claims, and how to write your ordinances to avoid such discrimination claims, please let us or IMLA staff know. We would love to do a “Part 2” at another conference.

Contact Information

Miles Risley

1201 Leopard St.

Corpus Christi, TX 78401

(361) 826-2489

MilesR@cctexas.com

Todd Sheeran

5355 W. Herriman Main Dr.

Herriman, UT 84096

(801) 758-0071

tsheeran@herriman.org

William "Mick" McKamie

6000 Western Place, Ste. 200

Fort Worth, TX 76107

(817) 332-2580

MMcKamie@toase.com

www.toase.com



International Municipal Lawyers Association

51 Monroe Street, Suite 404
Rockville MD, 20850

(202) 466-5424
info@imla.org
www.imla.org

