Litigation Landmines: Exclusionary Zoning and Sober Living Homes

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LITIGATION LANDMINES: EXCLUSIONARY ZONING AND SOBER LIVING HOMES

By: Rachel L. Andersen, JD*

ABSTRACT

This article delves into the intricate landscape of sober living home ordinances within residential zoning districts, shedding light on exclusionary restrictions and requirements that have triggered extensive and costly discrimination litigation. Providing a concise history of the origins of modern-day sober living homes, the article examines legislative initiatives and ongoing litigation concerning zoning ordinances aimed at regulating these homes in residential neighborhoods. It explores the nuanced use or prohibition of specific terms and conditions within such ordinances and compares historical interpretations of regulatory provisions for recovery residences. The article presents examples of contentious terms and requirements that have fueled litigation, along with recent court interpretations. In addition, it offers recommendations for clearer and simplified provisions while discussing the potential risks associated with more detailed regulation of the internal operations of recovery residences.
# Table of Contents

**Introduction** ................................................................. 201

**I. History** ........................................................................... 202
   A. Roots ................................................................. 202
   B. How the “Not In My Back Yard” (“NIMBY”) Movement and Public Perception Fueled the Fire ........................................................................... 204
   C. Legislation and Litigation .............................................. 206
      1. Fair Housing Act ................................................. 207
      2. Americans With Disabilities Act (ADA) ................. 208
      3. New Legislation .................................................. 209
      4. Courts ............................................................... 211

**II. Discussion** ................................................................. 213
   A. Proposals .............................................................. 214
      1. Recovery Home Defined ................................. 214
      2. The Magic Number .......................................... 216
      3. Location, Location, Location ........................ 218
   B. Prohibitions .......................................................... 220
      1. Licensing Schemes .......................................... 220
      2. “Good Neighbor” Policies .............................. 222
      3. Relapse Monitoring .......................................... 224
      4. Requirement for an On-Site Manager ............. 226

**Conclusion** .......................................................................... 227
INTRODUCTION

“The American Dream includes the idea that each person . . . has a room or a living unit to call his or her own, a place that is private, safe, and can be used to express [oneself] in its décor and customs for its use.” For recovering drug addicts and alcoholics, residential housing that supports abstinence from drugs and alcohol is hard to come by. Sober living homes play a pivotal role in facilitating the transition from active abuse to long term recovery.

Exclusionary zoning makes it nearly impossible for sober living homes to survive in residential neighborhoods. Local governments require sober living home operators to comply with exceedingly demanding requirements resulting in discriminatory barriers to fair housing. Defending the right to fair housing is cost prohibitive for the operators and many sober living home are forced to close.

This Comment examines sober living home ordinances in residential zoning districts and the exclusionary restrictions and requirements that have become the subject of costly and time-consuming discrimination litigation. Part II includes a brief history of the foundation for modern day sober living homes. It reviews legislative efforts and present litigation surrounding such zoning ordinances that attempt to regulate sober living homes in residential neighborhoods. For purposes of this discussion, terms such as

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1 Rachel L. Andersen is a 2024 graduate of Capital University Law School where she served as the Symposium Editor of the Capital University Law Review Vol. 52. She received a Bachelor of Arts in Organizational Leadership from Point Loma Nazarene University in San Diego, California. This Comment is dedicated to her friends and family, without whom this article would not be possible. May you enjoy the comforts of home as you “trudge the road to happy destiny. May God bless you and keep you until then.” (ALCOHOLICS ANONYMOUS, 164 (Alcoholics Anonymous World Svc. Inc., 1934)).


3 Meeting the Housing Needs of People with Substance Use Disorders, CENTER ON BUDGET AND POLICY PRIORITIES (May 1, 2019), https://www.cbpp.org/research/housing/meeting-the-housing-needs-of-people-with-substance-use-disorders [https://perma.cc/ZX3L-HLVD] (describing how homeless addicts cope with the dangers of living on the streets by using drugs and alcohol and find it difficult to stay abstinence without a safe place to live).

recovery home, recovery residence, sober living home, and sober home shall be used interchangeably.

Part III discusses the use or prohibition of use of certain terms and conditions within a zoning ordinance. It compares how regulatory provisions for recovery residences have historically been interpreted and offers examples of terms and requirements in the ordinances that have been the basis for litigation and the courts recent interpretations of those ordinances. It offers suggestions and support for clear and simplified provisions as well as discussion of the risks involved with more specific regulation of the internal operations of recovery residences. Part IV briefly summarizes the suggestions contained herein.

I. HISTORY

A. Roots

Community living arrangements for recovering alcoholics have existed since the mid nineteenth century. The first version of a sober living arrangement arose during the temperance movement where boarding house operators rented rooms to persons who did not drink. In the mid 1930’s, shortly after Alcoholics Anonymous was established, the 12-step house model of sober living began in Southern California. At the time, alcohol related patterns of behavior and disorderly public conduct related to alcohol abuse were primarily addressed by local “hospitals . . . state psychiatric hospital wards for treatment of alcoholism . . . the . . . local drunk tanks and county jail farms.” A person left an institution of the sort, drank again, and often returned to either the same or similar institution.

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6 Id.
7 A.A. Preamble, ALCOHOLICS ANONYMOUS (1947), https://www.aa.org/aa-preamble [https://perma.cc/MDF7-2JVF] (“Alcoholics Anonymous is a fellowship of people who share their experience strength and home with each other that they may solve their common problem and help others to recovery from alcoholism.”).
8 Wittman, supra note 1.
9 Wittman, supra note 1, at 160.
10 Id.
The cycle continued until the person either got sober or died. It often took months, and in the absence of a permanent residence, the person may have found a short-term living situation but there was no system of re-integration into mainstream society. Sober living homes, as the 12-step houses became known, became the ideal option for those trying to recover from alcoholism and to help break this repeated cycle of institutionalization.

Since the 1970’s, networks of sober living homes like The Oxford House have been established across the country. The Oxford House became the foundational model for residential sober living. The first Oxford House opened in 1975 and was designed to create a family like environment that supported its residents’ efforts to recover from substance abuse, primarily alcohol.

An Oxford House typically has eight residents but can vary from six to sixteen. The residents, as a group, function as a democracy, supporting themselves by paying rent and his or her own share of the expenses. Each house operates without debt. Most importantly, all residents must refrain from using illegal drugs or alcohol. The residents are not required to attend AA (or equivalent) meetings as a condition of residency, however, it is strongly suggested that all residents attend recovery meetings as part of his or her recovery program or for the good of the house as a whole. Unless specifically required by law, Oxford Houses are not licensed and do not have permanent staff. This model has been so successful across the country that the federal government has endorsed Oxford Houses by making special federal funds available to persons or entities wishing to establish one, provided it was based on the

11 Id.
12 Id.
14 Id.
15 Id.
19 Id. at 13.
20 Id. at 6.
21 Id. at 11.
22 Id. at 18.
Oxford House model. A 2020 study claimed there were 17,943 sober living residences across the country supporting 274,528 recovering persons each year.

Oxford houses and other similar sober living homes have been the object of many residential zoning disputes. These homes prefer to operate in residential settings but residential zoning is still primarily structured around the family unit of related persons and often restricts the number of unrelated persons living in one residential dwelling. One ordinance in Edmonds, Washington limited the number of unrelated occupants in a residential dwelling to five but allowed an unlimited amount of persons to occupy a residence if they were all related by blood, marriage or adoption. In Baton Rouge, Louisiana, only two unrelated persons were allowed to occupy a home in a residential zone. In both of these cases these ordinances were found to violate protections provided under the Fair Housing Act (“FHA”) and the Americans with Disabilities Act (“ADA”).

B. How the “Not In My Back Yard” (“NIMBY”) Movement and Public Perception Fueled the Fire

Group homes for persons with disabilities, in general, face more housing discrimination than any other group and stereotypes, prejudices, and fear are the primary culprit. Stereotypical fears and prejudices about persons recovering from substance use disorders is the foundation for the Not In My Back Yard (NIMBY) movement and

23 United States v. Borough of Audubon, 797 F.Supp 353, 355 n.1 (D.N.J. 1991) (“Under [the Anti-Drug Abuse Act of 1988], groups of four or more recovering alcoholics or drug users who want to live in a group home based on the Oxford model are entitled to a loan of up to $4,000 to cover the start-up expenses of renting a home. The loans are interest free and must be repaid by the residents of the home within two years. The only requirements are that the houses be (1) democratically self-governing, (2) financially self-supporting, and (3) that any person using drugs or alcohol be immediately expelled.”).
27 Sara C. Bronin, Zoning for Families, 95 INDIANA L. REV. 1, 2 (2020).
30 Id.; City of Edmonds, 514 U.S. at 737-38.
31 Brian J. Connolly & Dwight H. Merriam, Group Homes, Strategies for Effective and Defensible Planning and Regulation, 22 (American Bar Ass’n ed. 2014).
has fueled the fight against sober living homes in residential neighborhoods since its inception. In 1994, it was estimated that group homes failed to be established on half of the sites where they were proposed as a result of community opposition and discrimination. Neighbors believe that drug addicts and alcoholics living in the group homes are “capable of mayhem and violence” and bring criminality and homelessness to the neighborhood which, they fear, reduces property values.

Not only do the neighbors have fears around the stereotypes of a drug addict or alcoholic, they fear that the presence of recovery residences have the “effect of altering the residential character of neighborhoods so that it appears more institutional and business-oriented in nature.” The neighbors cite legitimate concerns of increased traffic and crime, congestion, overcrowding, noise, and general public safety all of which they claim, compounded together, results in reduced property values. However, numerous studies have shown that the presence of a group home, even a sober living home, has little to no effect on the deterioration of personal safety or property values in residential neighborhoods.

Much of the motivation in creating new ordinances for sober living homes is fueled by pressure from residential neighbors. Government leaders, however, state their purpose for these ordinances for sober living homes is not to appease fearful homeowners, but to maintain the character of existing residential

33 Connolly & Merriam, supra note 31, at 23.
34 SoCal Recovery, LLC v. City of Costa Mesa, 56 F.4th 802, 819 (9th Cir. 2023) (“[R]esident testimony at the City Council hearing indicated ‘fear of the influx of felons coming into the neighborhood, and the violence and damage’ they would bring.”).
35 AMERICAN BAR ASS’N STEERING COMM. ON UNMET LEGAL NEEDS OF CHILD. AND COMM’N ON HOMELESSNESS & POVERTY, NIMBY, A PRIMER FOR LAWYERS AND ADVOCATES, 28 (American Bar Ass’n 1999) (residents of other residential developments and neighborhoods may be asked to appear at zoning board hearings to comment that their homes have not lost value due to the presence of a sober living home in their community).
37 American Bar Ass’n Steering Comm. on Unmet Legal Needs of Child and Comm’n on Homelessness & Poverty, supra note 35, at 29.
39 Id.
neighborhoods while continuing to provide the same opportunities for access to fair housing for disabled persons as are afforded to non-disabled persons in the same neighborhood.40

Under pressure from their voters (often local homeowners), governments leaders continue to impose unreasonable restrictions on the operation of sober living homes.41 As a result, sober living homes face an uphill battle with local government and neighbors in either the continued operation of or establishment of a sober living home in residential neighborhoods.42 The provisions in these ordinances have unjustifiably discriminated against sober living home operators and residents and exposed local governments to costly and time-consuming discrimination lawsuits.43

C. Legislation and Litigation

State and local governments are given broad legislative power to pass local zoning laws provided the laws are not inconsistent with federal laws such as the FHA and the ADA.44 Early litigation around zoning discrimination against sober living homes involved whether a resident of a sober living home was a protected person under those acts.45 Courts continue to decide whether the local zoning laws that attempt to regulate sober living homes violate protections afforded to the residents.46

46 Id.
1. Fair Housing Act (FHA)

Recovering alcoholics and addicts are considered disabled as defined by the FHA. The FHA was established in 1968 and, under the FHA, state and local governments are prohibited against discriminating against disabled persons living in group homes. In one Ohio lawsuit, the district court for the Northern District of Ohio first had to determine whether the resident of the sober living home was disabled before deciding whether the resident was protected under the FHA. The court held disabled persons do not include those who are currently using or addicted to an illegal controlled substance. It reasoned that because a person is addicted to an illegal controlled substance, whether he was actively participating in his addiction or not was irrelevant, and such residents would likely not be protected as “disabled” under the FHA. Under this interpretation, a sober resident of a sober living home would not be protected under the FHA.

But other courts have held that persons recovering from drug and alcohol addiction or groups of recovering persons living together as a group home are “handicapped” and thus protected under the FHA. In Oxford v. Cherry Hill, the district court for the District of New Jersey interpreted recovering from drug addiction and alcoholism was an impairment Congress contemplated when drafting the 1988 Amendment to the FHA and commented that the language for the definition was derived from the Rehabilitation Act that courts have “consistently . . . interpreted . . . to cover alcoholics and drug addicts.” Under this interpretation, the resident would be protected. Therefore, it follows that if a group of recovering drug addicts or alcoholics are living together to remain sober, they are

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47 The Dep’t of Hous. & Urb. Dev. & The Dep’t of Just., Joint Statement on State and Local Land Use Laws and Practices and the Application of the Fair Housing Act, 6 (Nov. 10, 2016) https://www.justice.gov/opa/file/912366/download [https://perma.cc/5BXM-XK26] (the Department of Justice “DOJ” which enforces violations of the FHA uses “disabled” instead of “handicapped” but has claimed that “handicapped” and “disabled” have the same “legal meaning”).
51 Id. at *43.
52 Id. at *19; 42 U.S.C. § 3602(h).
53 Foote, supra note 45.
2. Americans With Disabilities Act (ADA)

There have been mixed outcomes with whether a recovering drug addict or alcoholic is considered disabled under the ADA. In general, the ADA defines a “disabled” person one who has “a physical or mental impairment that substantially limits one or more major life activities . . .”\(^{55}\) There is no per se rule under the ADA that defines recovering alcoholics or addicts as disabled.\(^{56}\) Courts across the country are left to determine whether the individual alcoholic or addict in question is disabled, as defined in the ADA, on a case-by-case basis.\(^{57}\)

For example, the Second Circuit held that when an alcoholic is unable to maintain sobriety outside a group living environment, he is substantially limited in his ability to care for himself, and this limitation brings his condition under the definition of disabled for ADA purposes in that case.\(^{58}\) There, the resident found it necessary to live in a sober living home because he was unable to remain sober while living independently.\(^{59}\) The Middle District of Louisiana relied on the Second Circuit’s opinion and additionally held that if the person is limited in their ability to live independently, such that living in the Oxford House is necessary, she was considered disabled.\(^{60}\)

Recovering drug addicts are also considered disabled under the ADA.\(^{61}\) The Ninth Circuit confirmed that a person is not considered disabled when they are actively using illegal drugs but once they are sober and are no longer using illegal drugs, they are protected as disabled under the ADA.\(^{62}\) This is important to note since, even though sober living homes were initially created to house recovering


\(^{57}\) Id.

\(^{58}\) Reg’l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 48 (2d. Cir. 2002) (one of the requirements for living in the halfway house was that the person be unable to maintain sobriety while living independently).

\(^{59}\) Id.

\(^{60}\) Oxford House, Inc., 932 F. Supp. 2d at 689.

\(^{61}\) Thompson v. Davis, 295 F.3d 890, 894-96 (9th Cir. 2002) (a rehabilitated drug addict claimed he was denied consideration for parole because of his disability).

\(^{62}\) Id. at 896.
alcoholics, they how also house recovering drug addicts.\textsuperscript{63} Therefore, if a person is a recovering alcoholic or drug addict (not currently using or drinking) and needs to reside in a sober living home, it follows that such person is disabled and is protected from discrimination under the ADA.

A disabled person is afforded certain protections from discriminatory housing practices under both the FHA and ADA as well as many state laws. For example, “[t]he FHA defines discrimination as a ‘refusal to make reasonable accommodations . . . when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling,’”\textsuperscript{64} It is also a violation of federal law to deny the sale or lease of a home to a person on the basis of their disability.\textsuperscript{65} Under Washington state law, “[n]o city may enact or maintain an ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure occupied by persons with handicaps differently than a similar residential structure occupied by a family or other unrelated individuals.”\textsuperscript{66} In the absence of a model statute, many states have used this language with minimal variations.\textsuperscript{67}

3. New Legislation

In 2018, the House Subcommittee on the Constitution and Civil Justice met to discuss the necessity of regulatory reform of sober living homes.\textsuperscript{68} Judy Chu, Representative from California testified to ongoing abuse and exploitation of persons in recovery living in sober

\textsuperscript{63} Lance Lang, \textit{A Definition and Short History of Sober Living Homes}, LINKEDIN (May 18, 2022), https://www.linkedin.com/pulse/definition-short-history-sober-living-homes-lance-lang [https://perma.cc/UG87-CY85].

\textsuperscript{64} Oxford House, Inc., 932 F.Supp.2d at 690.

\textsuperscript{65} 42 U.S.C. § 3604.


\textsuperscript{67} PATRICK J. ROHAN & ERIC DAMIEN KELLY, \textit{7 ZONING AND LAND USE CONTROLS} §4.05(2)(a), Lexis (2023) (“Both a group residential facility and a group residential home shall be a permitted residential use of property for the purposes of zoning and shall be a permitted use in all zones or districts. No county commission, governing board of a municipality or planning commission shall require a group residential facility, its owner or operator, to obtain a conditional use permit, special use permit, special exception or variance for location of such facility in any zone or district.”).

living homes and referred to a 2015 report from the DOJ that claims “abuse and fraud at Sober Living Homes in New York and Florida.” These reports describe sober living facilities that lacked access to naloxone, ordered unnecessary tests on residents to exhaust their insurance benefits, and required residents to relapse and re-enter treatment so resident directors could claim some of the Medicaid benefits.” Later that year, with Ms. Chu’s support, an amendment to the Public Health Service Act was passed.

The amendment, called the National Recovery Housing Best Practices, gives power to the Secretary of Health and Human Services to identify or create best practices, including model laws, for minimum standards and oversight in operating recovery residences. However, the primary focus of the act was to create a framework for regulating the operation of sober living residences and not to provide standards or models for local zoning regulations.

The most recent efforts at addressing local zoning regulations for sober living homes was prepared in 2021. The Legislative Analysis and Public Policy Association issued its version of a model act (2021 Model Act) the basis of which is premised on the requirement for recovery residence certification. The 2021 Model Act certifies sober living residences by levels which are differentiated from each other based on the degree of monitoring and supervision as well as the services provided inside the home. The 2021 Model Act appears to recognize that, so long as the sober living home complies with occupancy limits for unrelated persons, it is permitted to operate in a residential zone as a matter of right yet calls for licenses to operate if the occupancy exceeds the limit allowed by the zoning regulation.

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69 Id. at 2 (testimony of Judy Chu, U.S. Representative for California’s 28th congressional district).
70 Naloxone, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN. (SAMHSA) https://www.samhsa.gov/medications-substance-use-disorders/medications-counseling-related-conditions/naloxone (last visited Mar. 15, 2023) [https://perma.cc/36VG-KC49] (“Naloxone is an opioid antagonist medication that is used to reverse an opioid overdose.”).
72 Id.; 42 U.S.C. § 290ee-5(a).
74 Id.
76 Id. at 27.
77 Id. at 20.
78 Id. at 28.
I propose many of the provisions required by the act are at least confusing and complicated and at worst overreaching and overly burdensome.

4. Courts

The city of Costa Mesa, California has seen a string of discriminatory zoning regulation lawsuits in response to new zoning ordinances it enacted 2014 and 2015. In two separate suits (later combined), sober living home operators claim two city zoning ordinances, one that requires a permit to operate and the other that limits the distance between sober living homes, are discriminatory on the basis of the disability of the residents. The district court for the Central District of California sided with the city and found the sober living home operators could not prove that each of the residents, separately, were disabled and therefore, operators could not prove all the requirements of discrimination on the basis of disability.

On January 3, 2023, the Ninth Circuit Court of Appeals reversed the district court’s ruling. The Ninth Circuit held that the sober living home operators did not have to prove each resident was disabled under the FHA and ADA and that the residents of the house, “on a collective basis,” can satisfy the actual disability requirement. The case was remanded back to the district court for a finding as to whether or not the ordinances are discriminatory on the basis of disability. Costa Mesa appealed the Ninth Circuit’s decision and petitioned the United States Supreme Court to resolve the circuit split and decide whether each individual resident must prove he is protected under the FHA or whether, as the Ninth Circuit decided, that the entity itself could forego the individual showing.

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81 Id.
82 Id. at 820.
83 Id. at 814.
84 Id. at 820.
85 See generally Brief for Petitioner at 1, City of Costa Mesa v. SoCal Recovery, LLC, 144 S. Ct. 422 (2023) (No. 23-71).
for the Central District of California on remand from the Ninth Circuit.86

Costa Mesa prevailed over strikingly similar claims of failure to make a reasonable accommodations and discrimination under those same ordinances in 202087 and 2016.88 The court found the city’s ordinances to be justified only because the requirements of the ordinances ultimately benefited the disabled persons more than it burdened them.89 Since the inception of the ordinances at issue, Costa Mesa has and continues to spend years and millions of taxpayer money fighting these cases to trial.90

California is not alone. In June 2023, the city of Howell, Michigan paid $750,000 of taxpayer money to settle a discrimination suit brought by Amber Reineck House on claims that, by enacting a moratorium on sober living homes in residential neighborhoods, the city acted with intent to discriminate against it and interference with its assertion of rights, both of which are violations of the FHA.91 The house claimed the city “[placed] conditions on sober living home applicants that impose significant financial and logistical burdens on those applicant[s].”92

With the Ninth Circuit’s decision that SoCal Recovery provided sufficient evidence to find a genuine dispute as to the material facts, the case continues to move toward a trial on the merits and ultimately to a determination on whether Costa Mesa’s sober living

home ordinance will survive or be deemed discriminatory. While a decision in favor of SoCal Recovery offers no benefit to them as they no longer operate sober living homes in Costa Mesa, the decision will have bearing on the future of sober living home ordinances in communities around the country.

II. DISCUSSION

Local lawmakers have the power to establish recovery housing regulations which include clear definitions and standards of practice. In doing so, the regulations may successfully differentiate recovery homes from commercial uses and prevent unnecessarily restrictive zoning ordinances. Well drafted zoning regulations that are crafted with clear, non-discriminatory provisions including definitions and standards of practice and provisions that address community concerns while accommodating sober-living homes can help mitigate legal challenges. The recent discrimination lawsuits are primarily centered around the disability status of the residents of the sober living homes, how many unrelated persons may live together in these homes when they are located in residential zoning districts, how close sober living homes may be to other sober living homes, and the many burdensome licensing requirements such as around the clock staffing and attendance at AA meetings.

I suggest lawmakers draft local ordinances that expressly define what a sober living home or recovery residence is, including the purpose of the home, establish a reasonable occupancy limit, and allow sober living homes of the type described in all residential zoning districts as a matter of right. If the locality chooses to have a distance limit, I propose a shorter distance between sober living homes.

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93 Griffen, supra note 86.
homes. I propose a recovery residence ordinance that does not require a specific license, permit, or certification, unless the home receives government financial support. Zoning should not require adherence to a “good neighbor” community policy. It should not require relapse monitoring or the presence of an on-site house manager. The remainder of this Comment is dedicated to a discussion of these proposals.

A. Proposals

1. Recovery Home Defined

"Definitions are especially important because the general public, as well as the courts, must be able to attach specific meaning to the words and concepts appearing in the ordinance." 98 While many states have definitions of “recovery housing” within their statutes, there are still states that have no definition for sober living home or recovery home, such as Hawaii, Oregon, and Rhode Island. 99 A specific definition for sober living or recovery home states the purpose, intention, protections, and characteristics of a sober living home. 100 The definition calls out the nature of the residents’ disability, which lends reassurance to the occupants and operators that the occupants have additional rights as disabled persons. 101 Moreover, neighborhood concerns about recovery homes may be alleviated when a standardized definition including a purpose statement exists and the recovery home holds itself out as adhering to such standards. 102

The Florida Supreme Court, in upholding a Ft. Lauderdale ordinance for recovery homes, evaluated an ordinance that grouped recovery residences under their definition of community residences. 103 The ordinance described a “community residence” as “a residential living arrangement for unrelated individuals with disabilities living as a single functional family in a single dwelling

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99 Id. at 22-33.
100 Id. at 6.
101 Id. at 9.
102 Id. at 8.
103 See generally, Sailboat Bend Sober Living, LLC v. The City of Fort Lauderdale, 479 F.Supp.3d 1298 (U.S. Dist. Ct. 2020). (deciding whether or not the home was being used as a community residence or boarding house, and, if it was a community residence, were the fire alarm requirements discriminatory).
unit who are in need of the mutual support furnished by other residents of the community residence . . .”

The definition went on to say that this form of residence “seeks to emulate a biological family to normalize its residents and integrate them into the surrounding community.” Its primary purpose is to provide shelter in a family-like environment “treatment of the impairment is incidental in a sober living home as it is in any other residential home.” In its analysis of the definition itself, the court found it to be sound and nondiscriminatory against residents of sober living homes.

The 2021 Model Act defines a recovery residence as “a type of community residence that provides a safe, healthy, family-like, substance-free living environment that supports individuals in recovery from substance use disorder.” It goes on to describe the characteristics of a recovery residence as one that mimic’s a nuclear family and relies on the support of the other residents in recovery.

Supportive inter-relationships between residents are an essential component.

It is important to stress that recovery residences, as defined in this manner, are most closely analogous to the Oxford House model. The house, as a whole, is to function as a family, in a family setting, so that it provides the best support for the residents continued sobriety and reentry into the community. Residents living in a recovery residence of this type have historically had better outcomes of continued sobriety.

I propose the following definition for recovery residence:

Recovery Residence: A “recovery residence” is a substance free residential living arrangement for a group of unrelated disabled individuals, living as a single functioning family, in a single dwelling unit, who are in need of mutual support furnished by the other residents for continued recovery from alcohol and drug addiction.

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104 Id. at 1311-12.
105 Id.
106 Id.
107 Id. at 1333.
108 LEGIS. ANALYSIS AND PUBLIC POLICY ASS’N, supra note 75, at 10.
109 Id.
111 LEGIS. ANALYSIS AND PUB. POL’Y ASS’N, supra note 75, at 10.
112 NAT’L ASS’N OF RECOVERY RESIDENCES, supra note 5, at 24.
This suggested definition describes the characteristics of a recovery home, the residents of the home, recognizes them as disabled in order to preserve protections afforded under FHA and ADA. It states that the group operates as a functioning family supporting each other, and the goal of the residents is to remain in successful recovery from drug addiction and alcoholism. By combining successful elements of the above definitions, local lawmakers may be better situated to avoid or survive claims of discrimination aimed at what is considered a recovery residence.\textsuperscript{113}

2. The Magic Number

Choosing the appropriate occupancy limit for recovery homes is important for success in recovery from drug addiction and alcoholism as well as limiting negative neighborhood impact and potential discrimination claims. Too many occupants in a single-family residence creates “significant opposition” among neighbors and may be counterproductive to long-term recovery.\textsuperscript{114}

Many legal disputes between recovery home operators and local governments are over the number of residents allowed to occupy these homes.\textsuperscript{115} Courts have upheld ordinances supporting homes with five residents and found credible expert opinions touting the need for homes of this size in a residential neighborhood.\textsuperscript{116} Other courts have held that a maximum occupancy of eight unrelated individuals living together in a home in a residential zoning district does not discriminate against the disabled residents or their access to residential housing.\textsuperscript{117}

Many cities include the occupancy limits in the definition of a recovery residence. Costa Mesa’s ordinance limits placement of sober living homes in residential districts based on the number of people living in the home.\textsuperscript{118} It includes sober living homes as a

\textsuperscript{113} Erdington, supra note 4.

\textsuperscript{114} Leonard A. Jason et al., Counteracting 'Not in My Backyard': The Positive Effects of Greater Occupancy within Mutual-help Recovery Homes, 36 J. OF CMTY. PSYCH. 947, 948 (2008).

\textsuperscript{115} See generally Miller, supra note 25.


subset of “group homes” and permits use of a home in a single-family residential zone to for groups with six or fewer residents.\textsuperscript{119} It allows group homes of seven or more residents only in multi-family districts.\textsuperscript{120}

Ft. Lauderdale’s definition is similarly tiered and limits recovery homes to four to ten occupants without being discriminatory against the occupants.\textsuperscript{121} Oregon enacted HB 2583 in May 2021 which removed the word “family” from its occupancy limitations altogether and limit the number of total occupants, regardless of relatedness, to the maximum allowed to ensure fire safety.\textsuperscript{122} It’s law states that an occupancy limit \textit{may not} be established by the government if it is based on the familial status of the occupants.\textsuperscript{123}

Higher occupancy homes positively impact recovery success.\textsuperscript{124} One study relied on in a number of court cases found that larger Oxford House model recovery homes (homes with eight or more residents) were more successful than homes with fewer occupants because the larger house created a “fellowship” of persons working toward the same goal.\textsuperscript{125} The larger social group of persons not drinking or using drugs created a more secure sense of community.\textsuperscript{126} In the larger houses, it is a hypothesized benefit that rent can be lower as it is split across a larger group.\textsuperscript{127} In addition to improved success, there was fewer crime among the occupants in larger homes.\textsuperscript{128} However, larger houses may lose some of the residential atmosphere and family-like appearance, which may perpetuate the neighborhood stigma against sober living homes,\textsuperscript{129} where, group homes with six or fewer disabled persons has had only a minimal negative impact on neighborhood perception.\textsuperscript{130}

Most zoning ordinances have different occupancy limits for related and unrelated persons living together in residential districts.

\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Sailboat Bend Sober Living, LLC v. The City of Fort Lauderdale, 479 F. Supp. 3d 1298 (S.D. Fla. 2020) at 1312.
\textsuperscript{122} H.B. 2583, 81st Gen. Assemb. (Or. 2021).
\textsuperscript{123} Id. (removing “family” from residential zoning and redefining “family” in general are controversial subjects and only discussed here as an example of what one state has done to address the limitations on occupancy in residential zones).
\textsuperscript{124} Jason et al., \textit{supra} note 114, at 7.
\textsuperscript{125} Jason et al., \textit{supra} note 114, at 3.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 3-4.
\textsuperscript{128} Id. at 2.
\textsuperscript{129} Amy A. Mericle et al., \textit{Recovery in context: Sober living houses and the ecology of recovery}, 48 J. OF CMTY. PSYCH. 2589, 2598 (2020).
\textsuperscript{130} Hall v. Butte Home Health, 70 Cal. Rptr. 2d 246, 248, 252-253 (1997).
One option to avoid potential discrimination claims is to remove the relatedness requirement from the zoning code all together. Madison, Wisconsin recently redefined the word “family” within its city’s residential zoning code and created a standard cap on occupancy in residential zoning districts, regardless of relatedness or familial relationships. Alderman Grant Foster proudly proclaimed the removal of this requirement was “an opportunity . . . to remove discrimination.” Removing the relatedness requirement is ideal.

However, the size of the group of residents in a sober living home is a key factor for ultimate recovery success. I propose that either a recovery residence definition or occupancy provision limit the occupancy to no more than ten people living together in a recovery home. This size of group is likely to support improved recovery success rates, maintain the peer-support and family like system, minimize the negative perceptions of the residents in the surrounding neighborhood, and reduce the risk of the city’s exposure to claims of discrimination.

### 3. Location, Location, Location

A restriction on minimum distance between recovery residences need not be discriminatory. An ordinance that limited the distance between recovery residences to 1,000 feet was facially discriminatory in one city but the court found that same distance was acceptable in another. These courts used a burden versus benefit analysis to determine whether a particular proximity limitation is discriminatory. If the burden of lack of access to adequate housing for the disabled person was greater than the benefit of the housing itself, the ordinance was discriminatory.

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132 Id.


135 Children’s Alliance, 950 F. Supp. at 1496; Sailboat Bend, 479 F. Supp. 3d at 1321.

136 Id.
The nature and size of the city is a factor to be taken into consideration. In some cities, the distance between group homes for disabled persons may result in a city with no group homes. For example, Bellevue, Washington had a dispersal ordinance struck as discriminatory because the limitations on group homes completely eliminated the ability for a group home to operate anywhere in the city. But, in Ft. Lauderdale, the court found the same type of limitation acceptable because the mere fact that a sober home could exist in that residential zoning district was evidence enough that the limitation on the proximity was not discriminatory. The court reasoned that because groups of three or more unrelated persons who were not disabled were restricted from that residential zone completely and the same size of a group of disabled persons was permitted, the ability to have a home in that zone was a benefit that outweighed the burden placed by proximity restrictions.

In Raleigh, North Carolina, a proximity restriction of 375 yards between sober homes was found acceptable for the same reasons; the benefit to disabled persons who live in that zone outweighed the burden of disbursal. The only difference between Raleigh and Ft. Lauderdale, was Raleigh’s occupancy cap of four unrelated persons.

The government has a legitimate interest in preventing overconcentration of recovery homes in one area. Many cities argue they have enough recovery residences disbursed throughout the city to serve the needs of the person recovering from drug and alcohol addiction. Alternately, it argues that too many recovery residences in a geographic area defeats the purpose of reintegrating

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137 T. Peter Pierce, Regulating Sober Living Homes and the Challenges of Implementing the ADA & FHA, LEAGUE OF CALIFORNIA CITIES (May 4, 2016), https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/Spring-2016/5-2016-Spring-Regulating-Sober-Living-Homes-and-th.aspx [https://perma.cc/VBZ5-TEKJ].
138 Id.
139 Children’s Alliance, 950 F. Supp. at 1500.
140 Sailboat Bend, 479 F. Supp. 3d at 1305, 1318.
141 Sailboat Bend, 479 F. Supp. 3d at 1305, 1310, 1311, 1319, 1333 (ruling in favor of the City because Sailboat lacked convincing evidence to claim denial of their reasonable accommodation to have more unrelated persons living in the home than allowed by code and be within 1,000 feet of another sober home on the basis that it was facially and effectively discriminatory).
143 Id. at *8.
144 Children’s Alliance, 950 F. Supp. at 1499.
145 Pierce, supra note 137, at 6.
sober persons back into the residential environment because it creates a more institutional setting as opposed to a residential setting.\textsuperscript{146} This argument has been successful when supported by evidence of overconcentration.\textsuperscript{147} If the government can show there are a sufficient number of recovery residents available to the disabled person, the city may be successful in limiting the number of homes within a specific location without being discriminatory.\textsuperscript{148} Based on the individual needs of the community, proximity restrictions on the distance between recovery residences in a residential zoning district of 375 feet to 1,000 feet have prevailed against discrimination claims.\textsuperscript{149} I propose, if supported by the evidence of overconcentration, according to the nature and size of the city, any proximity restriction be limited to no more than 1,000 feet between recovery residences.

B. Prohibitions

Industry trade groups best practices\textsuperscript{150} and the 2021 Model Act suggest that licensing schemes, “good neighbor” policies, and recovery monitoring should be included in recovery residence ordinances.\textsuperscript{151} Such requirements are overreaching, border on invasion of privacy, and may infringe on a person’s Constitutional right to practice a religion of his choice. I strongly suggest local governments not include provisions such as these in its recovery residence zoning ordinances.

1. Licensing Schemes

Licensing schemes and certification requirements are the subject of recent lawsuits against local governments and should not be included in recovery residence ordinances.\textsuperscript{152} Many cities require

\begin{itemize}
\item \textsuperscript{146}\textit{Pierce, supra} note 137, at 6.
\item \textsuperscript{147} \textit{Id.} at 9-10, 13.
\item \textsuperscript{148} \textit{Id.} at 10-11.
\item \textsuperscript{149} \textit{Sailboat Bend}, 479 F. Supp. 3d at 1332-33.
\item \textsuperscript{151} \textit{See generally} LEGIS. ANALYSIS AND PUB. POL’Y ASS’N, \textit{supra} note 75.
\item \textsuperscript{152} \textit{See generally} Ariz. Recovery Hous. Ass’n v. Ariz. Dep’t of Health Servs., 462 F. Supp. 3d 990, (D. Ariz. 2020) (claiming the requirement for a license and the conditions to obtain one (including the licensure fees due to the state) have caused him presumed irreparable harm, that it will continue to occur, and that the effect of the requirements are
permits to operate a recovery home in a residential district. These licenses have numerous requirements including the creation of “house rules” and onsite managers. One statute even goes so far as to regulate interior décor. The 2021 Model Act calls for a system where recovery homes can only operate if they have been “certified.”

In March 2021, California, which does not have state requirement for licensure of recovery homes, admonished the city of Encinitas for requiring a permit as it “impose[d] many other different requirements on Group Homes than other residential uses” which created unduly burdensome provisions for these owners as opposed to other owners of homes in the same zoning district. The state reasoned that any different treatment of homes in this district based on disability was in and of itself unduly burdensome to the disabled person. It insisted that Encinitas repeal its ordinance to remove such license requirement as it violated state law prohibiting discriminatory land use practices. In response, Encinitas repealed their ordinance in its entirety. The Sixth Circuit held that a Stow, Ohio’s sober living home license requirement imposed “onerous safety and permit requirements on single-family residences occupied by . . . disabled persons” that were not imposed on other single-family residences in violation of the FHA.

As of 2020, California, Florida, Indiana, Massachusetts, and Ohio do not require certificates or licenses to operate recovery

See generally Letter from Megan Kirkeby to Pamela Antil, supra note 36.

Id. at 1.


residences. Some states have introduced bills to amend their recovery residence regulations, but most do not include certificate or licensing requirements to operate unless the operator is receiving public funds or referrals from government agencies. Costa Mesa, California; Del Rey Beach, Florida; Prescott, Arizona, and the State of Utah all have certification requirements and each law with such a requirement is currently or has recently been the subject of some form of lawsuit, investigation, or injunction.

In Utah, one sober living home operator is fighting back and claims city permit requirements are so “economically unfeasible and operationally impractical” that sober living homes will shut down and leave the disabled residents burdened by homelessness. He claims the license fees are excessive, the reporting and disclosure requirements are an invasion of privacy, and the interior requirements such as minimum room size requirements, lighting, bedroom occupancy, and personal decorating limits discriminate against the disabled residents and make meeting these conditions so onerous that the home may be forced to close its doors. The Utah statute requires licensing for all but Oxford Houses and the license is subject to local government approval.

The DOJ, in their 2016 statement on the application of the Fair Housing Act in state and local land use law, made it clear that requiring permits for unrelated disabled persons to occupy a single-family residence is discriminatory when there is no permit requirement for unrelated persons to occupy a single-family residence in the same district. The difference in treatment is based on disability, whether the effect is intended or not.

2. “Good Neighbor” Policies

Permits or certificates often require the recovery residence have and follow a “good neighbor” policy. For example, to obtain

164 Id. at 7-52.
165 Id. at 24-27.
166 Bonner, supra note 155.
167 Id.
168 Eric Martin et al., supra note 163, at 27.
169 U.S. DEP’T OF HOUS. & URB. DEV. & U.S. DEP’T OF JUST., supra note 47, at 3.
170 Id. at 4.
171 NAT’L COUNCIL FOR BEHAV. HEALTH, supra note 94, at 22-25.
certification by the Ohio Recovery Housing organization, an affiliate of the National Alliance for Recovery Residences, a house must provide the organization with a good neighbor policy the residents agree to follow as a condition of living in the home.\textsuperscript{172} Some states provide general guidelines for creating a good neighbor policy.\textsuperscript{173}

One recovery house claims their residents are required to volunteer in the neighborhood, “[l]ook for ways to chip in,” keep voices low, say “please” and “thank you,” and have common sense.\textsuperscript{174} One trade organization describes a good neighbor as one who participates in the community, blends in as a single-family, and otherwise integrates with the surrounding community.\textsuperscript{175}

The supporters claim that being a good neighbor “reinforce[s] mutual respect, self-regulation, and a community-orientation.”\textsuperscript{176} Unfortunately, many recovery home residents have been met with disdain, hostility, and prejudice from their neighbors.\textsuperscript{177} Encinitas had a provision that required a sober living operator to contact each owner of record and resident of all the properties within five hundred (500) feet of the proposed location and the State of California claimed that requirement was “stigmatizing” and would create undue prejudice from the neighbors.\textsuperscript{178} On more than one occasion, neighbors have attended public hearings of zoning appeals and expressed concerns that were found to be based on stereotypes, fears, and prejudices.\textsuperscript{179} Some have even gone so far as to place yard signs and do video surveillance causing residents to feel unwelcome in their home which ultimately resulted in the residents leaving the community.\textsuperscript{180}

The DOJ reminds localities that the government is prohibited from acting based on “fears, prejudices, stereotypes, or
unsubstantiated assumptions” that a community has about a disabled person or class of persons and cannot create an ordinance or deny a reasonable accommodation because of the community’s same “fears, prejudices, stereotypes, or unsubstantiated assumptions.” Requiring “good neighbor” policies in an effort to appease concerned neighbors, gives effect to and perpetuates those fears and stereotypes and should be avoided.

3. Relapse Monitoring

Recovery residence ordinances and permits that require the residents of a recovery home attend AA, or other AA based 12-step recovery meetings, risk both discrimination claims under the FHA and ADA and claims of violation of a person’s religious freedoms.

A 2023 employment lawsuit between the Equal Employment Opportunity Commission (EEOC) and United Airlines found an employer’s requirement that a pilot suffering from alcoholism attend AA meetings violated his rights to religious freedom. The pilot claimed AA was a Christian program because the program refers to “God” and since he was Buddhist and did not believe in God, attending such meetings violated his religious beliefs. United Airlines refused to allow him to return to work even when he asked for a reasonable accommodation to attend an alcohol recovery program that agreed with his religious beliefs.

The EEOC argued that United Airlines violated his religious freedoms by specifying he attend AA meetings and for failing to make reasonable accommodations for him to attend different meetings. Not only did this cost United Airlines in excess of $305,000 to settle the EEOC lawsuit.

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181 U.S. DEP’T OF HOUS. AND URBAN DEV., supra note 47, at 5.
184 Id.
186 Id. at 5.
187 Press Release, EEOC, supra note 183.
$300,000 in damages to the pilot, it also costs them court costs and legal fees to defend the case.\textsuperscript{188}

The Encinitas, California ordinance initially required sober living residents to be actively participating in a recovery program and maintenance of “records of attendance.”\textsuperscript{189} Additionally, any persons who did not participate would be evicted.\textsuperscript{190} However, the State of California struck this provision.\textsuperscript{191} The State enforced the understanding that a disabled person is not only a person who is “actively participating in [a] recovery program” but also one who has completed it.\textsuperscript{192} California also justified their reasoning by pointing out that requiring and monitoring attendance in a recovery program would detract from the familial setting and create a more institutionalized living arrangement in direct opposition of the city’s purpose of limiting the concentration of recovery homes so as not to negatively impact the residential character of the neighborhood.\textsuperscript{193}

Supporters of monitoring may rely on holdings like the one Ohio where the court held that the FHA protections do not apply to persons participating in “current, illegal use of or addiction to controlled substance[s]”\textsuperscript{194} and that monitoring his abstinence using proof of at AA meetings supported the plaintiffs claim that he remained protected under the ADA and therefore protected from discrimination based on his disability.\textsuperscript{195} However, monitoring abstinence by proof of attendance at AA (or other 12-step) meetings is not proof a person is abstinent.

Using the state of California’s reasoning, that completion of a recovery program is sufficient to meet the disabled requirement under the ADA, attendance at AA (or other 12-step) meetings is a violation of anti-discrimination protections under the ADA.\textsuperscript{196} This requirement also carries a risk of impeding a person’s right to religious freedom.\textsuperscript{197} Involvement in recovery meetings does positively impact long term recovery,\textsuperscript{198} but, to avoid exposure to

\textsuperscript{188} Id.
\textsuperscript{189} Letter from Megan Kirkeby to Pamela Antil, supra note 36, at 6.
\textsuperscript{190} Id.
\textsuperscript{191} Id. at 9-10.
\textsuperscript{192} Id. at 6-7.
\textsuperscript{193} Id. at 6.
\textsuperscript{194} Lake-Geauga, 2021 U.S. Dist. LEXIS 51814, at *19.
\textsuperscript{195} Hernandez v. Hughes Missile Sys. Co., 362 F.3d 564, 569 (9th Cir. 2004).
\textsuperscript{196} Letter from Megan Kirkeby to Pamela Antil, supra note 36, at 7.
\textsuperscript{197} Press Release, EEOC, supra note 183.
\textsuperscript{198} Douglas L. Polcin et al., What Did We Learn from Our Study on Sober Living Houses and Where Do We Go from Here?, 42(4) J. OF PSYCHOACTIVE DRUGS 425, (2010),
litigation risks, the government should avoid imposing AA or AA based 12-step meeting attendance.

4. Requirement for an On-Site Manager

Many sober living home statutes and operating permits require an onsite manager or resident house manager who monitors the activities of the residents. A house manager is a person designated either by the operator or appointed or elected by members of the residence. The house manager is often responsible for the day-to-day operation of the residence and performs duties such as accepting and denying applications, records maintenance, and monitoring the residents’ adherence to house policies.

The disputed Encinitas zoning ordinance initially called for an on-site house manager and the state of California struck down this provision of their ordinance claiming it was discriminatory in that it imposes a housing requirement for disabled persons that it does not for those occupants of neighboring residential dwellings that are not disabled, such that it is “in conflict with the FHA.” The state reasoned that the requirement was unduly burdensome on the disabled person(s). In effect, it was cost prohibitive to have an on-site manager and would make a recovery residence financially incapable of continuing to operate, displacing the residents, and increase homelessness. The state reasoned that the effect of requiring an on-site house manager would be in direct conflict with other interests of the city to combat homelessness.

Recovery residences aim to provide a family atmosphere to promote the function of domestic life and the presence or requirement of a house manager would detract from that intention. In order to maintain the family atmosphere and aid in mutual support, the members of the home should govern the house as a family unit would. The government should avoid a statutory

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3057870 [https://perma.cc/5N8E-2C94].

200 LEGIS. ANALYSIS AND PUB. POL’Y ASS’N, supra note 75, at 8-9.
201 Id.
202 Letter from Megan Kirkeby to Pamela Antil, supra note 36, at 6.
203 Id. at 7.
204 Id.
205 Id.
207 Letter from Megan Kirkeby to Pamela Antil, supra note 36, at 7.
requirement for a house manager. Therefore, because many licensing requirements run a serious risk of infringing on the disabled persons rights and freedoms, local municipalities should avoid a license or permit requirement for recovery residences in residential zoned districts.

CONCLUSION

This Comment “is meant to be suggestive only.” It is meant to offer a perspective on regulatory provisions that have been challenged and how they have either failed or prevailed. It offers suggestions for a clear definition of “recovery residence” that includes a limitation on the number of unrelated occupants. It suggests limits to disbursing recovery homes to avoid oversaturation while still providing reasonable access to recovery homes in residential neighborhoods and it suggests burdensome, and potentially discriminatory, requirements such as certifications and licensing schemes, “good neighbor” policies, requirement of attendance at AA meetings, and house managers should be avoided.

Addiction problems and their secondary effect are not going away. Access to affordable and appropriate housing is getting more difficult. Not only are recovering drug addicts and alcoholics impaired in their ability to function in life, they are often limited in their housing choices, especially in early recovery.

Lawmakers have the power and position to influence positive change, even if it is in one small sector of recovery. By reconsidering the way exclusionary zoning impacts sober living homes, they can reduce their city’s exposure to litigation risk, address the concerns of their voters, and provide protected resources for those recovering from drug addiction and alcoholism.

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208 See generally, Letter from Megan Kirkeby to Pamela Antil, supra note 36.