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REPLY TO BRUNSWICK

September 4, 2020

Via E-mail: donaldsaunders12@comcast.net

Lexington Place Property Owners' Association, Inc.
Attn: Mr. Donald Saunders
12 Pilgrims Lane
Brunswick, GA 31525

RE: Amendment to Declaration of Covenants and Restrictions

Dear Don,

Please forgive my delay in getting this letter to you. Months ago, you asked that I prepare an amendment to the Lexington Place Declaration of Covenants and Restrictions (CC&Rs) addressing concerns regarding use of residential homes in the subdivision as housing for individuals recovering from alcoholism or other addictions. I know that these concerns first arose when Distinctive Housing Solutions, Inc. purchased a home in the subdivision on behalf of Gateway Behavioral Health Services (Gateway) for its use as a rehabilitation facility [redacted] When we last spoke you mentioned that Gateway representatives had stressed that they "had the law on their side." Unfortunately, given the application of the Americans with Disabilities Act (ADA) and the Fair Housing Act (FHA) to such situations, I believe that is the case. I do not believe much can be done in the CC&Rs to preclude similar uses that would actually be enforceable.

There is some question as to the applicability of the ADA to this situation in that it typically applies to "public" areas and does not necessarily encompass Lexington as a whole. However, the body of law concerning application of the FHA to this situation is pretty clear cut. I'm enclosing a copy of a recent opinion regarding application of the FHA to CC&Rs where the HOA attempted to use business-use restrictions to prevent rental of a residence to a sober-living facility. The CC&Rs also limited leasing and use to "single family units." The opinion is unpublished (not formally published by the deciding court as an opinion establishing precedent), but it is very similar to the situation you have previously faced and cites well accepted precedent. *Montana Ranch HOA v. Beaith*, No. 1 CA-CV 19-0007 (Ariz. Court of Appeals June 30, 2020). It also allowed a request for attorney's fees against the HOA to proceed.

Under the FHA, it is unlawful to 'make unavailable or deny a dwelling to any buyer or renter because of a handicap.' People recovering from drug and/or alcohol addiction are disabled under the FHA and therefore protected from housing discrimination. Discrimination under the FHA includes 'a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a protected person equal opportunity to use and enjoy a dwelling. *Montana Ranch HOA.*

There are exemptions in the FHA for reasonable local, state, or federal restriction which may extend to HOAs, as well, but they are very narrowly construed and must be applied equally to all homeowners governed by a declaration. Thus, maximum occupancy rules may be enforced if uniformly applied, but family composition rules have met with much tougher scrutiny. *City of Edmons v. Oxford House, Inc.,* 514 U.S. 725, 115 S.Ct. 1776 (specifically finding that a single-family zoning rule invoked against a group home for those recovering from alcohol and drug addiction is not exempt from scrutiny under the FHA). Many entities have attempted to apply "single family" residence restrictions, and the Montana case mentions this, but single family residence is no longer construed in its traditional sense and, instead, is interpreted as a "single housekeeping unit" – meaning that where a group of people lives together in a home and shares living expenses and chores, they meet this threshold. This has been the position in Georgia for some time. *City of Fayettville v. Taylor,* 256 Ga. 697 (Ga. Supreme Court, 1987). Some definitions now specifically include "residents of residential care facilities and group homes for people with disabilities." However, the FHA does **not apply** to single family units comprised of juvenile offenders, sex offenders, persons who illegally use controlled substances and persons with disabilities who pose a significant danger to others *See,* Joint Statement of the Department of Housing and Urban Development and the Department of Justice re: Reasonable Accommodations Under the Fair Housing Act.

https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf

I know that we did discuss the potential deterrent effect of including some sort of provision relating to group homes in the Declaration even if not enforceable. However, you also run the risk of a challenge from an entity likely very familiar with this area of law and likely to seek attorney's fees in regard to such a provision's attempted enforcement. If the HOA can agree on a neutral provision – such as the number of cars permitted to be associated with any one household or the maximum number of people who may live in one house -- it is possible that such a restriction could survive scrutiny, but as we discussed, it would be at the potential inconvenience of the entire neighborhood and would be an uphill battle.

I'm sorry I can't provide you with a more hopeful outlook regarding this matter, and I hope that the current residents of the Gateway property have not changed the tenor of the neighborhood. If there are incidents which disrupt the neighborhood, I would encourage you to keep a careful record of them and report them if necessary.

.

Sincerely,

Melinda Bruley White

MONTANA RANCH HOMEOWNERS ASSOCIATION, Plaintiff/Appellee,
v.
EDMOND C. BEAITH, et al., Defendants/Appellants.

No. 1 CA-CV 19-0007

ARIZONA COURT OF APPEALS DIVISION ONE

June 30, 2020

Appeal from the Superior Court in Maricopa County
No. CV2016-017160
The Honorable Christopher A. Coury, Judge

REVERSED AND REMANDED

COUNSEL

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By Michael Warzynski, Bradley R. Jardine
Co-Counsel for Plaintiff/Appellee

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By Richard V. Mack
Counsel for Defendants/Appellants

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Maria Elena Cruz and Judge Jennifer M. Perkins joined.

CATTANI, Judge:

¶1 Edmond and Kelly Beaith, as trustees of the Beaith Family Trust, appeal the superior court's declaratory judgment and award of attorney's fees in favor of Montana Ranch Homeowners Association. For reasons that follow, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 The Beaiths' trust owns a home (the "Property") within Montana Ranch. In 2016, they leased the Property to Valor Behavioral Healthcare, which held a license to treat individuals recovering from drug and alcohol addiction. Valor used the Property as part of an all-inclusive residential treatment program, in which up to eight Valor clients stayed at the Property while they participated in 12-step meetings, therapy, and life coaching at another Valor facility. The clients ate and slept at the Property, where they were under 24-hour supervision. The clients also were randomly drug tested at the Property and participated in group meditation and nightly "wrap-ups" at the Property.

¶3 Approximately two months after the Valor lease began, Montana Ranch sent the Beaiths a cease-and-desist letter asserting that the lease violated provisions in the Montana Ranch covenants, conditions, and restrictions ("CC&Rs"), including rules prohibiting use of the Property for a "commercial enterprise" and limiting leasing of the Property to a "single family unit." The Beaiths responded with a letter denying that the Property was being used for a commercial enterprise and asserting that federal and state housing discrimination laws superseded the provisions of the CC&Rs on which Montana Ranch relied.

¶4 Montana Ranch ultimately filed a complaint in superior court, alleging that the Beaiths breached the CC&Rs and seeking a declaration that the CC&Rs prohibited businesses like Valor from operating in

Montana Ranch. The Beaiths counterclaimed, alleging that as applied to the Property and the Valor lease, the Montana Ranch CC&Rs interfered with a business expectancy and violated federal Fair Housing Act ("FHA") protections for substance-addicted individuals.

¶5 The Beaiths requested a jury trial on "all triable issues." The parties subsequently agreed, however, that the court would decide Montana Ranch's claims for declaratory relief, leaving the Beaiths' counterclaims to be resolved by the jury.[1] At trial, Montana Ranch's manager testified that the community enforces its rules and that business-use restrictions are common in CC&Rs and are important to maintain home values and the character of the community. The Beaiths in turn asserted that they were entitled to a "reasonable accommodation" under the FHA to afford people with disabilities an equal opportunity to live in the community. The Beaiths also presented testimony that other properties in Montana Ranch were used in connection with businesses, in particular a real estate broker's office and an Airbnb rental, and that Montana Ranch was selectively enforcing community parking restrictions against Valor.

¶6 After the close of evidence, and while the jury was deliberating on the Beaiths' counterclaims, the court ruled that the Beaiths' lease to Valor breached the CC&Rs and granted Montana Ranch declaratory relief. The court concluded that Valor's use of the Property violated Section 12.1 of the CC&Rs because the Property was being used "for predominantly a commercial enterprise," and that Valor's use also violated Section 12.21 of the CC&Rs, which limited leasing to "a single family unit." The court also allowed Montana Ranch to file an application for attorney's fees and costs.

¶7 Shortly thereafter, the jury rendered a verdict in favor of the Beaiths on their FHA counterclaim, but did not award damages. The jury found in favor of Montana Ranch on the Beaiths' claim for interference with a business expectancy. Before reaching their verdict, the jurors submitted a question asking whether damages could include attorney's fees. The court responded that any award of fees would be determined by the court and could not be part of the jury's damages analysis. After the verdict, the court initially awarded the Beaiths attorney's fees and costs related to their FHA counterclaim, but the court subsequently granted Montana Ranch's motion to reconsider, finding that the FHA claim had not altered the parties' legal relationship or required modification of Montana Ranch's behavior, so the Beaiths were not "prevailing parties" under federal law.

¶8 The superior court entered a final judgment and award of attorney's fees and costs in favor of Montana Ranch, and the Beaiths timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

I. Declaratory Judgment.

¶9 The Beaiths argue that the superior court erred by interpreting the CC&Rs in a manner that diminished or eliminated a handicapped person's ability to reside in the Montana Ranch subdivision, and that such persons were entitled to a reasonable accommodation under the FHA. In light of the jury's verdict on the Beaiths' FHA claim, we agree.

¶10 We review de novo questions of law, deferring to findings made by the relevant factfinder. *Powell v. Washburn*, 211 Ariz. 553, 555-56, ¶ 8 (2006); *see also Data Sales Co. v. Diamond Z Mfg.*, 205 Ariz. 594, 601, ¶ 30 (App. 2003) (deferring to a jury's findings of fact); *Imperial Litho/Graphics v. M.J. Enters.*, 152 Ariz. 68, 72 (App. 1986) (deferring to the superior court's findings of fact after bench trial). Section 12.1 of the Montana Ranch CC&Rs prohibits commercial

use of properties in the community. Section 12.21 of the CC&Rs allows leasing a property only to "a single family unit." The superior court properly addressed whether Valor was operating a commercial enterprise on the Property in violation of the CC&Rs and whether the lease to Valor violated the single-family-unit requirement. And the evidence presented supported the court's findings that Valor's use of the property, in the abstract, violated both provisions of the CC&Rs.

¶11 But violation of generally applicable CC&R provisions was only the first of two hurdles Montana Ranch had to overcome to prevail against the Beaiths. The Beaiths' counterclaim alleged that under the FHA, they were entitled to an exemption from the CC&Rs—a reasonable accommodation—to afford Valor's clients (who fit within the category of disabled persons under the FHA) an equal opportunity to use the Property. When the court granted Montana Ranch's request for a declaratory judgment, the superior court failed to take into account the jury's finding that the Beaiths had prevailed on their FHA claim.

¶12 Under the FHA, it is unlawful to "make unavailable or deny[] a dwelling to any buyer or renter because of a handicap" of the renter, any person associated with the renter, or any person residing in the rental. 42 U.S.C. § 3604(f)(1)(A)-(C). "[P]ersons recovering from drug and/or alcohol addiction are disabled under the FHA and therefore protected from housing discrimination." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1156 (9th Cir. 2013). Discrimination under the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a protected] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

¶13 In considering the Beaiths' counterclaim, the jury was expressly instructed to consider the "reasonable accommodation" requirement:

> "**Reasonable Accommodation**" means an accommodation in rules, policies or practices to afford people with disabilities an equal opportunity to live in a dwelling. When determining if an accommodation is necessary, the overall focus should be on whether waiver of the rule would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.

And after the jury found that application of the CC&Rs to Valor's use of the Property would violate the FHA, the court should have given effect to that finding in its ultimate assessment of whether Montana Ranch was entitled to a declaratory judgment for breach of the CC&Rs.

¶14 Instead, the superior court concluded that the commercial nature of Valor's business violated the CC&R rule prohibiting a commercial enterprise, analogizing Valor's business to other "all inclusive" programs the court concluded would violate the CC&Rs, such as lodging provided as part of a halfway house program for former prisoners, a flight school, or a golf academy. But none of those examples account for the jury's verdict and none involve lodging for persons protected from housing discrimination under the FHA.

¶15 The superior court reasoned that the jury's verdict did not bear on the declaratory judgment on the basis that "the Beaiths breached these CC&Rs well before any discrimination [that the jury may have considered] occurred." The court held that "[t]he moment that the Beaiths signed the lease with Valor, and the moment the first Valor patron began using the Beaiths' residence as part of Valor's rehabilitation

program, the Beaiths had violated the contractual obligation to abide by the CC&Rs."

The court further found that Montana Ranch's enforcement of the CC&Rs was not motivated by the residents' handicapped status, but rather by the commercial nature of Valor's business.

¶16 None of these findings, however, entitled Montana Ranch to prevail on its claim for declaratory relief. Indeed, the Beaiths' claim for a reasonable accommodation under the FHA presumed that without an accommodation, Valor's operations on the Property would violate the terms of the CC&Rs. And such an accommodation may be warranted under the FHA regardless of a party's motivation in seeking to enforce a rule. *Cf. Canady v. Prescott Canyon Estates Homeowners Ass'n*, 204 Ariz. 91, 93-94, ¶¶ 10-12 (App. 2002) (as amended) (noting that a reasonable accommodation "may involve 'changing some rule that is generally applicable so as to make its burden less onerous on the handicapped individual'") (citation omitted).

¶17 In *Westwood Homeowners Ass'n v. Tenhoff*, 155 Ariz. 229, 230-31, 237 (App. 1987), this court held unenforceable a restrictive covenant prohibiting the use of a property for "the care or treatment of the sick or disabled, physically or mentally." This court concluded that applying the restriction to a residential facility for the developmentally disabled was inconsistent with the policy underlying the Developmental Disabilities Act of 1978. *Id.* at 234. Although the ruling specifically did not decide "whether the facility is a business within the meaning of the deed restriction," *Westwood Homeowners* supports the proposition that a generally applicable community rule may not be enforced against an individual who is entitled to an exception from the rule as a reasonable accommodation under remedial antidiscrimination legislation. *Id.* at 231, 237.

¶18 Thus, even though, as the superior court found, the Valor lease violated a CC&R prohibition on commercial use, Montana Ranch was not entitled to declaratory relief if, as the jury verdict indicated, under the FHA, Montana Ranch was required to grant the Beaiths an exception from that community rule as a reasonable accommodation. For the same reasons, the court's ruling that the Valor lease violated the single-family-unit requirement in the CC&Rs is deficient for failure to recognize the need for a reasonable accommodation under the FHA. *See Rhodes v. Palmetto Pathway Homes, Inc.*, 400 S.E.2d 484, 485-86 (S.C. 1991) (holding that a restrictive covenant limiting the property to single-family residential use could not be enforced to prevent the use of a property as a home for the mentally impaired).

¶19 Accordingly, even accepting that Valor's use of the Property was inconsistent with the commercial-use and single-family-use provisions of the CC&Rs, the superior court erred by granting relief to Montana Ranch without giving effect to the jury's verdict on the Beaiths' FHA claim.

II. Evidence of Damages.

¶20 The Beaiths also argue the superior court erred by limiting their evidence of damages because of disclosure violations. The Beaiths argue in particular that they should have been permitted to pursue damages outlined in their declaration dated December 9, 2017, including emotional distress, late payments from their tenant, and the costs of defending a lawsuit at the expense of other desired activities. We disagree.

¶21 As the superior court correctly noted, "even though a claim is recognized, a party litigating this claim still is obligated to comply with Arizona's disclosure rules," i.e., even if a party proves an FHA violation, damages are not recoverable if they are not timely disclosed. Arizona Rule of Civil Procedure 26.1(a)(7) requires disclosure of "a

computation and measure of each category of damages alleged by the disclosing party, [and] the documents and testimony on which such computation and measure are based." The fact that damages for FHA claims "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts," *Pac. Shores*, 730 F.3d at 1169 (citation omitted), does not excuse a party from timely disclosing evidence in support of a damages claim, including a computation and measure of damages. And the failure to timely make required disclosures precludes a party from presenting that information at trial. Ariz. R. Civ. P. 37(c)(1).

¶22 The superior court concluded that the only evidence of damages the Beaiths timely disclosed was their declaration, but the declaration did not contain any specific damages figures other than $11,000 of missed rent, which Valor eventually paid in full, and an allegation that the Beaiths were unable to contribute $13,000 to their IRA as they had in previous years, which the court ruled was too attenuated to be relevant. Aside from those specific figures, the various grievances recounted in the declaration did not sufficiently disclose damages. Because no recoverable damages were timely disclosed, the superior court did not err by precluding evidence of damages on the Beaiths' FHA claim.

¶23 The Beaiths also argue that the superior court improperly instructed the jury when it responded to a jury question by stating that "'legal fees' [relating to an FHA claim] cannot be awarded by the jury, but can be awarded by the Court, if appropriate, after the trial." The Beaiths rely on *Pacific Shores*, in which the Ninth Circuit held that a trial court's "conclusion that [legal] costs were 'better resolved' through an application for attorney's fees" was erroneous. 730 F.3d at 1167. In *Pacific Shores*, however, the legal costs at issue were fees incurred by the plaintiffs to comply with newly enacted city ordinances that the plaintiffs later challenged as discriminatory, not fees incurred as part of the litigation itself. *Id.* Here, in contrast, the Beaiths did not seek damages in the form of legal fees they incurred in attempting to comply with CC&Rs; the fees they sought were incurred in preparation for anticipated litigation and were therefore properly determined by the court rather than by the jury. *See* 42 U.S.C. § 3613(c)(2). Consequently, the superior court did not err in answering the jury's question regarding legal fees.

III. Attorney's Fees.

¶24 The Beaiths next argue that the superior court erred by determining that Montana Ranch was the successful party in an action arising out of a contract and by denying the Beaiths' request for attorney's fees under the FHA.

A. Attorney's Fees Under A.R.S. § 12-341.01.

¶25 "The determination of the successful party under A.R.S. § 12-341.01(A) is within the 'discretion of the trial court,' and we will not disturb the court's award 'if any reasonable basis exists' to support it." *Lee v. ING Inv. Mgmt., LLC*, 240 Ariz. 158, 161, ¶ 8 (App. 2016) (citation omitted). We consider the record in the light most favorable to upholding the superior court's assessment. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13, ¶ 21 (App. 2011).

¶26 Here, the superior court found that

> Montana Ranch Homeowners Association substantially prevailed as to both claims for relief. Although counsel for the [Beaiths] is correct that the [Beaiths] did prevail on some theories of relief originally asserted in the Complaint, the primary crux of this lawsuit was whether the [Beaiths'] lease to

> Valor, and Valor's use of [the Property], violated the CC&Rs of Montana Ranch. Recognizing that Montana Ranch prevailed on these central questions, Montana Ranch is the prevailing party.

¶27 Because we have reversed the superior court's ruling granting Montana Ranch declaratory relief, and because the Beaiths prevailed on their FHA claim, we vacate the court's award of attorney's fees to Montana Ranch.

B. Attorney's Fees Under the FHA.

¶28 The superior court declined to award fees to the Beaiths, concluding that the jury verdict did not alter the legal relationship between the parties. The FHA permits a discretionary award of attorney's fees to the prevailing party in a civil action alleging discriminatory housing practices. *See* 42 U.S.C. § 3613(c)(2). As the superior court noted, the FHA provides that "prevailing party" for these purposes has the same meaning as the term in 42 U.S.C. § 1988. *See* 42 U.S.C. § 3602(o). Cases interpreting § 1988 have determined that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). Here, the jury verdict materially altered the legal relationship between the parties because it provided a successful defense against Montana Ranch's claim for declaratory relief. Although the superior court stated that it would exercise its discretion to deny the Beaiths attorney's fees even if available under the FHA, we remand for the superior court to reconsider its ruling in light of this decision.

CONCLUSION

¶29 For the foregoing reasons, the judgment of the superior court is reversed, the award of attorney's fees in favor of Montana Ranch vacated, and the cause remanded for the superior court to reconsider an award of fees in favor of the Beaiths. The Beaiths request an award of attorney's fees on appeal, as relevant here, under 42 U.S.C. § 3613(c)(2). In an exercise of our discretion, we award the Beaiths, as the prevailing party on appeal, their reasonable attorney's fees upon compliance with ARCAP 21.

Footnotes:

1. Although Montana Ranch's original complaint sought damages from the Beaiths for violating the CC&Rs, Montana Ranch later modified its request for relief and sought only declaratory and injunctive relief. And because the Valor lease ended before the case proceeded to trial, the superior court determined that Montana Ranch's request for injunctive relief was moot.

ALVAREZ-GLASMAN & COLVIN

ATTORNEYS AT LAW

ADDICTION, RECOVERY, AND THE RIGHT TO HOUSING

THE IMPORTANT INTERSECTION BETWEEN SOBER LIVING HOMES AND THE FAIR HOUSING ACT[1]

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

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

[1] This article was first published by the International Municipal Lawyers Association (IMLA), 7910 Woodmont Ave., Bethesda, MD. 20814, and is reproduced with the permission of IMLA. IMLA is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA serves more than 3,400 member municipalities and local government entities in the United States and Canada, and is the only international organization devoted exclusively to addressing the needs of local government lawyers. Further information about IMLA is available at IMLA's website, www.imla.org.

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 faculties 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 addition 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.

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[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.*