

REQUESTED COMMISSION ACTION:

     Consent           Ordinance           Resolution        X   Consideration           Workshop

SHORT TITLE OR MOTION: CONSIDERATION OF TRANSIENT HOUSING REPORT  
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\_\_\_\_\_

**Summary of Purpose and Why:**

In May of 2011, the City Manager asked the Development Services Department to examine solutions to address complaints associated with vacation rentals. Since vacation rentals and "sober homes" have many similarities in terms of their impacts on neighborhoods, staff used this opportunity to address both issues under the broader term, "transient housing". Staff researched the topic and assembled a team consisting of representatives from the following departments: Planning & Zoning, Building, Business Tax Receipt, Legal, Code Compliance, and Broward Sheriff's Office.

The group was charged with the primary objective of reducing the negative impacts associated with transient housing. Together, the group identified solutions that include adopting new standards, creating new policies to better enforce existing regulations, and education and outreach. Please refer to the Memo #11-304 for the research details and staff recommendations.

- (1) Origin of request for this action: City Manager
- (2) Primary staff contact: Jennifer Gomez / Robin M. Bird *Judy Hume Acting DSD* Ext. 4460
- (3) Expiration of contract, if applicable: N/A
- (4) Fiscal impact and source of funding: N/A

DEPARTMENTAL COORDINATION	DATE	DEPARTMENTAL RECOMMENDATION	DEPARTMENTAL HEAD SIGNATURE
<u>Dev. Ser. Dept.</u>	<u>11-304</u>	<u>n/a</u>	<u><i>[Signature]</i></u>
<u>X City Manager</u>			<u><i>[Signature]</i></u>


**ACTION TAKEN BY COMMISSION:**

<u>Ordinance</u>	<u>Resolution</u>	<u>Consideration</u>	<u>Workshop</u>
	<u>1st Reading</u>	<u>Results:</u>	<u>Results:</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____



DEPARTMENT OF DEVELOPMENT SERVICES  
CITY OF POMPANO BEACH  
100 West Atlantic Boulevard – Room 316  
Pompano Beach, FL 33060

**ADMINISTRATIVE MEMORANDUM NO. 11-304**

DATE: July 11, 2011  
TO: Dennis Beach, City Manager  
VIA: Robin M. Bird, Director of Development Services  
FROM: Jennifer Gomez, AICP, Principal Planner   
RE: Transient Housing Report

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**EXECUTIVE SUMMARY:**

In May of 2011, the City Manager asked the Development Services Department to examine solutions to address complaints associated with vacation rentals. Since vacation rentals and “sober homes” have many similarities in terms of their impacts on neighborhoods, staff used this opportunity to address both issues under the broader term, “transient housing”. Staff approached this task by (1) reviewing governing state legislation; (2) reviewing a listing of the City’s existing regulations; (3) contacting other cities to determine their rental regulations (for results, see Exhibit “A”); (4) reviewing past efforts from 2007 to address this concern; and (5) assembling a team consisting of representatives from the following departments: Planning, Building, Business Tax Receipt, Legal, Code Compliance, and Broward Sheriff’s Office.

The group was charged with the primary objective of reducing the negative impacts associated with transient housing. Together, the group identified solutions that include adopting new standards, creating new policies to better enforce existing regulations, and education and outreach.

*Recommendations:*

1. Continue with the recent effort to begin rental housing inspections and enforcement of Chapter 153: Rental Housing.
2. Adopt a definition of community group homes. Allow as a special exception use with clear conditions and distance requirements.
3. Rewrite the parking codes and begin enforcing the standard.
4. Create a rental housing certificate, and require a 24/7 contact. Make this information available to the public on Click2Gov.
5. Through the rental housing certificate, identify the maximum capacity of each dwelling unit and sleeping rooms. Make this information available to the public on Click2Gov.
6. Through the rental housing certificate, identify the maximum number of parking spaces available. Make this information available to the public on Click2Gov.

7. Promote the Click2Gov website.
8. Begin “after hours reporting” for nuisances associated with rental properties.
9. Provide an internal training module, so that all staff is clear on the possible citations and who has the authority to cite for violations.
10. Provide education materials so that property owners and the public understand their rights and responsibilities.
11. Require property owners to sign for the educational materials at the time the rental housing BTR is obtained.

## **INTRODUCTION AND ANALYSIS:**

Over the last several months, the City of Pompano Beach has received several complaints regarding public disturbances associated with transient housing in Pompano Beach. For the purposes of this report, transient housing refers to either short-term rentals (any property rented out on a temporary basis, frequently to vacationers), or temporary sober living recovery homes (any home in which several unrelated individuals cohabitate in an effort to support each other’s sobriety). A detailed article addressing the problems and challenges associated with regulating sober homes is included as Exhibit “B.” Exhibit “B” also includes a newspaper clipping that is advertising for a sober home in Deerfield Beach. While sober homes and vacation rentals are very different in nature, the transient nature of the uses can result in similar impacts on neighborhoods. Residents have reported that the weekly turn-over can result in a loss of a sense of security in neighborhoods. Other complaints are often due to excessive parking, traffic, noise and trash, crowding and other late night activity.

Vacation rentals and sober homes both have protections that make creating new standards challenging. Individuals recovering from alcoholism and drug addiction are defined as “disabled” according to the Fair Housing Act and Americans with Disabilities Act. In addition, the recently enacted Senate Bill #883 prohibits governments from regulating, restricting, or prohibiting vacation rentals based solely on their classification, use or occupancy. Because of the existing protections, any regulations passed to address these uses must apply to all rental housing situations.

A review of the City’s regulations revealed there already exists a significant number of codes related to public distances, including Chapter 70: General Provisions (parking); Chapter 95: Fire Prevention; Chapter 96: Health and Safety (litter and abandoned vehicles); Chapter 97: Noise Control; Chapter 113: Business Tax Receipt; Chapter 153: Rental Housing (minimum standards for maintenance and capacity); Chapter 155: Zoning Code (parking standards, permitted uses); and the Florida Building Code. With this large toolbox of existing regulations, the City is already armed with many options to battle the negative impacts associated with these uses.

In 2006, the City Commission held two workshops to discuss the issue of transient housing. At that time, it was determined that the major obstacle to enforcing these regulations was that BSO could not gain access to the premises without a warrant. The City subsequently revised Chapter 153: Rental Housing code, so that all rental houses are required to obtain a BTR and made them subject to inspection. From 2008-2010, rental housing was addressed on a complaint-only basis. In 2010, the City Manager, Dennis Beach, identified the value of using the inspections associated with rental houses as a tool to fight blight in deteriorating neighborhoods. The City Manager at that time charged Development Services with the task of developing a rental housing program and scheduling inspections for each rental home. A Business Tax Receipt Chief was hired in March of 2011 to lead this effort. There are currently 705 rental properties registered with the City. BTR staff

is arduously working to increase these numbers by contacting up to 400 potential properties per week. The City has reestablished rental inspections and Code Compliance is beginning to enforce Chapter 153.

Staff recognizes that even as the BTR program evolves, the Commissioners would like to see a more comprehensive and targeted approach to addressing this issue. To develop this approach, staff assembled a team of representatives from the following departments: Planning & Zoning, Building Inspections, Business Tax Receipt, Legal, Code Compliance, and Broward Sheriff's Office. The group met on June 7<sup>th</sup> 2011 to define the issues and again on June 21<sup>st</sup> to prepare recommendations. At the June 21<sup>st</sup> meeting, Development Services staff distributed the 20 suggestions that were raised at the first meeting. Staff members were asked to review and rank each recommendation. Based on the consensus of the group, staff recommends solving the negative impacts associated with transient housing from a three tiered approach: (1) adopt new standards, (2) create policies to better enforce existing regulations, and (3) engage in outreach and education.

## **RECOMMENDATIONS**

### **Adopt New Standards**

*Most of the recommendations apply to all rental housing; however, the following paragraph specifically refers to sober homes.* Using the City of Margate as an example (See Exhibit "C"), the City of Pompano Beach could adopt a definition of community group homes, which would include sober homes. This could be inserted in the code as permitted with special exception approval in multi-family zoning districts, with specific conditions and distance requirements. Staff would have to examine the appropriate distance requirements and conditions. This would provide reasonable accommodation for the use, while the conditions and distance requirements would help preserve the character of the neighborhood. The strict criteria that would be developed with the Special Exception would help to define the use and ensure that the operation was committed to helping the residents maintain their sobriety, thus differentiating it from a rooming house. Examples of successful sober homes across the country, such as Oxford House and Sober Life Centers of South Florida, show that many are operated by non-profit organizations. These tend to have stringent rules, such as: requiring recovering addicts to stay committed to sobriety, to partake in meetings, to avoid bars, drugs, violence, and alcohol.

Some of the most common complaints associated with transient housing are parking, noise and trash. The City of Pompano Beach Code Compliance department has been instructed to avoid citing property owners for parking on non-hard surfaces because of concerns that the zoning code is not clear on where parking is permitted. Staff recommends re-writing the parking code, to make it very clear where parking is permitted. Staff would also like the opportunity to recommend regulations on gravel driveways. These changes will help Code Compliance identify surfaces and parking areas that do not meet code.

### **Create New Policies to Better Enforce Existing Regulations**

Of the thirteen cities in Broward County that were surveyed, eleven have no clear restrictions or regulations on vacation rentals. Only the cities of Dania Beach and Lauderdale-by-the-Sea reported having some regulation on the issue, with Lauderdale-by-the-Sea having the most developed regulation process. It is important to note that even if a city has minimum stay standards, these standards are difficult to enforce.

Although Florida legislation prohibits cities from placing restrictions on transient housing, the City could model some policies from the Town of Lauderdale-by-the-Sea. The Town requires an "Application for a Vacation Rental Certificate" from all property owners to file with the Town for short-term rentals. This provides the city with a 24/7 local contact, in the case of any public disturbances, or issues which may arise with tenants. The application also requires a BTR with a mandatory annual inspection to maintain the Vacation Rental License. The City could require a 24/7 contact from *all rental properties*. The City could revise the Code to create a rental housing certificate. For approval of the certificate, staff could request the applicant report the square footage of the rental unit, and acknowledge the maximum number of occupants per sleeping room and in the overall rental unit. Staff could also identify the maximum number of cars permitted to be parked at the rental unit, based on the paved area in front of the house. All of this information could then be made available to the public on the City's Click2Gov webpage. BTR staff will then provide more information online to make the public understand the full utility of the website.

If Code Compliance was given the directive to aggressively enforce parking regulations, then this would limit the number of individuals who could park at the rental unit. All properties in Pompano Beach must meet minimum green space requirements (30% in single family districts); therefore, the number of cars that can be legally parked in front of a home is limited.

The issue of transient housing could also benefit if Code Compliance accelerated their enforcement of regulatory violations that are observed in the evening hours. Code Compliance's ability to enforce regulations has been previously limited to their hours of operation, which ends at 8 p.m. Since many of the public disturbance complaints are occurring in the evening hours, Code Compliance's ability to hold the property owner accountable has been limited. At the working group meeting, BSO officers mentioned that one practice that had been used in the past was that the BSO officers could observe for regulatory violations in the evening hours. For example, if a BSO officer responds to a complaint, they can also identify if other regulatory violations are occurring. These violations include excessive noise from mechanically-based equipment (such as generators), rental properties, parking on unapproved surfaces, properties that have not been kept-up and pose a public nuisance, and /or if it appears a family home is being utilized for a non-permitted use, such as a rooming house. The BSO officer could then fill out reports that would count as "expert testimony," which would be sufficient to enable Code Compliance to process the case without having to witness the violations.

### **Education and Outreach**

As the working group discussed issues related to rental housing, it quickly became apparent that the departments did not know the codes other departments were responsible for regulating and enforcing. Staff suggested that we create educational materials to distribute internally so that all departments were aware of the possible citations. To facilitate better enforcement of the codes, the group also suggested internal training sessions, so that all employees know "what to look for" relative to transient housing. All staff would then be clear on the possible citations and who is able to cite for violations.

The group also recommended creating educational materials that could be distributed by staff that would explain the rules and regulations for rental housing. These could also be presented to homeowners' associations, shared with sober housing providers and distributed to all rental properties. When this brochure is prepared, it can be distributed to every rental property owner, when they obtain their BTR.

## **CONCLUSION**

Staff recommends placing this report as a discussion item on a City Commission agenda. This will allow our elected officials to direct staff to implement the recommendations listed in this report and/ or any other regulations they see fit.

**Exhibit "A"**

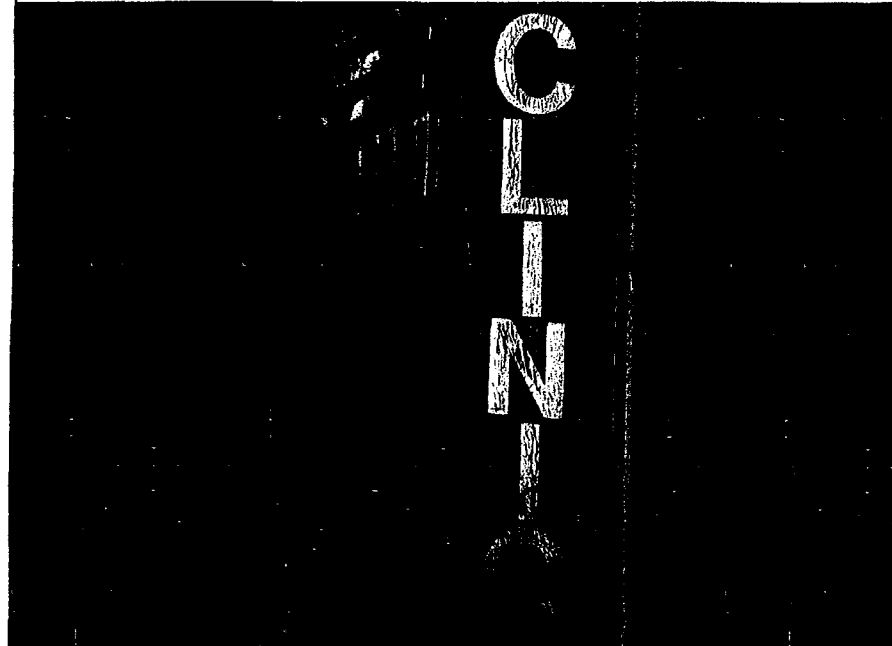
**Sober Housing/ Vacation Rental Regulations in Broward's Cities**

Cities	Sober Housing Regulations	Vacation Rentals Regulations
<b>Pembroke Pines</b>	Categorized as a group home. Cannot be located within 1,000 feet of another group home. (Not necessarily enforced)*	No restrictions on short term rental housing
<b>Lauderdale-by-the-Sea Deerfield Beach</b>	<i>Still waiting on response</i> No regulations on sober housing	Prohibits less than 7 days. Regulates over 7 days up to 3 months - requires certificate for the use and designated agent, and creates duties for property owner, agent, and occupants. No regulations on short-term vacation rentals
<b>Sunrise Plantation</b>	The city considered creating sober house regulations but determined that since it is not explicitly allowed, the City cannot regulate it. They determined they cannot regulate who can rent a single-family home. An apartment complex, could however violate state regulations for being transient when it says it is non-transient. No regulations on sober housing It could potentially fall under "Level 1 Facility" (Sec. 47-18.32) if it were regulated by the State. Otherwise, no regulations exist.*	No regulations on short term rental housing. No hotel use is allowed in residential zoning No regulations on short-term vacation rentals
<b>Fort Lauderdale</b>	Considered a "group care facility" and allowed with special exception approval in multi-family districts with separation requirements.*	Not allowed. (Not necessarily enforced)
<b>Margate</b>	Not listed on the master business list and therefore requires conditional use approval from the City Commission.	No restrictions on short term rental housing
<b>Oakland Park Coconut Creek</b>	Code does not address sober housing.	No regulations. Code enforcement is the only solution. Code does not address short-term vacation rentals.
<b>Coral Springs</b>	Considered a group home when licensed by the state. Otherwise regulated by the section of the code which addresses occupancy limits.*	Time shares are the only allowable vacation rentals and only allowed in RM-40 zoning districts
<b>Hollywood</b>	No regulations on sober housing	City looked into addressing it, but came to no final conclusion. In the end, the City Commission could not come up with a solution and chose not to address it in the Code.
<b>Miramar</b>	City defines sober homes as "group homes," although they acknowledged there is not a good definition for group homes.*	No restrictions on short term rental housing
<b>Dania Beach</b>	Falls under term "Transient public lodging"	Falls under term "Transient public lodging"; rented to guests for periods of 30 days or 1 calendar month, whichever is less.

\* These cities initially responded that they would classify the sober homes as a group home. This could be partially because the city may not be familiar with the use. Most cities' definition of group home state that the home must be licensed by the State. Since sober homes are not licensed by the State, additional research may likely reveal the sober home would not actually be treated as a group home.

# 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



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.<sup>2</sup> 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 facilities 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.<sup>3</sup>

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,

Municipalities and counties across the country are familiar with the Fair Housing Act<sup>1</sup> ("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

- (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.<sup>4</sup>

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.<sup>5</sup> 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].”<sup>6</sup>

### 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.”<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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,<sup>13</sup> homeless shelters and other similar locations are not protected.<sup>14</sup>

### 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.”<sup>15</sup>

To establish a disparate impact, a plaintiff must demonstrate that the challenged practice or policy actually or predictably resulted in discrimination.<sup>16</sup> 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.<sup>17</sup> A more substantial government justification is

*continued on page 26*



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**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.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup> In such situations, courts are quick to find in favor of sober living homes asserting disparate impact claims.<sup>21</sup>

"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"<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> Courts also consider the governmental purposes of the existing ordinance or action, and the benefits or accommodation to the handicapped individual.<sup>25</sup>

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.<sup>26</sup> However, fundamental or substantial modifications from municipal or zoning codes are not required.<sup>27</sup>

### **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<sup>28</sup> (for example, if a discriminatory practice has injured an organization's outreach program<sup>29</sup>). Additionally, traditional organizational standing allows suits on behalf of organization members.<sup>30</sup>

## **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."<sup>31</sup> 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.<sup>32</sup>

### **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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> The occupancy limits considered reasonable are often determined by building inspectors or health and safety inspectors.<sup>36</sup> An additional exemption in the FHA allows housing for older persons ("HOP") and discrimination based upon family status.<sup>37</sup> If the housing development meets the qualifications of a HOP established by Congress, ordinances discriminating based upon age are valid.<sup>38</sup>

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.”

### 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](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

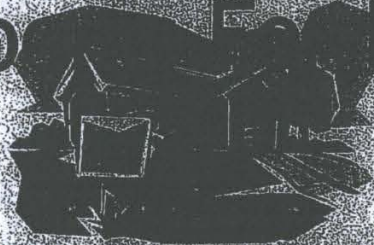
(D.N.J. 1992).

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).

M

# New Sober House

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**Exhibit “C”**  
**City of Margate**  
**Sober Home Regulations**

*Group care facilities:* A facility which provides residence, and/or supervision and services for individuals who are handicapped, aged, disabled, or undergoing rehabilitation including nursing homes, **sober** houses, halfway houses, convalescent homes, homes for the aged, foster and boarding homes, and retirement homes, whether the residents' stay are mandated or voluntary. The city shall ensure that no group care facilities are located within a one-thousand-foot radius of any other group care facilities located in any of the residentially zoned areas within the city. The one-thousand-foot radius will be used to provide a minimum separation of group care facilities needed to effectively preserve the residential neighborhoods of the city while also ensuring that disabled individuals inhabiting group care facilities experience a true neighborhood lifestyle.

Special Exception criteria for consideration:

- (a) Proximity to hospital and emergency facilities.
- (b) Accessibility for emergency vehicle services.
- (c) Accessibility to public transportation.
- (d) Impact on the surrounding area.
- (e) Accessibility to shopping, entertainment and other support services.
- (f) Control of dangerous behavior by clients, loitering and disorderly conduct.
- (g) A demonstration that adequate building and grounds maintenance will be provided.
- (h) Proximity of nearest like facility. No group care facility shall be located within six hundred sixty (660) feet, as measured by the shortest walking distance, of any other group care facility.
- (i) Provision of ample recreational facilities and landscaped area.