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"ALCOHOL AND DRUG REHAB HOMES— CLASSIC NIMBYISM OR EVERYONE'S FAIR SHARE?"

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The treatment of alcoholism and drug abuse in the United States has undergone a sea change since the 1950's. Formerly considered a social and moral disgrace, societal viewpoints and attitudes have dramatically changed. Consonant with that change, the matter and method of treating the problem has changed with it. The location of treatment facilities in remote areas or in commercial or industrial zones, together with the hospitalization of patients, has now changed, too.

Now, a steady, deliberate effort is being made across the country to relocate the facilities and their occupants to residential neighborhoods, often in single family homes with six or fewer patients, exclusive of staff.

This trend puts American living and neighborhoods on a collision course with treatment for these addictions. Residents, including minor children, are coming face-to-face with addicts and patients in their own neighborhoods, often as next-door neighbors and primarily in areas where, formerly, high-value and highly desirable housing has been located. Not surprisingly, this trend causes great tension and now, an explosion of litigation and sometimes feverish legislative efforts to "control" and to regulate the establishment and maintenance of these small, residential-in-scale and in location, facilities. How do cities and counties cope with this drastic change, with the discontent of their citizens and neighborhoods and the dramatic increase of Federal Fair Housing legislation designed to pre-empt local and municipal zoning and land-use regulations?

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Contemporaneous news reports by local media are probably the best way to divine the viewpoints, feelings and concerns of the neighbors themselves. The City of Newport Beach, CA, has been at the forefront of this controversy recently because of the beauty and value of the real property as well as the wealth of the neighborhoods, the costs charged to the patients for the treatment, and the reactions of the residents as a result. The primary local newspaper in the region, the Orange County Register, in publishing a series of articles profiling the residents and their reactions, captured these series of quotes:

> *"We've seen horrendous, horrible things," said Cindy Koller, a member of Concerned Citizens of Newport Beach, which is suing the City and various rehab home companies for $250 million. "This is now a prison without walls as far as I am concerned," Koller said of her neighborhood, which she said has endured rampant profanity and menacing behavior at the hands of recovering addicts.*[1]

The same article, though, discloses that the opinions are somewhat divided:

> *Interviews suggest nuanced and tolerant perspectives are held toward the dozens of rehab homes along the City's western shore. "I've been here six years. I don't have a bad thing to say about them," said Clint Langford, who rents a 40th Street apartment by a duplex operated by Sober Living by the Sea, Newport's largest rehab business ... Seashore Drive resident Bill Spitalnick lives by a rehab home, but says that in his eleven years on the block, he's been "bothered more by barking dogs than the Sober-Living people." ... Reza Gouhari, a 39th Street resident said he sides squarely with Concerned Citizens of Newport Beach. But he conceded that his complaints were less tangible than the group's reports of overdoses and residential break-ins by recovering addicts. It's mainly a "general feeling that they don't belong here" Gouhari said.*[2]

Many of the detrimental conditions have been quantified to much better effect by attorneys and municipalities on both sides of this dispute. For example, the City of Newport Beach retained independent counsel to issue a staff report to its City Council on December 11, 2007. It quantified the concerns this way:

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As the amount of group residential facilities (residential treatment facilities, "Sober Living" homes, boarding houses, and care facilities) has grown, residents and Council members have been concerned that too many of these homes in certain areas cause adverse secondary effects, like:

- *Extensive second-hand smoke;*
- *Higher levels of profanity and lewd speech;*
- *Slower or gridlocked transportation routes, if such routes are blocked by transit vans;*
- *More frequent deliveries (laundry, food, medicine, office goods) than is typical for a residential area;*
- *Noise and traffic associated with more frequent trash collection;*
- *Lack of frequent trash collection, in some instances, leading to vermin and odors;*
- *Persons unwillingly removed from the facilities left "on the streets" with few resources to return home, leading to scavenging or petty theft;*
- *Excessive debris, including cigarette butts, on sidewalks, in gutters, on streets; and/or*
- *Illegal smoking in public places where smoking is banned, including oceanfront walk and beaches.*[3]

Some of the neighborhood concerns have been outlined in legislative attempts to regulate or restrict or limit the concentration of the homes and their location. One of these efforts, Senate Bill SB 1000, introduced by State Senator Tom Harman of the 35th Senatorial District, a part of which encompasses the Newport Beach area, attacks the problem by trying to regulate the operators at the state level, in a sense, enacting state zoning laws. In a staff report prepared by the Legislative Analyst for preparation for the bills' argument and amendment, the positions of the proponents were summarized:

Supporters argue that SB-1000 will protect the quality of life and maintain the character of residential neighborhoods against the adverse impacts of residential recovery homes and group homes. Supporters argue that residential recovery homes and group homes are being run as business ventures in residential zones with little or no ability by the local or state government to regulate or mitigate the adverse impacts that commercial businesses can have on a residential community. The City of San Clemente points out that tough Federal housing protections for recovering addicts leave cities virtually powerless to regulate the recovery homes ....[4]

Not surprisingly, though, these concerns are pitted against an enormous profit potential for the home operators, a fact that hasn't been lost on their lobbyists or, for that matter, the legislators and others who are making the decision about whether to further regulate group homes or residential recovery homes. Again, using the City of Newport Beach as an example, the numbers describing the concentration of the facilities tell the story:

Specifically, the City of Newport Beach:

- *Has 2.63 licensed recovery beds per 1000 residents ....*
- *Is home to only 2.7-2.8 % of the total population of Orange County, but is host to approximately 14.6% of all licensed residential beds in the County; and*
- *Has at least 26 licensed residential alcohol and drug treatment and recovery facilities. Those facilities provide a total of 213 licensed residential beds, and are licensed for a total occupancy of 238 individuals....*
- *Has at least 54 unlicensed facilities, most with six or fewer residents, and most operated by one of two large local operators (Sober Living by the Sea and Morningside Recovery).... Of the 34 cities in Orange County, 18 have no ADP (California Department of Alcohol and Drug Programs)—licensed residential beds at all, and six cities have only one or two licensed residential recovery facilities .... In summary, the City is likely to have the highest amount of residential recovery facilities in Orange County and possibly the State.*[5]

The statistics bear out the problem of the over-concentration. The legislative staff analyst's report, though, brings up the very good point that Federal law interferes with the ability of a municipality to heavily regulate alcohol and drug rehab homes. Probably the most topical body of law on that point is the 1988 Fair Housing Amendments Act ("FHAA" 42 USC Section 3601 et. seq.). That body of law gives the plaintiff a right to establish a discrimination claim under its terms under a theory of disparate treatment,

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disparate impact, or a failure to make reasonable accommodation.[6] A "White Paper" prepared by attorneys for a residential recovery facilities conference of March 2, 2007, hosted by the City of Newport Beach, but held open to statewide participation, summarizes both the holding of a primary Federal appellate case in the field, *Gamble v. City of Escondido*, 104 F.3d 300, 19 A.D.D. 740 (9th Cir. 1997), and the text of the Fair Housing Amendments Act:

> *C. Disparate Treatment. To bring a disparate treatment claim, plaintiff must first establish a prima facie case showing: 1. the plaintiff is a member of a protected class; 2. the plaintiff applied for a permit or other approval and was qualified to receive it; 3. the permit was denied despite the plaintiff being qualified; and 4. the defendant approved permits for similarly situated parties during a period relatively near the time the plaintiff's request was denied. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the action. If the defendant satisfies the burden, the plaintiff must prove by a preponderance of the evidence that the defendant's reason is a mere pretext. Proof of discriminatory motive is crucial to a disparate treatment claim. (Gamble, supra, 104 F.3d at 305).*
>
> *D. Disparate Impact. To establish a prima facie disparate impact claim, a plaintiff must establish at least that the defendant's actions had a discriminatory effect by showing the following: 1. occurrence of certain outwardly neutral practices; 2. significantly adverse or disproportionate impact on persons of a particular type produced by facially neutral acts or practices. (Gamble, supra, 104 F.3d at 306.)*
>
> *E. Reasonable Accommodations. A municipality may commit discrimination if it refuses to "make reasonable accommodations and rules, policies, practices, or services, when such accommodations may be necessary to afford [the physically disabled] equal opportunity to use and enjoy a dwelling." (Gamble, supra, 104 F.3d at 307; citing 42 U.S.C.A. 3604 (3)(b)).*[7]

The morass of Federal as well as State legislation that exists to give alcohol and drug rehab operators relative freedom from local zoning and land use regulation is daunting. Municipalities in the State of California attempted to expand their power to regulate the use (SB 1000); the legislation was soundly defeated in committee, at least partly because of an Attorney General's opinion that indicated that at least State law in California preempted it:

> *The second question concerns whether a city may limit the number of treatment facilities serving six or fewer persons within its boundaries. For example, may a city enact an ordinance requiring that in addition to licensure by the Department, the prospective operator of a treatment facility must obtain the city's approval if the facility will be locate within 500 feet of an existing treatment facility? We conclude that it may not.*
>
> *The Constitution provides that the county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. (California Constitution, Article XI, Section 7) The rules to be applied in determining whether a city's ordinances would conflict with general laws were recently summarized in California Veterinary Medical Association v City of West Hollywood (2007) 152 Cal App 4th 536, 548:*
>
> *"The California Constitution reserves to a county or city the right to 'make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws.' 'If otherwise valid local legislation conflicts with State law, it is preempted by such law and is void.' [citations] A prohibited conflict exists if the local ordinance duplicates or contradicts general law or 'enters an area that either expressly or impliedly fully occupied by a general law' ...[citations and footnotes omitted]."*
>
> *"[I]n articulating the test for preemption the Supreme Court was concerned with ensuring that a state law does not infringe legitimate municipal interests other than that which the state law purports to regulate as a statewide interest." (City of Watsonville v State Department of Health Services (2005) 133 Cal App 4th 875, 889 .... Here the State law in question has the precise aim of regulating local zoning requirements in pursuance of a statewide interest. The legislature clearly intended to prevent local governments from applying any zoning clearances to small treatment facilities by mandating that they be treated the same as other single family residences for zoning purposes. The legislature may properly look to the statewide need, rather*

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than the local need, to overcome a charter city's municipal interest."[8]

The discussion of the six (6) or fewer occupancy law reflects California law that, as long as no actual treatment is rendered within the home; that the patients are simply housed, no permit or license of any kind is necessary. However, the lack of a license then allows the municipalities to zone and regulate them with established, standard zoning criteria, as long as those criteria are not violative of Federal Fair Housing law. If the facility is providing *"24-hour residential nonmedical services to adults who are recovering from problems related to alcohol, drug ..., misuse or abuse, and who need recover treatment or detoxification services" (California Health and Safety Code Section 11834.02, subd. (A))*, then the facility needs a license and an additional layer of regulation is emplaced by the State, but the State then preempts local regulation.

The net effect of this Attorney General's opinion that's cited above, in concert with assertion of the Federal law encompassed in the Fair Housing Amendments Act of 1988, essentially eviscerated the bill and effectively prevented the municipalities from expanding their ability to regulate group homes. SB-1000 was doomed to failure; although other legislation is now pending, it doesn't appear likely that that legislation will have much effect or impact.

In a telephone conversation with Senator Tom Harmon's office of Tuesday, July 29, 2008, the Senator's legislative aide, Brandy Huusfeldt, indicated that the original bill comprised twenty pages; after the legislative analysis and the Attorney General's opinion, it was cut down to one. The impact of the Fair Housing Amendments is therefore clear; it is a potent and formidable barrier to municipalities trying to respond to the complaints of its citizens about the negative effects of these facilities.

To put this situation in context requires the casting of a broader net. How have other states applied both their own law and Federal law in regulating this use? And with that law, how have Federal courts confronted with challenges to those regulations by highly organized and well-funded plaintiffs, reacted to these challenges?

Surprisingly, not all the opinions have been adverse to the municipalities. The first one that bears examination is the 1996 case of *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 14 A.D.D. 644 (8th Cir. 1996). That case involved two recovery homes operated by Oxford House, Inc., a well-organized and experienced nationwide operator of alcohol and drug rehab cooperative living homes located nationwide. Oxford House has been involved in numerous lawsuits of this type, as a cursory review of litigation registers nationwide will attest. The 1996 case appears somewhat typical in its facts. As the Appellate Court described it:

> *Oxford House-C and Oxford House-W are self-supporting, self-governing group homes for recovering alcoholics and drug addicts in the City of St. Louis. The Oxford Houses provide a family-like atmosphere in which the residents support and encourage each other to remain clean and sober, and immediately expel any resident who uses drugs or alcohol .... The houses also receive assistance from Oxford House, Inc., a national organization of Oxford Houses across the country.*
>
> *Oxford House-C and Oxford House-W are located in St. Louis neighborhoods zoned for single family dwellings. The city zoning code's definition of single family dwelling includes group homes with eight or fewer unrelated handicapped residents [citation omitted]. After city inspections revealed that more than eight recovering men were living at each Oxford House, the City cited the houses for violating the First Amendment.*
>
> *Rather than applying for a variance excepting them from the eight-person rule, the Oxford Houses, the DMH/ADA, and Oxford House, Inc. (collectively Oxford House) brought this lawsuit against the City, contending the City's attempt to enforce the rule violated the Fair Housing Act, as amended, 42 USC sections 3601-3631.... Holding the City had violated the Fair Housing Act and the Rehabilitation Act by enforcing the eight-member limit against the Oxford Houses, the District Court enjoined the city from using its zoning code to prevent the Oxford Houses from operating with their existing number of residents .... We reverse the judgment for Oxford House, vacate the injunction, and remand the counter claim for further consideration". Oxford House, 77 F.3d at 250-251.*

The Appellate Court reversed the lower court's granting of the injunction, at least in part, because the Appellate Court believed the District Court misconstrued the Act:

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We also reject the City's contention that under 42 USC Sections 3607(b) (1), the City's limits on the number of unrelated people who can live together in a single family residential zone are exempt from the Act's requirements. The Supreme Court held recently Section 3607(b)(1) only exempts total occupancy limits intended to prevent overcrowding in living quarters, not ordinances like the City's that are designed to promote the family character of a neighborhood. City of Edmonds v Oxford House, Inc., 115 S.Ct.1776, 1779 ....

.... The City does not contest the District Court's conclusion that the Oxford House residents are handicapped within the meaning of the Fair Housing Act because they are recovering addicts. The issue is whether the City has unlawfully discriminated against, failed to accommodate, and interfered with the housing rights of these handicapped men.

Rather than discriminating against Oxford House residents, the City's zoning code favors them on its face. The zoning code allows only three unrelated, non-handicapped people to reside together in a single family zone, but allows group homes to have up to eight handicapped residents. [citations omitted] Oxford House's own expert witness testified "Oxford Houses with eight residents can provide significant therapeutic benefits for their members." The District Court nevertheless found the City's zoning ordinances are discriminatory because the eight-person limit would destroy the financial viability of many Oxford Houses, and recovering addicts need this kind of group home. Even if the eight-person rule causes some financial hardship for Oxford Houses, however, the rule does not violate the Fair Housing Act if the City had a rational basis for enacting the rule. [citations omitted].

We conclude the eight-person rule is rational. Cities have a legitimate interest in decreasing congestion, traffic, and noise in residential areas, and ordinances restricting the number of unrelated people who may occupy a single family residence are reasonably related to these goals. [citation omitted] The City does not need to assert a specific reason for choosing eight as the cutoff point, rather than ten or twelve. "Every line drawn by a legislature leaves out some that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." [citation omitted] We conclude the City's eight-person restriction has a rational basis and thus is valid under the Fair Housing Act .... 77 F.3d at 251-252 (emphasis added).

The opinion went on to discuss at some length the lack of proof of bias or intent simply by the enactment of the regulation. Occupancy limits such as this one enjoyed Supreme Court as well as Federal Appellate Court sanction and approval, at least since the 1991 case of *Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.*, 923 F.2d 91 (8th Cir. 1991). In *Familystyle*, the 8th Circuit upheld group home dispersal requirements between homes for the mentally ill, finding that

> *The quarter mile spacing requirement guarantees that residential treatment facilities will, in fact, be "in the community" rather than in neighborhoods made up of group homes that recreate an institutional environment.... 923 F.2d at 94.* [9]

Interestingly, though, the degree of scrutiny that reviewing courts apply to these ordinances is in a state of flux throughout the country. The Second Circuit has not yet ruled on the appropriate standard for evaluating the validity of state statutes that are facially discriminatory under the FHAA, and the courts of appeals that have considered the question are divided. The 8th Circuit has subjected such statutes to "rational basis" scrutiny. See *Oxford House-C v City of St. Louis*, 77 Fed 3rd 249 (8th Circuit 1996; *Family Style of St. Paul, Inc. v City of St. Paul, Minn.*, 923 Fed 2nd 91-94 (8th Circuit 1991). The 6th, 9th and 10th Circuits, by contrast, have applied more searching scrutiny. For example, the 9th Circuit has held that facially discriminatory restrictions pass muster under the FHAA only if the defendant shows either "*1. that the restriction benefits the protected class or 2. that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes ....*" *Sierra v. City of New York*, 552 F. Supp.2d 428 (2008); but see *Larkin v. Michigan Dept. of Soc. Serv.*, 89 F.3d 285, 290(1996) ("Plaintiffs are just to reject the rational basis test and adopt the standard announced by the 10th Circuit, which requires the defendant to show that the discriminatory statutes either 1. are justified by individualized state safety concerns, or 2. really benefit, rather than discriminate against, the handicapped and are not based on unsupported stereotypes.").

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The 9th Circuit, encompassing California and Idaho, has elected to follow the 6th and the 10th Circuits, as they put it, "more searching method of analysis":

> *We have not previously adopted a standard for determining propriety or acceptability of justifications for facial discrimination under the Fair Housing Act. The Circuits that have addressed this issue are split. The 8th Circuit employs the same standards for analyzing a defendant's rationales and challenges under the Fair Housing Act as it applies to claims under the Equal Protection Clause. See Oxford House-C v City of St. Louis, 77 Fed 3rd 249, 252 (8th Circuit 1996) (Applying rational basis review to a defendant's proffered justifications for an ordinance that facially discriminated against disabled persons); Family Style of St. Paul v. City of St. Paul, 923 Fed 2nd 91, 94 (8th Circuit 1991(same). The 6th and 10th Circuits employ more searching method analysis. To allow the circumstance of facial discrimination under the 6th and 10th Circuits' approach, the defendant must either: 1. that the restriction benefits the protected class or 2. that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotype.... We will follow the standard adopted by the 6th and 10th Circuits, which standard is, we believe, more in line with the Supreme Court's analysis in Johnson Controls. Moreover, the 8th Circuit's approach is inappropriate for Fair Housing Act Claims because some classes of persons specifically protected by the Fair Housing Act, such as families and the handicapped, are not protected classes for Constitutional purposes. Community House, Inc. v City of Boise , 490 F.3d 1041, 1050 (2007).*

So how does this split of authority and difference in philosophy play out in the context of current ordinances and the tension between cities and their citizens trying to regulate and de-concentrate alcohol and drug rehab homes and their deleterious effects?

The main weapon that municipalities have in the fight to try to regulate the location, density and use of group homes and rehab facilities are municipal zoning ordinances that talk about them. The mechanism that many of them use to try to "rein in" these uses and these problems is partly by defining the uses and then limiting them.

One of the areas that ordinances try to limit is that of over-concentration. For example, the city of Riverside, CA, requires a 300-foot separation between any two different or same type of group housing, transitional shelter, permanent emergency shelter, or drop-in center. The City of Riverside requires a 1,000-foot separation where any of the uses is a parolee/probationer home. [10]

This idea isn't limited to California; in a 1997 article prepared for the State of Washington State Bar Association Land Use Conference, the City of Vancouver, WA City Attorney talked about it as well:

> *Requiring a mandatory minimum distance between group homes would seem to limit the number of housing opportunities available to handicapped persons in a community and thus violate the FHAA. Surprisingly, however, some advocates for group homes promote dispersion and a number of states have enacted statutory dispersion requirements. [see Kevin Zanner [sic], note, Dispersion Requirements for the Siting of Group Homes: Reconciling New York's Padvian Law with the Fair Housing Amendments Act of 1988, 44 Buffalo Law Review 249 (1996)] The rationale behind this kind of policy is that by requiring group homes to be distributed throughout the community, the residents are able to live in mainstream residential neighborhoods rather than in a cluster of group homes segregated from the rest of the community.*[11]

This is a topic that, apparently, many states already covered. In Arizona, by 1986, a 1,200-foot requirement between homes was enacted (See Arizona Revised Statutes Section 36-582H). In Colorado, the limit was 750 feet between homes (See Colorado Revised Statutes Section 30-28-115(2)(b) (1986)). In Connecticut, as of 1994, the limit was 1,000 feet (See Connecticut General Statute Section 8-3F). In the State of Delaware the distance was quite large; 5,000 feet between homes; and in Indiana 3,000 feet between homes; in Iowa size of a city block between homes and, in other examples, Michigan 1500 feet between residences and 3,000 feet in cities over one million in population; "no excessive concentration".[12]

One of these ordinances in Pennsylvania, though, interestingly, banned the thousand (1000) foot spatial requirement because it created on its face:

> *an explicit classification based on handicap which restricted the ability of persons with handicaps to live in a community of their choice.*[13]

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That case, *Horizon House Developmental Services, Inc. v Township of Upper South Hampton*, 804 F. Supp. 683, 685, affd, 995 F.2d 217 (3d Cir. 1993), involved these facts:

> *In 1988, Horizon House, a group home provider, announced its intention to open two group homes in Upper South Hampton, which had no dispersion requirement at the time. The plan met with strong objections from the neighborhood, and the township manager was directed by the Board of Supervisors to draft a group home ordinance. The first completed group home ordinance contained a 2,000-foot separation requirement. The town directed Horizon House to comply with the ordinance by applying for a use permit allowing the two homes to be located within 800 feet of one another. When this procedure proved fruitless, Horizon House applied for a variance which was also denied. The town enacted two additional group home ordinances, both of which had the effect of eliminating plaintiff's group home proposal because of the dispersion criteria. A fourth ordinance with a 1,000-foot dispersion requirement was drafted shortly thereafter, an attempt later characterized by the District Court as an effort by the town to achieve facial neutrality be deleting all reference to disability ....*
>
> *The first issue addressed by the Court was the facie validity of the group home ordinance. In determining whether the ordinance was valid on its face, the Court, citing International Union v Johnson Controls (1991) 499 US 187, looked to the explicit terms of the ordinance .... An ordinance may create an explicit classification on its face as long as it is enacted for a legitimate governmental purpose. The Court therefore addressed the town's justification for the ordinance. Recognizing the town's rationale as promoting the integration of handicapped individuals into the community, the Court applied a rational basis test and found that the town had provided no evidence that this justification was the basis for the decision to enact the ordinance. More importantly, the Court found that integration through dispersion was not an adequate justification under the FHAA .... The Court further stated that it was irrelevant that the spacing requirement also incidentally affected group homes for non-handicapped individuals. Thus, the ordinance on its face restricted the housing choices of individuals based on their handicaps and constituted a quota on the number of individuals with handicaps who can reside in the township. 44 Buffalo Law Review 249 at 269-270, citing Horizon House, 804 F. Supp. at 697.*

What's happening here? Clearly, there is a split of authority as to whether the dispersion requirement works to "de-concentrate" the number of homes. De-concentration is clearly a goal of the municipalities and the angry citizens. The City of Newport Beach's attempt to draft an ordinance to address this problem was mechanically laid out in the City's staff report of December 11, 2007 to its City Council:

> *B. Integral Facilities and Integral Uses. This ordinance defines "integral facilities" and "integral uses" [citation omitted]. In addition to defining the terms, the proposed ordinance states that the City will consider facilities that operate integrally to be a use subject to a use permit and therefore regulated similarly to small unlicensed facilities or general (seven and over) facilities ....*
>
> *C. Siting of New Facilities. The proposed ordinances change current law, which would allow various group residential uses in any zone in the City (some requiring an FEP) ("Federal Exception Permit"), to the following as shown in Table 1 .... Many existing group residential facilities—indeed most if not all of the unlicensed facilities—would become "legal non-conforming" upon adoption of this ordinance. All legal, non-conforming group residential uses would immediately be subject to the use permit process described below, and would have to apply for a use permit within ninety days of the passage of the proposed ordinance in order to continue their use. Group Residential Uses; December 11, 2007; City Council Staff Report; City of Newport Beach at pages 5 and 6.*

The Staff Report described the terms "integral facilities" and "integral uses":

> *In some cases, and in many cases in Newport Beach, facility operators network—or link—two or more facilities operationally. They may house clients in one house, and treat them in another or at a commercial location. They may transport clients in a single network of vans or shuttles. Staff may go from one house to another, offering counseling or other treatment services. Clients from various houses may all*

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attend a single large meeting together. The City considers this type of networking to make "six and unders" a different (and larger) type of use than a stand-alone use. Yet oftentimes the state licenses a handful of integrated facilities as distinctly separate six and unders. The proposed City ordinance contains a definition for "integral facility" and "integral use" so that the City can determine if such facilities should be regulated as a larger facility.[14]

Cities, then, are grappling with how to, in practice, "de-concentrate" these homes. If they comply with the "six and under" requirement, they are essentially unregulated, at least under California law. If the ordinance integrates them as a group, the city can attack the concentration issue. The specific language in the ordinance is worth review:

Integral Facilities: any combination of two or more residential care (small licensed, small unlicensed or general) facilities which may or may not be located on the same or contiguous parcels of land, that are under the control and management of the same owner, operator, management company or licensee or any affiliate of any of them, and are integrated components of one operation shall be referred to as integral facilities and shall be considered one facility per purposes of applying Federal, state, and local laws to its operation ....

Integral Uses: any two or more licensed or unlicensed residential care programs commonly administered by the same owner, operator, management company or licensee, or any affiliate of any of them, in a manner in which participants in two or more care programs participate simultaneously in any care or recovery activity or activities so commonly administered.[15]

In one sense, this is a revolutionary way of looking at the problem and a recognition of current business practices. Operating sober living centers, particularly in pleasant resort areas, is very big business; Sober Living by the Sea, one of the largest operators in Newport Beach, California is actually owned by Bain Capital, a large hedge fund. Costs to the patient can run as high as $30,000 per month for care and treatment. A brief review of the economics show the enormous profit potential for this use and, unfortunately, the motivation to abuse or bend zoning laws and by using this type of an ordinance the number of residents is defined by the entire premises, site, building or group of buildings that collectively provides services, not be a single building where separate buildings are integrated.

Another issue in breaking down the ordinances is the idea of how a "dwelling" is defined. The 2006 Federal case from the Eastern District of Pennsylvania, *Lakeside Resort Enterprises, LP v. Board of Sup'rs of Palmyra Tp.*, 455 F.3d 154 (3d Cir. 2006), involved this issue. Its primary headnote gives an excellent summary of the case and its holding:

The issue was whether a proposed drug- and alcohol-treatment facility qualified as a dwelling under the Fair Housing Act. Plaintiffs had lost a sale of resort property to buyers who intended to use the property as such a center due to the passage by the Supervisory Board of the ordinance, which prohibited such centers in a district that was zoned for community commercial use. The Appellate Court reversed. Due to funding restrictions, residents of the facility would stay there for 14.8 days on average, but the facility was intended for longer stays, and many stayed longer. Moreover, while they were there, they treated the facility like a home, eating together, receiving mail and visitors, and decorating their rooms. The Appellate Court, therefore, deemed the facility a dwelling under 42 USCS Sections 3602(b), 3604(f)(1).

What makes this case so interesting is that courts are bending over backwards to find that alcohol and rehab homes are, in fact, "dwellings." The Lakeside Resort Corp. case all but says so:

We must decide whether the proposed drug and alcohol treatment facility is a dwelling under the Fair Housing Act. In making this decision, we are to give a "generous construction" to the statute's "broad and inclusive" language. 455 F.3d at 156.

The loose and inclusive construction of the definition of what constitutes a "dwelling" has caused many of the ordinance writers to give up without a fight on the issue of whether alcohol and drug rehab homes are dwellings; they're looking at them from a density point of view and a concentration point of view instead. The overview of the applicable law shows that sophisticated, savvy operators will invoke Fair Housing Law or, if the operator is a religious entity, the Religious Land Use and Institutionalized Persons Act of 2000, to try to overturn a zoning ordinance that interferes with making money. See, e.g.,

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Men of Destiny Ministries, Inc. v. Osceola County, 2006 WL 3219321 (M.D. Fla. 2006).

In *Men of Destiny Ministries, Inc. v. Osceola County*, 2006 WL 3219321 (M.D. Fla. 2006),

> *MDM contends that it suffered discriminatory treatment for purposes of RLUIPA. Specifically, MDM points out that the Code permits 14 unrelated individuals to reside in a house and have religious study (even when provided by another), but those same 14 individuals could not do so if involved in a religious discipleship program. (Doc. 82 at 31).*

This Federal Court denied the application for the MDM plaintiffs to be relieved of having to comply with the Osceola County occupancy restrictions in a residential zone, complaining that it was an abuse of their freedom to practice religion. The Court disagreed:

> *But MDM is comparing apples and oranges. A group of people living together and engaging in religious study is simply not the same as a residential drug and alcohol rehabilitation facility, even if they share some characteristics. To demonstrate a violation of RLUIPA's Equal Terms provision, MDM would need to show that a secular rehabilitation facility or the like had been (or would be) treated better than its own religious-based facility. MDM made no such showing.*

Given the profit motives associated with the use of residential treatment facilities, it is unlikely that conflict between the communities and the operators will end soon. Unless and until the very real effects of these homes are mitigated, either by de-concentrating them and/or by regulating their density as well as addressing and resolving the health and safety issues surrounding them, the conflict will clearly continue. In an era where the concept of "community" is evoking an emotional response in citizens to less complex times, the transient nature of the residents of group homes interferes with the "sense of community" and will most certainly antagonize long time residents.[16] Property marketability and values will definitely decline; a concept that may not be politically correct but certainly a reality of the marketplace. In an era of declining property values and economic distress, this friction is bound to become worse; history has taught us the lesson that tolerance and inclusionary behavior deteriorate in bad economic times. Like so many of these conflicts, the responsibility for resolving them has fallen to the courts. Until a more comprehensive legislative solution is found to eventually resolve these conflicts, the economics of the activity will cause the problems to continue; there won't be a motivation for the operators to comply.

NOTES

1. Orange County Register "Newport Beach Residents are Mixed on Drug Rehab Homes," Jeff Overley; the Orange County Register, Part 2, P. 1, 9 (June 30th, 2008).
2. Orange County Register "Newport Beach Residents are Mixed on Drug Rehab Homes," Jeff Overley; the Orange County Register, Part 2, P. 9 (June 30th, 2008).
3. City Council Staff Report, City of Newport Beach, Subject: Group Residential Uses—Discussion with Special Counsel (Richards Watson Gershon) of Proposed Ordinances; James L. Markman and Roxanne Dioz, P. 1 (December 11, 2007).
4. Senate Health Committee Analysis; Senator Sheila J. Kuehl, Chair; Senate Bill SB-1000; P. 7 (Hearing Date: April 25, 2007).
5. City of Newport Beach, City Council Staff Report, P. 2, Para. 3.
6. See, e.g., *Gamble v. City of Escondido*, 104 F.3d 300, 19 A.D.D. 740 (9th Cir. 1997).
7. Taber, Alene M., Residential Recovery Homes and Their Local Impacts, Group Homes—Residential Recovery Facilities Conf., P. 2, Paras. 3-5 (March 2, 2007).
8. Opinion of Attorney General, State of California, Edmond G. Brown, Jr.; Gregory L. Gonot; Opinion Number 07-601 (December 18, 2007).
9. See, e.g., Taber & Alti, Residential Recovery Homes and Their Local Impacts, Group Homes—Residential Recovery Facilities Conf., P. 11 (March 2, 2007).
10. See Riverside, CA Municipal Code Section 19.64.040 (S) [as quoted in Taber & Alti, Residential Recovery Homes and Their Local Impacts, Group Homes -- Residential Recovery Facilities Conf., P. 11 (March 2, 2007)].
11. Gathe, T.H., Group Homes: Local Control and Regulation versus Federal and State Fair Housing Laws, Wash. St. B. A. Land Use Conf., P. 10 (May 1997).
12. Note 5, Dispersion Requirements for the Siting of Group Homes: Reconciling New York's Padavian Law with the Fair Housing Amendments Act of 1988, 44 Buff. L. Rev. 249 (1966) (as authored by Kevin J. Zanner).
13. 44 Buffalo Law Review 249, 267 (1966).

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14. Group Residential Uses, City Council Staff Report, City of Newport Beach at P. 4 (December 11, 2007).
15. Newport Beach Municipal Code § 20.03.030.
16. For a humorous, human-interest insight into the local government politics that play into zoning decision making for rehab homes, see the September 22nd, 2008 New Yorker article entitled "Dept. of Repurposing—Vacancy," at pages 34 and 35. The observations of the author about the mind-set of the villagers, many of whom have deep roots in the community, show not only the antipathy to the use but also to the underlying sentiment about the abuse of drugs in general and the effect of that abuse on a community.

Recent Cases

Supreme Court of Alabama rules city was not estopped from enforcing ordinance regarding the mobile home placement.

A tornado struck the city of Abbeville in Alabama on November 5, 2002 and completely destroyed Peterson's house, among others. Peterson's daughter and son-in-law, Ellis, lived in the home as well. The next month, Ellis purchased a double-wide mobile home to place on the property, failing to check with city officials about the zoning requirements and permits. The city code addresses mobile homes—requiring the unit to be oriented with the long axis parallel to the street, and not within 20 feet of any permanent building.

After he noticed a concrete slab being poured perpendicular to the street, the neighbor contacted the city clerk to complain. A police officer was sent to inspect and saw that Peterson and Ellis had dug a septic tank and installed field lines, had poured the concrete pad, and installed half of the mobile home unit perpendicular to the street, in violation of the city code. He stopped the project and told Peterson and Ellis to contact the city. They met with the city official the same day and explained that the debris from the destroyed house was still on the lot, and that there was no other way the mobile home could be positioned on the lot other than the way it was being positioned. The city official gave permission to finish the installation in the nonconforming perpendicular position because the family was homeless and facing an emergency situation, and because he believed the mobile home unit could not be placed on the property to conform to the code.

The city official subsequently inspected the site and learned that the mobile home could be placed on the property consistent with the code requirements. After being presented with a petition signed by neighbors asking the city to enforce the city code, the city ordered Peterson and Ellis to relocate the mobile home, offering to pay the expenses associated with the move, including moving the septic and field lines. Peterson and Ellis refused. The city sued, the defendants counterclaimed, and argued that the city was estopped from enforcing the ordinance.

The trial court granted summary judgment to the city. On appeal, the state's highest court affirmed. Reliance on an earlier estoppel case was misplaced because, contrary to the earlier decision, the city had not acquiesced to the replacement of the mobile-home in this case. The court concluded that "'[j]ustice and fair play' do not demand that the doctrine of estoppel be applied based on the facts of this case where there has been no 'misrepresentation or concealment of material fact' by the city." The city official allowed the completion of the installation based, in part, on the misrepresentation made by Peterson and Ellis that the unit could not be installed parallel to the street. *Peterson v. City of Abbeville*, 2008 WL 2469365 (Ala. 2008).

Testimony of council member and planning commissioner constitutes an independent and adequate basis for denying rezoning application.

Developer's request to rezone eight acres from R-1 to R-1(A), so that he could build patio homes on lots with frontage less than 100 feet, was denied. Several residents had expressed concerns about potential traffic problems, but no experts testified. The developer sought a declaration that the zoning regulations were unconstitutional. At trial, a city councilman and a member of the planning commission testified about their personal experience and observations driving on the road next to property.

The trial court ruled in the city's favor and the court of appeals affirmed. The developer petitioned for certiorari review, asserting that an earlier decision by the state Supreme Court requires professional or expert studies, rather than speculative testimony, in

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rezoning cases. *Martin v. O'Rear*, 423 So. 2d 829 (Ala. 1982). The Supreme Court distinguished this case, concluding that the testimony of the council member and planning commissioner "constitute an independent and adequate basis" for concluding that the city's denial was not based solely on speculation. They both testified on personal knowledge of the traffic congestion in the area. In *Martin*, the testimony of the chairman of the planning commission concerned a rezoning proposal which would prevent a black property owner from building a condominium complex. The court found the testimony concerning the blighting influence of the proposed development speculative. *Ex parte Nathan Rodgers Const., Inc.*, 2008 WL 2469369 (Ala. 2008).

Supreme Court of Minnesota distinguishes between area variances and use variances, declaring different hardship standards for each.

The owners of a grandfathered nonconforming lot requested a site permit from the county to construct a house and garage. They did not have the lot surveyed, but based on stakes and pins in place when the lot was originally platted the county inspector measured the house and approved the project. A year after completion of the project, it was discovered that the house and garage were built within the setback area. A subsequent survey confirmed the buildings were in violation of the county zoning ordinance. By that time, the owners had invested $234,917.44 in the project. They applied for an area variance, but the board of adjustment said it would consider the variance application as if it had been requested prior to construction, rather than after-the-fact, and denied it. The district court granted summary judgment in favor of the county. The court of appeals affirmed.

The state's highest court reversed and remanded. In a matter of statutory interpretation, the court decided that the "practical difficulties" and "particular hardship" standards found in Minn. Stat. § 394.27, Subd. 7, were not synonymous but the legislature meant for each to apply to different types of variances. "Practical difficulties" applies to a request for an area variance, while "particular hardship" applies to a request for a use variance. The court noted that both standards originated in the 1916 New York City Building Zoning Resolution. The "particular difficulties" standard has been considered by some states to be a less rigorous standard. Since the board of adjustment did not consider "practical difficulties" when it denied the owners' area variance, the matter was remanded. *In re Stadsvold*, 754 N.W.2d 323 (Minn. 2008).

Supreme Court of Montana declares certificates of survey are subject to subdivision review under the Subdivision and Platting Act.

The Gallatin County Clerk and Recorder accepted and recorded numerous certificates of survey ("COS"). Each COS divided the subject land into two parcels: one parcel greater than 160 acres and a "remainder" smaller parcel. After consulting with the county attorney, the clerk decided these COSs were subject to subdivision review under the Montana Subdivision and Platting Act and sought declaratory judgment from the District Court that these COSs were illegal divisions of land because they had not been submitted for review or exempted from review under the Act. The court ruled against the clerk and she appealed.

The Montana Supreme Court reversed and held that the COSs were subject to subdivision review under the Subdivision and Platting Act. The developer's argument was that the "remainder doctrine" allows divisions of land greater than 160 acres with a "remainder" left over not subject to the Act. The court said "[t]his argument defies logic as well as the plain language of the statute," which defines 'subdivision' in part as "a division of land or land so divided that it creates one or more parcels containing less than 160 acres". Each of the thirty or more COSs at issue in this case is subject to the Act. The developer then argued that this ruling could certainly not apply retroactively to the COSs already recorded, but the court disagreed. The court said, "We are not announcing a new judicial principle, but rather applying the plain language of the statute." *Mills v. Alta Vista Ranch, LLC*, 2008 MT 214, 344 Mont. 212, 187 P.3d 627 (2008).

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