Sober Houses and the Fair Housing Act:
A Report Prepared for the Vermont Legislature

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Executive Summary

The rise and spread of addiction in the United States in the last 40 years has led to a variety of responses to foster recovery. One response has been the "sober house," a residence for recovering substance abusers seeking a wholesome environment supportive of sobriety. The sober home has become a nation-wide phenomenon, and there are now dozens of sober houses in Vermont. A partial list of these is in Appendix B of this report.

The success of the sober house concept in supporting recovery has been proven scientifically, but in recent years, as addiction has become more widespread and the need for sober homes has grown, abuses have arisen in the system. Unscrupulous "profiteers" are creating "entrepreneurial" sober homes to make money by exploiting the needs of the handicapped, and the result is a host of problems.

In response to citizens' complaints about these problems, various local and state governments all over the country have responded by passing laws addressing zoning, public safety, building codes, traffic and parking, health, definitions of "family," and other aspects of group living. But none of these efforts have eliminated the problems, due to the unique nature of the sober house: its immunity from local and state regulation.

The 1988 Amendment to the Fair Housing Act (FHAA) barred discrimination against the handicapped, and recovering alcoholics and drug addicts are included in the definition of "handicapped." Federal law trumps local and state law. As applied by numerous federal courts, from the district level to the U.S. Supreme Court, the FHAA exempts sober homes even from legislation purporting to protect the residents of sober homes. Federal judges call such laws "paternalistic."

For a legislative body—be it a city, town or state—to venture into the regulation of sober homes is to enter perilous territory. Obstacles exist at the local and state levels with regard to regulating sober homes. Yet while regulation remains a challenge, there are ways to implement change and improve the conditions in our Vermont communities. Toward implementing such changes, our state government:

- can recognize the difference between the well-run sober homes and those run by profiteers out to make money
- can monitor the increasing problems of sober homes and their neighborhoods
- can encourage diligent monitoring of those aspects of sober home activity where fraud has turned up in other jurisdictions, e.g. the Medicaid fraud discovered in Massachusetts. Sober homes are immune from local and state regulations but their proprietors certainly are not immune from criminal prosecution.
- can solicit advice from experts and government administrators in other jurisdictions, like Massachusetts, on how to identify fraudulent schemes and other crimes that have been associated with sober homes. Toward this end, Appendix A provides a list of persons who can provide relevant information.
- can work with the appropriate administrators of Vermont government agencies to develop plans or programs that the state will be able to implement when Congress takes action to remedy the abuses in the sober house system.

Vermont has a well-deserved reputation as a progressive pioneer in social and political issues, and our Legislature can continue this tradition as we grapple locally and nationally with the sober home situation.

Acknowledgements

It is a pleasure to acknowledge all the help and support I have received in both the crafting of this report and in navigating the maze of activities that were the background to its creation. First to learn of the change of use at 19 East Street, Judy Woodruff alerted the neighborhood, and she has been a constant supporter of our efforts to deal with the sober house in our midst. The Woodruff family—Mary, Charlotte, Kate and Bill—also provided advice, ideas, tips, guidance and resources that helped in our appeal to the Development Review Board. I am very grateful for their interest and support.

Everett Coffey provided me with invaluable background and orientation to the history of Waterbury and its management. As a relative "newbie" to Vermont, I had little context within which to evaluate what was going on in our town. Everett was wonderful in sharing his deep familiarity with small-town politics in this neck of the woods.

Paul Donovan, the Librarian at the Vermont State Law Library, was a tremendous help early in the process, as we worked our way through the appeal, and later, as I undertook to set our experience in the context of the case law around sober homes. Thanks to Paul's expertise in finding and sending me the texts of the relevant cases, my broken leg was spared the trauma of getting to the Law Library in person. Thank you, Paul!

I am indebted to Joe Nusbaum and Jack Barwick, for their willingness to read a draft of this report and give me feedback. Their comments and suggestions for improvement were cogent, thoughtful and well-taken.

It would never have occurred to me to create this document were it not for the response of Senator Ann Cummings to a letter I wrote to her about the situation at 19 East Street. For her interest and concern, as well as her willingness to extend herself on behalf of her constituents, I am very grateful.

Finally, last but *most* of all, I owe a huge debt to the tireless efforts of Janet Cote, who took upon herself 90% of the chore of collecting information about the activities at 19 East Street, sober houses, the intricacies of the law, experts on substance abuse and sober homes, and any other information I couldn't find online. Jan did all my legwork (both literally and figuratively) as I sat at the computer, leg in cast. Without her help, encouragement, enthusiasm and resourcefulness, this report and all the background behind it would never have come into being.

If this report were to have a dedication, it would be to all those persons, past, present and in the future, who endeavor to provide a *quality* sober house experience to those in recovery.

Introduction

The background to this document: On July 27, 2013, some of the residents of East Street in Waterbury learned that their neighbor, Melissa Riegel-Garrett, was moving and would be renting her house (a two-family residence at 19 East Street) to a man, Andrew Gonyea, who would be converting it to a sober house. This news galvanized a protest movement, initially taking the form of gathering 53 names on a petition, and then, on July 30th, filing a formal appeal with the Waterbury Development Review Board of the Zoning Administrator's decision to approve this change of use without a conditional use permit hearing. The DRB heard the appellants on September 5th and 19th, and rejected the appeal on October 3rd. Some of the appellants considered filing an appeal with the Environmental Court until they learned of my research for this report.

The purpose of this document: There has been much talk, heated emotions and vitriol focused on this situation over the last 10 weeks, but little solid research of the subject of sober houses, their history and the relevant case law. Scholar that I am, I decided to research in depth the whole subject of sober houses, toward providing interested parties with a more informed perspective.

The Definition of "Sober House"

A "sober house" is a residence for people who are in recovery from substance abuse and/or chronic mental health disorders, ideally located in a quiet residential area that can provide the residents with a wholesome, supportive environment.[1] The literature contains many synonyms for "sober house," e.g. "sober living homes,"[2] "sober living environments,"[3] and "Alcohol and Drug Free (ADF) Homes."[4]

Another term—"halfway house"—turns up in the literature occasionally and this can cause confusion, because different states use the term differently. For example, in Minnesota, "halfway house" refers to a living situation for persons who are just out of a residential treatment center—a step down from tightly supervised care, but still offering consistent oversight.[5] In California, Florida and many other states, "halfway house" is often used interchangeably with "sober house."[6] In other jurisdictions "halfway house" is an interim facility for convicts who have been sent from prison to serve the remainder of their sentence in a less restrictive environment. In this sense "halfway houses" are highly monitored, regulated and operate under the state's department of corrections.[7] A sober

[1] *The Corporation of the Episcopal Church in Utah & The Haven v. West Valley City*, pp. 3-4. For all court cases the Westlaw citations are given in the Bibliography.
[2] Dumont (2011); cf. http://leadership-innovation.org/publicvoice/sobervrehab.html
[3] http://en.wikipedia.org/wiki/sober_living_environment
[4] This is the term used by the Massachusetts Department of Public Health, Bureau of Substance Abuse Services.
[5] http://www.sunsetrecovery.org/halfway-house-and-sober-house-...
[6] Ibid.
[7] http://en.wikipedida.org/wiki/Halfway_house

home is not run by the state but is a small business run either by a single proprietor or in a small partnership.[8]

Features of the Typical Sober House

Unlike residential treatment facilities, which are licensed by a state, and run by trained, licensed professionals, sober homes are privately owned and operated with a variety of management styles ranging from the democratic self-governance of the Oxford model,[9] to more directed programs like Steve Manko's Provider Plaintiffs.[10] The individuals who create sober homes come from varied backgrounds, almost all having a personal history of drug or alcohol addiction. Some homes have been created by past offenders (such is the case with the sober house at 19 East Street in Waterbury: Andrew Gonyea is currently on parole).[11] It is often difficult for prospective residents to learn about the background of the proprietor of the home, and the literature is rife with warnings to recovering addicts about the potential for abuse and exploitation by unscrupulous "profiteers" who create sober homes to make money while avoiding local and state zoning regulations.[12]

The typical sober home consists of a group of peers, all of whom are in recovery, sharing the goal of becoming independent and self-supporting. While some residents of sober homes may receive some form of government benefits, most sober homes do not receive grants or government subsidies (the one-third of sober homes in the U.S. that are not-for-profit organizations may be eligible for grants).[13]

The sober home places numerous requirements on its residents: Number One in importance is staying clean and sober. Most sober homes will expel a resident who repeatedly violates this rule. Participation in some form of 12-step program or a spiritually-based recovery program is either required or strongly encouraged. Residents must obey house rules which usually bar violence, threats of violence, fighting, harassment, theft or unexplained absences. Residents are expected to participate in the maintenance and governance of the residence, to do chores, to pay rent, buy food and be financially independent.[14]

As a form of communal living, most sober homes are small, ranging in size from 6 to 30 persons, depending on the size of the home. Residents typically share a bedroom with others, and they must demonstrate to the group that they are taking concrete steps toward long-lasting recovery, e.g. by finding work, holding down a job, and fulfilling their responsibilities. Residents are expected to be responsible for themselves. They can come and go as they please.[15] While some sober homes have curfews, the house at 19

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[8] Bridge Transitional Recovery Homes, Inc; info@BridgeRecoveryHomes.com

[9] For a full description of the Oxford House model, see its very informative Web site: www.oxfordhouse.org

[10] *Jeffrey O. et al. v. City of Boca Raton,* p. 4.

[11] Gonyea was convicted in April, 2005, of 3 felonies: burglary, assault with a deadly weapon, and assault and robbery, and is on parole until December 2014; Vermont Department of Corrections.

[12] 'Sober Living Home' vs. 'Residential Treatment Home;' http://leadership-innovation.org/publicvoice/sobervsrehab.html

[13] Bridge Transitional Recovery Homes, Inc.; info@BridgeRecoveryHomes.com

[14] Ibid.; cf. http://www.rehabs.com/about/sober-living/ and www.oxfordhouse.com

[15] http://www.rehabs.com/about/sober-living/

East Street does not, and the neighbors have been disturbed at all hours of the night as the sober house residents return home.

The Rise of the Sober House Concept

With the spread of the phenomenon of addiction in the last 30 years, there has grown a concern to develop ways to foster recovery. The sober home idea began, as most social phenomena seem to do, on the West Coast and has proliferated throughout most of the rest of the U.S.[16] Sober Living Coalitions or Networks have developed, and various televisions shows have brought the concept to public awareness.[17]

One of the most successful networks of sober houses is Oxford House. The original Oxford sober house was "…founded in 1975 by a group of men who were recovering from drug and/or alcohol addiction."[18] Between 1975 and 1993 the number of Oxford House sober homes grew from 1 to 375.[19] In 2013, the total is over 1,200 homes world-wide, reflecting both the viability of the concept and the growth of the problem of addiction.[20] Three basic rules govern the Oxford House model: the home is democratically self-governing, all the residents having a say in what goes on in their home; the home is financially self-supporting, all the residents contributing to the operation and paying rent; and all residents must forswear drinking or using: any use of alcohol or drugs results in immediate expulsion. Residents can stay in the home as long as they observe these 3 rules. When Congress wrote the Anti-Drug Abuse Act of 1988, it based the law on the Oxford House concept.[21]

Why did Congress put such value in the concept of the sober house? In the past, before the rise of sober homes, the "cured" recovering addict would be released back into his original environment, and would often relapse under the influence of old friends (still using/drinking) or the toxic family environment that fostered the substance abuse initially. Congress recognized the merit of some sort of interim environment—clean, sober, supportive of recovery. Hence the rise of the sober house. By the turn of the 21st century, sober houses were found in almost every state of the Union.[22]

Sources of Information on Sober Houses

Google "sober house" and the Internet will produce 7,660,000 results! This overwhelming body of material can be broken down into essentially 3 types: the ads for

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[16] http://en.wikipedia.org/wiki/Sober_living_environment
[17] E.g. "Celebrity Rehab with Dr. Drew," which mentioned the sober house idea in its eighth episode.
[18] *Oxford House, Inc. v. Town of Babylon*, p. 4
[19] Ibid.
[20] Gorman, Marinaccio & Cardinale (n.d.), p. 1; see Appendix D for the text of this article.
[21] *Oxford House, Inc. v. Town of Babylon*, p. 4.
[22] Because there is no regulation of sober homes, it is impossible to determine the exact number, even within single municipalities. The literature is replete with officials admitting they have no idea how many sober houses exist in their jurisdiction. Cf. "Saint Paul Sober House Zoning Study," p. 5, mn-stpaul.civicplus.com/DocumentView.asp?DID=4829; "Study Regarding Sober (Alcohol and Drug Free) Housing In response to Chapter 283, Section 10, of the Acts of 2010, p. 4, www.mass.gov/eohhs/docs/dph/substance-abuse/adf-housing-study.pdf; and "City of Delray Beach's Response to Questions Posed by DCF regarding Regulation of Recovery/Sober Houses," p. 2, www.dcf.state.fl.us/programs/samh/.../2013062DelrayBeachresponse.p...

sober houses, including chains or networks (the most famous of which is the Oxford House group noted above); articles from newspapers relating either citizen protests about sober houses appearing in their residential neighborhoods or crimes connected with sober houses; and scholarly articles reporting on research about sober houses. Herewith a brief summary of the 3 types.

The ads are pitched to recovering addicts or their families and, as one would expect, they talk up the advantages of their home over the establishments that lack services, offer no programs, have no structure, and provide minimal support. A sober house, by definition, is not licensed and offers no medical, counseling or professional services. Many of the ads warn readers to avoid the "rehab profiteers [who] LOVE this term 'sober living' and use it illegally to try to avoid local city zoning and regulations…"[23] Given the disintermediated nature of the Internet, it can be very difficult for a person to distinguish a quality sober house from a poor one simply by the Internet ads. Oxford House is an exception here, as it has a lengthy track record and some "name recognition" in the field of recovery assistance.

The second type—newspaper articles about sober houses—skews toward the negative, given both the nature of reporting ("If it bleeds, it leads" is a cardinal rule of American journalism!) and the fact that the typical sober house has few rules, little outside oversight, no regulation and no on-site management. In all my hours of trolling the Internet and reviewing the case law on this score I did not find a single article reporting a community's *pleasure* in learning of the placement of a sober house in their midst. The protests, the calls for politicians to do something, the appeals to the police—these articles are legion, and bespeak frustration on the part of citizens in residential areas when they discover that municipal zoning laws mean nothing in the face of the sober house's immunity under the federal Fair Housing Act.[24] Citizen displeasure comes starkly to the fore when crimes occur in or around a sober house, e.g. the recent murder in a Massachusetts sober house.[25]

The third type of Internet material is much more objective and dispassionate: the scholarly articles reporting on sober houses. Because the phenomenon arose on the West Coast, the most well-studied sober homes are in California and one of the most prolific organizations, in terms of scholarly analyses of sober homes, is the Alcohol Research Group of the Public Health Institute, based in Emeryville CA. This non-profit group has interviewed residents of sober homes, conducted surveys of dozens of "sober living houses" and analyzed data of multiple research projects, some of these funded by the National Institute on Drug Abuse. Their articles appear in a variety of scholarly publications, including the *Journal of Substance Abuse Treatment* and the *Journal of*

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[23] "Sober Living vs. Rehab?"; http://leadership-innovation.org/publicvoice/sobervsrehab.html

[24] For examples of litigation around sober houses and zoning, cf. *Schwarz v. City of Treasure Island,* pp. 22-24; *Human Resource Research and Management Group, Inc. & Oxford House v. County of Suffolk,* pp. 4,6,8,18,23; *Oxford House v. Town of Babylon,* p. 10; *Brad Bangerter v. Orem City Corporation,* p. 15; *Turning Point, Inc. v. City of Caldwell*, pp. 1,4; *Geraldine Larkin v. State of Michigan Department of Social Services,* pp. 2,5; *Bryant Woods Inn, Inc. v. Howard County, Maryland,* pp. 2,9; *The Corporation of the Episcopal Church in Utah v. West Valley City,* pp, 3,4,7,8; *Regional Economic Community Action Program, Inc. v. City of Middletown*, pp. 11,19,20; *Beverly Tsombanidis, Oxford House v. West Haven Fire Department*, pp. 10,18; *Lakeside Resort Enterprises, LP. v. Board of Supervisors of Palmyra Township,* p. 2; and *Jeffrey O. et al. v. City of Boca Raton,* pp. 2,5,7,10,13,18,19.

[25] Young (2013).

Psychoactive Drugs.[26] This third type of source provides the most solid material, in terms of substantive research that indicates the value and importance of sober homes in fostering sobriety, healing from addiction and advancing quality of life for recovering addicts and alcoholics. Appendix A to this report provides the contact information for the Alcohol Research Group (see "Douglas Polcin") and identifies some of the scholars and other experts on substance abuse, addiction and sober homes.

"The law is born old:" Problems Linked to Sober Homes

I heard the phrase "The law is born old." from my Yale professor, Robert S. Lopez, who was reminding us that law is never created *ex nihilo*, but arises from some societal need or problem—often a problem of long-standing. Certainly this is true in the context of sober homes: Over the 30+ years sober homes have existed, there have been multiple problems, from quotidian complaints about noise and garbage, to more serious problems like fights and thefts, to tragedies like suicides and murders.

The murder of Melissa Hardy in a South Boston sober house in June of 2013 made headlines and brought the existence of the sober house phenomenon to the attention of both the authorities and the public.[27] Hardy's was not the only fatality linked to sober houses: "… a memorandum from the Chief of Police of the City [of Boca Raton, Florida] detailing cases involving fatalities at the subject properties [run by Steve Manko]…"[28] came to the attention of the federal district court in the case of *Jeffrey O. et al. v. City of Boca Raton*. In another tragedy, Kathy O'Neill lost her son in a heroin overdose while he was living in a sober home in Patchogue, Long Island.[29] After Jarrod McEntyre died while living in a sober home in California, his mother Wendy created a Web site, www.JarrodsLaw.org, and a Foundation to press for regulation of sober homes.[30]

The residents of sober homes have committed lesser crimes, like stabbing, shoplifting, harassment, public sex acts, sexual assault, robbery, breaking and entering, auto theft and selling drugs.[31] More sophisticated schemes have involved fraud: in a Massachusetts case 8 sober houses cost Mass Health $3.8 million in a scheme involving fraudulent urine tests. In another Massachusetts case the operator of a sober house on Cape Cod received Medicaid kickbacks.[32]

More common are problems like lack of maintenance of the home, excessive debris on the grounds,[33] lack of heat and hot water, bedbugs,[34] noise at all hours of the night, high traffic volume,[35] parking problems,[36] and the bankruptcy of local food pantries due to the large number of sober home residents needing food.[37]

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[26] Cf. Polcin & Henderson (2008), Polcin (2009), Polcin, Korcha, Bond & Galloway (2010a), Polcin, Korcha, Bond & Galloway (2010b), and Polcin, Mulia & Jones (2012)
[27] Ibid.
[28] *Jeffrey O. et al. v. City of Boca Raton*, p. 13.
[29] Ruud (2013).
[30] http://www.change.org/petitions/state-of-california-implement-oversight-for-sober-living-homes
[31] Runyon (2011), Ruud (2013), and Issler (2013).
[32] Teehan (2013)
[33] *Human Resource Research and Management Group Inc & Oxford House v. County of Suffolk*, p. 28
[34] Seville & Kates (2013).
[35] "Sober Living and the Law." URL: www.soberlivingcertification.com

Harder to document are problems associated with the exploitation of the residents of some sober homes by "profiteers" who set up a home (or multiple homes, if they are "entrepreneurial")[38] more to make money than to provide proper care, quality living conditions and a positive recovery experience. One of the most explicit examples of such profiteering is provided in the federal case *Jeffrey O. et al. v. City of Boca Raton*. In this case a business, Provider Plaintiff, set up by Steve Manko in Boca Raton, Florida, served about 390 individuals in 14 apartment buildings, all within a quarter-mile of each other. Manko used tactics common to profiteers, e.g. "evicting individuals who relapse while keeping the person's deposit…".[39] This tactic was responsible for over ten percent of Provider Plaintiff's total income. Manko also forced residents to participate in treatment or rehabilitation activities, employing a "… business model [that] did not always appear to be so altruistic."[40] Manko also put more than three people in a housing unit, a policy that the District Court judge, Donald M. Middlebrooks, regarded as "based on economics," since this scheme netted Manko $2,720 a month per unit.[41] That Manko was able to purchase more than a dozen apartment buildings suggests the continued profitability of his business. In response to Manko's activities, the city of Boca Raton suggested that Provider Plaintiffs was "more of a profit driven enterprise than a place where people actually lived."[42] The judge came to conclude that "… some of Provider Plaintiffs' business practices give me pause, particularly where Provider Plaintiffs are seeking protection from a statute which protects handicapped individuals, because many of the business practices employed by Provider Plaintifss do not appear to serve the therapeutic needs of these handicapped individuals…"[43] Judge Middlebrooks termed Manko's practices "questionable," his activities "a commercial operation," and his hands "unclean."[44] Other examples of profiteering at the expense of sober home residents can be found in numerous federal cases, e.g.:

➔ in *Bryant Woods Inn, Inc. v. Howard County, Maryland* a neighbor of the sober house, in explaining why the proprietor sought to raise the number of residents from 8 to 15, did the math for the Court: "The real reason that I think more than eight is needed… is the pure economies of scale. I had heard the number quoted twenty-five hundred dollars a month is what each resident pays. Well if you multiply that by 12 times 8 residents, you're talking about a quarter of a million dollars of receipts in a year…."[45] The judge

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[36] Ibid. Lack of adequate parking was one reason why the Court of Appeals (4th Circ.) denied the appeal of a Maryland sober house—one of the very rare instances of a sober house losing its case in federal court; see *Bryant Woods Inn, Inc. v. Howard County, Maryland*, pp. 4 & 6.

[37] *Human Resource Research and Management Group Inc & Oxford House v. County of Suffolk*, p. 23.

[38] This is the term used by J. Paul Molloy, the CEO of Oxford House, in his deposition to the District Court in ibid., p. 31. Examples of entrepreneurial sober house operators are Steve Manko, in Boca Raton, Florida, and Andrew Gonyea, the operator of the sober home at 19 East Street in Waterbury. Gonyea now runs 4 sober homes in northern and central Vermont, and he told WCAX News that he intends to set up more all over the United States; see http://www.wcax.com/story/18064252/inmates-to-classmates-part-1

[39] *Jeffrey O. et al. v. City of Boca Raton*, p. 5.

[40] This was the conclusion Judge Middlebrooks reached in his assessment of Provider Plaintiffs' business model; ibid., p. 7.

[41] Ibid.

[42] Ibid., 14.

[43] Ibid.

[44] Ibid., pp. 16 & 20.

[45] *Bryant Woods Inn, Inc. v. Howard County, Maryland*, p. 6

concluded that the only real advantage that would accrue by expanding the size of the house would be to "… financially assist Bryant Woods Inn as a for-profit corporation."[46]
➔ in *Matthew Schwarz, Gulf Coast Recovery, Inc. v. City of Treasure Island*, the halfway house leased a single bedroom for recovering addicts for between $1,000 and $2000 a month (which included food).[47]
➔ in *Human Resource Research and Management Group Inc. & Oxford House v. County of Suffolk*, local citizens criticized the owners of substance abuse homes as "merely 'out to make a quick buck'," [48] by "profiteering"[49] at the expense of a vulnerable population. In response to this, the founder of the Oxford House model, J. Paul Molloy, testified in a deposition, that he "believed that regulation was appropriate for substance abuse houses run by 'entrepreneurs,'…"[50] i.e. by persons who operated sober homes more for profit than for the welfare of the residents.

Another type of problem associated with sober homes is community reaction: the "NIMBY" response when residents learn of plans to site a sober home in their midst.[51] We certainly saw this "Not In My Back Yard!" response in our Waterbury neighborhood in late July 2013. We got 53 signatures on a petition less than 48 hours after hearing of the imminent transformation of 19 East Street from a two-family home to a sober house. Our effort pales compared to opponents of sober homes in Suffolk County on Long Island: They got 4,000 petitions demanding action from County officials, as the number of sober homes in two communities rose from 29 to 40 over a 3-year period.[52] Organized opposition to sober homes and animosity toward their residents is not uncommon, much of it due to "blanket stereotypes about disabled persons,"[53] concerns for public safety, and reluctance on the part of long-time residents to lose a sense of community amid the influx of a transient population.[54]

Widespread community opposition often comes to the attention of town, city and state officials, and this creates another problem. As Judge Richard C.Wesley, of the U.S. Court of Appeals (2nd Circ.) noted in *Tsombanidis v. West Haven Fire Department*, local residents with a longstanding antipathy toward group homes can put pressure on a mayor

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[46] Ibid., 11.
[47] *Matthew Schwarz, Gulf Coast Recovery Inc. v. City of Treasure Island*, p. 8.
[48] *Human Resource Research and Management Group Inc & Oxford House v. County of Suffolk*, p. 30.
[49] Ibid., p. 8.
[50] Ibid., p. 31. Coming from Molloy—a staunch advocate for non-regulation of sober homes—this is a remarkable admission of the poor conditions in many of the entrepreneurial type of sober home.
[51] For examples of the "NIMBY" response in the case law cf. *Geraldine Larkin v. State of Michigan Department of Social Services*, p. 9; *Bryant Woods Inn, Inc. v. Howard County, Maryland*, pp. 5.10; *The Corporation of the Episcopal Church in Utah & The Haven v. West Valley City*, p. 4; *Regional Economic Community Action Program, Inc. v. City of Middletown*, p. 20; *Beverly Tsombanidis, Oxford House v. West Haven Fire Department*, pp. 8,9,18; *Jeffrey O. et al. v. City of Boca Raton*, p. 3,5,10,21; *Matthew Schwarz v. City of Treasure Island*, p. 18; *Human Resource Research and Management Group, Inc. v. County of Suffolk*, pp. 22,23,25,30; *Horizon House Development Services, Inc. v. Township of Upper Southampton*, p. 8; *Oxford House, Inc. v. Township of Cherry Hill*, p. 16-17; and *Oxford House, Inc. v. Town of Babylon*, p. 8.
[52] *Human Resource Research and Management Group, Inc. & Oxford House v. County of Suffolk*., pp. 22-23.
[53] Ibid., p. 25.
[54] Ibid., p. 16; cf. *Matthew Schwarz, Gulf Coast Recovery Inc. v. City of Treasure Island*, pp. 8,9,23-24; *Beverly Tsombanidis, Oxford House v. West Haven Fire Department*, p. 18; and *Lakeside Resort Enterprises v. Board of Supervisors of Palmyra Township*, pp. 1,5.

and other town officials.[55] In his decision, Judge Wesley acknowledged that "… the district court noted the hostility of neighborhood residents to OH-JH [Oxford House-Jones Hill] and their pressure on the Mayor and other city officials. Evidence supports the court's finding that this hostility motivated the City in initiating and continuing its enforcement efforts…."[56] Why is this a problem? In our democracy is it not to be expected that political leaders would be responsive to the concerns of their constituents? It is a problem due to recovering addicts being regarded as "persons with handicaps" and thus entitled to protection under the Fair Housing Act.[57] Which brings us to the next section of this report.

Legislative Responses to Problems with Sober Homes

Many of the legal cases that have come before the federal courts have arisen out of lawmakers' responses to citizens' fears and concerns about sober homes. These responses have taken various forms:

• City officials in West Haven, Connecticut, applied a double standard[58] in enforcing zoning regulations, occupancy rules, fire safety and other laws, in order to evict a sober home.[59]

• West Valley City, Utah, based its denial of a conditional use permit application by a sober home on the complaints of neighborhood residents.[60]

• Municipal decision-makers in Middletown, New York, took their position against the siting of a sober home in response to the animus expressed by residents toward recovering addicts.[61]

• Some officials of Boca Raton, Florida, treated recovering alcoholics unfairly in subjecting them to derogatory statements and humiliation in public meetings.[62]

• The city commissioners of Treasure Island, Florida, stated openly in public meetings that they did not want halfway houses in their neighborhoods.[63]

• Legislators in Clark County, Nevada, expressed their concern about sober homes "encroaching" on neighborhoods, which they feared would erode property values.[64]

• Without any attempt to make an official study, the legislature in Suffolk County, New York, set up a variety of regulations for sober houses, acting solely on the anecdotal testimony of citizens.[65]

• Town officials in the Township of Upper Southampton, Pennsylvania, responded to "community opposition and outmoded fears…" in creating an ordinance imposing spatial requirements on the siting of group homes.[66]

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[55] *Beverly Tsombanidis, Oxford House v. West Haven Fire Department,* p. 8,10,18.
[56] *Tsombanidis v. West Haven Fire Department,* p. 18.
[57] *City of Edmonds v. Oxford House, Inc.,* p. 5.
[58] I.e. the municipality tried to require more rigorous codes and standards for the sober home than it used for other residential properties.
[59] Ibid., p. 10
[60] *The Corporation of the Episcopal Church in Utah & The Haven v. West Valley City,* p. 3.
[61] *Regional Economic Community Action Program Inc.v. City of Middletown,* p. 6.
[62] *Jeffrey O. et al. v. City of Boca Raton,* p. 3.
[63] *Matthew Schwarz, Gulf Coast Recovery v. City of Treasure Island,* p. 18.
[64] *Nevada Fair Housing Center Inc. v. Clark County,* p. 9.
[65] *Human Resource Research and Management Group Inc. & Oxford House v. County of Suffolk,* p. 28
[66] *Horizon House Developmental Services Inc. v. Township of Upper Southampton,* p. 18.

In all these cases officials and lawmakers were reflecting their constituents' attitudes, or responding to citizens' complaints. But in every case the result was a federal lawsuit, and therein lies the key reality with regard to sober homes: Under the Fair Housing Act Amendment of 1988, recovering alcoholics and drug addicts, and the sober homes that provide them refuge, are immune from nearly all forms of regulation by local or state governments.[67]

Case Law related to Sober Homes

The case law on this point is clear. Persons in recovery from alcohol or drug addiction are a "protected class" since "Alcoholism, like drug addiction, is an 'impairment' under the definitions of a 'disability' set forth in Americans with Disabilities Act (ADA), Fair Housing Act (FHA), and Rehabilitation Act."[68] These Acts are federal laws, and federal District Judge Ann Aldrich notes, in *Larkin v. State of Michigan Department of Social Services*, that federal law "… may preempt state law… by explicitly preempting states laws, by occupying the field in area or by process in which federal law preempts state law when they actually conflict,…"[69]. In a typical scenarios a city or state passes whatever rules, regulations or restrictions the voters clamor for with regard to sober houses. Then the operators of these houses, knowing their rights, sue in federal court.

In some cases the operator of a sober house sues under both the FHAA and the Americans with Disabilities Act (ADA). When the sober house wins in federal district court, in many cases the municipality then appeals to the federal Court of Appeals. The sober house wins again.

In the 22 cases I studied,[70] all but two were won in favor of the plaintiff, the sober house. In the two where the sober house lost, failure was due either to poor preparation (failure to meet court deadlines or to produce documents germane to the case)[71] or to unique circumstances of the site (which had very little room for parking, in a county with a surplus of sober home spaces available for recovering addicts).[72]

Several months ago, in April of this year, New York State Senator Lee Zeldin, representing the 3rd Senate District (eastern Suffolk County), introduced "The Suffolk Healthy Sober Home Act," which aims "… to ensure that appropriate living standards are being maintained, and establish regulations pertaining to the operation of sober living homes…."[73] The bill addresses the overcrowding, unsanitary, incompetently managed, drug-and-alcohol infested condition of some sober homes in Suffolk County. Thus, on the face of it, this bill seeks to protect the residents of sober homes—a seemingly laudable goal. But the case law indicates that federal courts have a very different view.

"Paternalism" is the term used in multiple cases I studied in this regard. For example, the Michigan Department of Social Services sought to argue that the statutes

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[67] But not *all* forms; see the article by Gorman, Marinaccio & Cardinal, included here as Appendix D, for a discussion of the intricacies involved in regulating sober homes.
[68] *Regional Economic Community Action Program & United States of America v. City of Middletown*, p. 4.
[69] *Geraldine Larkin v. State of Michigan Department of Social Services*, p. 1.
[70] See the bibliography *infra* for the complete list, in alphabetical order.
[71] *Matthew Schwarz v. City of Treasure Island*, pp. 4,9-12,15,18-20.
[72] *Bryant Woods Inn, Inc. v. Howard County, Maryland*, pp. 4,10,11.
[73] Zeldin; http://www.nysenate.gov/

that were in violation of the FHAA "… cannot have a discriminatory intent because they are motivated by a benign desire to help the disabled."[74] Judge Ann Aldrich rejected this reasoning, based on the fact that "… all of the courts which have considered this issue under the FHAA have concluded the defendant's benign motive does not prevent the statute from being discriminatory on its face."[75] Aldrich went on to interpret the State's policy as "… based on the paternalistic idea that it knows best where the disabled should choose to live."[76] In *Jeffrey O. et al. v. City of Boca Raton*, Judge Donald Middlebrooks cited Aldrich's ruling in *Larkin* to reject the City's claim of benign intent.[77] Judge Larry Hicks, in *Nevada Fair Housing Center, Inc. v. Clark County*, noted that a "benign legislative intent does not convert a facially discriminatory law into a neutral law,…"[78] Judge Hicks went on to note that concerns for the safety of the residents of the sober home "may not be the 'true reason' for the spacing and registry requirements."[79] In *Human Resource Research and Management Group, Inc. & Oxford House v. County of Suffolk*, the County sought to regulate the location and placement of sober houses so as "… to protect the interests of the ill while still ensuring acceptance by local communities."[80] The federal court held that requiring a sober house to have an on-site manager would subject residents to "disparate treatment," would impose "a significant monetary cost on the operation of the substance abuse houses" and would frustrate the residents' privacy and "their ability to achieve an independent and normal living setting."[81] Finally, in the case of *Horizon House Developmental Services v. Township of Upper Southampton*, Judge Lowell Reed Jr. stated that "It is a violation of the FHAA to discriminate even if the motive was benign or paternalistic."[82]

In the face of this uniform rejection of any form of state legislation of sober homes, I find myself wondering at the legality of Senator Zeldin's bill. Perhaps he has broader political aspirations and is going through the motions of responding to his constituents' demands to do something about the phenomenon of sober houses, even though his legislation has as much chance of holding up in court as the proverbial snowball has in Hell. I don't know the Senator's motives, but the case law certainly suggests his efforts will cost New York State taxpayers and do little or nothing to benefit the folks living in poorly-run sober homes.

Oxford House, with its network of over a thousand sober homes, along with other Sober Living Networks and similar groups, is aggressive in its defense of the principle that sober homes are federally protected,[83] even those which are not well-run or suitable for people in recovery. The founder of Oxford House, J. Paul Molloy, recognizes that some homes—especially those run primarily for profit, rather than for the benefit of residents—*should* be regulated, to curb some of the abuses that have crept into the

[74] *Geraldine Larkin v. State of Michigan Department of Social Services*, p. 1.
[75] Ibid., p. 6.
[76] Ibid., p. 8.
[77] *Jeffrey O. et al. v. City of Boca Raton*, p. 11.
[78] *Nevada Fair Housing Center, Inc. v. Clark County*, p. 2.
[79] Ibid., p. 10.
[80] *Human Resource Research and Management Group Inc. & Oxford House v. County of Suffolk*, p. 8.
[81] Ibid., pp. 25-26.
[82] *Horizon House Developmental Services Inc. v. Township of Upper Southampton*, p. 18.
[83] See "Oxford House and the Rule of Law" on the Oxford House Web site: www.oxfordhouse.org

system.[84] Thirty-one Congressional Representatives recognized this fact when they sponsored an amendment to the Fair Housing Act in 1998. This bill would have allowed states to regulate sober houses, but it died in committee.[85]

What Might a Legislature Do About Sober Houses?

I have created this report for the Vermont Legislature in the hopes that it will give our legislators a sense of the complexity of the issues surrounding sober homes, as well as alerting our busy lawmakers to the peril of legislating on this issue. As legal experts on sober houses note, the "FHA [Fair Housing Act] may significantly complicate local agencies' efforts to regulate sober living operations,…"[86]. Most of the time, given the nature of complaints that engender regulation, these agencies are either the police or planning and zoning Boards. When a town or city attempts to remove a sober house, under its zoning laws, or tries to regulate its activities, under its concern for public safety, the house will likely sue, asserting that such actions either create a "disparate impact" (i.e. that the law discriminates against the handicapped) and/or the sober house will demand "reasonable accommodation" from the local jurisdiction (i.e. that the city/town/state must grant the house "…an exemption from the strict application of the…" law).[87]

The Fair Housing Act Amendment does not give sober houses carte blanche to do whatever they please. For example, a town/city/state may set "… restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[88] The key distinction between a permissible exemption and one that violates the FHAA is the universality of the regulation, according to the Supreme Court, in *City of Edmonds v. Oxford House*. If a legislative authority regulates occupancy limits for reasons of public safety (to prevent overcrowding in *all* dwelling units within the municipality) such a regulation would be permissible.[89] Governments can also impose age restrictions in housing developments devoted to older persons and this restriction would apply to a sober home if it were set up in such an age-restricted development.[90] These examples suggest just how narrowly courts construe exceptions to the non-discrimination principle.

In sum, for a legislative body—be it a city, town or state—to venture into the regulation of sober homes is to enter perilous territory. Gorman, Marinaccio and Cardinale, specialists in the *arcana* of sober house litigation, suggest careful deliberation of pertinent questions, e.g.

➔ Can the operator of the sober house show that the residents are truly disabled, i.e. that they are in recovery, not still drinking or using drugs? Individuals who are drinking or using drugs are not considered "disabled" under the FHAA. The operator of a sober house must be able to prove that the residents are in recovery.

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[84] Molloy said this in his deposition in *Human Resource Research and Management Group Inc. & Oxford House v. County of Suffolk*, p. 31.
[85] This was H.R. 3206 (105th): Fair Housing Amendments Act of 1998, February 12, 1998, proposed by Representatives Bilbray, Canady and Harman and referred to the House Judiciary Committee.
[86] Gorman, Marinaccio & Cardinale (n.d.), sect III, C; see Appendix D.
[87] Ibid., sect V, A.
[88] Ibid.
[89] *City of Edmonds v. Oxford House*, p. 8.
[90] *Gibson v. County of Riverside*, p. 18; Gorman, Marinaccio & Cardinale (n.d.), sect V, A.

➔ Is the house in question a "dwelling," i.e. not a transitional facility like a motel or hospital? Some short-term rentals, like boarding houses, have been regarded as "dwellings" by the courts. The definition of "dwelling" has been the subject of lawsuits.[91]
➔ Are the occupants of the sober house truly "residents," i.e. in place long enough to provide a sufficient interval for their recovery? If a municipality can prove that the sober house has a weekly turnover of occupants, the courts might see it more as a boarding house or flop house, and, as such, beyond the protection of the Fair Housing Act.
➔ Would providing "reasonable accommodation" to the sober house cause "undue financial or administrative burdens on the agency" or municipality? If the agency is able to prove that providing accommodation would cause a severe impact on the community, it would not be required to do so.
➔ Can other procedures resolve the problem? A sober house can seek "reasonable accommodation" from the town or city, in its lawsuit, only after it has first tried to work with the municipality to find resolutions. If a town requires a Conditional Use Permit prior to establishing a sober house, the proprietor of the house must apply for it. Only if he/she is denied the permit can he/she request reasonable accommodation. Proactive legal counsel can head off a FHA lawsuit at this step in the process by advising the municipality to craft some sort of accommodation.

While the case law has clarified these and other aspects of the Fair Housing Act with regard to sober houses, murky areas remain. For example, how might a municipality balance the need to maintain affordable housing and meet regional housing needs with the rights of individuals to set up sober houses? What is the proper relation between halfway houses (transitional housing for prisoners coming out of prison) and sober houses? between "specialized" housing (for probationers, sex offenders and other such specific populations) and sober houses? How might a state effectively detect or prevent instances of fraud in the handling of Medicaid and other health-related payments (as happened in Massachusetts)? As Gorman, Marinaccio and Cardinale conclude "… the future promises to pose even more questions about the FHA's requirements, and the scope of its protections."[92]

The issue of sober houses is also colored by politics. Vermont as a state is known for its progressive stance toward social issues, and certainly the local political leaders in Waterbury have taken a positive attitude toward the sober house at 19 East Street. Most of the residents living in proximity to this sober house are less positive about its presence, and they would urge lawmakers to recognize the distinction between well-run sober houses, like those that are part of the Oxford House network, and those run more for the financial gain of the operator. Given Andrew Gonyea's stated intentions to set up sober houses all over the United States,[93] and the six-figure income he is currently deriving from the 4 sober houses he has in Vermont, it is clear that he is one of the "entrepreneurs" J. Paul Molloy referred to in his deposition in *Human Resource Research and Management & Oxford House v. County of Suffolk*.[94] In Molloy's expert opinion such entrepreneurial sober houses *should* be regulated.

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[91] E.g. *Schwarz v. City of Treasure Island.*
[92] Gorman, Marinaccio & Cardinale (n.d.), sect. VI.
[93] Gonyea stated this in an interview with WCAX, the local Vermont news station, in July 2013; see http://www.wcax.com/story/18064252/inmates-to-classmates-part-1
[94] *Human Resource Research and Management & Oxford House v. County of Suffolk*, p. 31.

Conclusion: What Concerned Citizens Are Asking of Legislators

A sense of realism suggests that, at the moment, it would be a waste of time for a state legislature to try to regulate sober homes. Certainly there are abuses in the sober house system, and these abuses are growing and becoming more evident as the number of sober houses increases. Eventually something will *have* to be done, but the action will have to be in Washington, not Montpelier, or Albany, or Boston. As I consider the current situation in Washington, with the makeup of the House and the less-than-enthusiastic attitude on the part of some members of the House for increasing government regulations, I doubt that we can hope for much action in this regard from our current Congress.

While the Legislature would do well to avoid trying to regulate sober homes, it can:

- remain aware of the sober house phenomenon and recognize the difference between the well-run sober homes and those run by profiteers out to make money
- monitor the increasing problems associated with the "entrepreneurial" type of sober home, with help in this regard from residents living in the vicinity of these homes
- encourage diligent monitoring of those aspects of sober home activity where fraud has turned up in other jurisdictions, e.g. the instance of Medicaid fraud that Massachusetts officials discovered.[95] Sober homes are immune from local and state regulations but their proprietors certainly are not immune from criminal prosecution.
- solicit advice from experts and government administrators in other jurisdictions, like Massachusetts, on how to identify fraudulent schemes and other crimes that have been associated with sober homes. Toward this end, I have appended a list of knowledgeable people who might be contacted for information.
- work with the appropriate administrators of Vermont government agencies to develop plans or programs that the state will be able to implement when Congress takes action to remedy the abuses in the sober house system.

Vermont has a well-deserved reputation as a progressive pioneer in social and political issues, and our Legislature can continue this tradition as we grapple locally and nationally with the sober home situation.

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[95] Teehan (2013), 9.

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Appendix A:
List of Contacts, Organizations, and Resource Persons Knowledgeable about Addiction, Sober Homes and Recovery

If the Vermont Legislature seeks expert testimony about sober houses, the following have been identified in the literature as good sources of information.

* indicates the individual/organization is based in Vermont

***Barbara Cimaglio**
Deputy Commissioner, Alcohol and Drug Abuse Programs, Agency of Human Services, Vermont Department of Health
contact: 108 Cherry Street, PO Box 70, Burlington VT 05402-0070
(802) 951-1258; fax (802) 951-1275
email: Barbara.cimaglio@ahs.state.vt.us

Don Coyhis
An active member of A.A., Coyhis combined his commitment to sobriety with his Native American roots to found The Wellbriety Movement, whose mission is to bring 100 Native American communities into healing through the Wellbriety program, which is based on the principles of A.A.
contact: The Wellbriety Movement Advocacy Office, 10920 Connecticut Avenue, Suite 100, Kensington MD 20895
(202) 328-5415

***Jyoti Daniere**
The current Director of Health and Wellness Education at Middlebury College, Daniere had previously been a counselor at the University of Vermont and St. Michael's College. She is the founder of The Burlington Eating Disorders Center, which provides therapy for a range of problems, including substance abuse.
contact: Parton Center for Health and Wellness, Middlebury College, 131 South Main St., Middlebury VT 05733
(802) 443-5135; 443-5141

Matthew M. Gorman
Gorman is a partner in the California law firm of Alvarez/Glasman & Colvin, practicing in the fields of municipal law, land use and real estate law.
contact: Alvarez/Glasman & Colvin, 13181 Crossroads Parkway North, City of Industry CA 91746
(562) 699-5500

Keith Humphreys
Research Professor of Psychiatry, Stanford University, Humphreys is one of a handful of scholars studying self-help groups like Alcoholics Anonymous. Helping to bridge the gap between the science and practice of recovery, Dr. Humphreys was formerly part of the White House Office of National Drug Control policy group.
contact: Department of Psychiatry, Stanford University School of Medicine, 401 Quarry Rd. MC 5717, Stanford CA 94305
(650) 723-6643
knh@stanford.edu

Anthony Marinaccio
Marinaccio is an Associate Attorney with the California law firm Alvarez/Glasman & Colvin specializing in real estate and landlord-tenant law.
contact: Alvarez/Glasman & Colvin, 13181 Crossroads Parkway North, City of Industry CA 91746
(562) 699-5500
Carol McDaid
The co-founder and principal of Capitol Decisions Inc, McDaid is a Washington D.C. lobbyist focused on national alcohol and drug treatment policy. Previously she worked for Blue Cross and Blue Shield and the Employee Benefit Services Group of PriceWaterhouseCoopers Washington National Tax Service.
contact: Capitol Decisions Inc., 101 Constitution Ave N.W., Suite 675 East, Washington D.C. 20001
(202) 737-8168
mailbox@capitoldecisions.com
Thomas McLellan
Professor of Psychiatry at the University of Pennsylvania, McLellan served as Obama's "drug czar" before returning to his post as Director of the Center for Substance Abuse Solutions. Widely regarded as one of the best researchers on drug-abuse issues, McLellan lost a son to a drug overdose in 2009.
contact:
Pennsylvania Medicine Neuroscience Center, 600 Walnut Street, Philadelphia PA 19106
(215) 399-0980
Dr. William Miller
Emeritus Distinguished Professor of Psychology & Psychiatry at the University of New Mexico, Miller did pioneering studies that changed how clinicians think about substance abuse and how to effect change in alcoholics and addicts. He won an "Innovators in Combating Substance Abuse" awarded by the Robert Wood Johnson Foundation.
contact: Department of Psychology, University of New Mexico, Logan Hall MSC 03 2220 1, Albuquerque NM 87131
(505) 277-4121
J. Paul Molloy
Founder and CEO of the non-profit sober house network Oxford House, Molloy trained as a lawyer, served as Minority Counsel in both the U.S. House and Senate until his alcoholism forced him to leave, and created the first Oxford House in 1975. He is an active advocate of the Oxford House model, frequently testifying in federal cases involving sober homes.
contact: Oxford House, 1010 Wayne Ave, Suite 300, Silver Spring MD
(800) 689-6411
Stanton Peele
A controversial figure in the substance abuse community, Peele is a prolific author of many books and articles that challenge the A.A. model for treating addiction. His Life Process Program offers an alternate way toward sobriety.
contact: Life Progress Program, 2355 Fairview Ave, #264, Roseville MN 55113
(855) 527-8536
info@lifeprocessprogram.com

Douglas Polcin
The director of the Alcohol Research Group, Public Health Institute, Polcin has directed many studies of sober homes and their problems and successes. He was the lead investigator of "An Evaluation of Sober Living Houses," a 5-year study funded by the National Institute on Alcohol Abuse and Alcoholism.
contact: Public Health Institute, Alcohol Research Group, 6475 Christie Avenue, Emeryville CA 94608-1010
(510) 597-3440; (510) 985-6459
dlpolcin@aol.com

Phillip Valentine
Executive Director of the Connecticut Community for Addiction Recovery, Valentine has been a sober member of A.A. for 23 years. His organization helps those in recovery stay sober, find jobs and survive in the system.
contact: Connecticut Community for Addiction Recovery, 198 Wethersfield Ave., Hartford CT 06114

***Vermont Association for Mental Health & Addiction Recovery**
100 State Street, Montpelier VT 05602
(802) 223-6263; (800) 769-2798
Peter Espenshade, Executive Director; Rita Johnson, Director, Friends of Recovery, Vermont

***Vermont Recovery Center Network**
200 Olcott Drive, White River Junction VT 05001
(802) 738-8998
vtrecoverynetwork@gmail.com
Mark Ames, Director

Nora Volkow
The Director of the National Institute on Drug Abuse at the National Institutes of Health, Dr. Volkow is a research psychiatrist specializing in the brain chemistry of addiction. She has authored over 500 articles and more than 80 book chapters on the health aspects of drug abuse and addiction.
contact: National Institute on Drug Abuse, National Institutes of Health, 6001 Executive Blvd., Rom 5213, MSC 9561, Bethesda MD 20892-9561
(301) 443-1124

William White
A senior consultant at the Chestnut Health System, a local community treatment center in Illinois, White is best known for his book *Slaying the Dragon: A History of Addiction and Addiction Treatment in the U.S.* He served as Deputy Director of the National Institute on Drug Abuse's training center in Washington D.C.
contact: Chestnut Health System, 1003 Martin Luther King Jr. Drive, Bloomington IL 61701
(309) 827-6026; info@chestnut.org

Appendix B:
A Partial List of Sober Homes in Vermont

Google "sober homes in Vermont" and one site that pops up is the Sober Living Directory. It lists 34 sober homes, but this list, like the one below, is only a *partial* list because, as is the situation in other states, many sober homes (especially the "entrepreneurial" type) fly "under the radar," operating without affiliation with other homes and independent of any network. In most situations involving entrepreneurial sober homes, addicts connect with the home through word of mouth at A.A. or N.A. meetings. Given this reality, it is impossible to be certain of the number of sober homes but both the literature and case law suggest the number is growing, in Vermont and all over the United States. If the Legislature chooses to investigate the subject, I'm sure some of the contacts listed in Appendix A—especially the Vermont Association for Mental Health & Addiction Recovery, and the Vermont Recovery Center Network—will be able to identify other sober homes in Vermont.

The following 4 sober houses are part of the Oxford House network (these are not listed on the Sober Living Directory's Web site):

Oxford House Catherine Street 8 Catherine Street Burlington VT 05401-4836 gender: M 802 660-9797	Oxford House Kirk 42 Bright St. Burlington VT 05401-3670 gender: W 802 497-2005	Oxford House Callahan Park 10 Catherine Street Burlington VT 05401-4836 gender: M 802 399-2839	Oxford House East Terrace 10 East Terrace South Burlington VT 05403-6144 gender: W 802 497-1999

The following 4 sober houses are operated by Andrew Gonyea. The only way we learned about the 3 in Burlington and Essex Junction is through extensive legwork by Ms. Janet Cote, in August of 2013; reference to these 4 sober homes is nowhere to be found on the Internet. Gonyea gets his residents by attending A.A. meetings and telling attendees about his homes.

Next Step Recovery Burlington VT gender: M	Foundation House Essex Junction VT gender: M	Safe Haven Recovery Burlington VT gender: M	19 East Street Waterbury VT 05676 gender: M

Other sober homes in Vermont:

Rise Phoenix House 37 Elmwood Avenue Burlington VT 05401	Dismas House 8 Butternut Court Essex Junction VT 05452	Healthcare and Rehabilitation Services 1 Hospital Court

gender: M 802 735-9790	gender: M & W 802 879 8100	Bellows Falls VT 05101
United Counseling Service of Bennington Ledge Hill Road Bennington VT 05201	Central Vermont Sober Home 100 Hospitality Drive Berlin VT 05641	Clara Martin Center 1483 Lower Plain Bradford VT 05033
Valley Vista 23 Upper Plain Street Bradford VT 05033	Youth Services Inc. 32 Walnut Street Brattleboro VT 05301	Phoenix Houses of New England 435 Western Avenue Brattleboro VT 05301
Brattleboro Retreat Anna Marsh Lane Brattleboro VT 05302 (has 3-star rating)	Brattleboro Retreat Anna Marsh Lane Brattleboro VT 05302 (has 1-star rating)	Starting Now no street listed Brattleboro VT 05301
Spectrum Youth & Family Services 177 Pearl Street Burlington VT 05401	Howard Center for Human Services 45 Clarke Street Burlington VT 05401	Howard Center 184 Pearl Street Burlington VT 05401
Cornerstone Drug Treatment Program 76 Glen Road Burlington VT 05401	Chittenden Center 1 South Prospect Street Burlington VT 05401	Champlain Drug & Alcohol Services 855 Pine Street Burlington VT 05401
Healthcare & Rehabilitation Services 49 School Street Hartford VT 05047	Counseling Service of Addison County 49 Main Street Middlebury VT 05753	Washington County Youth Service Bureau 38 Elm Street Montpelier VT 05601
Tri-County Substance Abuse Services 55 Seymour Lane Newport VT 05855	BAART Behavioral Health Services 475 Union Street Newport VT 05855	Spruce Mountain Inn 155 Towne Avenue Plainfield VT 05667
Clara Martin Center 11 Main Street Randolph VT 05060	Rutland Mental Health Services 135 Granger Street Rutland VT 05701	Recovery House Inc. 35 Washington Street Rutland VT 05701
Champlain Drug & Alcohol Services 172 Fairfield Street	Tri-County Substance Abuse Services 2225 Portland Street	BAART Behavioral Health Services 445 Portland Street

Saint Albans VT 05478	St. Johnsbury VT 05819	St. Johnsbury VT 05819
Fletcher Allen 56 West Twin Oaks Terrace South Burlington VT 05403	Centerpoint 1025 Airport Drive South Burlington VT 05403	Healthcare/Rehabilitation Services 107 Park Street Springfield VT 05156
Maple Leaf Farm Associates Inc. 10 Maple Leaf Road Underhill VT 05489	Recovery House Inc. 98 Church Street Wallingford VT 05773	Clara Martin Center 39 Fogg Farm Road Wilder VT 05088

Appendices C, D, E and F are attached as separate documents. They include:
C. The text of the Fair Housing Act and Amendment of 1988
D. "Alcoholism, Drug Addiction, and the Right to Fair Housing: How the Fair Housing Act Applies to Sober Living Homes," an article by Gorman, Marinaccio & Cardinale on the FHA and sober homes
E. "Oxford House and Rule of Law," a statement from the Web site of Oxford House indicating the leadership this network of sober houses has shown in litigating on behalf of sober houses
F. *Jeffrey O. et al. v. City of Boca Raton*, text of the federal lawsuit that most closely resembles the situation with the Waterbury VT sober house at 19 East Street
G. article by John Foote on The Fair Housing Act Amendment of 1988 and Group Homes for the Handicapped

APPENDIX C

42 U.S.C.
United States Code, 2009 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 45 - FAIR HOUSING
SUBCHAPTER I - GENERALLY
From the U.S. Government Printing Office, www.gpo.gov

SUBCHAPTER I—GENERALLY

§3601. Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

(Pub. L. 90–284, title VIII, §801, Apr. 11, 1968, 82 Stat. 81.)

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–430, §13(a), Sept. 13, 1988, 102 Stat. 1636, provided that: "This Act and the amendments made by this Act [see Short Title of 1988 Amendment note below] shall take effect on the 180th day beginning after the date of the enactment of this Act [Sept. 13, 1988]."

SHORT TITLE OF 1995 AMENDMENT

Pub. L. 104–76, §1, Dec. 28, 1995, 109 Stat. 787, provided that: "This Act [amending section 3607 of this title] may be cited as the 'Housing for Older Persons Act of 1995'."

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100–430, §1, Sept. 13, 1988, 102 Stat. 1619, provided that: "This Act [enacting sections 3610 to 3614a of this title, amending sections 3602, 3604 to 3608, 3615 to 3619, and 3631 of this title and sections 2341 and 2342 of Title 28, Judiciary and Judicial Procedure, repealing former sections 3610 to 3613 of this title, and enacting provisions set out as notes under this section and section 3602 of this title] may be cited as the 'Fair Housing Amendments Act of 1988'."

SHORT TITLE

Section 1 of Pub. L. 90–284, as added by Pub. L. 100–430, §2, Sept. 13, 1988, 102 Stat. 1619, provided: "That this Act [enacting this chapter, sections 231 to 233, 245, 2101, and 2102 of Title 18, Crimes and Criminal Procedure, and sections 1301 to 1303, 1311, 1312, 1321 to 1326, 1331, and 1341 of Title 25, Indians, amending sections 1973j, 3533, 3535 of this title, and sections 241, 242, and 1153 of Title 18, enacting provisions set out as notes under sections 231 and 245 of Title 18, and repealing provisions set out as notes under section 1360 of Title 28, Judiciary and Judicial Procedure] may be cited as the 'Civil Rights Act of 1968'."

Section 800 of Pub. L. 90–284, title VIII, as added by Pub. L. 100–430, §4, Sept. 13, 1988, 102 Stat. 1619, provided that: "This title [enacting this subchapter and amending sections 3533 and 3535 of this title] may be cited as the 'Fair Housing Act'."

SEPARABILITY

Pub. L. 100–430, §14, Sept. 13, 1988, 102 Stat. 1636, provided that: "If any provision of this Act [see Short Title of 1988 Amendment note above] or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby."

DISCLAIMER OF PREEMPTIVE EFFECT ON OTHER ACTS

Pub. L. 100–430, §12, Sept. 13, 1988, 102 Stat. 1636, provided that: "Nothing in the Fair Housing Act [this subchapter] as amended by this Act [see Short Title of 1988 Amendment note above] limits any right, procedure, or remedy available under the Constitution or any other Act of the Congress not so amended."

INITIAL RULEMAKING

Pub. L. 100–430, §13(b), Sept. 13, 1988, 102 Stat. 1636, provided that: "In consultation with other appropriate Federal agencies, the Secretary shall, not later than the 180th day after the date of the enactment of this Act [Sept. 13, 1988], issue rules to implement title VIII [this subchapter] as amended by this Act [see Short Title of 1988 Amendment note above]. The Secretary shall give public notice and opportunity for comment with respect to such rules."

FEDERALLY PROTECTED ACTIVITIES; PENALTIES

Penalties for violations respecting federally protected activities not applicable to and not affecting activities under this subchapter, see section 101(b) of Pub. L. 90–284, set out as a note under section 245 of Title 18, Crimes and Criminal Procedure.

§3602. Definitions

As used in this subchapter—

(a) "Secretary" means the Secretary of Housing and Urban Development.

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) "Family" includes a single individual.

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title.

(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

(h) "Handicap" means, with respect to a person—

(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 (as defined in section 802 of title 21).

(i) "Aggrieved person" includes any person who—

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

(j) "Complainant" means the person (including the Secretary) who files a complaint under section 3610 of this title.

(k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission

of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

(*l*) "Conciliation" means the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through informal negotiations involving the aggrieved person, the respondent, and the Secretary.

(m) "Conciliation agreement" means a written agreement setting forth the resolution of the issues in conciliation.

(n) "Respondent" means—

(1) the person or other entity accused in a complaint of an unfair housing practice; and

(2) any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under section 3610(a) of this title.

(*o*) "Prevailing party" has the same meaning as such term has in section 1988 of this title.

(Pub. L. 90–284, title VIII, §802, Apr. 11, 1968, 82 Stat. 81; Pub. L. 95–598, title III, §331, Nov. 6, 1978, 92 Stat. 2679; Pub. L. 100–430, §5, Sept. 13, 1988, 102 Stat. 1619.)

AMENDMENTS

1988—Subsec. (f). Pub. L. 100–430, §5(a), substituted "3606, or 3617" for "or 3606".

Subsecs. (h) to (*o*). Pub. L. 100–430, §5(b), added subsecs. (h) to (*o*).

1978—Subsec. (d). Pub. L. 95–598 substituted "trustees in cases under title 11" for "trustees in bankruptcy".

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–430 effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as a note under section 3601 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–598 effective Oct. 1, 1979, see section 402(a) of Pub. L. 95–598, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

TRANSVESTISM

Section 6(b)(3) of Pub. L. 100–430 provided that: "For the purposes of this Act [see Short Title of 1988 Amendment note set out under section 3601 of this title] as well as chapter 16 of title 29 of the United States Code [29 U.S.C. 701 et seq.], neither the term 'individual with handicaps' nor the term 'handicap' shall apply to an individual solely because that individual is a transvestite."

§3603. Effective dates of certain prohibitions

(a) Application to certain described dwellings

Subject to the provisions of subsection (b) of this section and section 3607 of this title, the prohibitions against discrimination in the sale or rental of housing set forth in section 3604 of this title shall apply:

(1) Upon enactment of this subchapter, to—

(A) dwellings owned or operated by the Federal Government;

(B) dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, under agreements entered into after November 20, 1962, unless payment due thereon has been made in full prior to April 11, 1968;

(C) dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by

the credit of the Federal Government, under agreements entered into after November 20, 1962, unless payment thereon has been made in full prior to April 11, 1968: *Provided*, That nothing contained in subparagraphs (B) and (C) of this subsection shall be applicable to dwellings solely by virtue of the fact that they are subject to mortgages held by an FDIC or FSLIC institution; and

(D) dwellings provided by the development or the redevelopment of real property purchased, rented, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under loan or grant contracts entered into after November 20, 1962.

(2) After December 31, 1968, to all dwellings covered by paragraph (1) and to all other dwellings except as exempted by subsection (b) of this section.

(b) Exemptions

Nothing in section 3604 of this title (other than subsection (c)) shall apply to—

(1) any single-family house sold or rented by an owner: *Provided*, That such private individual owner does not own more than three such single-family houses at any one time: *Provided further*, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: *Provided further*, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: *Provided further*, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

(c) Business of selling or renting dwellings defined

For the purposes of subsection (b) of this section, a person shall be deemed to be in the business of selling or renting dwellings if—

(1) he has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or

(2) he has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or

(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

(Pub. L. 90–284, title VIII, §803, Apr. 11, 1968, 82 Stat. 82.)

§3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)(1) 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 of—

(A) that buyer or renter,[1]

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes—

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.[2]

(B) 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; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that—

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsection, the term "covered multifamily dwellings" means—

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(Pub. L. 90–284, title VIII, §804, Apr. 11, 1968, 82 Stat. 83; Pub. L. 93–383, title VIII, §808(b)(1), Aug. 22, 1974, 88 Stat. 729; Pub. L. 100–430, §§6(a)–(b)(2), (e), 15, Sept. 13, 1988, 102 Stat. 1620, 1622, 1623, 1636.)

AMENDMENTS

1988—Pub. L. 100–430, §6(e), inserted "and other prohibited practices" in section catchline.
Subsecs. (a), (b). Pub. L. 100–430, §6(b)(2), inserted "familial status," after "sex,".
Subsecs. (c) to (e). Pub. L. 100–430, §6(b)(1), inserted "handicap, familial status," after "sex,".
Subsec. (f). Pub. L. 100–430, §6(a), added subsec. (f).
Subsec. (f)(3)(A). Pub. L. 100–430, §15, which directed the substitution of "except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted." for the period at the end of subpar. (A) was executed by making the substitution for a semicolon as the probable intent of Congress because subpar. (A) ended with a semicolon, not a period.
1974—Pub. L. 93–383 inserted ", sex" after "religion" wherever appearing in cls. (a) to (e).

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–430 effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as a note under section 3601 of this title.

[1] *So in original. The comma probably should be a semicolon.*

[2] *So in original. The period probably should be a semicolon.*

§3605. Discrimination in residential real estate-related transactions

(a) In general

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) "Residential real estate-related transaction" defined

As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance—
(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or
(B) secured by residential real estate.

(2) The selling, brokering, or appraising of residential real property.

(c) Appraisal exemption

Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

(Pub. L. 90–284, title VIII, §805, Apr. 11, 1968, 82 Stat. 83; Pub. L. 93–383, title VIII, §808(b)(2), Aug. 22, 1974, 88 Stat. 729; Pub. L. 100–430, §6(c), Sept. 13, 1988, 102 Stat. 1622.)

AMENDMENTS

1988—Pub. L. 100–430 amended section generally. Prior to amendment, section read as follows: "After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or

other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: *Provided*, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 3603(b) of this title."

1974—Pub. L. 93–383 inserted ", sex" after "religion".

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–430 effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as a note under section 3601 of this title.

§3606. Discrimination in the provision of brokerage services

After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, handicap, familial status, or national origin.

(Pub. L. 90–284, title VIII, §806, Apr. 11, 1968, 82 Stat. 84; Pub. L. 93–383, title VIII, §808(b)(3), Aug. 22, 1974, 88 Stat. 729; Pub. L. 100–430, §6(b)(1), Sept. 13, 1988, 102 Stat. 1622.)

AMENDMENTS

1988—Pub. L. 100–430 inserted "handicap, familial status," after "sex,".

1974—Pub. L. 93–383 inserted ", sex" after "religion".

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–430 effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as a note under section 3601 of this title.

§3607. Religious organization or private club exemption

(a) Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

(b)(1) Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

(2) As used in this section, "housing for older persons" means housing—

(A) provided under any State or Federal program that the Secretary determines is specifically

designed and operated to assist elderly persons (as defined in the State or Federal program); or

(B) intended for, and solely occupied by, persons 62 years of age or older; or

(C) intended and operated for occupancy by persons 55 years of age or older, and—

(i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;

(ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and

(iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall—

(I) provide for verification by reliable surveys and affidavits; and

(II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

(3) Housing shall not fail to meet the requirements for housing for older persons by reason of:

(A) persons residing in such housing as of September 13, 1988, who do not meet the age requirements of subsections [1] (2)(B) or (C): *Provided*, That new occupants of such housing meet the age requirements of subsections [1] (2)(B) or (C); or

(B) unoccupied units: *Provided*, That such units are reserved for occupancy by persons who meet the age requirements of subsections [1] (2)(B) or (C).

(4) Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of title 21.

(5)(A) A person shall not be held personally liable for monetary damages for a violation of this subchapter if such person reasonably relied, in good faith, on the application of the exemption under this subsection relating to housing for older persons.

(B) For the purposes of this paragraph, a person may only show good faith reliance on the application of the exemption by showing that—

(i) such person has no actual knowledge that the facility or community is not, or will not be, eligible for such exemption; and

(ii) the facility or community has stated formally, in writing, that the facility or community complies with the requirements for such exemption.

(Pub. L. 90–284, title VIII, §807, Apr. 11, 1968, 82 Stat. 84; Pub. L. 100–430, §6(d), Sept. 13, 1988, 102 Stat. 1622; Pub. L. 104–76, §§2, 3, Dec. 28, 1995, 109 Stat. 787.)

CODIFICATION

September 13, 1988, referred to in subsec. (b)(3)(A), was in the original "the date of enactment of this Act", which was translated as meaning the date of enactment of Pub. L. 100–430, which enacted subsec. (b) of this section, to reflect the probable intent of Congress.

AMENDMENTS

1995—Subsec. (b)(2)(C). Pub. L. 104–76, §2, amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: "intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Secretary shall develop regulations which require at least the following factors:

"(i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and

"(ii) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and

"(iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older."

Subsec. (b)(5). Pub. L. 104–76, §3, added par. (5).

1988—Pub. L. 100–430 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–430 effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as a note under section 3601 of this title.

REGULATIONS

Pub. L. 102–550, title IX, §919, Oct. 28, 1992, 106 Stat. 3883, provided that: "The Secretary of Housing and Urban Development shall, not later than 180 days after the date of the enactment of this Act [Oct. 28, 1992], make rules defining what are 'significant facilities and services especially designed to meet the physical or social needs of older persons' required under section 807(b)(2) of the Fair Housing Act [42 U.S.C. 3607(b)(2)] to meet the definition of the term 'housing for older persons' in such section."

[1] *So in original. Probably should be "paragraph".*

§3608. Administration

(a) Authority and responsibility

The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

(b) Assistant Secretary

The Department of Housing and Urban Development shall be provided an additional Assistant Secretary.

(c) Delegation of authority; appointment of administrative law judges; location of conciliation meetings; administrative review

The Secretary may delegate any of his functions, duties, and powers to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, conciliating, hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter under this subchapter. The person to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department of Housing and Urban Development in compliance with sections 3105, 3344, 5372, and 7521 of title 5. Insofar as possible, conciliation meetings shall be held in the cities or other localities where the discriminatory housing practices allegedly occurred. The Secretary shall by rule prescribe such rights of appeal from the decisions of his administrative law judges to other administrative law judges or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

(d) Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

(e) Functions of Secretary

The Secretary of Housing and Urban Development shall—

(1) make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States;

(2) publish and disseminate reports, recommendations, and information derived from such studies, including an annual report to the Congress—

(A) specifying the nature and extent of progress made nationally in eliminating discriminatory housing practices and furthering the purposes of this subchapter, obstacles remaining to achieving equal housing opportunity, and recommendations for further legislative or executive action; and

(B) containing tabulations of the number of instances (and the reasons therefor) in the preceding year in which—

(i) investigations are not completed as required by section 3610(a)(1)(B) of this title;

(ii) determinations are not made within the time specified in section 3610(g) of this title; and

(iii) hearings are not commenced or findings and conclusions are not made as required by section 3612(g) of this title;

(3) cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices;

(4) cooperate with and render such technical and other assistance to the Community Relations Service as may be appropriate to further its activities in preventing or eliminating discriminatory housing practices;

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter; and

(6) annually report to the Congress, and make available to the public, data on the race, color, religion, sex, national origin, age, handicap, and family characteristics of persons and households who are applicants for, participants in, or beneficiaries or potential beneficiaries of, programs administered by the Department to the extent such characteristics are within the coverage of the provisions of law and Executive orders referred to in subsection (f) of this section which apply to such programs (and in order to develop the data to be included and made available to the public under this subsection, the Secretary shall, without regard to any other provision of law, collect such information relating to those characteristics as the Secretary determines to be necessary or appropriate).

(f) Provisions of law applicable to Department programs

The provisions of law and Executive orders to which subsection (e)(6) of this section applies are—

(1) title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.];

(2) this subchapter;

(3) section 794 of title 29;

(4) the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.];

(5) the Equal Credit Opportunity Act [15 U.S.C. 1691 et seq.];

(6) section 1982 of this title;

(7) section 637(a) of title 15;

(8) section 1735f–5 of title 12;

(9) section 5309 of this title;

(10) section 1701u of title 12;

(11) Executive orders 11063, 11246, 11625, 12250, 12259, and 12432; and

(12) any other provision of law which the Secretary specifies by publication in the Federal Register for the purpose of this subsection.

(Pub. L. 90–284, title VIII, §808, Apr. 11, 1968, 82 Stat. 84; Pub. L. 95–251, §3, Mar. 27, 1978, 92 Stat. 184; Pub. L. 95–454, title VIII, §801(a)(3)(J), Oct. 13, 1978, 92 Stat. 1222; Pub. L. 100–430, §7, Sept. 13, 1988, 102 Stat. 1623.)

REFERENCES IN TEXT

This Act, referred to in subsec. (a), means Pub. L. 90–284, Apr. 11, 1968, 82 Stat. 73, as amended, known as the Civil Rights Act of 1968, which enacted this chapter, sections 231 to 233, 245, 2101, and 2102 of Title 18, Crimes and Criminal Procedure, and sections 1301 to 1303, 1311, 1312, 1321 to 1326, 1331, and 1341 of Title 25, Indians, amended sections 1973j, 3533, 3535 of this title, and sections 241, 242, and 1153 of Title 18, enacted provisions set out as notes under sections 231 and 245 of Title 18, and repealed provisions set out as notes under section 1360 of Title 28, Judiciary and Judicial Procedure. For complete classification of this Act to the Code, see Tables.

The Civil Rights Act of 1964, referred to in subsec. (f)(1), is Pub. L. 88–352, July 2, 1964, 78 Stat. 241, as amended. Title VI of the Civil Rights Act of 1964 is classified generally to subchapter V (§2000d et seq.) of chapter 21 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

The Age Discrimination Act of 1975, referred to in subsec. (f)(4), is title III of Pub. L. 94–135, Nov. 28, 1975, 78 Stat. 728, as amended, which is classified generally to chapter 76 (§6101 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6101 of this title and Tables.

The Equal Credit Opportunity Act, referred to in subsec. (f)(5), is title VII of Pub. L. 90–321, as added by Pub. L. 93–495, title V, §503, Oct. 28, 1974, 88 Stat. 1521, as amended, which is classified generally to subchapter IV (§1691 et seq.) of chapter 41 of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 15 and Tables.

The Executive orders referred to in subsec. (f)(11) are set out as notes under sections of the Code as follows:

Ex. Ord. No. 11063: 42 U.S.C. 1982,
Ex. Ord. No. 11246: 42 U.S.C. 2000e,
Ex. Ord. No. 11625: 15 U.S.C. 631,
Ex. Ord. No. 12250: 42 U.S.C. 2000d–1, and
Ex. Ord. No. 12432: 15 U.S.C. 631.

Ex. Ord. No. 12259, referred to in subsec. (f)(11), was set out below, prior to revocation by Ex. Ord. No. 12892, Jan. 17, 1994, 59 F.R. 2939, set out below.

CODIFICATION

The second sentence of subsec. (b) of this section has been omitted as it amended sections 3533(a) and 3535(c) of this title.

AMENDMENTS

1988—Subsec. (d). Pub. L. 100–430, §7(a), inserted "(including any Federal agency having regulatory or supervisory authority over financial institutions)" after "urban development".

Subsec. (e)(2). Pub. L. 100–430, §7(b)(1)(A), inserted provisions relating to annual report to Congress.

Subsec. (e)(6). Pub. L. 100–430, §7(b)(1)(B)–(D), added par. (6).

Subsec. (f). Pub. L. 100–430, §7(b)(2), added subsec. (f).

1978—Subsec. (c). Pub. L. 95–251 substituted "administrative law judges" for "hearing examiners".

Pub. L. 95–454 substituted "5372" for "5362".

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–430 effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as a note under section 3601 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–454 effective on first day of first applicable pay period beginning on or after 90th day after Oct. 13, 1978, see section 801(a)(4)(A) of Pub. L. 95–454, set out as an Effective Date note under section 5361 of Title 5, Government Organization and Employees.

TREATMENT OF OCCUPANCY STANDARDS

Pub. L. 105–276, title V, §589, Oct. 21, 1998, 112 Stat. 2651, provided that:

"(a) ESTABLISHMENT OF POLICY.—Not later than 60 days after the date of the enactment of this Act [Oct. 21, 1998], the Secretary of Housing and Urban Development shall publish a notice in the Federal Register for effect that takes effect upon publication and provides that the specific and unmodified standards provided in the March 20, 1991, Memorandum from the General Counsel of the Department of Housing and Urban Development to all Regional Counsel shall be the policy of the Department of Housing and Urban Development with respect to complaints of discrimination under the Fair Housing Act (42 U.S.C. 3601 et seq.) on the basis of familial status which involve an occupancy standard established by a housing provider.

"(b) PROHIBITION OF NATIONAL STANDARD.—The Secretary of Housing and Urban Development shall not directly or indirectly establish a national occupancy standard."

EXECUTIVE ORDER NO. 12259

Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253, which related to leadership and coordination by Secretary of Housing and Urban Development of fair housing programs and activities in Federal programs, was revoked by Ex. Ord. No. 12892, §6–607, Jan. 17, 1994, 59 F.R. 2939, set out below.

EX. ORD. NO. 12892. LEADERSHIP AND COORDINATION OF FAIR HOUSING IN FEDERAL PROGRAMS: AFFIRMATIVELY FURTHERING FAIR HOUSING

Ex. Ord. No. 12892, Jan. 17, 1994, 59 F.R. 2939, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in accordance with the Fair Housing Act, as amended (42 U.S.C. 3601 *et seq.*) ("Act"), in order to affirmatively further fair housing in all Federal programs and activities relating to housing and urban development throughout the United States, it is hereby ordered as follows:

SECTION 1. *Administration of Programs and Activities Relating to Housing and Urban Development.*

1–101. Section 808(d) of the Act, as amended [42 U.S.C. 3608(d)], provides that all executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of the Act and shall cooperate with the Secretary of Housing and Urban Development to further such purposes.

1–102. As used in this order, the phrase "programs and activities" shall include programs and activities operated, administered, or undertaken by the Federal Government; grants; loans; contracts; insurance; guarantees; and Federal supervision or exercise of regulatory responsibility (including regulatory or supervisory authority over financial institutions).

SEC. 2. *Responsibilities of Executive Agencies.*

2–201. The primary authority and responsibility for administering the programs and activities relating to housing and urban development affirmatively to further fair housing is vested in the Secretary of Housing and Urban Development.

2–202. The head of each executive agency is responsible for ensuring that its programs and activities relating to housing and urban development are administered in a manner affirmatively to further the goal of fair housing as required by section 808 of the Act [42 U.S.C. 3608] and for cooperating with the Secretary of Housing and Urban Development, who shall be responsible for exercising leadership in furthering the purposes of the Act.

2–203. In carrying out the responsibilities in this order, the head of each executive agency shall take appropriate steps to require that all persons or other entities who are applicants for, or participants in, or who are supervised or regulated under, agency programs and activities relating to housing and urban development shall comply with this order.

2–204. Upon receipt of a complaint alleging facts that may constitute a violation of the Act or upon receipt of information from a consumer compliance examination or other information suggesting a violation of the Act, each executive agency shall forward such facts or information to the Secretary of Housing and Urban Development for processing under the Act. Where such facts or information indicate a possible pattern or practice of discrimination in violation of the Act, they also shall be forwarded to the Attorney General. The authority of the Federal depository institution regulatory agencies to take appropriate action under their statutory authority remains unaffected.

SEC. 3. *President's Fair Housing Council.*

3–301. There is hereby established an advisory council entitled the "President's Fair Housing Council" ("Council"). The Council shall be chaired by the Secretary of Housing and Urban Development and shall

consist of the Secretary of Health and Human Services, the Secretary of Transportation, the Secretary of Education, the Secretary of Labor, the Secretary of Defense, the Secretary of Agriculture, the Secretary of Veterans Affairs, the Secretary of the Treasury, the Attorney General, the Secretary of the Interior, the Chair of the Federal Reserve, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Chair of the Federal Deposit Insurance Corporation, and such other officials of executive departments and agencies as the President may, from time to time, designate.

3–302. The President's Fair Housing Council shall review the design and delivery of Federal programs and activities to ensure that they support a coordinated strategy to affirmatively further fair housing. The Council shall propose revisions to existing programs or activities, develop pilot programs and activities, and propose new programs and activities to achieve its goals.

3–303. In support of cooperative efforts among all executive agencies, the Secretary of Housing and Urban Development shall:

(a) cooperate with, and render assistance to, the heads of all executive agencies in the formulation of policies and procedures to implement this order and to provide information and guidance on the affirmative administration of programs and activities relating to housing and urban development and the protection of the rights accorded by the Act; and

(b) develop memoranda of understanding and any necessary implementing procedures among executive agencies designed to provide for consultation and the coordination of Federal efforts to further fair housing through the affirmative administration of programs and activities relating to housing and urban development, including coordination of the investigation of complaints or other information referred to the Secretary as required by section 2–204 of this order that would constitute a violation of the Act or, where relevant, other Federal laws. Existing memoranda of understanding shall remain in effect until superseded.

3–304. In connection with carrying out functions under this order, the Secretary of Housing and Urban Development is authorized to request from any executive agency such information and assistance as the Secretary deems necessary. Each agency shall furnish such information to the extent permitted by law and, to the extent practicable, provide assistance to the Secretary.

SEC. 4. *Specific Responsibilities.*

4–401. In implementing the responsibilities under sections 2–201, 2–202, 2–203, and section 3 of this order, the Secretary of Housing and Urban Development shall, to the extent permitted by law:

(a) promulgate regulations in consultation with the Department of Justice and Federal banking agencies regarding programs and activities of executive agencies related to housing and urban development that shall:

(1) describe the functions, organization, and operations of the President's Fair Housing Council;

(2) describe the types of programs and activities defined in section 1–102 of this order that are subject to the order;

(3) describe the responsibilities and obligations of executive agencies in ensuring that programs and activities are administered and executed in a manner that furthers fair housing;

(4) describe the responsibilities and obligations of applicants, participants, and other persons and entities involved in housing and urban development programs and activities affirmatively to further the goal of fair housing; and

(5) describe a method to identify impediments in programs or activities that restrict fair housing choice and implement incentives that will maximize the achievement of practices that affirmatively further fair housing.

(b) coordinate executive agency implementation of the requirements of this order and issue standards and procedures regarding:

(1) the administration of programs and activities relating to housing and urban development in a manner affirmatively to further fair housing; and

(2) the cooperation of executive agencies in furtherance of the Secretary of Housing and Urban Development's authority and responsibility under the Act.

4–402. Within 180 days of the publication of final regulations by the Secretary of Housing and Urban Development under section 4–401 of this order, the head of each executive agency shall publish proposed regulations providing for the administration of programs and activities relating to housing and urban development in a manner affirmatively to further fair housing, consistent with the Secretary of Housing and Urban Development's regulations, and with the standards and procedures issued pursuant to section 4–401(b) of this order. As soon as practicable thereafter, each executive agency shall issue its final regulations. All executive agencies shall formally submit all such proposed and final regulations, and any related issuances or standards, to the Secretary of Housing and Urban Development at least 30 days prior to public announcement.

4–403. The Secretary of Housing and Urban Development shall review proposed regulations and standards

prepared pursuant to section 4–402 of this order to ensure conformity with the purposes of the Act and consistency among the operations of the various executive agencies and shall provide comments to executive agencies with respect thereto on a timely basis.

4–404. In addition to promulgating the regulations described in section 4–401 of this order, the Secretary of Housing and Urban Development shall promulgate regulations describing the nature and scope of coverage and the conduct prohibited, including mortgage lending discrimination and property insurance discrimination.

SEC. 5. *Administrative Enforcement.*

5–501. The head of each executive agency shall be responsible for enforcement of this order and, unless prohibited by law, shall cooperate and provide records, data, and documentation in connection with any other agency's investigation of compliance with provisions of this order.

5–502. If any executive agency concludes that any person or entity (including any State or local public agency) applying for or participating in, or supervised or regulated under, a program or activity relating to housing and urban development has not complied with this order or any applicable rule, regulation, or procedure issued or adopted pursuant to this order, it shall endeavor to end and remedy such violation by informal means, including conference, conciliation, and persuasion. An executive agency need not pursue informal resolution of matters where similar efforts made by another executive agency have been unsuccessful, except where otherwise required by law. In the event of failure of such informal means, the executive agency, in conformity with rules, regulations, procedures, or policies issued or adopted by it pursuant to section 4 of this order hereof, shall impose such sanctions as may be authorized by law. To the extent authorized by law, such sanctions may include:

(a) cancellation or termination of agreements or contracts with such person, entity, or any State or local public agency;

(b) refusal to extend any further aid under any program or activity administered by it and affected by this order until it is satisfied that the affected person, entity, or State or local public agency will comply with the rules, regulations, and procedures issued or adopted pursuant to this order;

(c) refusal to grant supervisory or regulatory approval to such person, entity, or State or local public agency under any program or activity administered by it that is affected by this order or revoke such approval if previously given; and

(d) any other action as may be appropriate under law.

5–503. Findings of any violation under section 5–502 of this order shall be promptly reported by the head of each executive agency to the Secretary of Housing and Urban Development and the Attorney General. The Secretary of Housing and Urban Development shall forward this information to all other executive agencies.

5–504. Any executive agency shall also consider invoking appropriate sanctions against any person or entity where any other executive department or agency has initiated action against that person or entity pursuant to section 5–502 of this order, where the Secretary of Housing and Urban Development has issued a charge against such person or entity that has not been resolved, or where the Attorney General has filed a civil action in Federal Court against such person or entity.

5–505. Each executive agency shall consult with the Secretary of Housing and Urban Development, and the Attorney General where a civil action in Federal Court has been filed, regarding agency actions to invoke sanctions under the Act. The Department of Housing and Urban Development, the Department of Justice, and Federal banking agencies shall develop and coordinate appropriate policies and procedures for taking action under their respective authorities. Each decision to invoke sanctions and the reasons therefor shall be documented and shall be provided to the Secretary of Housing and Urban Development and, where appropriate, to the Attorney General in a timely manner.

SEC. 6. *General Provisions.*

6–601. Nothing in this order shall limit the authority of the Attorney General to provide for the coordinated enforcement of nondiscrimination requirements in Federal assistance programs under Executive Order No. 12250 [42 U.S.C. 2000d–1 note].

6–602. All provisions of regulations, guidelines, and procedures proposed to be issued by executive agencies pursuant to this order that implement nondiscrimination requirements of laws covered by Executive Order No. 12250 [42 U.S.C. 2000d–1 note] shall be submitted to the Attorney General for review in accordance with that Executive order. In addition, the Secretary shall consult with the Attorney General regarding all regulations and procedures proposed to be issued under sections 4–401 and 4–402 of this order to assure consistency with coordinated Federal efforts to enforce nondiscrimination requirements in programs of Federal financial assistance pursuant to Executive Order No. 12250.

6–603. Nothing in this order shall affect the authority and responsibility of the Attorney General to commence any civil action authorized by the Act.

6–604. (a) Part IV and sections 501 and 503 of Executive Order No. 11063 [42 U.S.C. 1982 note] are revoked. The activities and functions of the President's Committee on Equal Opportunity in Housing described in that Executive order shall be performed by the Secretary of Housing and Urban Development.

(b) Sections 101 and 502(a) of Executive Order No. 11063 are revised to apply to discrimination because of "race, color, religion (creed), sex, disability, familial status or national origin." All executive agencies shall revise regulations, guidelines, and procedures issued pursuant to Part II of Executive Order No. 11063 to reflect this amendment to coverage.

(c) Section 102 of Executive Order No. 11063 is revised by deleting the term "Housing and Home Finance Agency" and inserting in lieu thereof the term "Department of Housing and Urban Development."

6–605. Nothing in this order shall affect any requirement imposed under the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*), the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*) or the Community Reinvestment Act (12 U.S.C. 2901 *et seq.*).

6–606. Nothing in this order shall limit the authority of the Federal banking agencies to carry out their responsibilities under current law or regulations.

6–607. Executive Order No. 12259 is hereby revoked.

SEC. 7. *Report.*

7–701. The Secretary of Housing and Urban Development shall submit to the President an annual report commenting on the progress that the Department of Housing and Urban Development and other executive agencies have made in carrying out requirements and responsibilities under this Executive order. The annual report may be consolidated with the annual report on the state of fair housing required by section 808(e)(2) of the Act [42 U.S.C. 3608(e)(2)].

WILLIAM J. CLINTON.

FEDERAL LEADERSHIP OF FAIR HOUSING

Memorandum of President of the United States, Jan. 17, 1994, 59 F.R. 8513, provided:

Memorandum for the Heads of Executive Departments and Agencies

On April 11, 1968, one week after the assassination of the great civil rights leader Martin Luther King, Jr., the Fair Housing Act [42 U.S.C. 3601 et seq.] was enacted (1) to prohibit discrimination in housing, and (2) to direct the Secretary of Housing and Urban Development to affirmatively further fair housing in Federal housing and urban development programs. Twenty-five years later, despite a strengthening of the Fair Housing Act 5 years ago, hundreds of acts of housing discrimination occur in our Nation each day.

Americans of every income level, seeking to live where they choose, feel the weight of discrimination because of the color of their skin, their race, their religion, their gender, their country of origin, or because they are disabled or have children.

An increasing body of evidence indicates that barriers to fair housing are pervasive. Forty percent of all families move every 5 years. This statistic is significant given the results of a recent study, commissioned by the Department of Housing and Urban Development (HUD), which found that more than half of the African Americans and Latinos seeking to rent or buy a home are treated differently than whites with the same qualifications. Moreover, based upon Home Mortgage Disclosure Act [12 U.S.C. 2801 et seq.] data, the number of minority persons who are rejected when attempting to obtain loans to purchase homes is two to three times higher than it is for nonminorities in almost every metropolitan area of this country.

Racial and ethnic segregation, both in the private housing market and in public and assisted housing, has been well documented. Despite legislation (the Fair Housing Act) and Executive action (Executive Order No. 11063 [42 U.S.C. 1982 note]), the divisive impact of housing segregation persists in metropolitan areas all across this country. Too many lower income and minority Americans face barriers to housing outside of central cities. Segregation in housing and schools deprives too many of our children and youth of an opportunity to enter the marketplace or work on an equal footing. For too many families, our cities are no longer the launching pads for economic self-sufficiency and upward mobility that they have been for countless immigrants and minorities since the country's birth. And many Americans who are better off abandon the cities.

The resulting decline in the very heart of too many of our metropolitan areas threatens all of us: the health of our dynamic regional economies—the very lifeblood of future national economic growth and higher living standards for all of us and all of our children—is placed at risk.

We can do better. We can start by making sure that our own Federal policies and programs across all of our agencies support the fair housing and equal opportunity goals to which all Americans are committed. If all of our executive agencies affirmatively further fair housing in the design of their policies and administration of their programs relating to housing and urban development, a truly nondiscriminatory housing market will be

closer to achievement.

By an Executive Order [Ex. Ord. No. 12892, set out above] ("the Order") I am issuing today and this memorandum, I am addressing those needs. The Secretary of Housing and Urban Development and, where appropriate, the Attorney General—the officials with the primary responsibility for the enforcement of Federal fair housing laws—will take the lead in developing and coordinating measures to carry out the purposes of this Order.

Through this Order, I am first expanding Executive Order No. 11063 to provide protection against discrimination in programs of Federal insurance or guaranty to persons who are disabled and to families with children.

Second, I am revoking the old Executive Order No. 12259 entitled "Leadership and Coordination of Fair Housing in Federal Programs." The new Executive order reflects the expanded authority of the Secretary of Housing and Urban Development and I am directing him to take stronger measures to provide leadership and coordination in affirmatively furthering fair housing in Federal programs.

Third, I ask the heads of departments and agencies, including the Federal banking agencies, to cooperate with the Secretary of Housing and Urban Development in identifying ways to structure agency programs and activities to affirmatively further fair housing and to promptly negotiate memoranda of understanding with him to accomplish that goal.

Further, I direct the Secretary of Housing and Urban Development to review all of HUD's programs to assure that they truly provide equal opportunity and promote economic self-sufficiency for those who are beneficiaries and recipients of those programs.

I also direct the Secretary to review HUD's programs to assure that they contain the maximum incentives to affirmatively further fair housing and to eliminate barriers to free choice where they continue to exist. This review shall include Federally assisted housing, Federally insured housing and other housing and housing related programs, including those of the Government National Mortgage Association and the Federal Housing Administration.

Today, I am establishing a new Cabinet-level organization to focus the cooperative efforts of all agencies on fair housing. The President's Fair Housing Council will be chaired by the Secretary of Housing and Urban Development and will consist of the Secretary of Health and Human Services, the Secretary of Transportation, the Secretary of Education, the Secretary of Labor, the Secretary of Defense, the Secretary of Agriculture, the Secretary of Veterans Affairs, the Secretary of the Treasury, the Attorney General, the Secretary of the Interior, the Chair of the Federal Reserve, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, and the Chair of the Federal Deposit Insurance Corporation.

The President's Fair Housing Council shall review the design and delivery of Federal programs and activities to ensure that they support a coordinated strategy to affirmatively further fair housing. The Council shall propose revisions to existing programs or activities, develop pilot programs and activities, and propose new programs and activities to achieve its goals.

I direct the Secretary of Housing and Urban Development and the President's Fair Housing Council to develop a pilot program to be implemented in selected metropolitan areas. This initiative will promote fair housing choice by helping inner-city families to move to suburban neighborhoods and by making the central city more attractive to those who have left it. I direct the members of the Council to undertake a demonstration program that will reinvent the way assisted housing is offered to applicants, will break down jurisdictional barriers in housing opportunities, and will promote the use of subsidies that diminish residential segregation, and will combine these initiatives with refined educational incentives aimed at improving the effectiveness of inner-city schools. I am directing that transportation alternatives be considered along with targeted social service and job training programs as part of the support necessary to create a one-stop, metropolitan area-wide fair housing opportunity pilot program that will effectively offer Federally assisted housing, Federally insured housing, and private market housing within a metropolitan area to all residents of the area. The pilot program should call upon realtors, mortgage lenders, housing providers, and local governments, among others, to assist in expanding housing choices.

To address the findings of recent studies, I hereby direct the Secretary of Housing and Urban Development and the Attorney General and, where appropriate, the heads of the Federal banking agencies to exercise national leadership to end discrimination in mortgage lending, the secondary mortgage market, and property insurance practices. The Secretary is directed to issue regulations to define discriminatory practices in these areas and the Secretary and the Attorney General are directed to aggressively enforce the laws prohibiting these practices.

In each of these areas, I direct the Secretary of Housing and Urban Development to take the lead with the other Federal agencies in working to gain the voluntary cooperation, participation, and expertise of all of those

in private industry, the States and localities who can assist in achieving the Nation's fair housing goals.

The Secretary of Housing and Urban Development is authorized and directed to publish this memorandum in the Federal Register.

WILLIAM J. CLINTON.

§3608a. Collection of certain data

(a) In general

To assess the extent of compliance with Federal fair housing requirements (including the requirements established under title VI of Public Law 88–352 [42 U.S.C. 2000d et seq.] and title VIII of Public Law 90–284 [42 U.S.C. 3601 et seq.]), the Secretary of Agriculture shall collect, not less than annually, data on the racial and ethnic characteristics of persons eligible for, assisted, or otherwise benefiting under each community development, housing assistance, and mortgage and loan insurance and guarantee program administered by such Secretary. Such data shall be collected on a building by building basis if the Secretary determines such collection to be appropriate.

(b) Reports to Congress

The Secretary of Agriculture shall include in the annual report of such Secretary to the Congress a summary and evaluation of the data collected by such Secretary under subsection (a) of this section during the preceding year.

(Pub. L. 100–242, title V, §562, Feb. 5, 1988, 101 Stat. 1944; Pub. L. 104–66, title I, §1071(e), Dec. 21, 1995, 109 Stat. 720.)

REFERENCES IN TEXT

Public Law 88–352, referred to in subsec. (a), is Pub. L. 88–352, July 2, 1964, 78 Stat. 241, as amended, known as the Civil Rights Act of 1964, title VI of the Civil Rights Act of 1964 is classified generally to subchapter V (§2000d et seq.) of chapter 21 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

Title VIII of Public Law 90–284, referred to in subsec. (a), is title VIII of Pub. L. 90–284, Apr. 11, 1968, 82 Stat. 81, as amended, known as the Fair Housing Act, which is classified principally to subchapter I (§3601 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 3601 of this title and Tables.

CODIFICATION

Section was enacted as part of the Housing and Community Development Act of 1987, and not as part of title VIII of Pub. L. 90–284, popularly known as the Fair Housing Act, which comprises this subchapter.

AMENDMENTS

1995—Subsec. (a). Pub. L. 104–66, §1071(e)(1), struck out "the Secretary of Housing and Urban Development and" before "the Secretary of Agriculture", "each" before "collect, not less than annually", and "involved" before "determines such collection".

Subsec. (b). Pub. L. 104–66, §1071(e)(2), substituted "The" for "The Secretary of Housing and Urban Development and the" before "Secretary of Agriculture" and struck out "each" before "include in the".

§3609. Education and conciliation; conferences and consultations; reports

Immediately after April 11, 1968, the Secretary shall commence such educational and conciliatory activities as in his judgment will further the purposes of this subchapter. He shall call conferences of persons in the housing industry and other interested parties to acquaint them with the provisions of this subchapter and his suggested means of implementing it, and shall endeavor with their advice to work out programs of voluntary compliance and of enforcement. He may pay per diem, travel, and

transportation expenses for persons attending such conferences as provided in section 5703 of title 5. He shall consult with State and local officials and other interested parties to learn the extent, if any, to which housing discrimination exists in their State or locality, and whether and how State or local enforcement programs might be utilized to combat such discrimination in connection with or in place of, the Secretary's enforcement of this subchapter. The Secretary shall issue reports on such conferences and consultations as he deems appropriate.

(Pub. L. 90–284, title VIII, §809, Apr. 11, 1968, 82 Stat. 85.)

§3610. Administrative enforcement; preliminary matters

(a) Complaints and answers

(1)(A)(i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

(ii) Such complaints shall be in writing and shall contain such information and be in such form as the Secretary requires.

(iii) The Secretary may also investigate housing practices to determine whether a complaint should be brought under this section.

(B) Upon the filing of such a complaint—

(i) the Secretary shall serve notice upon the aggrieved person acknowledging such filing and advising the aggrieved person of the time limits and choice of forums provided under this subchapter;

(ii) the Secretary shall, not later than 10 days after such filing or the identification of an additional respondent under paragraph (2), serve on the respondent a notice identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under this subchapter, together with a copy of the original complaint;

(iii) each respondent may file, not later than 10 days after receipt of notice from the Secretary, an answer to such complaint; and

(iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), unless it is impracticable to do so.

(C) If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

(D) Complaints and answers shall be under oath or affirmation, and may be reasonably and fairly amended at any time.

(2)(A) A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent upon written notice, under paragraph (1), to such person, from the Secretary.

(B) Such notice, in addition to meeting the requirements of paragraph (1), shall explain the basis for the Secretary's belief that the person to whom the notice is addressed is properly joined as a respondent.

(b) Investigative report and conciliation

(1) During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint.

(2) A conciliation agreement arising out of such conciliation shall be an agreement between the respondent and the complainant, and shall be subject to approval by the Secretary.

(3) A conciliation agreement may provide for binding arbitration of the dispute arising from the complaint. Any such arbitration that results from a conciliation agreement may award appropriate relief, including monetary relief.

(4) Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the Secretary determines that disclosure is not required to further the purposes of this subchapter.

(5)(A) At the end of each investigation under this section, the Secretary shall prepare a final investigative report containing—

(i) the names and dates of contacts with witnesses;

(ii) a summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;

(iii) a summary description of other pertinent records;

(iv) a summary of witness statements; and

(v) answers to interrogatories.

(B) A final report under this paragraph may be amended if additional evidence is later discovered.

(c) Failure to comply with conciliation agreement

Whenever the Secretary has reasonable cause to believe that a respondent has breached a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed under section 3614 of this title for the enforcement of such agreement.

(d) Prohibitions and requirements with respect to disclosure of information

(1) Nothing said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned.

(2) Notwithstanding paragraph (1), the Secretary shall make available to the aggrieved person and the respondent, at any time, upon request following completion of the Secretary's investigation, information derived from an investigation and any final investigative report relating to that investigation.

(e) Prompt judicial action

(1) If the Secretary concludes at any time following the filing of a complaint that prompt judicial action is necessary to carry out the purposes of this subchapter, the Secretary may authorize a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint under this section. Upon receipt of such an authorization, the Attorney General shall promptly commence and maintain such an action. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with the Federal Rules of Civil Procedure. The commencement of a civil action under this subsection does not affect the initiation or continuation of administrative proceedings under this section and section 3612 of this title.

(2) Whenever the Secretary has reason to believe that a basis may exist for the commencement of proceedings against any respondent under sections 3614(a) and 3614(c) of this title or for

proceedings by any governmental licensing or supervisory authorities, the Secretary shall transmit the information upon which such belief is based to the Attorney General, or to such authorities, as the case may be.

(f) Referral for State or local proceedings

(1) Whenever a complaint alleges a discriminatory housing practice—

(A) within the jurisdiction of a State or local public agency; and

(B) as to which such agency has been certified by the Secretary under this subsection;

the Secretary shall refer such complaint to that certified agency before taking any action with respect to such complaint.

(2) Except with the consent of such certified agency, the Secretary, after that referral is made, shall take no further action with respect to such complaint unless—

(A) the certified agency has failed to commence proceedings with respect to the complaint before the end of the 30th day after the date of such referral;

(B) the certified agency, having so commenced such proceedings, fails to carry forward such proceedings with reasonable promptness; or

(C) the Secretary determines that the certified agency no longer qualifies for certification under this subsection with respect to the relevant jurisdiction.

(3)(A) The Secretary may certify an agency under this subsection only if the Secretary determines that—

(i) the substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made;

(ii) the procedures followed by such agency;

(iii) the remedies available to such agency; and

(iv) the availability of judicial review of such agency's action;

are substantially equivalent to those created by and under this subchapter.

(B) Before making such certification, the Secretary shall take into account the current practices and past performance, if any, of such agency.

(4) During the period which begins on September 13, 1988, and ends 40 months after September 13, 1988, each agency certified (including an agency certified for interim referrals pursuant to 24 CFR 115.11, unless such agency is subsequently denied recognition under 24 CFR 115.7) for the purposes of this subchapter on the day before September 13, 1988, shall for the purposes of this subsection be considered certified under this subsection with respect to those matters for which such agency was certified on September 13, 1988. If the Secretary determines in an individual case that an agency has not been able to meet the certification requirements within this 40-month period due to exceptional circumstances, such as the infrequency of legislative sessions in that jurisdiction, the Secretary may extend such period by not more than 8 months.

(5) Not less frequently than every 5 years, the Secretary shall determine whether each agency certified under this subsection continues to qualify for certification. The Secretary shall take appropriate action with respect to any agency not so qualifying.

(g) Reasonable cause determination and effect

(1) The Secretary shall, within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), determine based on the facts whether

reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. If the Secretary is unable to make the determination within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

(2)(A) If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall, except as provided in subparagraph (C), immediately issue a charge on behalf of the aggrieved person, for further proceedings under section 3612 of this title.

(B) Such charge—

(i) shall consist of a short and plain statement of the facts upon which the Secretary has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(ii) shall be based on the final investigative report; and

(iii) need not be limited to the facts or grounds alleged in the complaint filed under subsection (a) of this section.

(C) If the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance, the Secretary shall immediately refer the matter to the Attorney General for appropriate action under section 3614 of this title, instead of issuing such charge.

(3) If the Secretary determines that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall promptly dismiss the complaint. The Secretary shall make public disclosure of each such dismissal.

(4) The Secretary may not issue a charge under this section regarding an alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

(h) Service of copies of charge

After the Secretary issues a charge under this section, the Secretary shall cause a copy thereof, together with information as to how to make an election under section 3612(a) of this title and the effect of such an election, to be served—

(1) on each respondent named in such charge, together with a notice of opportunity for a hearing at a time and place specified in the notice, unless that election is made; and

(2) on each aggrieved person on whose behalf the complaint was filed.

(Pub. L. 90–284, title VIII, §810, as added Pub. L. 100–430, §8(2), Sept. 13, 1988, 102 Stat. 1625.)

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (e)(1), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

PRIOR PROVISIONS

A prior section 3610, Pub. L. 90–284, title VIII, §810, Apr. 11, 1968, 82 Stat. 85, related to enforcement, prior to repeal by Pub. L. 100–430, §8(2).

EFFECTIVE DATE

Section effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as an Effective Date of 1988 Amendment note under section 3601 of this title.

§3611. Subpoenas; giving of evidence

(a) In general

The Secretary may, in accordance with this subsection, issue subpoenas and order discovery in aid of investigations and hearings under this subchapter. Such subpoenas and discovery may be ordered to the same extent and subject to the same limitations as would apply if the subpoenas or discovery were ordered or served in aid of a civil action in the United States district court for the district in which the investigation is taking place.

(b) Witness fees

Witnesses summoned by a subpoena under this subchapter shall be entitled to the same witness and mileage fees as witnesses in proceedings in United States district courts. Fees payable to a witness summoned by a subpoena issued at the request of a party shall be paid by that party or, where a party is unable to pay the fees, by the Secretary.

(c) Criminal penalties

(1) Any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry or to produce records, documents, or other evidence, if it is in such person's power to do so, in obedience to the subpoena or other lawful order under subsection (a) of this section, shall be fined not more than $100,000 or imprisoned not more than one year, or both.

(2) Any person who, with intent thereby to mislead another person in any proceeding under this subchapter—

(A) makes or causes to be made any false entry or statement of fact in any report, account, record, or other document produced pursuant to subpoena or other lawful order under subsection (a) of this section;

(B) willfully neglects or fails to make or to cause to be made full, true, and correct entries in such reports, accounts, records, or other documents; or

(C) willfully mutilates, alters, or by any other means falsifies any documentary evidence;

shall be fined not more than $100,000 or imprisoned not more than one year, or both.

(Pub. L. 90–284, title VIII, §811, as added Pub. L. 100–430, §8(2), Sept. 13, 1988, 102 Stat. 1628.)

PRIOR PROVISIONS

A prior section 3611, Pub. L. 90–284, title VIII, §811, Apr. 11, 1968, 82 Stat. 87, related to evidence, prior to repeal by Pub. L. 100–430, §8(2).

EFFECTIVE DATE

Section effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as an Effective Date of 1988 Amendment note under section 3601 of this title.

§3612. Enforcement by Secretary

(a) Election of judicial determination

When a charge is filed under section 3610 of this title, a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed, may elect to have the claims asserted in that charge decided in a civil action under subsection (*o*) of this section in lieu of a hearing under subsection (b) of this section. The election must be made not later than 20 days after the receipt by the electing person of service under section 3610(h) of this title or, in the case of the Secretary, not

later than 20 days after such service. The person making such election shall give notice of doing so to the Secretary and to all other complainants and respondents to whom the charge relates.

(b) Administrative law judge hearing in absence of election

If an election is not made under subsection (a) of this section with respect to a charge filed under section 3610 of this title, the Secretary shall provide an opportunity for a hearing on the record with respect to a charge issued under section 3610 of this title. The Secretary shall delegate the conduct of a hearing under this section to an administrative law judge appointed under section 3105 of title 5. The administrative law judge shall conduct the hearing at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur.

(c) Rights of parties

At a hearing under this section, each party may appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas under section 3611 of this title. Any aggrieved person may intervene as a party in the proceeding. The Federal Rules of Evidence apply to the presentation of evidence in such hearing as they would in a civil action in a United States district court.

(d) Expedited discovery and hearing

(1) Discovery in administrative proceedings under this section shall be conducted as expeditiously and inexpensively as possible, consistent with the need of all parties to obtain relevant evidence.

(2) A hearing under this section shall be conducted as expeditiously and inexpensively as possible, consistent with the needs and rights of the parties to obtain a fair hearing and a complete record.

(3) The Secretary shall, not later than 180 days after September 13, 1988, issue rules to implement this subsection.

(e) Resolution of charge

Any resolution of a charge before a final order under this section shall require the consent of the aggrieved person on whose behalf the charge is issued.

(f) Effect of trial of civil action on administrative proceedings

An administrative law judge may not continue administrative proceedings under this section regarding any alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

(g) Hearings, findings and conclusions, and order

(1) The administrative law judge shall commence the hearing under this section no later than 120 days following the issuance of the charge, unless it is impracticable to do so. If the administrative law judge is unable to commence the hearing within 120 days after the issuance of the charge, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(2) The administrative law judge shall make findings of fact and conclusions of law within 60 days after the end of the hearing under this section, unless it is impracticable to do so. If the administrative law judge is unable to make findings of fact and conclusions of law within such period, or any succeeding 60-day period thereafter, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(3) If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such

relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent—

(A) in an amount not exceeding $10,000 if the respondent has not been adjudged to have committed any prior discriminatory housing practice;

(B) in an amount not exceeding $25,000 if the respondent has been adjudged to have committed one other discriminatory housing practice during the 5-year period ending on the date of the filing of this charge; and

(C) in an amount not exceeding $50,000 if the respondent has been adjudged to have committed 2 or more discriminatory housing practices during the 7-year period ending on the date of the filing of this charge;

except that if the acts constituting the discriminatory housing practice that is the object of the charge are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory housing practice, then the civil penalties set forth in subparagraphs (B) and (C) may be imposed without regard to the period of time within which any subsequent discriminatory housing practice occurred.

(4) No such order shall affect any contract, sale, encumbrance, or lease consummated before the issuance of such order and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the charge filed under this subchapter.

(5) In the case of an order with respect to a discriminatory housing practice that occurred in the course of a business subject to a licensing or regulation by a governmental agency, the Secretary shall, not later than 30 days after the date of the issuance of such order (or, if such order is judicially reviewed, 30 days after such order is in substance affirmed upon such review)—

(A) send copies of the findings of fact, conclusions of law, and the order, to that governmental agency; and

(B) recommend to that governmental agency appropriate disciplinary action (including, where appropriate, the suspension or revocation of the license of the respondent).

(6) In the case of an order against a respondent against whom another order was issued within the preceding 5 years under this section, the Secretary shall send a copy of each such order to the Attorney General.

(7) If the administrative law judge finds that the respondent has not engaged or is not about to engage in a discriminatory housing practice, as the case may be, such administrative law judge shall enter an order dismissing the charge. The Secretary shall make public disclosure of each such dismissal.

(h) Review by Secretary; service of final order

(1) The Secretary may review any finding, conclusion, or order issued under subsection (g) of this section. Such review shall be completed not later than 30 days after the finding, conclusion, or order is so issued; otherwise the finding, conclusion, or order becomes final.

(2) The Secretary shall cause the findings of fact and conclusions of law made with respect to any final order for relief under this section, together with a copy of such order, to be served on each aggrieved person and each respondent in the proceeding.

(i) Judicial review

(1) Any party aggrieved by a final order for relief under this section granting or denying in whole or in part the relief sought may obtain a review of such order under chapter 158 of title 28.

(2) Notwithstanding such chapter, venue of the proceeding shall be in the judicial circuit in which the discriminatory housing practice is alleged to have occurred, and filing of the petition for review shall be not later than 30 days after the order is entered.

(j) Court enforcement of administrative order upon petition by Secretary

(1) The Secretary may petition any United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred or in which any respondent resides or transacts business for the enforcement of the order of the administrative law judge and for appropriate temporary relief or restraining order, by filing in such court a written petition praying that such order be enforced and for appropriate temporary relief or restraining order.

(2) The Secretary shall file in court with the petition the record in the proceeding. A copy of such petition shall be forthwith transmitted by the clerk of the court to the parties to the proceeding before the administrative law judge.

(k) Relief which may be granted

(1) Upon the filing of a petition under subsection (i) or (j) of this section, the court may—

(A) grant to the petitioner, or any other party, such temporary relief, restraining order, or other order as the court deems just and proper;

(B) affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceedings; and

(C) enforce such order to the extent that such order is affirmed or modified.

(2) Any party to the proceeding before the administrative law judge may intervene in the court of appeals.

(3) No objection not made before the administrative law judge shall be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

***(l)* Enforcement decree in absence of petition for review**

If no petition for review is filed under subsection (i) of this section before the expiration of 45 days after the date the administrative law judge's order is entered, the administrative law judge's findings of fact and order shall be conclusive in connection with any petition for enforcement—

(1) which is filed by the Secretary under subsection (j) of this section after the end of such day; or

(2) under subsection (m) of this section.

(m) Court enforcement of administrative order upon petition of any person entitled to relief

If before the expiration of 60 days after the date the administrative law judge's order is entered, no petition for review has been filed under subsection (i) of this section, and the Secretary has not sought enforcement of the order under subsection (j) of this section, any person entitled to relief under the order may petition for a decree enforcing the order in the United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred.

(n) Entry of decree

The clerk of the court of appeals in which a petition for enforcement is filed under subsection (*l*) or (m) of this section shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary, the respondent named in the petition, and to any other parties to the proceeding before the administrative law judge.

***(o)* Civil action for enforcement when election is made for such civil action**

(1) If an election is made under subsection (a) of this section, the Secretary shall authorize, and not later than 30 days after the election is made the Attorney General shall commence and maintain, a civil action on behalf of the aggrieved person in a United States district court seeking relief under this subsection. Venue for such civil action shall be determined under chapter 87 of title 28.

(2) Any aggrieved person with respect to the issues to be determined in a civil action under this subsection may intervene as of right in that civil action.

(3) In a civil action under this subsection, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may grant as relief any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section 3613 of this title. Any relief so granted that would accrue to an aggrieved person in a civil action commenced by that aggrieved person under section 3613 of this title shall also accrue to that aggrieved person in a civil action under this subsection. If monetary relief is sought for the benefit of an aggrieved person who does not intervene in the civil action, the court shall not award such relief if that aggrieved person has not complied with discovery orders entered by the court.

(p) Attorney's fees

In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under this section, the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section 504 of title 5 or by section 2412 of title 28.

(Pub. L. 90–284, title VIII, §812, as added Pub. L. 100–430, §8(2), Sept. 13, 1988, 102 Stat. 1629.)

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subsec. (c), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

PRIOR PROVISIONS

A prior section 3612, Pub. L. 90–284, title VIII, §812, Apr. 11, 1968, 82 Stat. 88, related to enforcement by private persons, prior to repeal by Pub. L. 100–430, §8(2).

EFFECTIVE DATE

Section effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as an Effective Date of 1988 Amendment note under section 3601 of this title.

§3613. Enforcement by private persons

(a) Civil action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 3610(a) of this title and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement

with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing practice which forms the basis for such complaint except for the purpose of enforcing the terms of such an agreement.

(3) An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this subchapter with respect to such charge.

(b) Appointment of attorney by court

Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may—

(1) appoint an attorney for such person; or

(2) authorize the commencement or continuation of a civil action under subsection (a) of this section without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

(d) Effect on certain sales, encumbrances, and rentals

Relief granted under this section shall not affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this subchapter.

(e) Intervention by Attorney General

Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section 3614(e) of this title in a civil action to which such section applies.

(Pub. L. 90–284, title VIII, §813, as added Pub. L. 100–430, §8(2), Sept. 13, 1988, 102 Stat. 1633.)

PRIOR PROVISIONS

A prior section 3613, Pub. L. 90–284, title VIII, §813, Apr. 11, 1968, 82 Stat. 88, related to enforcement by Attorney General by bringing civil action requesting preventive relief, prior to repeal by Pub. L. 100–430, §8(2).

EFFECTIVE DATE

Section effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as an Effective Date of 1988 Amendment note under section 3601 of this title.

§3614. Enforcement by Attorney General

(a) Pattern or practice cases

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

(b) On referral of discriminatory housing practice or conciliation agreement for enforcement

(1)(A) The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to a discriminatory housing practice referred to the Attorney General by the Secretary under section 3610(g) of this title.

(B) A civil action under this paragraph may be commenced not later than the expiration of 18 months after the date of the occurrence or the termination of the alleged discriminatory housing practice.

(2)(A) The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to breach of a conciliation agreement referred to the Attorney General by the Secretary under section 3610(c) of this title.

(B) A civil action may be commenced under this paragraph not later than the expiration of 90 days after the referral of the alleged breach under section 3610(c) of this title.

(c) Enforcement of subpoenas

The Attorney General, on behalf of the Secretary, or other party at whose request a subpoena is issued, under this subchapter, may enforce such subpoena in appropriate proceedings in the United States district court for the district in which the person to whom the subpoena was addressed resides, was served, or transacts business.

(d) Relief which may be granted in civil actions under subsections (a) and (b)

(1) In a civil action under subsection (a) or (b) of this section, the court—

(A) may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this subchapter as is necessary to assure the full enjoyment of the rights granted by this subchapter;

(B) may award such other relief as the court deems appropriate, including monetary damages to persons aggrieved; and

(C) may, to vindicate the public interest, assess a civil penalty against the respondent—

(i) in an amount not exceeding $50,000, for a first violation; and

(ii) in an amount not exceeding $100,000, for any subsequent violation.

(2) In a civil action under this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section 2412 of title 28.

(e) Intervention in civil actions

Upon timely application, any person may intervene in a civil action commenced by the Attorney General under subsection (a) or (b) of this section which involves an alleged discriminatory housing practice with respect to which such person is an aggrieved person or a conciliation agreement to which such person is a party. The court may grant such appropriate relief to any such intervening party as is authorized to be granted to a plaintiff in a civil action under section 3613 of this title.

(Pub. L. 90–284, title VIII, §814, as added Pub. L. 100–430, §8(2), Sept. 13, 1988, 102 Stat. 1634.)

PRIOR PROVISIONS

A prior section 3614, Pub. L. 90–284, title VIII, §814, Apr. 11, 1968, 82 Stat. 88, related to expedition of court proceedings under section 3612 or 3613 of this title, prior to repeal by Pub. L. 98–620, title IV, §402(40), Nov. 8, 1984, 98 Stat. 3360.

EFFECTIVE DATE

Section effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as an Effective Date of 1988 Amendment note under section 3601 of this title.

§3614–1. Incentives for self-testing and self-correction

(a) Privileged information

(1) Conditions for privilege

A report or result of a self-test (as that term is defined by regulation of the Secretary) shall be considered to be privileged under paragraph (2) if any person—

(A) conducts, or authorizes an independent third party to conduct, a self-test of any aspect of a residential real estate related lending transaction of that person, or any part of that transaction, in order to determine the level or effectiveness of compliance with this subchapter by that person; and

(B) has identified any possible violation of this subchapter by that person and has taken, or is taking, appropriate corrective action to address any such possible violation.

(2) Privileged self-test

If a person meets the conditions specified in subparagraphs (A) and (B) of paragraph (1) with respect to a self-test described in that paragraph, any report or results of that self-test—

(A) shall be privileged; and

(B) may not be obtained or used by any applicant, department, or agency in any—

(i) proceeding or civil action in which one or more violations of this subchapter are alleged; or

(ii) examination or investigation relating to compliance with this subchapter.

(b) Results of self-testing

(1) In general

No provision of this section may be construed to prevent an aggrieved person, complainant, department, or agency from obtaining or using a report or results of any self-test in any proceeding or civil action in which a violation of this subchapter is alleged, or in any examination or investigation of compliance with this subchapter if—

(A) the person to whom the self-test relates or any person with lawful access to the report or the results—

(i) voluntarily releases or discloses all, or any part of, the report or results to the aggrieved person, complainant, department, or agency, or to the general public; or

(ii) refers to or describes the report or results as a defense to charges of violations of this subchapter against the person to whom the self-test relates; or

(B) the report or results are sought in conjunction with an adjudication or admission of a violation of this subchapter for the sole purpose of determining an appropriate penalty or remedy.

(2) Disclosure for determination of penalty or remedy

Any report or results of a self-test that are disclosed for the purpose specified in paragraph

(1)(B)—

(A) shall be used only for the particular proceeding in which the adjudication or admission referred to in paragraph (1)(B) is made; and

(B) may not be used in any other action or proceeding.

(c) Adjudication

An aggrieved person, complainant, department, or agency that challenges a privilege asserted under this section may seek a determination of the existence and application of that privilege in—

(1) a court of competent jurisdiction; or

(2) an administrative law proceeding with appropriate jurisdiction.

(Pub. L. 90–284, title VIII, §814A, as added Pub. L. 104–208, div. A, title II, §2302(b)(1), Sept. 30, 1996, 110 Stat. 3009–421.)

EFFECTIVE DATE

Privilege provided for in this section applicable to self-test conducted before, on, or after effective date of regulations prescribed under section 2302(b)(2) of Pub. L. 104–208, set out below, with certain exception, see section 2302(c) of Pub. L. 104–208, set out as a note under section 1691c–1 of Title 15, Commerce and Trade.

REGULATIONS

Section 2302(b)(2) of div. A of Pub. L. 104–208 provided that:

"(A) IN GENERAL.—Not later than 6 months after the date of enactment of this Act [Sept. 30, 1996], in consultation with the Board and after providing notice and an opportunity for public comment, the Secretary of Housing and Urban Development shall prescribe final regulations to implement section 814A of the Fair Housing Act [42 U.S.C. 3614–1], as added by this section.

"(B) SELF-TEST.—

"(i) DEFINITION.—The regulations prescribed by the Secretary under subparagraph (A) shall include a definition of the term "self-test" for purposes of section 814A of the Fair Housing Act, as added by this section.

"(ii) REQUIREMENT FOR SELF-TEST.—The regulations prescribed by the Secretary under subparagraph (A) shall specify that a self-test shall be sufficiently extensive to constitute a determination of the level and effectiveness of the compliance by a person engaged in residential real estate related lending activities with the Fair Housing Act [42 U.S.C. 3601 et seq.].

"(iii) SUBSTANTIAL SIMILARITY TO CERTAIN EQUAL CREDIT OPPORTUNITY ACT REGULATIONS.—The regulations prescribed under subparagraph (A) shall be substantially similar to the regulations prescribed by the Board to carry out section 704A of the Equal Credit Opportunity Act [15 U.S.C. 1691c–1], as added by this section."

§3614a. Rules to implement subchapter

The Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this subchapter. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.

(Pub. L. 90–284, title VIII, §815, as added Pub. L. 100–430, §8(2), Sept. 13, 1988, 102 Stat. 1635.)

PRIOR PROVISIONS

A prior section 815 of Pub. L. 90–284 was renumbered section 816 and is classified to section 3615 of this title.

EFFECTIVE DATE

Section effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as an Effective Date of 1988 Amendment note under section 3601 of this title.

INITIAL RULEMAKING

Secretary to issue rules to implement this subchapter as amended by Pub. L. 100–430 not later than the

180th day after Sept. 13, 1988, see section 13(b) of Pub. L. 100–430, set out as a note under section 3601 of this title.

§3615. Effect on State laws

Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

(Pub. L. 90–284, title VIII, §816, formerly §815, Apr. 11, 1968, 82 Stat. 89; renumbered §816, Pub. L. 100–430, §8(1), Sept. 13, 1988, 102 Stat. 1625.)

PRIOR PROVISIONS

A prior section 816 of Pub. L. 90–284 was renumbered section 817 and is classified to section 3616 of this title.

§3616. Cooperation with State and local agencies administering fair housing laws; utilization of services and personnel; reimbursement; written agreements; publication in Federal Register

The Secretary may cooperate with State and local agencies charged with the administration of State and local fair housing laws and, with the consent of such agencies, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist him in carrying out this subchapter. In furtherance of such cooperative efforts, the Secretary may enter into written agreements with such State or local agencies. All agreements and terminations thereof shall be published in the Federal Register.

(Pub. L. 90–284, title VIII, §817, formerly §816, Apr. 11, 1968, 82 Stat. 89; renumbered §817, Pub. L. 100–430, §8(1), Sept. 13, 1988, 102 Stat. 1625.)

PRIOR PROVISIONS

A prior section 817 of Pub. L. 90–284 was renumbered section 818 and is classified to section 3617 of this title.

FAIR HOUSING INITIATIVES PROGRAM

Pub. L. 100–242, title V, §561, Feb. 5, 1988, 101 Stat. 1942, as amended, which established a demonstration program on fair housing initiatives and was formerly set out as a note under this section, was transferred to section 3616a of this title.

§3616a. Fair housing initiatives program

(a) In general

The Secretary of Housing and Urban Development (in this section referred to as the "Secretary") may make grants to, or (to the extent of amounts provided in appropriation Acts) enter into contracts or cooperative agreements with, State or local governments or their agencies, public or private nonprofit organizations or institutions, or other public or private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices, to develop, implement, carry out, or coordinate—

(1) programs or activities designed to obtain enforcement of the rights granted by title VIII of the Act of April 11, 1968 [42 U.S.C. 3601 et seq.] (commonly referred to as the Civil Rights Act of 1968), or by State or local laws that provide rights and remedies for alleged discriminatory housing practices that are substantially equivalent to the rights and remedies provided in such title VIII, through such appropriate judicial or administrative proceedings (including informal methods of conference, conciliation, and persuasion) as are available therefor; and

(2) education and outreach programs designed to inform the public concerning rights and obligations under the laws referred to in paragraph (1).

(b) Private enforcement initiatives

(1) In general

The Secretary shall use funds made available under this subsection to conduct, through contracts with private nonprofit fair housing enforcement organizations, investigations of violations of the rights granted under title VIII of the Civil Rights Act of 1968 [42 U.S.C. 3601 et seq.], and such enforcement activities as appropriate to remedy such violations. The Secretary may enter into multiyear contracts and take such other action as is appropriate to enhance the effectiveness of such investigations and enforcement activities.

(2) Activities

The Secretary shall use funds made available under this subsection to conduct, through contracts with private nonprofit fair housing enforcement organizations, a range of investigative and enforcement activities designed to—

(A) carry out testing and other investigative activities in accordance with subsection (b)(1) of this section, including building the capacity for housing investigative activities in unserved or underserved areas;

(B) discover and remedy discrimination in the public and private real estate markets and real estate-related transactions, including, but not limited to, the making or purchasing of loans or the provision of other financial assistance sales and rentals of housing and housing advertising;

(C) carry out special projects, including the development of prototypes to respond to new or sophisticated forms of discrimination against persons protected under title VIII of the Civil Rights Act of 1968 [42 U.S.C. 3601 et seq.];

(D) provide technical assistance to local fair housing organizations, and assist in the formation and development of new fair housing organizations; and

(E) provide funds for the costs and expenses of litigation, including expert witness fees.

(c) Funding of fair housing organizations

(1) In general

The Secretary shall use funds made available under this section to enter into contracts or cooperative agreements with qualified fair housing enforcement organizations, other private nonprofit fair housing enforcement organizations, and nonprofit groups organizing to build their capacity to provide fair housing enforcement, for the purpose of supporting the continued development or implementation of initiatives which enforce the rights granted under title VIII of the Civil Rights Act of 1968 [42 U.S.C. 3601 et seq.], as amended. Contracts or cooperative agreements may not provide more than 50 percent of the operating budget of the recipient organization for any one year.

(2) Capacity enhancement

The Secretary shall use funds made available under this section to help establish, organize, and build the capacity of fair housing enforcement organizations, particularly in those areas of the

country which are currently underserved by fair housing enforcement organizations as well as those areas where large concentrations of protected classes exist. For purposes of meeting the objectives of this paragraph, the Secretary may enter into contracts or cooperative agreements with qualified fair housing enforcement organizations. The Secretary shall establish annual goals which reflect the national need for private fair housing enforcement organizations.

(d) Education and outreach

(1) In general

The Secretary, through contracts with one or more qualified fair housing enforcement organizations, other fair housing enforcement organizations, and other nonprofit organizations representing groups of persons protected under title VIII of the Civil Rights Act of 1968 [42 U.S.C. 3601 et seq.], shall establish a national education and outreach program. The national program shall be designed to provide a centralized, coordinated effort for the development and dissemination of fair housing media products, including—

(A) public service announcements, both audio and video;
(B) television, radio and print advertisements;
(C) posters; and
(D) pamphlets and brochures.

The Secretary shall designate a portion of the amounts provided in subsection (g)(4) of this section for a national program specifically for activities related to the annual national fair housing month. The Secretary shall encourage cooperation with real estate industry organizations in the national education and outreach program. The Secretary shall also encourage the dissemination of educational information and technical assistance to support compliance with the housing adaptability and accessibility guidelines contained in the Fair Housing Act Amendments of 1988.

(2) Regional and local programs

The Secretary, through contracts with fair housing enforcement organizations, other nonprofit organizations representing groups of persons protected under title VIII of the Civil Rights Act of 1968 [42 U.S.C. 3601 et seq.], State and local agencies certified by the Secretary under section 810(f) of the Fair Housing Act [42 U.S.C. 3610(f)], or other public or private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices, shall establish or support education and outreach programs at the regional and local levels.

(3) Community-based programs

The Secretary shall provide funding to fair housing organizations and other nonprofit organizations representing groups of persons protected under title VIII of the Civil Rights Act of 1968, or other public or private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices, to support community-based education and outreach activities, including school, church, and community presentations, conferences, and other educational activities.

(e) Program administration

(1) Not less than 30 days before providing a grant or entering into any contract or cooperative agreement to carry out activities authorized by this section, the Secretary shall submit notification of such proposed grant, contract, or cooperative agreement (including a description of the geographical distribution of such contracts) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives.

(2) Repealed. Pub. L. 104–66, title I, §1071(d), Dec. 21, 1995, 109 Stat. 720.

(f) Regulations

(1) The Secretary shall issue such regulations as may be necessary to carry out the provisions of this section.

(2) The Secretary shall, for use during the demonstration authorized in this section, establish guidelines for testing activities funded under the private enforcement initiative of the fair housing initiatives program. The purpose of such guidelines shall be to ensure that investigations in support of fair housing enforcement efforts described in subsection (a)(1) of this section shall develop credible and objective evidence of discriminatory housing practices. Such guidelines shall apply only to activities funded under this section, shall not be construed to limit or otherwise restrict the use of facts secured through testing not funded under this section in any legal proceeding under Federal fair housing laws, and shall not be used to restrict individuals or entities, including those participating in the fair housing initiatives program, from pursuing any right or remedy guaranteed by Federal law. Not later than 6 months after the end of the demonstration period authorized in this section,[1] the Secretary shall submit to Congress the evaluation of the Secretary of the effectiveness of such guidelines in achieving the purposes of this section.

(3) Such regulations shall include provisions governing applications for assistance under this section, and shall require each such application to contain—

(A) a description of the assisted activities proposed to be undertaken by the applicant, together with the estimated costs and schedule for completion of such activities;

(B) a description of the experience of the applicant in formulating or carrying out programs to prevent or eliminate discriminatory housing practices;

(C) available information, including studies made by or available to the applicant, indicating the nature and extent of discriminatory housing practices occurring in the general location where the applicant proposes to conduct its assisted activities, and the relationship of such activities to such practices;

(D) an estimate of such other public or private resources as may be available to assist the proposed activities;

(E) a description of proposed procedures to be used by the applicant for monitoring conduct and evaluating results of the proposed activities; and

(F) any additional information required by the Secretary.

(4) Regulations issued under this subsection shall not become effective prior to the expiration of 90 days after the Secretary transmits such regulations, in the form such regulations are intended to be published, to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives.

(5) The Secretary shall not obligate or expend any amount under this section before the effective date of the regulations required under this subsection.

(g) Authorization of appropriations

There are authorized to be appropriated to carry out the provisions of this section,[2] $21,000,000 for fiscal year 1993 and $26,000,000 for fiscal year 1994, of which—

(1) not less than $3,820,000 for fiscal year 1993 and $8,500,000 for fiscal year 1994 shall be for private enforcement initiatives authorized under subsection (b) of this section, divided equally between activities specified under subsection (b)(1) of this section and those specified under subsection (b)(2) of this section;

(2) not less than $2,230,000 for fiscal year 1993 and $8,500,000 for fiscal year 1994 shall be for qualified fair housing enforcement organizations authorized under subsection (c)(1) of this section;

(3) not less than $2,010,000 for fiscal year 1993 and $4,000,000 for fiscal year 1994 shall be for the creation of new fair housing enforcement organizations authorized under subsection (c)(2) of this section; and

(4) not less than $2,540,000 for fiscal year 1993 and $5,000,000 for fiscal year 1994 shall be for education and outreach programs authorized under subsection (d) of this section, to be divided equally between activities specified under subsection (d)(1) of this section and those specified under subsections (d)(2) and (d)(3) of this section.

Any amount appropriated under this section shall remain available until expended.

(h) Qualified fair housing enforcement organization

(1) The term "qualified fair housing enforcement organization" means any organization that—

(A) is organized as a private, tax-exempt, nonprofit, charitable organization;

(B) has at least 2 years experience in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims; and

(C) is engaged in all the activities listed in paragraph (1)(B) at the time of application for assistance under this section.

An organization which is not solely engaged in fair housing enforcement activities may qualify as a qualified fair housing enforcement organization, provided that the organization is actively engaged in each of the activities listed in subparagraph (B).

(2) The term "fair housing enforcement organization" means any organization that—

(A) meets the requirements specified in paragraph (1)(A);

(B) is currently engaged in the activities specified in paragraph (1)(B);

(C) upon the receipt of funds under this section will become engaged in all of the activities specified in paragraph (1)(B); and

(D) for purposes of funding under subsection (b) of this section, has at least 1 year of experience in the activities specified in paragraph (1)(B).

(i) Prohibition on use of funds

None of the funds authorized under this section may be used by the Secretary for purposes of settling claims, satisfying judgments or fulfilling court orders in any litigation action involving either the Department or housing providers funded by the Department. None of the funds authorized under this section may be used by the Department for administrative costs.

(j) Reporting requirements

Not later than 180 days after the close of each fiscal year in which assistance under this section is furnished, the Secretary shall prepare and submit to the Congress a comprehensive report which shall contain—

(1) a description of the progress made in accomplishing the objectives of this section;

(2) a summary of all the private enforcement activities carried out under this section and the use of such funds during the preceding fiscal year;

(3) a list of all fair housing enforcement organizations funded under this section during the preceding fiscal year, identified on a State-by-State basis;

(4) a summary of all education and outreach activities funded under this section and the use of such funds during the preceding fiscal year; and

(5) any findings, conclusions, or recommendations of the Secretary as a result of the funded activities.

(Pub. L. 100–242, title V, §561, Feb. 5, 1988, 101 Stat. 1942; Pub. L. 101–625, title IX, §953, Nov.

28, 1990, 104 Stat. 4419; Pub. L. 102–550, title IX, §905(b), Oct. 28, 1992, 106 Stat. 3869; Pub. L. 104–66, title I, §1071(d), Dec. 21, 1995, 109 Stat. 720.)

REFERENCES IN TEXT

The Civil Rights Act of 1968, referred to in subsecs. (a)(1), (b)(1), (2)(C), (c)(1), and (d), is Pub. L. 90–284, Apr. 11, 1968, 82 Stat. 73, as amended. Title VIII of the Act, known as the Fair Housing Act, is classified principally to subchapter I (§3601 et seq.) of this chapter. For complete classification of these Acts to the Code, see Short Title notes set out under section 3601 of this title and Tables.

The Fair Housing Act Amendments of 1988, referred to in subsec. (d)(1), probably means the Fair Housing Amendments Act of 1988, Pub. L. 100–430, Sept. 13, 1988, 102 Stat. 1619, as amended. For complete classification of this Act to the Code, see Short Title of 1988 Amendment note set out under section 3601 of this title and Tables.

The phrase "Not later than 6 months after the end of the demonstration period authorized in this section", referred to in subsec. (f)(2), probably means the end of the demonstration period pursuant to former subsec. (e) of this section, which provided that such period was to end Sept. 30, 1992. However, subsec. (e) was redesignated (h) and struck out by Pub. L. 102–550. See 1992 Amendment notes below.

CODIFICATION

Section was enacted as part of the Housing and Community Development Act of 1987, and not as part of title VIII of Pub. L. 90–284, known as the Fair Housing Act, which comprises this subchapter.

Section was formerly set out as a note under section 3616 of this title.

AMENDMENTS

1995—Subsec. (e)(2). Pub. L. 104–66 struck out par. (2) which read as follows: "The Secretary shall provide to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives a quarterly report that summarizes the activities funded under this section and describes the geographical distribution of grants, contracts, or cooperative agreements funded under this section."

1992—Subsecs. (b) to (f). Pub. L. 102–550, §905(b)(1), (2), added subsecs. (b) to (d) and redesignated former subsecs. (b) and (c) as (e) and (f), respectively.

Subsec. (g). Pub. L. 102–550, §905(b)(1), (3), redesignated subsec. (d) as (g) and, in first sentence, substituted "$21,000,000 for fiscal year 1993 and $26,000,000 for fiscal year 1994, of which—" and pars. (1) to (4) for "including any program evaluations, $6,000,000 for fiscal year 1991 and $6,300,000 for fiscal year 1992, of which not more than $3,000,000 in each year shall be for the private enforcement initiative demonstration."

Subsec. (h). Pub. L. 102–550, §905(b)(4), added subsec. (h) and struck out former subsec. (h) which provided that the demonstration period authorized by this section would end Sept. 30, 1992.

Pub. L. 102–550, §905(b)(1), redesignated subsec. (e) as (h).

Subsecs. (i), (j). Pub. L. 102–550, §905(b)(4), added subsecs. (i) and (j).

1990—Subsec. (d). Pub. L. 101–625, §953(a), amended first sentence generally. Prior to amendment, first sentence read as follows: "There are authorized to be appropriated to carry out the provisions of this section, including any program evaluations, $5,000,000 for fiscal year 1988, and $5,000,000 for fiscal year 1989, of which not more than $3,000,000 in each year shall be for the private enforcement initiative demonstration."

Subsec. (e). Pub. L. 101–625, §953(b), substituted "1992" for "1989".

CHANGE OF NAME

Committee on Banking, Finance and Urban Affairs of House of Representatives treated as referring to Committee on Banking and Financial Services of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress. Committee on Banking and Financial Services of House of Representatives abolished and replaced by Committee on Financial Services of House of Representatives, and jurisdiction over matters relating to securities and exchanges and insurance generally transferred from Committee on Energy and Commerce of House of Representatives by House Resolution No. 5, One Hundred Seventh Congress, Jan. 3, 2001.

CONGRESSIONAL FINDINGS

Section 905(a) of Pub. L. 102–550 provided that: "The Congress finds that—

"(1) in the past half decade, there have been major legislative and administrative changes in Federal fair housing and fair lending laws and substantial improvements in the Nation's understanding of

discrimination in the housing markets;

"(2) in response to evidence of continuing housing discrimination, the Congress passed the Fair Housing Act Amendments of 1988 [probably should be the Fair Housing Amendments Act of 1988, Pub. L. 100–430, see Short Title of 1988 Amendment note set out under section 3601 of this title], to provide for more effective enforcement of fair housing rights through judicial and administrative avenues and to expand the number of protected classes covered under Federal fair housing laws;

"(3) in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 [Pub. L. 101–73, see Short Title of 1989 Amendment note set out under 12 U.S.C. 1811], the Congress expanded the disclosure provisions under the Home Mortgage Disclosure Act [probably should be the Home Mortgage Disclosure Act of 1975; 12 U.S.C. 2801 et seq.] to provide increased information on the mortgage lending patterns of financial institutions;

"(4) in the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], the Congress provided a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

"(5) in 1991, data collected under the Home Mortgage Disclosure Act disclosed evidence of pervasive discrimination in the Nation's mortgage lending markets;

"(6) the Housing Discrimination Survey, released by the Department of Housing and Urban Development in 1991, found that Hispanic and African-American homeseekers experience some form of discrimination in at least half of their encounters with sales and rental agents;

"(7) the Fair Housing Initiatives Program should be revised and expanded to reflect the significant changes in the fair housing and fair lending area that have taken place since the Program's initial authorization in the Housing and Community Development Act of 1987 [Pub. L. 100–242, see Short Title of 1988 Amendment note under section 5301 of this title];

"(8) continuing educational efforts by the real estate industry are a useful way to increase understanding by the public of their fair housing rights and responsibilities; and

"(9) the proven efficacy of private nonprofit fair housing enforcement organizations and community-based efforts makes support for these organizations a necessary component of the fair housing enforcement system."

[1] *See References in Text note below.*

[2] *So in original. The comma probably should not appear.*

§3617. Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

(Pub. L. 90–284, title VIII, §818, formerly §817, Apr. 11, 1968, 82 Stat. 89; renumbered §818 and amended Pub. L. 100–430, §§8(1), 10, Sept. 13, 1988, 102 Stat. 1625, 1635.)

PRIOR PROVISIONS

A prior section 818 of Pub. L. 90–284 was renumbered section 819 and is classified to section 3618 of this title.

AMENDMENTS

1988—Pub. L. 100–430 struck out at end "This section may be enforced by appropriate civil action."

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–430 effective on the 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as a note under section 3601 of this title.

§3618. Authorization of appropriations

There are hereby authorized to be appropriated such sums as are necessary to carry out the purposes of this subchapter.

(Pub. L. 90–284, title VIII, §819, formerly §818, Apr. 11, 1968, 82 Stat. 89; renumbered §819, Pub. L. 100–430, §8(1), Sept. 13, 1988, 102 Stat. 1625.)

PRIOR PROVISIONS

A prior section 819 of Pub. L. 90–284 was renumbered section 820 and is classified to section 3619 of this title.

§3619. Separability

If any provision of this subchapter or the application thereof to any person or circumstances is held invalid, the remainder of the subchapter and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

(Pub. L. 90–284, title VIII, §820, formerly §819, Apr. 11, 1968, 82 Stat. 89; renumbered §820, Pub. L. 100–430, §8(1), Sept. 13, 1988, 102 Stat. 1625.)

APPENDIX D

First published in the California Real Property Journal, a quarterly publication of the Real Property Law Section of the State Bar of California.

Alcoholism, Drug Addiction, and the Right to Fair Housing:

How The Fair Housing Act Applies To Sober Living Homes

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

I. INTRODUCTION

In 2007, staff working at a city in east Los Angeles County was notified that a small single family home in a quaint residential neighborhood was occupied by more than ten unemployed drug addicts, most of whom were on parole, with little or no supervision by authorities or others. Investigation of the home revealed that its two bedrooms had been illegally subdivided and furnished with bunk beds. The living room had been divided with drywall and make-shift plumbing had been installed for an extra toilet. A tent had been pitched in the backyard to house additional occupants, and the garage had been furnished with carpet, a toilet, a shower, and beds. In fact, all occupants were found to be parolees with alcohol or drug addictions, most were unemployed, and many had lived there for only a few days or more due to the frequency in turnover. To make matters worse, the home was located next door to a family with three children, across the street from another family with four children, and within walking distance of an elementary school bus stop.

Prompted by neighbor complaints, city councilmember outrage, and public safety concerns from police, the city took steps to vacate the home. These efforts met resistance. The property owner claimed that the residents were "disabled individuals" protected from dislocation under the Federal Fair Housing Act ("FHA" or the "Act"),[1] and that they were entitled to continue residing at that house because it was a "***sober living home***" which provided an environment of support and sobriety necessary for recovery.

Miles away, a multi-million dollar mansion is charging wealthy occupants thousands of dollars to reside in a serene environment, free of alcohol and drugs, to assist in recovery from addiction. When faced by complaints of neighboring properties, the operators of this facility also claimed that it was a "***sober living home***," protected from regulation pursuant to the FHA.

While in Orange County, whole sections of beachfront neighborhoods have been converted to so-called "***sober living homes***." The operators object to city and neighborhood complaints on the ground that their operations are protected by the FHA.

These scenarios may sound strange, but they are certainly true. They illustrate a challenging issue in residential land use and Fair Housing Act jurisprudence: Where should individuals undergo rehabilitation for alcohol and drug addiction? How does the Fair Housing Act affect local government's authority to regulate and restrict alcohol and drug recovery facilities? With the advent of "sober living homes" – homes designed to incorporate alcohol and drug addiction recovery into normal residential life – these issues have been pushed to the forefront in many communities and will likely face increasing attention as the popularity of sober living treatment advances.

This article summarizes the legal characteristics of sober living homes and how they are regulated under their relation with the FHA. In particular, this article illustrates how the FHA is being used by owners and residents of sober living homes to advance their establishment and operation, and it explores what local jurisdictions can do to regulate sober living homes in light of FHA requirements.

II. WHAT IS A SOBER LIVING HOME?

There are many variations among sober living facilities and operators; however, all emphasize the same facets of life under their roofs. The location of a sober living or alcohol recovery home in a drug free, single family neighborhood plays a crucial role in an individual's recovery by providing a supportive environment that promotes self esteem, helps create an incentive not to relapse, and avoids the temptations that the presence of drug use can create.[2]

A plethora of for-profit and non-profit organizations operate sober living facilities, ranging from the single landlord who rents his/her home to individuals with alcohol or drug addictions to the corporation that employs a full-time staff of treatment professionals and owns multiple facilities across numerous cities or states. A good example of the "sober living model" is Oxford House, a well-known network of sober living facilities that operate throughout the United States and internationally. Although each residence is an independent organization, the umbrella organization, Oxford House, serves as a network connecting other sober living homes in the area. According to Oxford House, 1,200 self-sustaining homes operate on its model, serving 9,500 people at any one time, totaling more than 24,000 annually.[3] Oxford House operates on the theory that those recovering from drug and alcohol addictions will remain sober if they live in a supportive environment with those suffering similar addictions.[4]

Whether sober living facilities follow the Oxford House model or some other approach, their locations vary from high end beach communities that mirror resort living, to dilapidated single family homes located in high crime neighborhoods plagued by poverty. Reactions to sober living facilities can be similarly varied. Some view sober living facilities as service providers, providing much-needed support to individuals recovering from addictions. For others, sober living facilities are viewed as blight in the community, often becoming most problematic when neighbors and nearby residents learn that large numbers of alcohol and drug addicts reside together near them.

Nearly any single family home can become a "sober living home" by adopting that label and renting rooms to individuals with alcohol or drug addictions. It is not uncommon for landlords seeking to maximize their rents to adopt the sober living moniker even though no actual sober living programs are implemented at the site. Abuses of the sober living model abound, with some single family homes housing upwards of twenty or thirty individuals under the guise of

"sober living" when, in fact, these homes provide no meaningful program for recovery and do not adhere to "legitimate" sober living guidelines.

This creates significant confusion for cities, counties, and other agencies charged with regulating residential land use and assisting disabled individuals. In perhaps the most well-known jurisdiction facing problems posed by sober living facilities, the City of Newport Beach has experienced an extreme concentration of sober living facilities, which have transformed neighborhoods from a relaxed beach going atmosphere to a quasi-clinical community providing services from a patchwork of residential buildings. In this context, neighborhood outrage prompted regulation by the city, ultimately precipitating an FHA lawsuit by sober living operators.[5]

Indeed, it is difficult for those agencies to discern between "legitimate" sober living facilities, which employ good faith measures to assist individuals in their alcohol or drug addiction recovery, from "illegitimate" facilities which use the "sober living" title as a front for questionable rental practices. This confusion can be complicated by the various state licensing provisions that regulate facilities providing care for the disabled or for those recovering from addiction. In California, the Department of Social Services[6] and the Department of Alcohol and Drug Programs,[7] are responsible for licensing and supervising specified facilities which may operate as sober living programs, or which may provide housing or services similar to that provided by unlicensed sober living facilities.[8] The California Attorney General has noted the difference between licensed facilities and non-licensed sober living homes. Licensed facilities are different "from facilities that simply provide a cooperative living arrangement for persons recovering from alcohol and other drug problems. The latter 'sober living environments' are not subject to licensing from the Department."[9] Such licensed facilities enjoy substantial protections from local regulation and therefore make it difficult for local agencies to police sober living homes and to prohibit "illegitimate" sites from operating.

III. HOW DOES THE FHA APPLY TO SOBER LIVING HOMES?

A. HISTORIC ROOTS DEFINING DRUG AND ALCOHOL ADDICTION AS A DISABILITY

The crux of the FHA's application to sober living facilities is based on the definition of a "disability." The FEHA does not address alcoholism or drug abuse as disabilities that would be protected under FEHA; however, it includes the definition of a "disability" found in the Americans with Disabilities Act ("ADA") if it provides results in "broader protection of the civil rights of individuals with a mental disability or physical disability . . . or would include any medical condition not included."[10] As amended in 1988, the FHA prohibits discrimination in housing on the basis of handicap. As amended, the Act defines "handicap" 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."[11]

In determining whether substance abuse would be considered a handicap, Congress' intent is important to discern.[12] Such intent was first formed when Congress first formed its intent when it adopted the Rehabilitation Act a few years prior to the FHA.[13] Under the Rehabilitation Act:

> "[I]ndividuals who have a record of drug use or addiction but who are not currently using illegal drugs would continue to be protected if they fell under the definition of handicap.... Just like any other person with a disability, such as cancer or tuberculosis, former drug-dependent persons do not pose a threat to a dwelling or its inhabitants simply on the basis of status. Depriving such individuals of housing, or evicting them, would constitute irrational discrimination that may seriously jeopardize their continued recovery."[14]

Ultimately, Congress determined that many terms of the Rehabilitation Act should apply to the FHA, and courts have later found that the term "physical or mental impairment" under the FHA includes diseases such as drug addiction (when it is not caused by current illegal use of a controlled substance) and alcoholism.[15] Thus, although many would not, at first glance, realize that a handicapped person includes one suffering from alcoholism or drug addiction; in fact the FHA extends its protections to such persons. In 2000, the Ninth Circuit held: "It is well established that individuals recovering from drug or alcohol addiction are handicapped under the Act [FHA]."[16]

B. ESTABLISHING ALCOHOL OR DRUG ADDICTION AS A DISABILITY UNDER THE FHA

To demonstrate a disability under the FHA, a plaintiff must 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.[17] However, a plaintiff must show not only that he was an alcoholic in the past, but also that his past alcoholism substantially limited one or more major life activities.[18] 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.[19]

However, to qualify as a handicap under the FHA, the person must not be currently abusing alcohol and/or drugs. The FHA expressly limits protection to not include "current, illegal use of or addiction to a controlled substance."[20] Although the FHA does not define what it means to be a current drug user, courts rely upon the ADA and the Rehabilitation Act to determine what is "current drug use." At the time of the alleged discrimination the plaintiff must prove he was not using illegal drugs – even if the person later uses illegal drugs again at the time the complaint is filed or at the time of trial.[21] Thus, an individual with an alcohol or drug addiction may qualify for preferential housing rights pursuant to the FHA.

C. NEXUS BETWEEN THE ADDICTION DISABILITY AND HOUSING NEED

Of course, disability due to an alcohol or drug addiction does not immediately entitle an individual to live wherever he or she wants. To qualify as disabled under the FHA, there must be a ***nexus*** that links the treatment of the disability with the need for housing. In the context of sober living homes this nexus arguably exists when living at a particular location is, in and of itself, a means of treating the alcohol or drug disability.

Typically, this nexus is shown by asserting that a supportive, sober residential environment is necessary for sobriety and addiction recovery. Individuals with alcohol or drug addiction allege that such environments foster sobriety, and encourage trust and camaraderie between residents that is necessary for recovery. Plaintiffs argue that they would suffer substantial limitations and risk "falling off the wagon" if not for living in a sober living environment. Courts have agreed with this theory.[22]

Sober living advocates assert this nexus when claiming FHA protection over sober living facilities. For example, when recovering alcohol and drug addicts live together, "house rules" prohibiting the consumption of alcohol and drugs, requiring attendance at "house meetings" to encourage sobriety, mutual support are established. House rules are intended to maximize efforts to cope with, and overcome addiction. Merely living in a sober house may be viewed as a necessary means of accommodating one's disability such that the FHA essentially entitles the right to live there.

Applying the FHA in this way opens the door to any number of living arrangements intended to assist those recovering from alcohol or drug addiction. Essentially, anywhere a sober environment is provided, or where support for addiction recovery is encouraged, might be viewed as location where an alcohol or drug addict may assert FHA protections.

For example, in 2007, the City of Newport Beach attempted to address the "clustering" of multiple unlicensed sober living homes by imposing restrictions on the establishment and operation of "group residential uses," aimed at curbing a perceived saturation of sober living facilities in neighborhoods.[23] Such efforts prompted a lawsuit by an operator, "Sober Living by the Sea," alleging FHA violations and other claims.[24] In addition, Sober Living by the Sea filed a complaint with the U.S. Department of Housing and Urban Development alleging violations of the Federal housing laws. According to the City's website, the City has since settled the lawsuit with Sober Living by the Sea and other sober living home operators.[25] However, certain sober living facilities remain in operation despite continued opposition from residents, and recent reports have indicated that lawsuits by other sober living operators continue.[26] Such events illustrate that FHA may significantly complicate local agencies' efforts to regulate sober living operations, and highlight the means by which sober living operators can challenge local regulation.

D. WHAT LOCATIONS MAY QUALIFY AS SOBER LIVING HOMES PROTECTED BY THE FHA?

Despite the broad application of FHA requirements to locations claiming to offer a sober living experience, there are some limits to applying the Act.

First, the FHA itself is limited to "dwellings." The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[27] A dwelling 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."[28] Although the FHA does not define what a residence is, courts have interpreted the definition of a residence to be the ordinary meaning of the term.[29]

The definition of a dwelling is important because many sober living homes offer short term residencies and experience high turnover rates. Because tenancies at sober living homes vary dramatically the way residents treat their facilities and how they view these facilities are important indicators for whether the structure will be considered a dwelling under the FHA.

Although a dwelling is covered by the FHA, temporary shelters are not. Dwellings must be intended for use as a residence. Two factors determine whether a facility is a dwelling under the FHA: first is whether the facility is intended or designed for occupants who intend to remain at the facility for a significant period; and second is whether the occupants of the facility would view it as a place to return to during that period.[30] Courts typically find that a "significant period of time" is longer than one would normally stay in a motel and can be for as short as two weeks.[31]

Locations viewed as "temporary dwellings," such as boarding homes, halfway houses, flop houses, and similar locations, have been found to be "dwellings" under the FHA.[32] Notably, however, a homeless shelter is ***not*** considered a "dwelling" protected under the FHA because it only provides emergency, overnight shelter.[33] Thus, application of the FHA to such "temporary" sober living establishments may be of limited use in some contexts.

Similarly, in reviewing the differences between a "home" and a "hotel," the more occupants treat the structure like their home by performing tasks such as cooking their own meals, cleaning their own rooms and the premises, doing their own laundry, and spending free time in the common areas the more likely courts will determine that a structure is a dwelling for purposes of the FHA.[34]

Under these definitions, a sober living home may qualify as a home or a hotel depending on how the living situation is arranged. Often, a sober living home does not provide anything more than a bed, while other homes provide actual care, such as prepared meals and cleaning services. Although many sober living homes provide some form of counseling and guidance, sparse supervision is not uncommon and residents who can care for themselves are often allowed a high degree of independence.

IV. HOW DOES A SOBER LIVING HOME ASSERT THE FHA?

FHA violations may be established either by (1) showing ***disparate impact*** based upon a practice or policy of a particular group; or (2) by "showing that the defendant failed to make ***reasonable accommodations*** in rules, policies, or practices so as to afford people with disabilities an equal opportunity to live in a dwelling."[35]

A. DISPARATE IMPACT

To prove disparate impact under the FHA, a plaintiff must demonstrate that the challenged practice actually or predictably results in discrimination.[36] If a plaintiff is able to establish discrimination, the defendant must then prove his or her action further a legitimate government interest and that there is no alternative available to serve the interest would have a less discriminatory effect.[37] Further, when plaintiffs are merely requesting to remove an obstacle to housing, rather than creating new housing units, a local government must establish a more substantial justification for its conduct.[38]

In the context of sober living homes, it is often difficult to prove a disparate impact because similar group living arrangements such as fraternity or sorority houses and other group homes may also be excluded from a particular zone, so a sober living home would have to prove that the exclusion disparately impacts substance abusers more so than those living under different group arrangements.[39] Other types of land use or building regulations, such as building codes, may also be of little value to plaintiffs asserting disparate impact claims because such regulatory measures are applied uniformly.[40]

However, disparate impact analysis is easier to prove when there is evidence of discriminatory intent. For example, in *Oxford House v. Town of Babylon*, the town attempted to evict residents of a sober living home from a single family home because the town code defined a single family home as a building established for the residency of not more than one family.[41] In *Town of Babylon*, an Oxford House was established in a single family neighborhood. Soon thereafter nearby residents complained that they did not want recovering alcoholics and drug addicts living in their neighborhood.[42] Because the record of town council meetings contained discriminatory statements against alcoholics, the court found the town had evicted a sober living home from a single family neighborhood because it disliked alcoholics.[43]

Plaintiffs requested that the town modify the definition of a family. Although the court agreed that the town's interest in its zoning ordinance was substantial, it found that evicting the residents from a sober living home did not further that interest because evidence showed that the house was well maintained, the town had not received many complaints from neighbors, and the house did not alter the residential character of the neighborhood.[44] Relying on the FHA, the court balanced plaintiff's claim of discriminatory impact against the City's justification.[45] When balancing the interests, the discriminatory impact was far greater than the town's interests which may not have been supported by substantial evidence. Further, the court found that two factors weighed heavily in plaintiff's favor. First, evidence of discriminatory intent by the town; and second, evidence that plaintiff wanted the town to eliminate an obstacle to housing rather than suing the city to compel the city to building housing.[46] Consequently, plaintiff had proven a disparate impact under the FHA because the town's policy of preventing a sober living home from being established in a single family neighborhood disparately impacted individuals with alcohol and drug addiction.[47]

B. REASONABLE ACCOMMODATION

Under the FHA, it is a discriminatory practice to refuse to make "a 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."[48] Under the FHA, a handicap is defined as a physical or mental impairment which substantially limits one or more major life activities of a person.[49] As stated by the Central District of California in *Behavioral Health Services v. City of Gardena*:

> "[A city] must accommodate plaintiffs when the accommodation is necessary [i.e., when plaintiffs' disability prevents them from use of the property unless exceptions are granted] and does not impose undue financial or administrative burdens, or require a fundamental alteration of the zoning program."[50]

An accommodation is reasonable under the FHA if it does not cause undue hardship, fiscal or administrative burdens on the municipality, or does not undermine the basic purpose that the zoning ordinance seeks to achieve.[51] Courts have applied the reasonable accommodations requirements to zoning ordinances and other land use regulations and practices thereby requiring cities to make reasonable accommodations for those disabled under the FHA's definition.[52] Under similar laws, courts have held that even one incident of a denial of reasonable accommodation is sufficient to trigger a violation.[53] Thus, a three-part test is applied in 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.[54] To determine if an accommodation is reasonable the Court must determine whether the accommodation would undermine a legitimate governmental purpose and effect of an existing zoning ordinance, and must consider the benefit to the handicapped person, and the costs associated with such an accommodation.[55] In particular, an accommodation is unreasonable if it would cause an undue financial and administrative burden on the local jurisdiction.[56] In sum, a reasonable accommodation changes a rule of general applicability to make it less burdensome on a handicapped person.

Consequently, courts have held that 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.[57] However, a municipality is not required to make fundamental or substantial modifications from its municipal or zoning code to accommodate a disabled person.[58] The crux of the issue often becomes what is considered a reasonable versus a substantial modification.

A local government or private entity must make an accommodation if it is reasonable and necessary to afford handicapped persons equal opportunity to use and enjoy housing.[59] A court will look at many factors to determine whether or not an accommodation would be reasonable, including whether the accommodation would undermine the legitimate purposes of zoning regulations and the benefits that the accommodation would provide to the handicapped person.[60] Further, a reasonable accommodation cannot require an undue financial and administrative burden on a local government.[61] However, the city may not impose unreasonable restrictions if it grants a reasonable accommodation.[62]

C. STANDING AND EXHAUSTION OF REMEDIES

One who seeks a reasonable accommodation from a governmental regulation, ordinance or practice must do so through the agency's established procedure to obtain the relief that he/she seeks. A plaintiff must first provide the governmental entity an opportunity to accommodate the plaintiff through the entity's established procedures used to adjust the neutral policy in question.[63]

The first hurdle plaintiffs must establish when challenging an ordinance or decision by a government body is whether the plaintiff has ***standing***. Issues concerning standing under the FHA are similar to those under other laws for the disabled, such as the ADA. In general, those rules permit non-disabled persons to assert claims under the law on behalf of individuals who are disabled.[64] Under the FHA, one has standing if one would have standing under Article III of the U.S. Constitution.[65] Under the FEHA, any "aggrieved person" may bring suit to seek relief for a discriminatory housing practice.[66] An "aggrieved person" is one who has been injured by a discriminatory housing practice.[67]

An organization is allowed to bring a suit on its own under the FHA when its purpose is frustrated and when it expends resources because of a discriminatory action.[68] For example, in *Fair Housing of Marin v. Combs*, Fair Housing of Marin ("FHM") filed suit alleging discrimination against African-Americans which caused the group to suffer injury to its ability to provide outreach and education to end unlawful discrimination practices and alleging it had to spend additional resources in response to defendant's discriminatory actions.[69] The Ninth Circuit held that FHM established standing to sue under the FHA because the defendant's illegal housing discrimination injured FHM's outreach programs, requiring it to implement alternate programs in the community to compensate for the discrimination.[70]

In addition, an organization is allowed to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interest it seeks to vindicate is germane to the organization's interests; and (3) neither the claim asserted nor the relief requested requires the individual participation of its members.[71]

Perhaps more important than who may bring a lawsuit is whether the lawsuit is ***ripe***. "To prevail on a reasonable accommodation claim, 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."[72] In *Oxford House v. City of St. Louis*, the Eighth Circuit found that plaintiff did not have a claim of failure to make a reasonable accommodation when plaintiff had not applied for a variance even after the city had requested that plaintiff (a sober living home with eight residents) first apply for a variance.[73] The court stated, "The Oxford Houses must give the City a chance to accommodate them through the City's established procedures for adjusting the zoning code."[74] However, a plaintiff is not first required to appeal a decision through the local body and may file suit once a reasonable accommodation is first denied.[75] The first approval may require a public hearing which is not considered unreasonable if applied evenly to the handicapped and non-handicapped.[76] Therefore, a public hearing may be required to receive a reasonable accommodation and that alone is not considered unreasonable.

Accordingly, although a disabled individual must first request a reasonable accommodation and follow the local jurisdiction's procedures to receive a reasonable accommodation, it may not have to follow the appeal procedure once the first denial occurs. It is important to note this because a lawsuit is subject to dismissal without a determination of the merits if there is no standing or the issue is not ripe for review.

V. PITFALLS AND POSSIBILITIES IN REGULATING SOBER LIVING SITES

As the foregoing makes clear, FHA claims involving sober living facilities typically involve two competing interests: (1) the interests of individuals recovering from addition, often represented by landowners or organizations which provide addiction recovery services; versus (2) the interests of residents who seek to preserve the "family-friendly" character of their neighborhoods, often represented by city attorneys, county counsel, or other public agency attorneys (or attorneys hired by citizen groups opposed to sober living facilities in their neighborhoods). These disputes arise after a claimed sober living home is established in a single family residential neighborhood bringing with it unfamiliar and seemingly unrelated faces living together, congregating on porches and front yards, or wandering nearby streets. Disturbances arise, eventually leading to phone calls to the police, complaints to the local officials, and ultimately for demands by the city or county to intervene and shut down the sober living home.

It is at this point where FHA requirements may first become a concern. Faced with such claims, local jurisdictions may determine that a sober living site does not operate as a "single family home," but rather constitutes a "board-and-care facility," "rooming house," or similar type of group living facility which may not be permitted in a single family neighborhood, or which my be subject to land use or business permit requirements in order to lawfully operate. Typically, code enforcement citations are issued or other legal steps are taken to enforce such provisions against the facility, in response to which the facility operator or owner raises the FHA as a basis for challenge, asserting that enforcement is unlawful because doing so would infringe upon the fair housing rights of residents, each of which are "disabled" due to their alcohol or drug addiction.

A. THE LEGAL ENVIRONMENT IN WHICH FHA CLAIMS ARE MADE

A local jurisdiction's authority to regulate sober living facilities is derived from its general police powers. Article XI, Section 7, of the California Constitution grants local governments the authority to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[77] Additionally, the Planning and Zoning Law[78] authorizes cities and counties to regulate the use of buildings and land for residential purposes,[79] and numerous other provisions vest in local agencies broad authority to regulate residential uses and housing within their jurisdictions.[80] When disputes involving sober living facilities arise, cities and counties often seek to regulate the facility's operations or prohibit its existence entirely. *FHA claims are therefore pitted against these authorities. As such, issues triggered by sober living sites often concern local government's legitimate state law powers, and whether they are preempted by the interests sought to be advanced by the FHA.

Significantly, because sober living facilities are a relatively new form of residential use, and because they involve the interplay of unique and technical legal provisions, most local jurisdictions lack a standard land use definition for such facilities in their zoning and regulatory codes. Thus, when problems with sober living facilities arise, municipalities must categorize the facilities within existing land use definitions in order to regulate them. Many local codes define "boarding houses," "rooming houses," or similar types of "group living facilities" as unique residential use which are regulated according to established zoning provisions, often requiring the owner to obtain a Conditional Use Permit or other discretionary approval for the use to occur.

Therefore, a municipality faced with a problematic sober living facility may, for example, assert that the facility is an un-permitted boarding house, and may cite the owner or pursue legal action to shut the facility down based on such authority. Alternatively, where the sober living facility is located in single family zone, a municipality may assert that the sober living facility is an unlawful multi-family use which is prohibited in that location. Similarly, it may claim that that the facility operates as a residential "business," akin to a residential hotel or hostel rather than a residence, and therefore is prohibited in residential zones. Municipalities may also discover building code, housing code, and other technical problems with facilities that have been illegally remodeled to accommodate occupancies beyond that for which the structure was originally designed.

In response to such claims, the sober living operator may rely on the FHA to assert that the city's authorities are unlawful because they either: (a) create a ***disparate impact***, so as to discriminate against disabled individuals (i.e., those with an alcohol or drug addiction); or (b) require ***reasonable accommodation***, so as to grant the site an exemption from strict application of the city's authorities. Plaintiffs filing suit under the FHA often bring actions alleging both ***disparate impact*** and ***reasonable accommodation*** theories.[81] Of course, the analyses for each theory are different. Disparate impact analysis focuses on neutral policies that disparately impact handicapped persons,[82] whereas reasonable accommodation analysis focuses on whether a local jurisdiction could make an exemption to a policy to allow a handicapped person to use and enjoy a dwelling.[83]

Despite the restrictions imposed on a municipality's ability to enforce otherwise generally applicable zoning restrictions, there are some exemptions created by the FHA. Application of these exemptions, however, is often complicated. For example, in *City of Edmonds v. Oxford House,* the Supreme Court dealt with an FHA exemption allowing "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.[84] Specifically, the Court analyzed a provision of the City's zoning code governing areas zoned for "single family residences."[85] The section at issue defined "family as "persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons."[86] The Court held that the exemption did not apply to provisions designed to "foster the family character of a neighborhood," and instead applied only to occupancy limits seeking to prevent overcrowding in living quarters.[87] As such, the City's single family residence zoning requirement was not exempt from the FHA, and the City was required to permit operation of the facility.

The maximum occupancy exemption was also at issue in *Turning Point, Inc. v. City of Caldwell.*[88] After receiving complaints from its citizens regarding a dwelling that was housing homeless individuals suffering from disabilities, the City imposed a 15 person occupancy limit on the dwelling.[89] The City imposed the limitation "to preserve the integrity of the neighborhood."[90] However, the court invalidated the limitation after finding it "unreasonable."[91] Instead, the court ordered the occupancy set at 25, a number supported by the City Building Inspector's analysis of the dwelling.[92]

Another FHA exemption was analyzed in *Gibson v. County of Riverside*, which dealt with a City ordinance imposing age restrictions on persons occupying dwelling units in the zoned area.[93] Pursuant to the FHA, developments qualifying as housing for older persons ("HOP") can discriminate based on family status.[94] Analyzing the ordinance at issue, the court cited three requirements, recognized by congress, that must be met by housing developments seeking to qualify as a HOP: 1) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons; 2) the occupation of at least 80 percent of the units by at least one person 55 years of age or older and; 3) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.[95] While the individuals challenging the ordinance were not handicapped in *Gibson*, this exemption does apply to sober living homes, and is valid if the three requirements are met.

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.[96]

B. PRACTICE POINTERS FOR AGENCY COUNSEL AND SOBER LIVING ADVOCATES

Concerns are often greatest when the sober living operator is perceived as "illegitimate." For example, some operators offer housing to individuals with alcohol or drug addiction in "flophouses" or boarding homes designed to house as many individuals as possible where residents do not follow any sober living regimen and might not be in treatment for addiction. Indeed, the residents may themselves be viewed as vulnerable, emotionally or mentally disturbed individuals who are being taken advantage of because they have few other places to find housing; or they may be viewed as social deviants who feign disability in order to "work the system."

The problems such facilities pose to a neighborhood can be enormous because their residents often do suffer from one or more emotional or mental disabilities, are often unemployed, or loiter in and around the premises, congregate in yards, or create a fearful presence in the neighborhood which disrupts the "family-friendly" character of a traditional single family neighborhood. The outrage voiced by residents and neighbors in such circumstances can be extreme, and the operator may raise the FHA not as a legitimate basis for defense, but as a tactic to remain operating without governmental challenge.

Because of the deference, courts have shown to the FHA operators of "illegitimate" facilities have used the FHA and their residents' disabilities as a tool to avoid local government oversight. An operator facing city enforcement may, for example, assert the FHA's reasonable accommodation requirements as a shield to avoid liability and to coerce the city to allow the facility to remain operating. This stands in stark contrast to "legitimate" sober living facilities, some of which may be licensed by the state or affiliated with hospitals or respected clinics. Such "legitimate" facilities may face similar public outcry, and may likewise assert the protections of the FHA to avoid local government regulation.

For practitioners who represent cities, counties, or interest groups concerned about the potential impact that a sober living facility will have on a neighborhood, facing such claims can be challenging, as passionate residents and public officials demand prompt action ,while concern for potential liability for violating the FHA requires counsel to proceed very cautiously.

Often, applying the FHA's requirements strictly, methodically, and uniformly will "ferret-out" the legitimate sober living sites from those that merely use the FHA as a mask for otherwise unprotected operations. Counsel should consider answering the following questions:

1. Are the residents truly "disabled?" Only those with a disability are protected under the FHA. Counsel should verify the claimed disability prior to considering FHA claims. For example, merely claiming that a house is used for "sober living" is insufficient to establish protections under the FHA. Residents must actually be "disabled" meaning they must actually be recovering from alcohol or drug addiction. While an operator may have standing to assert FHA protections on their behalf, this does not waive the obligation to show that residents are in fact disabled. Sites which claim to be "sober living homes," but are fronts for flophouses, may be unable to establish FHA protection. Residents' disabilities should be verified.

2. Is the site a "dwelling?" The FHA applies to "dwellings" only, and while it may be difficult to differentiate between a site which provides in-and-out transitional housing from a true "dwelling," courts have found that merely providing a place for someone to sleep for the night is insufficient. For example, motels are not dwellings, even though some other short term rental situations such as boarding houses, halfway homes, and flop houses are considered dwellings. Investigating the actual living conditions and terms of occupancy may help determine whether the site is a "dwelling" under the FHA, or a transitional facility outside the FHA's protections.[97]

3. Does mere "occupancy" at a site make it a "residence?" While case law has not addressed this point, a colorable argument could be made that the FHA applies only to "residences," and not to occupancies which are temporary or transitional in nature. If, for example, a sober living site has a weekly turnover of occupants, it may be a stretch to argue that the FHA was intended to apply to such sites because they do not function as true housing which the FHA was adopted to protect. "Legitimate" sober living facilities typically provide long-term residencies in order to provide a sufficient period for recovery. Focusing on the length of occupancy may be helpful in determining the legitimacy of the facility. Additionally, there is authority to support the proposition that such impermanent occupancies may be excluded from single family residential zones because they do not adhere to the "residential" character of those areas.[98] Although this issue has not been clearly delineated by the courts, excluding sober living sites on this basis may be proper both under the FHA and principles of zoning.

4. Has the ***nexus*** between the disability and the need for housing been established? The FHA applies where housing is needed in order to accommodate disability. Even when reasonable accommodation is sought, it must be "necessary" to address the disability.[99] Thus, in the context of sober living, it must be determined why living at a particular site serves the residents' alcohol or drug addiction. "Legitimate" sober living sites should be able to demonstrate this connection through group living arrangements that support sobriety, encourage recovery through mutual support of housemates, and provide services that help residents cope with their addictions. "Illegitimate" facilities may be unable to show such factors, or may have such routine turnover in occupancy that the connection is too tenuous to be valid.

5. Even if the FHA applies, must ***reasonable accommodation*** be granted? As noted previously, while disabled individuals are entitled to reasonable accommodation from government restrictions which impact their use or enjoyment of housing, such does not automatically exempt all contrary provisions. Rather, accommodation from government restrictions may be denied if it imposes undue financial or administrative burdens on the agency or requires a fundamental alteration of an agency's zoning provisions.[100] Therefore, rather than "rubber stamp" all requests for reasonable accommodation, a city or county may undertake a formal review of the request and weigh the financial, administrative, and zoning impacts that approving the request would have on the jurisdiction and surrounding community.

6. Can other agency procedures or entitlements resolve the problem? As noted previously, a disabled individual may not pursue reasonable accommodation unless he/she has first sought "traditional" approvals to alleviate barriers to equal use and enjoyment of a dwelling. Thus, where an agency requires an operator to obtain a Conditional Use Permit prior to establishing a sober living facility, the operator must apply for, and be denied, the CUP before he/she may request reasonable accommodation from the CUP requirement. Counsel for the agency may, in such circumstance, advise that the CUP be crafted so as to address the accommodations that the operator otherwise seeks, thus avoiding any FHA issues from arising. Alternatively, counsel may advise the agency to consider reasonable accommodation requests in conjunction with the CUP application, such that requested accommodations can become conditions within the CUP itself. Because these steps require the facility to submit information for agency evaluation, and culminating in a public hearing, employing such procedures may help identify "legitimate" sober living operators. Additionally, such procedures will create a record that will be useful in future proceedings involving the facility.

How an agency responds to a sober living facility often depends, in large part, on the politics of the community. Certain municipalities are known for their "progressive" stance toward accommodating individuals recovering from drug or alcohol addiction. Other municipalities may disfavor such facilities, and may seek to exclude all but the most exclusive sober living facilities from their jurisdictions. When facing those in the latter category, practitioners representing sober living operators, residents in sober living programs, or advocates for sober living facilities would be well served to answer the following:

1. Has verification of disabilities been provided? For FHA protections to apply, true disabilities must be established. Sober living advocates should be prepared to provide proof that residents at a sober living site have been diagnosed with an alcohol or drug addiction, are undergoing treatment for such addiction, or to provide such other evidence to substantiate residents' disabled status. When representing an organization asserting FHA protection on others' behalf, counsel may consider soliciting residents' consent to provide records of medical evaluation or treatment to substantiate disability status. However, counsel should be aware of privacy concerns and the laws governing privacy of health information, including the Federal Health Insurance Portability and Accountability Act (HIPAA).[101] Providing such evidence may go far to "legitimize" the facility and differentiate it from "illegitimate" sites disfavored by cities and counties.

2. Has a ***nexus*** between the disability and the accommodation been articulated? Courts have recognized that mutually-supportive group living arrangements may be an important accommodation for individuals with alcohol or drug addictions.[102] In order to demonstrate the importance of a sober living environment in recovery, sober living advocates should be prepared to produce evidence demonstrating the connection sober living arrangements have with treating residents' disabilities. Based on well-established precedent applying the FHA, if this showing is established, restrictions on operation may be difficult for a city or county to justify, and the legitimacy of the facility may be enhanced in the eyes of public officials charged with reviewing the site.

3. Is there evidence of ***disparate impact*** in application or enforcement? There is legal authority to support FHA claims where a city or county enforces its police or zoning powers in a manner that bans or unfairly discriminates against sober living facilities.[103] Thus, sober living advocates should consider whether local zoning and regulatory codes establish unacceptable barriers to the operation of sober living facilities, and whether the jurisdiction has a history of excluding sober living facilities from operating. If such disparate treatment is evident, sober living advocates may be able to persuade the local agency that further exclusions will violate the FHA. Additionally, to the extent that a sober living site causes impacts which are no different than other normal residences in the area, prohibiting the site from operating may be problematic. "Legitimate" sober living sites should fall within this category and enjoy a relatively strong position in negotiating with cities and counties over their operations.

4. Does zoning improperly define "family" when restricting residency? In the context of land use regulation, case law prohibits

government agencies from limiting the definition of a "family" to those related by blood, marriage or adoption.[104] Rather, courts have held that the concept of "family" must be broadly construed to include numerous types of "non-traditional" living arrangements, including group living among individuals who are not related.[105] While not necessarily an FHA concern, such authorities empower sober living operators by enabling them to assert that residents of sober living homes are just as much a "family" as are a husband, wife, and children. Jurisdictions which exclude such living arrangements from the definition of a "family," or which prohibit such arrangements in single family zones where traditional families are otherwise welcome, may be subject to legal challenge. Sober living advocates who can demonstrate that residents, even though unrelated, act as a cooperative "family unit," may be significantly advantaged when facing such challenges by local agencies.

5. Is due consideration given to requests for ***reasonable accommodation***? A local agency is required to grant disabled individuals ***reasonable accommodation*** from agency restrictions when necessary for equal use or enjoyment of a dwelling.[106] Where local zoning or regulatory restrictions prohibit group living arrangements, sober living advocates should request reasonable accommodation from such restrictions. Because reasonable accommodation must be granted unless it causes undue financial or administrative burdens to the agency or fundamentally alters an agency's zoning provisions, sober living advocates start with an advantage when presenting reasonable accommodation requests to cities and counties. However, prudent advocates should be prepared to substantiate the requests by demonstrating that the facility will not be burdensome to the agency. For example, submitting evidence as to the facility's internal policies and procedures which are intended to minimize impacts and smoothly integrate the facility into the surrounding neighborhood may go far in any request for reasonable accommodation. Additionally, providing such evidence will demonstrate the "legitimacy" of the site and distinguish it from "illegitimate" facilities which may be problematic for the agency. In short, the FHA provides a number of options which can be helpful in ensuring that communities remain protected without infringing on individuals' rights to fair housing. Practitioners representing local agencies may undertake a number of steps when faced with FHA scenarios which may help to screen "legitimate" facilities from those which use the FHA to mask their motives. Conversely, those representing sober living operators, residents, and advocates should not take the FHA for granted, but should be aware that its provisions must be properly utilized to protect legitimate sober living facilities.

VI. CONCLUSION-QUESTIONSTHAT 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.[107]

Perhaps more importantly, however, 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.

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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ENDNOTES

1. The federal Fair Housing Act is codified at 42 U.S.C. § 3601, *et seq.* California's State law counterpart, the California Fair Employment and Housing Act, is codified at Gov't Code § 12900, *et seq.* This article focuses on the requirements of the federal Act, although the California Act is interpreted according to federal law precedent.
2. *Oxford House v. Township of Cherry Hill* (N.J. 1992) 799 F.Supp. 450, 453.
3. http://www.oxfordhouse.org/userfiles/file/oxford_house_history.php.
4. *Tsombanidis v. West Haven Fire Dept.* (2d Dist. 2003) 352 F.3d 565, 570.
5. *See* fn. 24, *ante*.
6. Health & Safety Code § 1500, *et seq.*
7. Health & Safety Code § 11834.01, *et seq.*
8. *See, e.g.*, Health & Safety Code § 11834.01(a) (alcohol or drug abuse recovery or treatment facilities licensed by the Department of Alcohol and Drug Programs are defined as: "any premises, place, or building that provides 24-hour residential non-medical services to adults who are recovering from problems related to alcohol, drug, or alcohol and drug recovery treatment or detoxification services.").
9. Cal. Op. Atty. Gen. 07-601.
10. Cal. Govt. § 12926.
11. 42 U.S.C. § 3602(h).
12. *Oxford House v. Township of Cherry Hill*, (D.N.J. 1992) 799 F.Supp. 450, 459 ("Congress contemplated alcoholism and drug addiction as being among the kinds of "impairments" covered under this definition.").
13. *Id.*
14. See, *Oxford House v. Township of Cherry Hill*, 799 F.Supp. 450, 459 (D.N.J. 1992).
15. 24 CFR § 100.201(a)(2).
16. *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1219.
17. *Regional Economic Community Action Program v. City of Middletown* (2d Dist. 2001) 294 F.3d 35, 46.
18. *Id.*
19. *Id.* at 47.
20. 42 U.S.C. § 3602(h).
21. *Fowler v. Borough of Westville* (N.J. 2000) 97 F.Supp.2d 602, 609.
22. *Id.*
23. City of Newport Beach Ordinance No.'s 2007-8, 2008-05.
24. Claims were brought pursuant to the FHA, the Americans with Disabilities Act, the Rehabilitation Act of 1974 (29 U.S.C. § 794 et seq.), 42 U.S.C. § 1983, California Fair Employment & Housing Act, the California Alcohol & Drug Program (Health & Safety Code § 11834 et seq.), California Civil Code § 52.1, and federal and state causes of action for inverse condemnation.
25. Settlement agreement available at www.newportbeachca.gov.
26. *See, e.g.*, Brianna Bailey, *Daily Pilot*, "Civic Center Costs Mulled" (Oct. 27, 2009) (describing City of Newport Beach City Council hearing approving continued operation of Pacific Shores Recovery, a sober living facility which underwent City review, and noting additional sober living operators which either have lawsuits against the City or are pursuing administrative review pursuant to the City regulatory provisions).

27. 42 U.S.C. § 3604(a) (emphasis added).
28. 42 U.S.C. § 36502(b).
29. *Mills Music, Inc. v. Snyder* (1985) 468 U.S. 153, 164.
30. *Lakeside Resort Enterprises v. Board of Supervisors of Palmyra* (3d Cir. 2006) 455 F.3d 154, 158.
31. *Id.* at 159.
32. *Schwarz v. City of Treasure Island* (11th Cir. 2008) 544 F.3d 1201, 1214.
33. *Johnson v. Dixon* (D.D.C. 1991) 786 F.Supp. 1, 4.
34. *Schwarz v. City of Treasure Island*, 544 F.3d at 1214-1215.
35. *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1219.
36. *Oxford House v. Town of Babylon* (E.D.N.Y. 1993) 819 F.Supp. 1179, 1182.
37. *Id.*
38. *Id.* at 1185.
39. *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1220.
40. *Tsombanidis v. West Haven Fire Dept.* (2d Dist. 2003) 352 F.3d 565, 574-75.
41. *Oxford House v. Town of Babylon* (E.D.N.Y. 1993) 819 F.Supp. 1179, 1181.
42. *Id.*
43. *Id.*
44. *Oxford House v. Town of Babylon* (E.D.N.Y. 1993) 819 F.Supp. 1179, 1181
45. *Id.* at 1183.
46. *Id.*
47. *Id.*
48. *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).
49. 42 U.S.C. § 3602(h).
50. *Behavioral Health Services v. City of Gardena* (C.D. Cal. Feb. 26, 2003) No. CV 01-07183, 2003 WL 21750852.
51. *Township of Cherry Hill*, 799 F.Supp. at 463-66.
52. See, *Township of Cherry Hill*, 799 F.Supp. at 462-63; *Horizon House Developmental Service Inc., v. Town of Upper Southampton*, 804 F. Supp 683, 699-670 (E.D.Pa. 1992); *Stewart B. McKinney Foundation, Inc., v. Town Plan & Zoning Commission of the Town of Fairfield*, 790 F.Supp. 1197, 1221 (D.Conn. 1992).
53. *A.M. v. Albertsons, LLC* (2009) Cal. Ct. of Appeal, First App. Dist., Case No. A122307.
54. *The Corporation of the Episcopal Church of Utah v. West Valley City* (D. Utah 2000) 119 F.Supp.2d 1215, 1221.
55. *Id.*
56. *Id.*
57. *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.
58. *Sanghvi v. City of Claremont* (9th Cir. 2003) 328 F.3d 532.
59. 42 U.S.C. § 3604(f)(3).
60. *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1221.
61. *Corporation of the Episcopal Church in Utah v. West Valley City* (2000) 119 F.Supp.2d 1215, 1221.
62. *Behavioral Health Services v. City of Gardena* (C.D. Cal. February 26, 2003) No. CV 01-07183, 2003 WL 21750852.
63. *Tsombanidis v. West Haven Fire Dept.* (2d Cir. 2003) 352 F.3d 565, 578.
64. In a recent case, for example, a teacher who was retaliated against after advocating for disabled students has standing to sue under the Rehabilitation Act and the ADA. *Barker v. Riverside County Office of Education* (9th Cir. Cal. 2009) 2009 DJDAR 15159.
65. *Smith v. Pacific Properties* (9th Cir. 2004) 358 F.3d 1097,1102.
66. Gov't Code § 12989.1.
67. Gov't Code § 12927(g).
68. *Fair Housing of Marin v. Combs* (9th Cir. 2002) 285 F.3d 899.
69. *Id.* at 905.
70. *Id.*
71. *Smith v. Pacific Properties and Development Corp.* (9th Cir. 2004) 358 F.3d 1097, 1101.
72. *Tsombanidis v. West Haven Fire Dept.* (2d Cir. 2003) 352 F.3d 565, 578.
73. *Oxford House v. City of St. Louis* (8th Cir. 1996) 77 F.3d 249.
74. *Id.* at 253.
75. *Bryant Woods Inn v. Howard County* (4th Cir. 1997) 124 F.3d 597, 601-602.
76. *U.S. v. Village of Palatine* (7th Cir. 1994) 37 F.3d 1230, 1234.
77. Cal. Const. Article XI, § 7.
78. Gov't code 65000, *et seq.*
79. Gov't Code 65850.
80. Gov't Code 65103 (regulation pursuant to general plan designations); Gov't Code 66410, *et seq.* (regulation through implementation of Subdivision Map Act).
81. *Oxford House v. Township of Cherry Hill* (D.N.J. 1992) 799 F.Supp. 450.
82. *Tsombanidis v. West Haven Fire Dept.* (2d Cir. 2003) 352 F.3d 565, 574-75.
83. *Id.* at 578.
84. 42 U.S.C. 3607(b)(1).
85. City of Edmonds v. Oxford House. (1995) 514 U.S. 725, 728.
86. *Id.*
87. *Id.*
88. *Turning Point, Inc., v. City of Caldwell* (1996) 74 F.3d 941.
89. *Id.* at 943.
90. *Id.*
91. *Id.* at 944.
92. *Id.*
93. *Gibson v. County of Riverside* (2002) 181 F.Supp.2d 1057, 1072.
94. *Id.* at 1075.
95. *Id.* at 1075, 1076.
96. *City of Edmonds v. Oxford House, Inc.* (1995) 514 U.S. 725, 731.
97. *Schwarz v. City of Treasure Island* (11th Cir. 2008) 544 F.3d 1201.
98. *Ewing v. City Carmel-by-the-Sea* (1991) 234 Cal.App.3d 1579, 1593.
99. *Behavioral Health Services v. City of Gardena*, No. CV 01-07183, 2003 WL 21750852, 10 (C.D. Cal. February 26, 2003).
100. *Oxford House v. Township of Cherry Hill* (D. N.J. 1992) 799 F.Supp. 450, 462; *Behavioral Health Services v. City of Gardena* (C.D. Cal. February 26, 2003) No. CV 01-07183, 2003 WL 21750852, 10.
101. 45 CFR §§ 160, 162, 164; Health Insurance Portability and Accountability Act of 1996, Public Law 104-191.
102. *Oxford House v. Township of Cherry Hill* (D. N.J. 1992) 799 F.Supp. 450, 460.
103. *Oxford House v. Town of Babylon* (E.D.N.Y. 1993) 819 F.Supp. 1179, 1182-1185.
104. *City of Santa Barbara v. Adamson* (1980) 27 Cal. 3d 123, 132-33; *City of Chula Vista v. Pagard* (1981) 115 Cal.App.3d 785, 795; *College Area Renters & Landlord Assn. v. City of San Diego* (1996) 43 Cal.App.4th 677, 687-88.
105. *Id.*
106. *Tsombanidis v. West Haven Fire Dept.* (2d Cir. 2003) 352 F.3d 565, 578.
107. California Housing Development Law, Gov't Code § 65913, *et seq.*; California Housing Element Law, Gov't Code § 65580, *et seq.*

APPENDIX E

Oxford House and The Rule of Law

Following national expansion of Oxford House™ in 1989, a number of cases or controversies have arisen as some communities or companies have attempt to treat an Oxford House™ different than an ordinary family would have been treated. Oxford House, Inc. took the lead in defending the right of any Oxford House™ to establish a house in a good neighborhood – particularly in light of the 1988 Amendments to the Federal Fair Housing Act adding "handicapped" as a protected class. A watershed in those efforts was the decision by the United States Supreme Court in May 1995 in the case City of Edmonds, WA v. Oxford House, Inc. et. al. 514 U.S. 725 (1995). In that case, the Supreme Court ruled in a 6-3 decision that recovering alcoholics and drug addicts were a protected class under the handicapped provisions of the Federal Fair Housing Act Amendments of 1988.

The late Herb Eastman, Professor at Saint Louis University, published an article in the Boston University Public Interest Law Journal [1995, Vol. 5, No.1] written several months before the Supreme Court decision in the *Edmonds Case* entitled. War on Drugs or on Drug Users? Drug Treatment and the NIMBY Syndrome. Professor Eastman's article is a good summary of the state of the law just prior to the Edmonds decision. To compare the adaptation of cities and others to the Fair Housing Act Amendments see an earlier article by John Petrila, J.D., LL.M. from an Issue Brief: Fair Housing Act Amendments [1994] from the University of South Florida.

In 1994, Robert L. Schonfeld, Esq. and Seth P. Stein, Esq. [currently with Moritt Hock Hamroff & Horowitz LLP, Garden City, NY] writing in the Fordham Urban Law Journal, Vol. XXI, set forth one of the best analysis of the 1988 Amendments of the Federal Fair Housing Act – particularly in how the Amendments extended its protections to the disabled as individuals and how the amendments incorporate reasonable accommodation standards. While the article was published a few months before the Supreme Court decided City of Edmonds, WA v. Oxford House, Inc., the Court's decision is consistent with the reasoning and conclusions of Schonfeld and Stein.

Two legal articles published shortly after the *Edmonds Case* are [1] The Law and the Land: The Edmonds Case by Matthew J. Cholewa and Dwight H. Merriam, AICP– attorneys with the law firm of Robinson & Cole in Hartford, Connecticut, where they practice land use and real estate law and [2] The Fair Housing Act Amendments Act of 1988 and Group Homes for the Handicapped by John H. Foote and reprinted from the Journal of the Section on Local Government Law of the Virginia State Bar, Vol. III, No, 1, September 1997. Both articles discuss the impact of the Edmonds Case on application of local zoning restrictions on the location of group homes for the handicapped in residential parts of a town or city.

A few days after September 11, 2001 Oxford House officials and their attorneys had to drive to Waterbury, Connecticut for a trial to determine if seven men could continue to live in an Oxford House in West Haven, Connecticut without the instillation of a sprinkler system. The case involved Oxford House, the City of West Haven and the State

of Connecticut and the issue was whether or not the particular house had to install a fire safety sprinkler system even though there was no requirement placed on families living in similar houses. Senior Federal Judge Gerard L. Goettel, in his decision, explains in detail the different types of discrimination under the Federal Fair Housing Act and such basic requirements on government and others to make reasonable accommodation. The Tsombanidis Case, 180 F. Supp. 2d 262 (2001) was substantially affirmed by the Second Circuit Court of Appeals. Tsombanidis Case 2d Cir.

The Fair Housing Act extends protection from discrimination beyond state actors. For example, courts have sustained the position that insurance companies cannot charge landlords more for comprehensive insurance when the landlord is renting property to handicapped individuals. In *Wai v. Allstate Insurance Co*, 75 F. Supp. 2d 1 (D.D.C. 1999), two landlords who rented their homes to people with disabilities were denied standard landlord insurance and were directed to purchase costlier commercial insurance policies. The Court held that although insurance policies are not explicitly mentioned in the text of the FFHA, denial of homeowners' insurance on the basis of disability violates §3604(f)(1), which declares it unlawful to "discriminate in the sale, or rental, or otherwise make unavailable or deny, a dwelling to any buyer or renter because of handicap." The court held that denial of insurance coverage would make a dwelling unavailable to the persons with disability and the insurer had to make a reasonable accommodation. Oxford House was a party to the suit. The Wai Case settled the fact that recovering alcoholics and drug addicts are subject to the nondiscrimination provisions of both FFHA and ADA whether such discrimination is from the state or private entities. John Stanton, one of the Washington, DC attorneys handling that case, has written a law review article covering the entire matter of discrimination under the Fair Housing Act, as amended, and the rights of disabled individuals. His Hofstra Law Review Article can be downloaded.

The rights of recovering alcoholics and drug addicts to live in Oxford Houses located in good neighborhoods are well established. A memorandum summarizing cases involving Oxford House precedents under the federal Fair Housing Act entitled Legal Memo Zoning can be downloaded. The HUD Complaint Form for filing a discrimination complaint with the United States Department of Housing and Urban Development can be download here.

Oxford House follows a rule of law in making certain that its time-tested system of operation works well. At the same time Oxford House follows laws in the community at large including those that prohibit others from discriminating against the existence of the individual Oxford House.

Phone: (301) 587-2916 | Toll Free: (800) 689-6411 | Fax: (301) 589-0302
Address: Oxford House, Inc. · 1010 Wayne Avenue, Suite 300 · Silver Spring, MD 20910

APPENDIX F

511 F.Supp.2d 1339, 34 NDLR P 100
(Cite as: 511 F.Supp.2d 1339)

United States District Court,
S.D. Florida.
JEFFREY O. et al., Plaintiffs,
v.
CITY OF BOCA RATON, Defendant.

No. 03–80178–CIV.
Feb. 26, 2007.

Background: Recovering alcoholics and drug addicts and operators of substance abuse treatment facilities brought action alleging that city ordinance barring such facilities from residential areas violated Fair Housing Act (FHA), Title II of Americans with Disabilities Act (ADA), and federal constitution. Bench trial was held.

Holdings: The District Court, Donald M. Middlebrooks, J., held that:
(1) recovering alcoholics and drug addicts suffered "handicap" under FHA;
(2) ordinance barring substance abuse treatment facilities from residential areas violated FHA; and
(3) occupancy limitation of three unrelated people in residence violated FHA.

Judgment for plaintiffs.

West Headnotes

[1] **Civil Rights 78 1022**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1022 k. Alcohol or drug use. Most Cited Cases

Civil Rights 78 1331(3)

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1331 Persons Aggrieved, and Standing in General
78k1331(3) k. Property and housing. Most Cited Cases

Recovering alcoholics and drug addicts suffered "handicap," and thus had standing to bring action alleging that city's restrictions on placement of substance abuse treatment facilities violated Fair Housing Act (FHA), where recovering individuals were not engaged in current drug or alcohol use, had because of their addiction been unable to perform major life activities, and intended to return to facilities if they relapsed. Fair Housing Act, § 802(h), 42 U.S.C.A. § 3602(h).

[2] **Civil Rights 78 1022**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1022 k. Alcohol or drug use. Most Cited Cases

Civil Rights 78 1331(3)

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue

511 F.Supp.2d 1339, 34 NDLR P 100
(Cite as: 511 F.Supp.2d 1339)

78k1331 Persons Aggrieved, and Standing in General

78k1331(3) k. Property and housing. Most Cited Cases

Recovering alcoholics and drug addicts had record of impairment that substantially limited their major life activities, and thus had standing to bring action alleging that city's restrictions on placement of substance abuse treatment facilities violated Fair Housing Act (FHA), even if they did not currently suffer from handicap, where all recovering individuals had experienced active drug or alcohol addiction at one point in their lives that rendered them chronically incapable of working, taking care of themselves, or maintaining personal relationships. Fair Housing Act, § 802(h), 42 U.S.C.A. § 3602(h); Americans with Disabilities Act of 1990, § 3(2), 42 U.S.C.A. § 12102(2).

[3] **Civil Rights 78 1081**

78 Civil Rights

781 Rights Protected and Discrimination Prohibited in General

78k1074 Housing

78k1081 k. Public regulation; zoning. Most Cited Cases

Fair Housing Act (FHA) does not preempt or abolish municipality's power to regulate land use and pass zoning laws. Fair Housing Act, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

[4] **Civil Rights 78 1081**

78 Civil Rights

781 Rights Protected and Discrimination Prohibited in General

78k1074 Housing

78k1081 k. Public regulation; zoning. Most Cited Cases

Governmental entity may establish that facially discriminatory law does not violate Fair Housing Act (FHA) by showing that restriction : (1) addresses legitimate public safety concerns, or (2) benefits protected class. Fair Housing Act, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

[5] **Civil Rights 78 1022**

78 Civil Rights

781 Rights Protected and Discrimination Prohibited in General

78k1016 Handicap, Disability, or Illness

78k1022 k. Alcohol or drug use. Most Cited Cases

City ordinance requiring substance abuse treatment facilities to be in city's medical district or with conditional permit in motel/business district discriminated against recovering alcoholics and drug addicts, in violation of Fair Housing Act (FHA) provision requiring municipalities to provide reasonable accommodations to handicapped persons, despite city's contention that restrictions were necessary to protect character of its residential areas, where only activity required to bring service facility within ordinance's purview was that it require tenants to perform testing to determine if they were drug and alcohol free as term of their tenancy, there was no evidence that apartment building that required its tenants to be drug tested did not serve as its tenants' residence, and restriction substantially limited housing options for recovering individuals. Fair Housing Act, § 804(f), 42 U.S.C.A. § 3604(f).

[6] **Civil Rights 78 1075**

78 Civil Rights

781 Rights Protected and Discrimination Prohibited in General

78k1074 Housing

78k1075 k. In general. Most Cited Cases

To succeed on Fair Housing Act (FHA) discrimination claim under disparate impact theory, plaintiffs must provide evidence that neutral practice had disproportionate impact on protected class. Fair Housing Act, § 804(f), 42 U.S.C.A. § 3604(f).

[7] **Civil Rights 78 1022**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1022 k. Alcohol or drug use. Most Cited Cases

City code's occupancy limitation of three unrelated people in residence had disparate impact upon recovering alcoholics and drug addicts, in violation of Fair Housing Act (FHA) provision requiring municipalities to provide reasonable accommodations to handicapped persons, even though there were other possibilities for group home of recovering individuals in city's residential area, where recovering individuals often needed group living arrangements as part of their recovery, any other group home would require state licensing, and city lacked any established procedure by which handicapped individuals could request reasonable accommodation to occupancy limitation. Fair Housing Act, § 804(f), 42 U.S.C.A. § 3604(f).

[8] **Equity 150 65(1)**

150 Equity
150I Jurisdiction, Principles, and Maxims
150I(C) Principles and Maxims of Equity
150k65 He Who Comes Into Equity Must Come with Clean Hands
150k65(1) k. In general. Most Cited Cases

Misconduct by plaintiff that impacts relationship between parties as to issue brought before court to be adjudicated can be basis upon which court can apply maxim of unclean hands.

[9] **Civil Rights 78 1463**

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1463 k. Mental suffering, emotional distress, humiliation, or embarrassment. Most Cited Cases

Recovering alcoholics and drug addicts were not entitled to recover compensatory damages as result of city's adoption of ordinances placing restrictions on placement of substance abuse treatment facilities that violated Fair Housing Act (FHA), despite their claim that they suffered humiliation of community disdain, compromise of their anonymity as to their recovering status, and stress of possibly losing their sober housing, where derogatory statements about them were made by public at city council meeting at which ordinance was discussed, and city delayed application of ordinance until resolution of FHA lawsuit. Fair Housing Act, § 804(f), 42 U.S.C.A. § 3604(f).

[10] **Damages 115 184**

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k184 k. In general. Most Cited Cases

Damages award must be based on substantial evidence, not speculation.

[11] **Civil Rights 78 1462**

511 F.Supp.2d 1339, 34 NDLR P 100
(Cite as: 511 F.Supp.2d 1339)

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1462 k. Grounds and subjects; compensatory damages. Most Cited Cases

Owners of substance abuse treatment facilities were not entitled to recover compensatory damages as result of city's adoption of ordinances placing restrictions on placement of substance abuse treatment facilities that violated Fair Housing Act (FHA), despite owners' contention that they were unable to obtain financing for another apartment building due to litigation, where there was no evidence regarding building's listing price or seller's agreement to owners' price, or that there was sufficient demand for substance abuse treatment housing to fill another building. Fair Housing Act, § 804(f), 42 U.S.C.A. § 3604(f).

[12] **Civil Rights 78 ⚿1461**

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1461 k. Nominal damages. Most Cited Cases

Award of nominal damages was warranted in Fair Housing Act (FHA) action successfully challenging city ordinance placing restrictions on placement of substance abuse treatment facilities, even though no compensatory damages were awarded. Fair Housing Act, § 804(f), 42 U.S.C.A. § 3604(f).

***1341** James Kellogg Green, West Palm Beach, FL, William K. Hill, Melissa Pallett-Vasquez, Bilzin Sumberg Baena Price & Axelrod, Miami, FL, for Plaintiffs.

Diana Grub Frieser, City of Boca Raton, Boca Raton, FL, Jamie Alan Cole, Matthew Harris Mandel, Weiss Serota Helfman Pastoriza et al., Fort Lauderdale, FL, for Defendant.

FINAL ORDER

DONALD M. MIDDLEBROOKS, District Judge.

This cause came before the Court for final disposition during a non-jury trial from January 22, 2007 through January 29, 2007. Plaintiffs brought suit against the Defendant City of Boca Raton in March 2003, alleging that it violated the Fair Housing Act, 42 U.S.C. § 3601 et seq. (FHA), Title II of the Americans with Disabilities Act, ***1342**42 U.S.C. § 12131, et seq. (ADA), and the 14th Amendment to the United States Constitution by passing Ordinance 4649, as amended by Ordinance 4701, and Section 28–2. Primarily, Plaintiffs allege that the City's actions discriminate against them based on their handicapped status where these two zoning provisions limit the ability of Plaintiffs to reside in residential areas of the City. Pursuant to Federal Rule of Civil Procedure 52(a), I make the following findings of fact and conclusions of law.

Facts

Plaintiffs are individuals who are recovering alcoholics and drug addicts ("Individual Plaintiffs"), as well as corporate entities ("Provider Plaintiffs") which provide housing and additional services to approximately 390 recovering individuals in areas zoned for residential use within the Defendant City of Boca Raton ("City"). Steve Manko is the president of Provider Plaintiffs who own a number of apartment buildings which are marketed to recovering individuals as sober housing. In their sober housing, Provider Plaintiffs provide different levels of oversight to their residents, including, but not limited to drug testing, curfews, room checks, medication controls, and group meetings.

In 2002, the City was faced with the dilemma of how to regulate sober houses, such as Provider Plaintiffs'. Ordinance Number 4649 was proposed to deal with the issue. At the city council meeting where the

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council took up this ordinance, many residents of the City spoke specifically about Provider Plaintiffs' facilities and their impact on the neighborhood. Provider Plaintiffs served approximately 390 individuals in 14 apartment buildings, all of which are within a quarter of a mile of each other. The residents of the City expressed many concerns, including the way in which Provider Plaintiffs operated their business. Specifically, residents spoke to Provider Plaintiffs' policy of evicting individuals who relapse while keeping the person's deposit [FN1] and kicking individuals out with no where to go when they relapsed. The residents were also concerned about the changing dynamic of their neighborhood where the individuals living in Provider Plaintiffs' buildings frequently loitered in front of the apartment buildings, did not stay for more than a few months, and were often from out of town. There were also a lot of broad generalizations made by residents at the meeting, regarding the negative impact a high concentration of recovering individuals had on their neighborhood. One resident testified that he was able to purchase drugs at Boca House. At that meeting, the city council passed Ordinance Number 4649. The city council later passed Ordinance 4701 which amended Ordinance 4649. Ordinance Number 4649, as amended by Ordinance Number 4701 ("Ordinance 4649") states:

> FN1. Residents of Provider Plaintiffs paid rent by the week, rather than on a monthly basis. There was testimony that at least one individual relapsed multiple times in a one-month span, allowing Manko to keep the individual's deposit each time. This testimony was further supported by Provider Plaintiffs' damage expert who when calculating lost profits included over ten percent of Provider Plaintiff's total income as that derived from lost deposits.

> Substance Abuse Treatment Facility shall mean a service provider or facility that is: 1) licensed or required to be licensed pursuant to Section 397.311(18). Fla. Stat. or 2) used for room and board only and in which treatment and rehabilitation activities are provided at locations other than the primary residential ***1343** facility, whether or not the facilities used for room and board and for treatment and rehabilitation are operated under the auspices of the same provider. For the purposes of this subparagraph (2), service providers or facilities which require tenants or occupants to participate in treatment or rehabilitation activities, or perform testing to determine whether tenants or occupants are drug and/or alcohol free, as a term or condition of, or essential component of, the tenancy or occupancy shall be deemed to satisfy the "treatment and rehabilitation activities" component of the definition contained in this section.
>
> The Ordinance requires that Substance Abuse Treatment Facilities as defined above be located in the City's Medical Center District, or with approval, in a Motel/Business district.

The City put forth evidence to establish that in passing Ordinance 4649 it was attempting to group together compatible uses and separate non-compatible uses. For example, the City's Mayor testified that Provider Plaintiffs engaged in commercial and medical uses, therefore making them appropriately placed in medical or commercial zones. The City's planning and zoning director testified that Provider Plaintiffs' facilities which offered a "unique recovery program" were different from normal apartment buildings. The planning and zoning director also explained that the services provided by Provider Plaintiffs were not residential in character. Therefore, where the services provided were not residential in character, Provider Plaintiffs' facilities should not be located in a residential area according to the planning and zoning director.

Provider Plaintiffs' buildings are located in an area with other multi-family residences. In addition, the area in which Provider Plaintiffs' buildings are

located is very close to commercial areas. The appearance of Provider Plaintiffs' buildings does not stand out in the area. There was no evidence at trial as to how Provider Plaintiffs' facilities impacted the surrounding residential area, including but not limited to additional cars in the area, additional foot traffic in the area, a burden on public resources, or even an appearance that was out of character with the area.

Also involved in this case, is a provision of the City Code, Section 28–2, which defines the term family as:

> 1 person or a group of 2 or more persons living together and interrelated by bonds of consanguinity, marriage, or legal adoption, or a group of persons not more than 3 in number who are not so interrelated, occupying the whole or part of a dwelling as a separate housekeeping unit with a single set of culinary facilities. The persons thus constituting a family may also include gratuitous guests and domestic servants. Any person under the age of 18 years whose legal custody has been awarded to the state department of health and rehabilitative services or to a child-placing agency licensed by the department, or who is otherwise considered to be a foster child under the laws of the state, and who is placed in foster care with a family, shall be deemed to be related to a member of the family for purposes of this chapter. Nothing herein shall be construed to include any roomer or boarder as a member of a family.

The City requires a residential dwelling unit be occupied by one family. Therefore, this provision limits the amount of unrelated people who can live in a residential dwelling unit in the City.

***1344** Individual Plaintiffs and the current residents of Provider Plaintiffs who testified were all recovering alcoholics or drug addicts. Because of their addiction, these individuals lost jobs and families, and some were unable to keep a roof over their head during their active addiction. One Plaintiff testified that personal hygiene was the first ability he lost during a relapse. He did not take care of himself, including self-grooming and eating. A current resident of Provider Plaintiffs testified that during her active addiction she was homeless. Each of the recovering individuals testified as to the difficulties they were faced with as addicts, including an inability to possess large amounts of money, have an intimate relationship with another person, or be around people consuming alcohol or using drugs. Recovery from alcohol or drug addiction is an ongoing process, which for many individuals can be a lifelong process. At one time each of the Individual Plaintiffs lived in Provider Plaintiffs' apartment buildings. They also testified that if they relapsed they would return to live in Provider Plaintiffs' residences. The restrictions imposed by Provider Plaintiffs during the residents' early stages of recovery aided these individuals as they advanced through their recovery.

Plaintiffs' expert, Riley Regan, testified as to the impact addiction has on one's life, not just during active addiction, but also for the rest of his or her life. It is common for recovering individuals to need to live in an environment that is drug and alcohol free in order to further their recovery. Regan stated that without drug testing there is no way for everyone to be sure that the living environment is drug and alcohol free. This testimony was also supported by the recovering individuals who testified that drug testing kept them motivated to stay sober and kept them safe. Regan also testified about the need for recovering individuals not to live alone because loneliness can trigger a relapse and living with other individuals imposes an accountability to other people. This testimony was in line with that of the recovering individuals who testified where they described loneliness and boredom as possible triggers to relapses. This is not to say that some of the individuals wanted to live alone and did live alone, but many acknowledged the benefits they had and could reap from living with

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other recovering individuals.

Provider Plaintiffs provided many tools to recovering individuals to aid in their recovery. It is more than just housing, it was also characterized as a treatment model. While this is arguably a laudable endeavor on Manko's behalf, his business model did not always appear to be so altruistic. Manko's positions regarding what services he provided and what legal arrangement he had with his residents shifted depending on the implications of such for his business model, more than for the therapeutic needs of his residents. For example, prior to this litigation, recovering individuals executed a license agreement with Provider Plaintiffs in what may have been an effort to escape traditional landlord/tenant laws. However, such individuals now execute a lease. This change in terminology coincides with Manko's current suit which seeks protection from the Fair Housing Act and his attempt at differentiating himself from the commercial use that concerned the City. Instead, Manko is attempting to focus on the housing aspect of the services he provides. Provider Plaintiffs continue to market themselves in the recovering community as a provider of a "unique recovery program." Provider Plaintiffs' marketing literature uses terms like "Three–Phase Transitional ***1345** Recovery Program." All of these facts support the conclusion that Provider Plaintiff is providing more than housing.

Manko's history with the City and his shifting position is also exemplified by his agreement with the City to comply with Section 28–2, but failing to do so. In 1996, Manko was cited for violating the occupancy limitation of the City code. That same year Manko entered in a stipulation with the City agreeing not to have more than three unrelated persons occupying a single unit. Again in 2001, Manko was cited with the same violation and again informed the City that he was seeking to comply with Section 28–2, although occasionally violated the limitation because of unexpected events. At trial it became clear that Manko never consistently limited his units to three individuals. Furthermore, at trial Manko argued that having more than three individuals in a unit [FN2] was essential to the residents' recovery. However, Manko's decision to continue to put more than three individuals in a unit could reasonably have been based on economics. Provider Plaintiffs charged $170 a week for each recovering individual. With four people in a unit, Provider Plaintiffs grossed approximately $2,720 a month per unit. Manko testified that the same unit rented to a family of four would go for approximately $1,200, less than half of what Provider Plaintiffs made by placing more than three recovering individuals in each unit. This calculation may have played into Manko's continued violation of Section 28–2. Provider Plaintiffs' continued profitability is exemplified by their ability to acquire a significant number of apartment buildings in the area.

> FN2. Manko's position at trial was that each bedroom needed to have two people in it to be most therapeutically effective. This position made Section 28–2 applicable to most of Manko's units where most of the apartments in his apartment buildings had more than one bedroom.

Manko's questionable business practices aside, the evidence at trial did demonstrate that the two provisions Plaintiffs challenge limit the ability of recovering individuals to obtain housing within the residential areas of the City. The recovering individuals testified about the importance of living in a residential area because there are many more temptations in commercial zones, such as bars and hotels which recovering addicts would frequent during their active addition. Therefore, it would be more difficult for them to maintain their sobriety while living in such areas. As discussed above many recovering individuals need, at least at one point during their recovery, to live in a substance-free environment and their recovery is further supported by group living arrangements, both for the practicality of day-to-day living,

as well as, the economic viability of such housing arrangements.

Plaintiffs' claims include a claim for a reasonable accommodation. The City put forth evidence that its Petition for Special Case Approval form was the form an individual would use to request a reasonable accommodation. This form makes no mention of a reasonable accommodation or a disability. The City attorney testified that this form is how a person or entity would request a reasonable accommodation. The form lists five different options for which it is a petition for, none of which is a reasonable accommodation. The City attorney testified that an applicant would check the sixth box which states Other (specify), with a blank line. The City's zoning code made no provision for individuals to request a reasonable accommodation from zoning and land use restrictions based on disability.

***1346 Law**

Plaintiffs bring claims under the Fair Housing Act, 42 U.S.C. § 3601 et seq., the American with Disabilities Act, 42 U.S.C. § 12131 et seq., and the 14th Amendment to the United States Constitution. I begin with Plaintiffs' Federal Fair Housing Act claim because I think that is where the crux of this case lies.

Standing

[1] Plaintiffs assert they have standing to bring a claim under the FHA because they are disabled due to their recovering status. The City disagreed asserting, amongst other things, that the evidence supported the position that the recovering individuals could complete all major life activities. The FHA defines handicap with respect to an individual as having "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 3602(h). The existence of such handicap must be examined on a case-by-case basis. *See* *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 566, 119 S.Ct. 2162, 144 L.Ed.2d 518 (1999).[FN3] Major life activities include walking, learning, performing manual tasks, getting an apartment, being unable to perform a class of jobs, and caring for oneself. *Rossbach v. City of Miami*, 371 F.3d 1354, 1357–59 (11th Cir.2004); *U.S. v. S. Mgmt. Corp.*, 955 F.2d 914, 919 (4th Cir.1992). To substantially limit means a long-term, permanent restriction, or considerable. *See* *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 196, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002)(speaking to the definition of substantial as including considerable); *Rossbach*, 371 F.3d at 1357. The recovering individuals testified about the negative impact their addiction had on their lives, including preventing them from caring for themselves or keeping a home at times, and losing jobs and families. All of these things impacted their everyday lives in a significant way. All Individual Plaintiffs and current residents of Provider Plaintiffs testified, that at one time, they had because of their addiction been unable to perform one of these major life activities. For some the deprivation was long-term. For others the deprivation may have been short-term, but repeated itself with frequency when he or she would relapse and again find themselves without their family, their home, their job, or ability to care for his or herself. The evidence established that the individuals involved suffered an impairment which qualified them as disabled under the FHA.

> FN3. While the *Kirkingburg* case dealt with the American with Disability Act, as courts have noted the definitions under the two acts, one of disability and the other using the term handicap, are "almost verbatim." *Bragdon v. Abbott*, 524 U.S. 624, 631, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998). Accordingly, I will use the terms and applicable analyses interchangeably.

The position that recovering individuals can be considered disabled is supported both in case law and legislative history.[FN4] ***1347** "As a medical matter,

addiction is a chronic illness that is never cured but from which one may nonetheless recover." *S. Mgmt. Corp.*, 955 F.2d at 920. "Alcoholism, like drug addiction, is an 'impairment' under the definitions of a disability set forth in the FHA, the ADA, and the Rehabilitation Act." *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46 (2d Cir.2002)(" *RECAP* "). Congress intended to treat drug addiction as a significant impairment constituting a handicap unless excluded, such as by current drug use in accordance with 42 U.S.C. § 3602(h). *See Lakeside Resort Enters., LP v. Bd. of Supervisors of Palmyra Township*, 455 F.3d 154, 156 n. 5 (3d Cir.2006); *RECAP*, 294 F.3d at 46; *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 338–39 (6th Cir.2002); *S. Mgmt. Corp.*, 955 F.2d at 919. The Fourth Circuit specifically spoke to the need for addicts to be given equal access to housing, instead of being denied housing on the basis of their constant craving and its accompanying dangers. *S. Mgmt. Corp.*, 955 F.2d at 922. I do not pass on the question of a *per se* disability for recovering alcoholics or drug addicts. As a matter of fact I do not think a *per se* rule is appropriate in these circumstances where the court's obligation is to do a case-by-case evaluation to determine if an individual is handicapped. However, that does not preclude these individuals from satisfying the definition. Their testimony was moving and credible.

> FN4. This position is also supported by 28 C.F.R. § 35.104(4)(1)(ii) which specifically references drug addiction and alcoholism as one meaning of physical or mental impairment in regards to nondiscrimination on the basis of disability in state and local government services. This section of the Code of Federal Regulations also directly addresses individuals who have successfully completed a rehabilitation program. 28 C.F.R. § 35.131(a)(2) states "[a] public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in the current use of drugs and who—" is participating in a supervised rehabilitation program or successfully completed a rehabilitation program.

[2] The definition of disability includes two other possibilities by which Plaintiffs can demonstrate their standing under the FHA, having had a record of the type of impairment discussed above, or being regarded as having such an impairment. 42 U.S.C. § 12102(2). In order to demonstrate that an individual is handicapped due to having had a record of an impairment, the individual must have satisfied the first definition at some point. *See Burch v. Coca–Cola Co.*, 119 F.3d 305, 321 (5th Cir.1997). All the individuals who testified at trial had experienced active drug or alcohol addiction at one point in their lives. As discussed above, the Individual Plaintiffs and current residents had been homeless, unable to hold down a job, or take care of themselves during their active addiction. Active addiction and its recovery are not short-term problems. They are long-term and for many require permanent diligence to maintain their sobriety. Their addiction particularly in its active stages substantially limited major life activities. This evidence supported these individuals having met the first definition, at the very least during their active addiction. Therefore, even if the above analysis is incorrect as to the individuals currently satisfying the first definition, where during their active addiction they satisfied the first definition, Individual Plaintiffs have a record of such an impairment making them handicapped under the second definition of the FHA.

There are two additional points I would like to make regarding the matter of standing in this case. First, is that the Individual Plaintiffs are not current residents of Provider Plaintiffs. However, they did testify that if they were to relapse they would return to Provider Plaintiffs' residences for some period of time during their recovery after they completed detoxification. For cases brought under the FHA, stand-

ing is to be as broad as the Constitution permits. *See Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1537 (11th Cir.1994). *Jackson* involved a plaintiff's***1348** challenge to the site selection process regarding a public housing project. *Id.* Plaintiff was wait-listed for the project and stated her intention to probably move in once it was built. *Id.* In this case, Individual Plaintiffs stated their intention to return to Provider Plaintiffs' residences should they relapse, which is a constant significant risk for recovering individuals. This is a similar position to that of the plaintiff in *Jackson.* Given Individual Plaintiffs' stated intention to return upon the happening of a certain likely event and the broad policy of standing under the FHA, I conclude the Individual Plaintiffs have standing to challenge the City's action.[FN5]

> FN5. This is also supported by the statute which talks about who may bring a suit under the FHA as an aggrieved person which is defined to include any person who "believes that such person *will be* injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i)(emphasis added).

The other point I want to make involves the propriety of Provider Plaintiffs' standing. FHA cases are often brought by a provider of housing on behalf of the residents it seeks to house. *See Brandt v. Vill. of Chebanse, Ill.*, 82 F.3d 172, 173 (7th Cir.1996); *Smith & Lee Assocs., Inc. v. City of Taylor, Mich.*, 102 F.3d 781 (6th Cir.1996). Moreover, Provider Plaintiffs' status as a profit enterprise does not negate such standing. *See Brandt*, 82 F.3d at 173(case brought by residential housing developer); *Smith & Lee Assocs., Inc.*, 102 F.3d at 781(suit brought by profit owner of group home). Accordingly, all parties to this action have standing to bring their FHA claims.

Merits of Plaintiffs' claims under the Fair Housing Act

This case tests the limits of the protection provided by the FHA and a municipality's ability to legislate in an effort to preserve the character of its residential neighborhoods. Legally this is a difficult case where Plaintiffs are protected by the FHA, but exactly how that protection impacts the City's acts is unclear. The case is made more difficult by its facts where the City claims it was attempting to do something that while possibly permissible under the law, is not what it did by passing the Ordinance. My conclusion in this case is that the City's actions challenged here are limited by the FHA, the question is how limited.

[3] Plaintiffs argued that the City's ordinances are discriminatory and thus, in violation of the FHA. The City responded that it was merely trying to move commercial/medical uses out of residential areas. 42 U.S.C. § 3604(f) of the FHA prohibits a public entity from discriminating against disabled persons by denying such persons the ability to live in a dwelling. The amendments to the FHA, which added handicapped individuals, were a statement by Congress of the commitment to end the unnecessary exclusion of individuals with disabilities from American mainstream where such exclusion was often based on generalizations and stereotypes of people's disabilities and the attendant threats of safety that often accompanied these generalizations. *See Elliott v. City of Athens, Ga.*, 960 F.2d 975, 978 (11th Cir.1992)(discussing the House Report on the Fair Housing Amendments Act) *abrogated by, City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995). Congress intended for the FHA to apply to zoning ordinances. *See Larkin v. State of Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir.1996)(discussing***1349** the explicit intent of Congress to have the FHA apply to zoning laws). However, the FHA does not pre-empt or abolish a municipality's power to regulate land use and pass zoning laws. *See Hemisphere Bldg. Co., Inc. v. Vill. of Richton Park*, 171 F.3d 437, 440 (7th Cir.1999); *Bryant Woods Inn, Inc. v. Howard County,*

Md., 124 F.3d 597, 603 (4th Cir.1997). "Land use restrictions aim to prevent problems caused by the 'pig in the parlor instead of the barnyard.' " *City of Edmonds*, 514 U.S. at 732, 115 S.Ct. 1776 (quoting *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303 (1926)). The amendments to the FHA were intended to prohibit the use of zoning regulations to limit "the ability of [the handicapped] to live in the residence of their choice in the community." H.R.Rep. No. 100–711, 100th Cong., 2d Sess. 24 (1988), U.S.Code Cong. & Admin.News 1988, pp. 2173, 2185. The intersection between these two principles is where this case meets.

It is against this backdrop that I address Plaintiffs' claims. Plaintiffs challenge two provisions of the City's zoning code, Ordinance 4649 and Section 28–2. Plaintiffs' argument is that each ordinance on its own, and the two in combination effectively limit the ability of recovering individuals to live in residential areas of the City in violation of the FHA. There are two ways to prove a violation of the FHA. *See Larkin*, 89 F.3d at 289. First is by showing that the defendant was motivated by a discriminatory intent against the handicapped. *Id.* The second is where a defendant's actions are neutral, but have a discriminatory effect, thus having a disparate impact on the handicapped. *Id.* Plaintiffs argued they have proven a violation of the FHA under both avenues. This case does implicate both avenues. Plaintiffs' claim as to Ordinance 4649 is best analyzed under the discriminatory intent theory while Plaintiffs' claim as to Section 28–2 is most appropriately analyzed under the disparate impact theory. Accordingly, I will address them separately.

Ordinance 4649

I begin with Plaintiffs' challenge to Ordinance 4649. Ordinance 4649 defines substance abuse treatment facilities and requires them to be in the City's medical district or with a conditional permit in a motel/business district. An ordinance facially discriminates against the handicapped where it singles them out and applies different rules to them. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir.1995); *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43, 46–47 (6th Cir.1992). As applied to this case, the question is not whether the City was specifically intending to discriminate against Plaintiffs, but rather whether the ordinance on its face treats recovering drug addicts and alcoholics different from non-handicapped individuals. *See Larkin*, 89 F.3d at 290 (discussing how a defendant's benign motive does not prevent a statute from being discriminatory on its face); *see also Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985)(discussing how discrimination against the handicapped is often the result of thoughtlessness, not particular offensive anger). The language of the Ordinance singles out recovering individuals where they are the individuals who would be residing in a substance abuse treatment facility. *See McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir.1992)(discussing how discrimination against an individual because of his or her handicap is often aimed at an effect of the handicap rather than the handicap itself). While this does not mean that all recovering individuals live in a ***1350** substance abuse treatment facility, there was no evidence, nor did anyone argue that non-recovering individuals live in substance abuse treatment facilities. Accordingly, Ordinance 4649 treats recovering individuals differently from non-recovering individuals where it requires the individuals who live in substance abuse treatment facilities, recovering individuals, to live in the City's medical zone or with conditional approval in a motel/business zone. This is sufficient to establish a prima facie case of discrimination. However, my analysis does not end here.

[4] Next, I must determine if the City's differential treatment of recovering individuals is justified such that it is not in violation of the FHA. The Eleventh Circuit has not addressed the standard a governmental defendant must meet to justify disparate treatment under the FHA.[FN6] Therefore, I look to

other circuits for guidance on what the City is required to prove to establish that this distinction is not discriminatory under the FHA. *See* *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1252 (11th Cir.2003)(looking to other circuits for guidance as to what standard to apply where the Eleventh Circuit had not adopted one yet). Four United States Courts of Appeals have addressed this issue. *Cmty. House, Inc. v. City of Boise, Idaho*, 468 F.3d 1118 (9th Cir.2006); *Larkin*, 89 F.3d 285; *Bangerter*, 46 F.3d 1491; *Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.*, 923 F.2d 91 (8th Cir.1991). The Eighth Circuit was the first to develop a test to be used in these situations, but none of the other circuits confronted with the issue have chosen to follow the Eighth Circuit's analysis. In *Familystyle*, the Eighth Circuit adopted the rational relation test finding no FHA violation where a defendant demonstrated that its action was rationally related to a legitimate governmental interest. Two of the other three circuits which have addressed this issue determined that once a plaintiff has established an ordinance is facially discriminatory, a defendant can present one of two possible justifications for the discriminatory ordinance: (1) legitimate public safety concerns; or (2) that the restriction benefits the protected class. *Cmty. House, Inc.*, 468 F.3d at 1125 (9th Cir.); *Bangerter*, 46 F.3d at 1503–04 (10th Cir.). In refusing to use the rational relation test employed in *Familystyle*, the Tenth Circuit discussed how an equal protection analysis is misplaced where in an FHA claim a handicapped plaintiff is bringing a claim based on a statute of which he or she is the "direct object of the statutory protection." *Bangerter*, 46 F.3d at 1503. The Ninth Circuit adopted the Tenth Circuit ***1351** test arguing a similar distinction. It discussed how those protected by the FHA were not necessarily protected classes for constitutional purposes, thereby not making the rational relation test appropriate. *Community House, Inc.*, 468 F.3d at 1125 (discussing how this standard is also more in line with the Supreme Court's analysis in *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991)). The Sixth Circuit did not adopt either the *Bangerter* or the *Familystyle* test, but instead stated that "in order for facially discriminatory statutes to survive a challenge under the FHAA, the defendant must demonstrate that they are 'warranted by the unique and specific needs and the abilities of those handicapped persons' to whom the regulations apply." *Larkin*, 89 F.3d at 290 (quoting *Marbrunak, Inc.*, 974 F.2d at 47). I agree that a rational relation test is not appropriate where the individuals bringing this statutory claim are the direct object of its protection, the protection of which appears to have been intended to be greater than that provided by the rational relation test. I agree that the presence of either of the *Bangerter* justifications would allow a facially discriminatory statute to survive an FHA challenge.

FN6. In a recent unpublished opinion, the Eleventh Circuit employed the test from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) in an FHA context. *See* *Boykin v. Bank of Am. Corp.*, 162 Fed.Appx. 837 (11th Cir.2005). However, the facts of *Boykin* are substantially different than those in the present case. In *Boykin*, the plaintiff was challenging a bank's treatment of her loan application. Therefore, the case involved a discriminatory act during a residential real-estate related transaction against an individual being established through circumstantial evidence. This case involves two pieces of legislation passed by a City and a facial discrimination challenge. Plaintiffs' claims do not rely on circumstantial evidence, but instead relied on the City's legislation and its impact on handicapped individuals. Therefore, the instant situation is not sufficiently analogous to the facts of *Boykin* to cause me to determine that the Eleventh Circuit would employ a *McDonnell Douglas* test here. *See* *Cmty.*

> *House, Inc. v. City of Boise, Idaho*, 468 F.3d 1118, 1124 (9th Cir.2006)(discussing how the *McDonnell Douglas* test is inapplicable to facial discrimination challenges under the FHA).

However, I am not sure that the *Bangerter* test includes all possible justifications. As discussed below, I recognize a municipality's interest in protecting the residential character of a neighborhood, as was argued strenuously here, and its ability to legislate such protection. While I agree with the City that this is a legitimate interest, I also recognize that this protection must be legislated with the needs of those protected by the FHA in mind.

Having articulated possible justifications that would allow Ordinance 4649 to survive Plaintiffs' FHA challenge, this issue becomes whether such justifications are present in this case. This is a difficult analysis where the City's primary justification was grouping compatible uses together, which is not one of the *Bangerter* justifications, nor is it a justification recognized by any of the other circuits that have addressed this issue. That being said, I will evaluate all justifications the City put forth for Ordinance 4649 in an effort to determine whether, even if in combination, they support the Ordinance and allow it to withstand Plaintiffs' challenge. There was some evidence at trial regarding public safety concerns [FN7] the City had about Provider Plaintiffs' residences. In *Bangerter,* the court pointed out that the statute itself states that "[n]othing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." *Bangerter,* 46 F.3d at 1503 (quoting 42 U.S.C. § 3604(f)(9)). The legislative history indicates that generalized perceptions of threats to safety should not support discrimination. *See* H.R.Rep. No. 100–711, 1988 U.S.Code Cong. Admin.News at p. 2179. The residents spoke at the city council meeting about their fears that stemmed from Provider Plaintiffs' residences. However, the transcript and video tape of the meeting admitted at trial did not support of a finding that any safety ***1352** justification for this Ordinance was supported by a direct threat to the safety and health of others more so than generalized perceptions. The City did not put forth any evidence regarding the relationship between the crime involved at the halfway houses and crime occurring at other non-halfway house residences in the area. Accordingly, this evidence did not support a finding that Provider Plaintiffs' residences, or others that would fit the definition of substance abuse treatment facility, posed a direct threat to the health or safety of other individuals.

> FN7. The evidence consisted of a memorandum from the Chief of Police of the City detailing cases involving fatalities at the subject properties in a year and a half period and a list of incidents involving halfway houses in the City.

The City's main justification was that the Ordinance was passed to group together compatible uses, a common use of zoning ordinances. Specifically, the City's argument was that service providers or facilities that would meet the definition of a substance abuse treatment facility under the Ordinance, were commercial and medical in nature and therefore did not belong in a residential area. However, the only activity required to bring a service provider or facility within the purview of the Ordinance is that the service provider or facility require tenants to perform testing to determine if they are drug and alcohol free as a term of their tenancy. The language of the Ordinance [FN8] goes to a service provider or facility "used for room and board only and in which treatment and rehabilitation activities are provided at locations other than the primary residential facility, whether or not the facilities used for room and board and for treatment and rehabilitation are operated under the auspices of the same provider. For purposes of this

subparagraph (2), service providers or facilities which require tenants or occupants to participate in treatment and rehabilitation activities, or perform testing to determine whether tenants or occupants are drug and/or alcohol free, as a term or condition of, or essential component of, the tenancy or occupancy shall be deemed to satisfy the 'treatment and rehabilitation activities' component of the definition contained in this section." It is not clear how this condition of tenancy turns a dwelling into a commercial facility, or at least more of a commercial facility than any residence rented or leased to occupants which would be by definition a commercial facility where it is viewed with regard to a profit. The condition of tenancy would make no change to the outward appearance of the residence, be it a single family home or an apartment building. The City put forth no evidence that an apartment building that required its tenants to be drug tested would somehow negate the fact that those individuals were living in the apartment building, making it their home. [FN9] Instead, the City put forth evidence to establish that the residences offered by Provider Plaintiffs were more of a profit driven enterprise than a place where people actually lived.

> FN8. The Ordinance also includes in its definition of substance abuse treatment facilities a service provider or facility that is "[l]icensed or required to be licensed pursuant to F.S. § 397.311(18)." Florida Statute Section 397.311(18) defines "Licensed service provider" as "a public agency under this chapter, a private for-profit or not-for-profit agency under this chapter, a physician or any other private practitioner licensed under this chapter, or a hospital that offers substance abuse impairment services through one or more of the following licensable service components" and then goes on to list such components. As discussed in further detail in the remedies section of this order, I conclude that this section of the Ordinance can remain.
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> FN9. Even the City's planning and zoning director testified that Provider Plaintiffs' apartment buildings look just like an apartment building.

***1353** I do not disagree with the City's position on this point. However, Ordinance 4649 did not capture the use it was attempting to segregate. The City was looking at Provider Plaintiffs and the services they provided to recovering addicts, including a program with three different phases, drug testing on site, transportation, group therapy meetings, medication control, money control, Alcoholic Anonymous and Narcotics Anonymous meetings on site, curfews, room inspections, bed checks, and individual therapy. Recovering individuals spent limited time in each phase, requiring them to move from building to building. The City also looked at Provider Plaintiffs' business model where they were marketing themselves as unique recovery programs, had a large office use in the main facility, charged individuals by the week with no regard for what unit they were in or how many individuals were living in the unit, and kept deposits from individuals who relapsed regardless of how many times they had previously relapsed while staying with Provider Plaintiffs. The City found the combination of these uses and Provider Plaintiffs' business practices commercial in nature. As I expressed at trial and earlier in this order, some of Provider Plaintiffs' business practices give me pause, particularly where Provider Plaintiffs are seeking protection from a statute which protects handicapped individuals, because many of the business practices employed by Provider Plaintiffs do not appear to serve the therapeutic needs of these handicapped individuals. However, questionable business practices aside, the Ordinance does not capture the commercial and medical uses that underlie the City's justification, nor did the City prove either of the *Bangerter* factors justified the passage of the Ordinance.

Instead, the Ordinance, which hinges the location of a housing provider in a residential zone to whether that housing provider requires its residents to be subjected to drug testing as part of his or her occupancy, substantially limits the housing options for recovering individuals in the City. Recovery from substance abuse is an ongoing struggle for many, which for a large number of such individuals may require at least some period of time living in a drug and alcohol free environment. Regan's testimony established the substantial risk of relapse recovering individuals face and their need to be in a supportive drug and alcohol free environment to decrease such risk. Regan testified that one can not absolutely determine if a living environment is drug and alcohol free unless its residents are drug tested. There was also testimony at trial, by Regan, and the recovering individuals, as to the role a group living arrangement plays in their recovery, including helping to keep them clean because of the transparency, but also providing them with less opportunities for loneliness, a major trigger for relapse. Other courts have acknowledged the role a group living arrangement plays in the recovery of substance abusers. *See* *Corp. of the Episcopal Church in Utah v. West Valley City*, 119 F.Supp.2d 1215, 1217–18 (D.Utah 2000); *Oxford House, Inc. v. Town of Babylon*, 819 F.Supp. 1179, 1183 (E.D.N.Y.1993); *U.S. v. Borough of Audubon, N.J.*, 797 F.Supp. 353, 358–59 (D.N.J.1991). The need for handicapped people to live in group arrangements for support or to pool caretaker staff has been described as essential. *Brandt*, 82 F.3d at 174; *see also* *Smith & Lee Assocs., Inc.*, 102 F.3d at 795–96 (discussing the need to allow group homes for the elderly to have at least nine residents in them for economic viability). Such group living arrangements which are drug and alcohol free, thus necessitating drug testing, at the very least off site, fall ***1354** within the purview of the Ordinance. Based on this evidence the restriction that a housing provider who requires drug testing as an essential part of a tenant's occupancy only provide housing in a medical district or possibly in a motel/business district cannot be seen as a restriction that benefits recovering individuals. Thereby, the City has limited the opportunities for recovering individuals to live in residential areas of Boca Raton.

[5] As discussed above, the City argued the Ordinance was aimed at commercial and medical uses. The City's list of such uses is much longer than just drug testing. However, the Ordinance includes none of these other uses. The City argued the Ordinance did not capture a mere housing provider that required drug testing where the Ordinance only captured "service providers or facilities." The Ordinance does use this language, however the distinction between who imposes the requirement, the residents of the group living arrangement or their landlord appears to be without significance to the impact on the residential character of the neighborhood. For example, a entity which wanted to provide substance free housing to twenty recovering individuals in ten one-bedroom apartments complete with drug testing as part of their lease to insure the substance free component of their environment, and AA and/or NA meetings in the building's common area would have to provide such housing in the medical district or apply for a conditional use in a motel/business district. Yet, under the City's distinction a building housing 90 people in 30 apartments subject to the same drug testing requirement discussed above and having the same AA and/or NA meetings, could be in the residential zone so long as the residents themselves got together and agreed to put the restrictions on themselves and arrange for the AA and/or NA meetings themselves. It is not clear that the difference of who imposes the requirements on residents is significant to the analysis of whether the use is a commercial one.[FN10] The City put forth no evidence which demonstrated that a sober living arrangement provided by a third party destroys the residential character of a neighborhood more than a sober living arrangement organized by the residents themselves.[FN11] Based on the evidence presented, the City's distinction does not cure the Ordinance's discriminatory impact. This is

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not to say that the City is precluded from attempting to separate the commercial from the residential. As I stated earlier, Provider Plaintiffs' residences include a lot more services than drug testing, and perhaps more than is therapeutically necessary.

> FN10. As discussed in the Joint Statement of the Department of Justice and the Department of Housing and Urban Development, group homes are often provided by an organization that provides housing and various services for individuals in the group homes. *See* Joint Statement of the Department of Justice and the Department of Housing and Urban Development, Group Homes, Local Land Use, and the Fair Housing Act *available at* http:// www. usdoj. gov/ crt/ housing/ final 8_ 1. htm.

> FN11. *See supra* n. 9.

Therefore, my ruling regarding the Ordinance is not intended to limit the City's ability to regulate what it sees, and what I saw as well from the evidence, as a commercial operation. My concerns are similar to those discussed by the Supreme Court in *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) where it stated:

> The regimes of boarding houses, fraternity houses, and the like present urban ***1355** problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels 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. This goal is a permissible one within *Berman v. Parker,* [348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954)] supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Boraas, 416 U.S. at 9, 94 S.Ct. 1536. The sheer volume of individuals Provider Plaintiffs are housing within a small geographic location contributes to setting Provider Plaintiffs' housing opportunities apart from the residences that surround it. This is in addition to the transitory nature of the housing where residents are shifted through different buildings depending on what phase of the program they are in. I recognize that Provider Plaintiffs' facilities are apartment buildings amidst other apartment building and therefore to the naked eye one may not see Provider Plaintiffs' buildings as the pig in the parlor. However, because of the congregation of Provider Plaintiffs' facilities and the multitude of services offered by Provider Plaintiffs, a closer examination would bring to light the difference between Provider Plaintiffs' facility and an average residential apartment building. As discussed in *Boraas,* the ability to protect the residential nature of a neighborhood is not limited to controlling the negatives that obviously do not conform with the area, but includes the ability to set apart areas where people make their home from the rest of the City. While I agree that recovering individuals need to be given the opportunity to live in group arrangements as discussed earlier, such arrangements need not include approximately 390 people in a group of buildings all within a quarter of a mile of each other. Once again the City's Ordinance does not directly address this concern. Even though I agree with the City's ability to protect the residential character of the neighborhood and Provider Plaintiffs' possible impact on that character in this case, the link between the Ordinance and the protection of the residential character of the neighborhood is not a direct one.

The City did not present sufficient evidence to justify the Ordinance based on legitimate public

safety concerns or to demonstrate that the restriction imposed benefitted the recovering individuals. In this case, neither of the *Bangerter* justifications are present. In addition, the City's justification of grouping like uses together is not a sufficient justification where protecting the residential character of its neighborhoods could have been legislated in a less discriminatory way such that it did not substantially limit the availability of residential housing to recovering individuals.

Section 28–2

[6] I must now turn to Section 28–2 of the City Code, the City's definition of family. The analysis regarding this Section is different than that of the Ordinance. Section 28–2 by its own terms does not refer to recovering individuals or substance abuse. Instead, Section 28–2 treats all individuals, handicapped and non-handicapped, provided they are unrelated or not within the Section's two exceptions, foster children and domestic servants, alike. Four non-handicapped non-related people ***1356** cannot live in a single dwelling, just as four recovering individuals cannot live in a single dwelling. Therefore, this Section is more appropriately examined for its disparate impact on handicapped individuals. *See RECAP,* 294 F.3d at 52. A disparate impact analysis should be employed where a facially neutral section of the city code is examined to determine its differential impact on a protected group under the FHA. *See RECAP,* 294 F.3d at 52. To succeed on a disparate impact theory, plaintiffs must provide evidence that the neutral practice had a disproportionate impact on the protected class. *RECAP,* 294 F.3d at 52–53; *2922 Sherman Ave. Tenants' Ass'n v. D.C.,* 444 F.3d 673, 681 (D.C.Cir.2006). The question in this case is whether limiting the occupancy of a single dwelling in the City to three unrelated people has a disproportionate impact on recovering individuals.

Plaintiffs' argument at trial was that it did where recovering individuals often require the availability of group living arrangements as part of their recovery. The City argued that this provision does not violate the FHA where there are other possibilities for a group home of recovering individuals in a residential area of the City. The evidence at trial supported the conclusion that recovering individuals often need group living arrangements as part of their recovery for a variety of reasons. Two of the reasons, as discussed by Regan, are decreasing the possibility of relapse by decreasing the feelings of loneliness and increasing the supervision due to the accountability present when people live together. Regan's testimony has previously supported such findings. *See Town of Babylon,* 819 F.Supp. at 1183. The last reason, as discussed earlier in this order, is the economic viability of providing housing to handicapped people. This reason has also been recognized in the law. *Brandt,* 82 F.3d at 174; *Smith & Lee Assocs., Inc.,* 102 F.3d at 795–96. Plaintiffs' position is further bolstered by an examination of the Oxford House model. Oxford Houses, the work of a non-profit organization which helps recovering individuals establish group sober homes, require a minimum of six residents to receive a charter for the proposed home. The Oxford House Manual, *available at* http:// www. oxfordhouse. org. The City argued that groups of recovering individuals could live together under other provisions of the City Code. For example, the City pointed to the community residential homes allowed for by the City Code and detailed in Florida Statute Section 419.001. However, the Florida statute requires community residential homes to be licensed by the Agency for Health Care Administration or that the handicapped residents of such a home be a client of one of four different state agencies. Fla. Stat. § 419.001. Limiting the possibility of recovering individuals to live in a residential area only if they become licensed or are clients of a state agency limits their housing options. Based on the foregoing, I agree with Plaintiffs that Section 28–2 impacts recovering individuals more than non-recovering individuals.

Once Plaintiffs establish this disproportionate impact on the handicapped, the burden is shifted to

the City to prove that the action furthered "a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir.1988); *See Town of Babylon*, 819 F.Supp. at 1183. The City argued that this definition of family furthered a variety of governmental interests, including controlling population ***1357** density and preserving the single family character of the City's residential areas. I agree that the preservation of a residential character is a legitimate governmental interest. However, in this case the City did not demonstrate that there was no less discriminatory alternative means to accomplish this goal. Section 28–2 makes no exception for a group home for recovering individuals who merely want to live in a single family home and would not impact the residential character of the neighborhood. Section 28–2 provides two other exceptions and the City put forth no evidence to explain why allowing a similar exception for recovering individuals would destroy the residential character of the neighborhood.

[7] The no less discriminatory means is further exemplified by the City's lack of any established procedure by which handicapped individuals could request a reasonable accommodation to the occupancy limitation. Discrimination under the FHA includes denying or making a dwelling unavailable because of a handicap, including refusing to make reasonable accommodation in rules, policies, practices, or services such that would be necessary to afford such person the opportunity to use and enjoy a dwelling. *See* 42 U.S.C. § 3604(f)(3)(B). There was no evidence that a reasonable accommodation to Section 28–2 was available. The City put forth evidence of a Petition for Special Case Approval form which it argued an individual would use to request for reasonable accommodation. Neither reasonable accommodation, nor disability were mentioned on the form. There was no evidence of such form having been used historically by handicapped individuals to request a reasonable accommodation. There was no evidence that the form was referenced anywhere else in the City Code that dealt with reasonable accommodation requests. Where Section 28–2 itself provides no exception for handicapped individuals and the City's Code has no clearly established procedure that would allow a handicapped individual, group of individuals, or provider of group homes, to request a reasonable accommodation of the occupancy limitation, the City has not demonstrated that no less discriminatory alternative to Section 28–2 would serve the same interest. Therefore, Section 28–2 as written violates the FHA.

This is not to say that the City's occupancy limitation of three unrelated people is not permitted should the City legislate it in a less discriminatory fashion. The Plaintiffs argued that *City of Edmonds* suggests that such caps violate the FHA. I do not read *City of Edmonds* to make such suggestion. *City of Edmonds*, 514 U.S. 725, 115 S.Ct. 1776. *City of Edmonds* held that the type of limitation used here, "the family-defining kind," is not exempted from the FHA by 42 U.S.C § 3607(b)(1). *Id.* at 728, 115 S.Ct. 1776. Instead, the Court held, the exemption only applies to "total occupancy limits, i.e., numerical ceilings that serve to present overcrowding in living quarters." *Id.* The question before me is not whether Section 28–2 falls within 42 U.S.C. § 3607(b)(1)'s purview.

I do not think the FHA is violated merely by having a cap on the number of unrelated individuals who can live in a single family dwelling. Furthermore, I find nothing wrong with the number three that the City has chosen. A city must draw a line somewhere. The number chosen is in line with the average occupants per unit within the City. The number of individuals per unit on average was less than three. As eloquently stated by Justice***1358** Holmes, "[n]either are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law." *Irwin v. Gavit*,

268 U.S. 161, 45 S.Ct. 475, 476, 69 L.Ed. 897 (1925); *see* *Boraas*, 416 U.S. at 8, 94 S.Ct. 1536 (stating that every line a legislature draws leaves out some that might as well have been included, the use of such discretion is a legislative function); *see also* *Smith & Lee Assocs., Inc.*, 102 F.3d at 797 n. 13 (discussing the fine line drawn between a group home of nine residents not substantially altering the residential character of a single-family neighborhood while a twelve resident group home would more likely do so). While I find no legal problem with the cap of three unrelated individuals per se, the limitation without any exception for handicapped individuals or an established reasonable accommodation procedure violates the FHA.

This is not to say that recovering individuals should have a blanket exemption from a cap on the number of unrelated people that can live in a dwelling in a residential district of the City. Nor is it to say that the City cannot limit Provider Plaintiffs' units to three unrelated people per unit. There was testimony at trial that Provider Plaintiffs could be profitable and have therapeutic success with only three people per apartment. All of this can be considerations in attempting legislate a capacity limitation that complies with the FHA.

My ruling here is not intended to limit the City's ability to regulate the residential character of its neighborhoods. As discussed above, I agree with the City that preservation of the residential character of its neighborhoods is a legitimate governmental interest. However, the impact of these two zoning sections limits the ability of recovering individuals to obtain housing in residential areas of Boca Raton. They did not with little, if any, evidence as to how the presence of recovering individuals destroys the residential character. The City may regulate the residential character of its neighborhoods, so long as they devise a means to protect the ability of recovering people to live in the residential neighborhoods in a meaningful way which takes in mind their need for a group living substance free environment.

Remedies

At the conclusion of the bench trial, I asked each of the parties, and the Department of Justice, who has a related case pending against the City, to submit recommendations as to an appropriate remedy in this case. I told the parties "I would like to accomplish the purpose but do it as narrowly [FN12] as possible." Despite this request, both parties essentially argued their positions again, including suggesting the broadest remedy available to each of them. I decline to adopt any of the positions offered given the facts of the case and the precedent on the issue of remedies.

> FN12. I went further to explain that "It doesn't help me to say just strike everything and enjoin everything.... I need something better than that. And the same thing goes for the city. You know, the more specificity—in fact, even—if you were going to deal with the ordinances, specific excisements, if that's how we would handle it. And if there's procedure that you would suggest I order, a specific language. You know, concepts aren't as much helpful at this point to me as language."

Having found that the Ordinance and Section 28–2 violate the FHA, the question before me is whether they should both be stricken, as Plaintiffs suggest, or if I should more narrowly tailor the relief as I alluded to at the conclusion of the bench ***1359** trial. The precedent supports a narrow tailoring. *See* *Ayotte v. Planned Parenthood of N. New England, et al.*, 546 U.S. 320, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006). In *Ayotte*, Justice O'Connor addressed a similar predicament. The Court specifically held "that invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief." *Ayotte*, 126 S.Ct. at 964. In this case I attempt to achieve the result I think is necessary as narrowly as

possible.

As to Ordinance 4649, the primary difficulties with this Ordinance involve the second definition and its subsection. I find no violation of the FHA by the City's first definition, those service providers or facilities that are "licensed or required to be licensed pursuant to Section 397.311(18) Fla. Stat." This statute details various licensable service components and defines an entity as a licensed service provider if it offers substances abuse impairment services through one or more such licensable service components. Nothing in the statute indicates that by not allowing a licensed service provider to be located in a residential area, the City is precluding recovering individuals from living in residential areas where recovering individuals can reasonably live in residential areas of the City without needing two or more of the licensable service components listed in Section 397.311(18). Accordingly, section one of Ordinance 4649 shall remain in effect. While I have ideas, some of which are expressed herein and others of which were discussed at trial, about how section two of the Ordinance could be written to better serve the City's justification and comply with the FHA, I decline to re-write the Ordinance. My decision is based on the roles of the legislature and judiciary, but also on a principle Justice O'Connor discussed in *Ayotte.* Courts should not determine to whom a statute should apply where a legislature has cast its net widely because this would put the judiciary in the legislature's role. *See* *Ayotte,* 126 S.Ct. at 968. Therefore, I decline to parse the second definition or to add my own words to it. The City is enjoined from enforcing section two of Ordinance 4649.

Section 28–2 is not susceptible to parsing either. However, given my discussion above, I am going to temporarily enjoin enforcement of section 28–2 against recovering addicts until such time as the City passes a reasonable accommodation procedure. The City must provide a process by which a request for reasonable accommodation on the basis of one's disability could be requested.[FN13] Accommodations are to give consideration for the limitations caused by the disability. This remedy does not enjoin the City against enforcing this provision of the City Code against Provider Plaintiffs. I reach this conclusion not only because of my position that while recovering individuals need an accommodation to allow for group living situations, I found no evidence which persuaded me that this maxim requires Provider Plaintiffs to have more than three individuals in each of their units. As discussed above there was evidence that Provider Plaintiffs' facilities can be therapeutically ***1360** successful and profitable with three individuals per unit.

> FN13. As discussed in the Joint Statement, local governments should "make efforts to insure that the availability of [reasonable accommodation request] mechanisms is well known within the community." Joint Statement at page 4. There was no evidence that the Petition for Special Case Approval form was well known as the avenue to a reasonable accommodation. Instead, the testimony was that the Petition for Special Case Approval form was a catch all application.

[8] My position as to Provider Plaintiffs being excluded from this temporary enjoinment is also based on Provider Plaintiffs' unclean hands where they previously agreed to comply with section of the City Code demonstrating their ability to do so and continue to offer housing to recovering individuals. Misconduct by a plaintiff which impacts the relationship between the parties as to the issue brought before the court to be adjudicated can be the basis upon which a court can apply the maxim of unclean hands. *See* *Mitchell Bros. Film Group v. Cinema Adult Theater,* 604 F.2d 852, 863 (11th Cir.1979). The maxim of 'he who comes into equity must come with clean hands' has been said to close the door of equity to a litigant tainted by inequitableness as to the matter about which the litigant seeks relief. *See* *Precision*

Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945). This principle requires the litigant to act "fairly and without fraud or deceit as to the controversy in issue." *Id.* at 814–15, 65 S.Ct. 993. Where Provider Plaintiffs can continue to provide housing to recovering individuals while complying with Section 28–2 and they previously agreed to, I find it unnecessary to enjoin enforcement against them.

Damages

[9] As to damages, the Individual Plaintiffs asserted that their injury included the humiliation of community disdain, the compromise of their anonymity as to their recovering status, and the stress of possibly losing their sober housing. I do not doubt the humiliation the Individual Plaintiffs felt as they listened to the city council meeting where the Ordinance was addressed. However, many of them did not even attend the meeting. Their testimony regarding their emotional harm was conclusory and was not specific such that it convinced me of the nature and extent of their emotional harm. *See, e.g., Bailey v. Runyon*, 220 F.3d 879, 880–81 (8th Cir.2000)(discussing how a plaintiff's own testimony can be sufficient but is not necessarily the sine qua non to establishing evidence of emotional harm). Plaintiffs did not put forth any evidence of ramifications of their emotional distress. *See, e.g., Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1254–56 (4th Cir.1996). The City was required to hold the public meeting and allow members of the public to speak to the Ordinance. *See* Fla. Stat. § 166.041. In this case, I find the statements made at a democratic function were not sufficient to establish injury. The City delayed application of the Ordinance until 18 months after the rendition of a final non-appealable order in this case. The Individual Plaintiffs did not have to suffer the loss of sober housing and have had ample opportunity to address such a possibility where this lawsuit has been pending for over three years. I do not find Individual Plaintiffs established a concrete injury sufficient to sustain a compensatory damage award.

[10][11] Similarly, the damages claimed by Provider Plaintiffs are unwarranted where they are speculative. A damage award must be based on substantial evidence, not speculation. *See Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 457 (5th Cir.1979).[FN14] Provider Plaintiffs claimed lost revenues where they were ***1361** unable to grow their business due to the uncertainty of this litigation, mainly premised on their inability to obtain financing for another apartment building due to this litigation. Provider Plaintiffs presented a damages expert. However, he relied on an appraisal price of the building with no evidence to establish Provider Plaintiffs could have bought the building at that price. There was no evidence regarding the listing price of the building and the seller's agreement to Provider Plaintiffs' price. There was also no evidence regarding the increased demand for the type of housing Provider Plaintiffs provided such that they would be able to fill another building. In sum, the evidence was speculative that Provider Plaintiffs would have made the profits articulated, but for the Ordinance and Section 28–2.

FN14. Decisions of the United States Court of Appeals for the Fifth Circuit that as existed on September 30, 1981 are binding on the United States Court of Appeals for the Eleventh Circuit. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir.1981).

[12] Despite not having found sufficient evidence to establish a need for compensatory damages, I do think that Plaintiffs are entitled to an award of nominal damages. "Nominal damages are a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or breach of the defendant's duty, or in case where, although there has been a real injury, the

plaintiff's evidence fails to show its amount." BLACK'S LAW DICTIONARY 392 (6th ed.1990). While the Eleventh Circuit has stated that merely a violation of a purely statutory right does not mandate an award of nominal damages for such statutory violation, it has not precluded such an award where the district court finds it appropriate. *See* *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 845 (11th Cir.1991). The Supreme Court has recognized the role that nominal damages play in cases where there is no concrete damage to compensate, but it is important to observe an individuals' rights. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n. 11, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986). The Sixth Circuit has stated that at a minimum an award of nominal damages would be appropriate where a plaintiff proved a violation of the FHA and that he suffered a non-quantifiable injury as a result. *See* *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224 (6th Cir.2003); *see also* *Baltimore Neighborhoods, Inc. v. LOB, Inc.*, 92 F.Supp.2d 456, 464 (D.Md.2000)(finding an award of nominal damages appropriate in a violation of the FHA case where plaintiff failed to show actual damage). Plaintiffs did not present evidence sufficient to sustain a damage award. However, this should not detract from the finding that the City violated the FHA. This is particularly true where as discussed above the statutory claim which Plaintiffs bring entitles them to greater protection than their constitutional rights would provide to a similar claim and nominal damages are required for a violation of constitutional rights. *See* *Walker*, 944 F.2d at 845(discussing how *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) applies only to violations of constitutional magnitudes). In order to not take away the importance of such violation, I conclude that an award of nominal damages is appropriate.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Judgment is entered in favor of Plaintiffs as to their Federal Fair Housing Act claims. Judgment is entered in favor of Plaintiffs against Defendant in the amount of $1.00 as to ***1362** each Plaintiff. It is FURTHER ORDERED AND ADJUDGED that the City is enjoined from enforcing section 2 of Ordinance 4649 and is enjoined from enforcing Section 28–2 as to recovering individuals until such time as the City passes a reasonable accommodation procedure. Plaintiffs' remaining claims are dismissed. Judgement shall be entered in accordance with this Order.

S.D.Fla.,2007.
Jeffrey O. v. City of Boca Raton
511 F.Supp.2d 1339, 34 NDLR P 100

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APPENDIX G

The Fair Housing Act Amendments Act of 1988 and Group Homes for the Handicapped

By John H. Foote

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Introduction

Regulation of group homes for persons with one or more handicapping conditions is a volatile issue throughout the United States. Since the General Assembly's first foray into the field in 1977, directing certain local zoning controls over group homes for the mentally ill, mentally retarded, and developmentally disabled (see Va. Code Ann. § 15.1-486.2, now repealed, and its current version, § 15.1-486.3), there have been major changes in federal law with direct impact on local authority to deal with the location and control of group homes. Indeed, that law now creates significant and important restrictions on the extent of permissible local regulation. This article outlines the current state of affairs affecting group homes for the handicapped. It offers clear warning to local governments that ordinances and policies which are discriminatory in purpose or effect, or which fail to make reasonable accommodation for the needs of the handicapped, can have costly consequences.

Congregate living arrangements among unrelated people are nothing new, of course, nor is their treatment by the courts. There has been legislation and litigation over what constitutes a "family" for years. Localities are not powerless to define the term: more than twenty years ago, the United States Supreme Court held that local ordinances defining "family" to mean one or more persons related by blood, adoption or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit, are constitutional. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). But facially neutral classifications can have unintended results or affirmatively discriminatory purposes or effects, and not long after *Belle Terre*, the Court held that a definition of "family" which criminalized a grandmother's desire to live with her two grandsons -- who were not brothers but cousins -- was an unconstitutional deprivation of her due process rights. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

The Fair Housing Amendments Act

Restrictions on the definition of family, however, are only one aspect of America's approach to housing and housing discrimination. For many years Congress has made it national policy to eliminate such discrimination in all its forms, through the Fair Housing Act of 1968. The original Act (Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619) banned, among other things, housing discrimination on the basis of race, color, religion, and national origin, and provided for a variety of enforcement mechanisms. The Act was amended in 1974 and again in 1988, however, and it was these latter changes, known as the Fair Housing Amendments Act of 1988 (the "FHAA"),

which made truly substantive revisions in the law, and which form the source of the principal restrictions on local control of group homes. See PL 100-430, 102 Stat. 1619 (1988), 42 U.S.C. 3601, et seq.

Even before the FHAA, the United States Supreme Court had held in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), that the Equal Protection Clause prohibits a city from requiring a special use permit for group homes for mentally retarded persons, when such permits are not required for other similar residential uses. But it was the FHAA that truly altered the landscape. Drawing heavily on existing law with respect to handicap discrimination in federally-supported programs (See § 504 of the Rehabilitation Act of 1973, 29 U.S.C. 701), the Act made it unlawful for any one of a number of covered entities, including local governments 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 of –

> (A) that buyer or renter,
>
> (B) a person residing in or intending to reside in that dwelling after it is so sold, rented or made available; or
>
> (C) any person associated with that buyer or renter.
>
> 42 U.S.C. 3604(f)(1)

The Act defines discrimination to include not only traditional discriminatory practices, but also "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." 42 U.S.C. 3604(f)(3)(B). While localities need not do everything humanly possible to accommodate a disabled person, the "reasonable accommodation" requirement imposes affirmative duties to modify local requirements when they discriminate against the handicapped. *Liddy v. Cisneros*, 823 F. Supp. 164, 176 (S.D. NY 1993).

The Act defines handicap extremely broadly as

> (1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities,
> (2) a record of having such an impairment, or
> (3) being regarded as having such an impairment.

Although there are exceptions to this definition, including those "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others" (42 U.S.C. 3604(f)(9)), and people afflicted with the "current, illegal use of or addiction to a controlled substance" (42 U.S.C. § 3602(h)), handicap does include people who take drugs legally, or people who were once, but no longer are, illegal drug users. *United States v. Southern Management Corp.*, 955 F.2d 914, 919-23 (4th Cir. 1992).

Congress understood that one of the central problems for the establishment of group homes is baseless hostility on the part of neighbors and even local governments themselves. It manifestly intended, therefore, to preempt state and local laws that effectuated or perpetuated housing discrimination. The House Judiciary Committee said that:

> [t]he FHAA, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion. . . .
>
> While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment of or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discrimination against persons with disabilities. The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decision and practices. The Act is intended to prohibit the application of special requirements through land-use regulation, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individual to live in the residence of their choice in the community . . .
>
> Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner, which discriminates against people with disabilities. Such discrimination often results from false or overprotective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited.
>
> House Committee on the Judiciary,
> Fair Housing Amendments Act of 1988,
> H.R. Rep. No. 711, 100th Cong. 2d Sess., at 18, 24.

Thus, with specific regard to the exercise of local powers, the Act says clearly that "[a]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. 3615 (emphasis supplied).

Judicial treatment of "handicap." The decisions interpreting the FHAA have been far reaching in determining what constitutes a handicap. In fact, it is difficult to conceive a disability that does not constitute a handicap. Thus the FHAA has been held to cover not only rather obviously handicapped folks, such as the wheelchair-bound, or visually impaired, but also those who are disadvantaged by alcoholism and drug addiction (e.g.,*Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450 (D. N.J. (1991)), those beset by emotional problems and mental illness or retardation (e.g.,*Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614 (D. N.J. 1994)), and old age. *United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220, 224 (D.P.R. 1991). It extends to communicable diseases, including AIDS and HIV. *Support Ministry v. Village of Waterford,* 808 F. Supp. 120, 133-35 (N.D. N.Y. 1992). The homeless can be deemed handicapped, if only because their homelessness is related to other, specific handicaps. *Stuart B. McKinney Foundation v. Town of Fairfield,* 790 F. Supp. 1197 (D. Conn. 1992).

It has been estimated that one out every six persons in America is handicapped under this definition. Housing Discrimination: Law and Litigation, by Robert G. Schwemm (Clark, Boardman, Callaghan 1990), § 11.5(2), p. 11-56.

Judicial Treatment of Discriminatory Housing Practices

FHAA group home cases turn on one -- or more frequently all -- of three different theories: discriminatory intent, discriminatory effect, or failure to make "reasonable accommodation" to the needs of the handicapped. While the decisions often involve all three, there are several identifiable sub-classifications of FHAA cases worthy of note.

Family Composition Rules

Many cases involve local ordinance definitions of "family" that preclude group homes. Rarely do these definitions survive scrutiny in the group home context. Although lower courts had been roughly handling "family composition rules" for some time, in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995) the Supreme Court held that such rules are plainly subject to the FHAA and while limitations on unrelated residents is not per se invalid, they must be scrutinized carefully for their discriminatory intent or effect.

An example of these cases is *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450 (D. N.J. 1991), the federal court rejected a state court ruling that residents of a group home for recovering alcoholics were not a single family under the Township's ordinance, and that they were not handicapped. The court noted that those handicapped by alcoholism or drug abuse are persons more likely than others to need a living arrangement in which sufficiently large groups of unrelated people live together in residential neighborhoods for mutual support during the recovery process. The Township produced no evidence of a nondiscriminatory reason for its position. See also *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D. N.J. 1991)(nine residents necessary to make a group home for recovering alcoholics viable.)

Special use permits and the imposition of restrictive conditions

Several cases have involved requirements for special use permits, or the imposition of particular conditions on those permits. While the Eastern District of Virginia has held that the mere requirement for a special use permit does not violate the Act (*Oxford House v. City of Virginia Beach*, 825 F. Supp. 1251 (E.D. Va. 1993)), in fact courts rarely uphold denials of such permits, or the imposition of burdensome conditions. In *Bangerter v. Orem City, Utah*, 46 F.3d 1491 (10th Cir. 1995), for example, the court of appeals found that requirements that a group home for mentally retarded adults give assurances its residents would be properly supervised on a 24-hour-a-day basis, and that the home establish a community advisory committee to deal with neighbor's complaint, were not imposed on other communal living arrangements under the City's zoning ordinance, and were intentionally discriminatory.

In *Turning Point, Inc. v. City of Caldwell, Idaho*, 74 F.3d 941 (9th Cir. 1996), the City asserted that a homeless shelter for 16 residents in a single-family district was a "boarding house" that required a special use permit to exceed twelve persons. A permit was granted, but for a limited number of residents, and subject to requirements for resident staff, parking spaces, a new sidewalk and landscaping and an annual review of the permit. The court rejected these restrictions as having no relationship to legitimate zoning purposes, and set occupancy at 25 based on testimony from the Fire Chief. It reduced the parking requirement, eliminated the sidewalk and landscaping, and struck the annual review requirement. See also *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 46-48 (6th Cir. 1992) (invalidating requirement that a home for four mentally retarded adult women install an alarm system interconnected to ceiling sprinkler system, doors with push bars swinging outwards with lighted exit signs, and fire walls and flame retardant wall coverings, as based on false and overprotective assumptions); *North Shore-Chicago Rehabilitation, Inc. v. Village of Skokie*, 827 F. Supp. 497, 499-502 (N.D. Ill. 1993) (enforcement of requirements on home for traumatically brain-damaged adults that home consist of five or fewer residents on a permanent basis, with paid professional staff, license from state, local occupancy permit and compliance with local, was discriminatory and constituted a failure to make reasonable accommodation).

Dispersal Requirements

A number of localities have imposed requirements that group homes be geographically dispersed in an effort to deinstitutionalize target populations. Dispersal rules do not generally survive. In *Larkin v. State of Michigan*, 883 F. Supp. 172, 177 (E.D. Mich. 1994) a state statutory scheme precluded issuance of a license if it would "substantially contribute to an excessive concentration" of such facilities, and required notification be given to the City Council to review the number of existing and proposed facilities within 1500 feet of a proposed facility and to its neighbors. The City argued that its dispersal requirement prevented formation of "ghettos" and normalized the environment. The Court found no rational legal basis for these provisions, and held that they were facially discriminatory, since "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."

In *United States v. Village of Marshall*, 787 F. Supp. 872, 878 (W.D. Wis. 1991), a Wisconsin statute required that group homes be separated by 2,500 feet. A group home for six mentally ill persons was proposed 1619 feet from another existing home. The trial court found no evidence to support this requirement and held that the reasonable accommodation requirement mandated the grant of permission.

In *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 622-23 (D. N.J. 1994) a state statute permitted six residents but required a special use permit for more than six, but which could be denied if located within 1500 feet of an existing residence or community shelter for victims of domestic violence, or the number of persons other than resident staff residing at the existing residence exceed the greater of 50 persons or .5% of the municipal population. The court invalidated the statute on the ground that there was no evidence that developmentally disabled persons present a danger to the community: "The record is devoid of any evidence upon a fact finder could reasonably conclude that community residences housing more than six developmentally disabled persons would detract from a neighborhood's residential character." See also *Horizon House v. Township of Upper South Hampton*, 804 F. Supp. 683, 695-97 (E.D. Pa. 1992) (aff'd without opinion, 995 F.2d 217 (3rd Cir. 1993) (1000 foot dispersal rule was on based unfounded fears about people with handicaps and facially invalid).

Not all courts have agreed with this approach. In *Familystyle of St. Paul v. City of St. Paul, Minn.*, 923 F.2d 91 (8th Cir. 1991) the court was faced with a request for a special use permit to expand an existing campus of homes from 119 to 130 mentally ill persons. The City issued temporary permits on condition that Familystyle work to disperse its facilities consistently with Minnesota's deinstitutionalization policy, which required that community residential facilities for the mentally impaired be located at least one-quarter mile apart. The court rejected the argument that the dispersal requirements impermissibly limited housing choices, holding that nondiscrimination and deinstitutionalization are compatible goals. Contrary to the legislative history and treatment by other courts, the Eight Circuit suggested that the FHAA did not intend simply to eliminate state and local zoning authority.

Neighbor Notification Requirements

Yet another class of cases has involved requirements that neighbors be specifically notified of the advent of group homes. None of these schemes has survived. In *Potomac Group Home v. Montgomery County*, 823 F. Supp. 1285, 1296-99 (D. Md. 1993), the court struck a requirement that neighbors of each group home adjacent and opposite and neighborhood civic associations be notified prior to the location of a group home for disabled elderly, as unsupported by legitimate justification. "The requirement is as offensive as would be a rule that a minority family give notification and invite comment before moving into a predominantly white neighborhood." See also *Horizon House*, supra, (notification requirement based on discriminatory intent and effect and violation of reasonable accommodation rule).

Reasonable Accommodation Requirements

Finally, a special subset of cases, have involved a locality's failure to make "reasonable accommodation" for the needs of the handicapped. The Act requires localities to make such accommodation by amendment to or variance of local ordinances and policies when they stand in the way of the location and operation of group homes. An accommodation is reasonable unless it requires a "fundamental alteration in the nature of a program or imposes undue financial and administrative burdens." *Southeastern Community College v. Davis*, 442 U.S. 397, 410-412 (1979) (interpreting § 504 of the Rehabilitation Act). Mere adherence to existing zoning requirements and land use policies is generally insufficient to protect the locality, if those requirements and policies contravene the Act. A good example of the extent to which the courts will go is *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3rd Cir. 1996), where the court of appeals said there that although "what the 'reasonable accommodation' standard requires is not a model of clarity", a failure to amend ordinances to permit nursing homes for handicapped persons in residential zones is a failure to make reasonable accommodation.

In *Judy B. v. Borough of Tioga*, 889 F. Supp. 792, 799-800 (M.D. Pa. 1995), United Christian Ministries wanted to convert a motel into SROs for the disabled. They were denied a use variance, and the denial was upheld by the state courts, but the federal court held that the denial was a failure to make reasonable accommodation, and that changes must be affirmatively made so that people with handicaps may use and enjoy a dwelling. Granting a use variance would require an "extremely modest" accommodation in the zoning rules, and the proposed use was fundamentally consistent with the neighborhood. See also *United States v. City of Philadelphia*, 838 F. Supp. 223 (E.D. Pa. 1993), aff'd 30 F.3d 1488 (3rd Cir. 1994) (requirement for a rezoning constituted a failure to make reasonable accommodation).

While localities must make reasonable accommodations, it does appear that they must first be given an opportunity to do so. In *United States v. Village of Palatine, Illinois*, 37 F. 3d 1230 (7th Cir. 1994) the Oxford House program, which has a policy of refusing to seek local permits, declined to seek a required special use permit, The court held that it had never invoked the procedures that would have permitted reasonable accommodation to be made. See also *Oxford House-C v. City of St. Louis,* 77 F.3d 249 (8th Cir. 1996) (restriction to eight residents by-right not discriminatory, and Oxford House's refusal to apply for permits to house more than eight residents rendered reasonable accommodation claim unripe).

Neighborhood Opposition as a Defining Characteristic

As has been suggested, there is frequently hostile citizen opposition to the location of group homes. It is perhaps fatal for the locality to accede to such pressure, which the courts invariably find to be based on groundless fears.

In *Stuart B. McKinney Foundation v. Town of Fairfield*, 790 F. Supp. 1197, 1221-22 (D. Conn. 1992) the court invalidated a requirement for a special exception for the use of a two-family residence as a home for seven HIV-positive persons. Despite efforts to act quietly, the location of the home was leaked to the press, and there was a large gathering at a local firehouse and much political uproar. The trial court noted that meetings were

marked by many bigoted remarks. Subsequently, the Planning Director sent the home a letter asking thirteen questions, including inquiry into standards of admission, number of people who would live at the property, average anticipated length of residence, type of medical care, how the determination of departure date was made, leases, payment of rent and other expenses, staffing, services and facilities to be provided and transportation. The City admitted that there were no legitimate dangers to public health and safety from HIV-positive residents, and the court found that the City's practices evidenced a clear discriminatory intent. See also *Support Ministry v. Village of Waterford*, 808 F. Supp. 120, 133-35 (N.D. N.Y. 1992) (citizen opposition and government hostility manifested when Town passed ordinance to assure the defeat of a group home for AIDS victims and named opponents to the Zoning Board of Adjustment. Uncontradicted evidence showed that it was "[c]rystal clear" that local ordinance was enacted to prevent Support Ministries from establishing its home.)

In *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D. N.J. 1991), the Mayor and other city officials led hostile responses to a group home, and the Zoning Administrator had first announced that Oxford House was a permitted use but after a City Council meeting at which much opposition was expressed by the neighborhood, changed her position. The court found the City's conduct intentionally discriminatory.

A Cautionary Tale

Localities must not underestimate the time and difficulty that FHAA cases can cost. The lengthy saga of Smith & Lee Associates is instructive. The case involved efforts by a private group home operator to locate a foster care home for twelve elderly handicapped residents in a single-family residential district. Michigan law authorized adult foster care homes for six or fewer residents in all residential neighborhoods, but in order to house more than six the home required local approval, which was denied.

The district court first held that the City had been guilty of discriminatory intent, disparate impact, and failure to make reasonable accommodation, and imposed a $50,000 civil penalty on the City. *Smith & Lee Associates, Inc. v. Taylor, Michigan*, 798 F. Supp. 442 (E.D. Mich. 1992). The court of appeals reversed. *Smith & Lee Associates, Inc. v. Taylor, Michigan*, 13 F.3d 920, 929-32 (6th Cir. 1993). It upheld the constitutionality of Taylor's definition of "family", and reversed the lower court's finding as to discriminatory intent. As to reasonable accommodation it concluded that the district court could not simply order the locality to advise Smith & Lee that it could proceed.

On remand, however, the district court again held that City had been motivated by discriminatory animus, and directed the City to amend its ordinance and to pay Smith & Lee profits from the impermissible limitation on the number of residents. *United States v. City of Taylor, Michigan*, 872 F. Supp. 423, 429-443 (E.D. Mich. 1995).

On a second appeal, *Smith & Lee Associates, Inc. v. Taylor, Michigan*, 102 F.3d 781 (6th Cir. 1996), the court of appeals held that the trial judge had erred in finding discriminatory intent, but that he had been correct to find that the City had failed to make reasonable accommodation by adapting its processes to accommodate the group home.

The court said that although Taylor had no duty to approve Smith & Lee's zoning application, it could not lawfully deny that application because of the demonstrated hostility of the City government to the handicapped. The FHAA is concerned with achieving equal results and not just formal equality, and imposes an affirmative duty to reasonably accommodate handicapped people.

Conclusion

This article has only touched on major issues that are presented by local regulation of group homes. But the message is clear: local regulation cannot discriminate against the handicapped, and, moreover, localities must take affirmative steps to accommodate them. Finally, localities must steel themselves to the opposition that the location of group homes almost invariably attracts. To accede to political pressures growing out of ignorance and bias can lead to judicial intervention at the best, and substantial civil penalties at the worst.