



POLICY ALERT: THE LEGAL PATH TO PROMOTING QUALITY RECOVERY HOUSING

Texas legislative efforts to address recovery housing must comply with federal and state fair housing laws and the Americans With Disabilities Act (ADA). This Policy Alert highlights why the Texas Boarding Home Facilities Act cannot be used to regulate recovery housing. To legally and effectively address its substance use disorder public health crisis, Texas must redirect the discussion and enact an incentivized certification for recovery housing that will standardize operational requirements statewide, preserve quality affordable housing opportunities and prevent over-regulation.

Texas Recovery Housing Is Protected by Federal and State Fair Housing Laws

- ❖ Recovery housing, also known as recovery homes and recovery residences, are shared family-like living arrangements that provide an important source of affordable housing and recovery support for individuals in recovery for substance use. These residences, which provide a supportive living arrangement, are protected by the federal Fair Housing Amendments Act of 1988, the Texas Fair Housing Act and the ADA, Title II.
- ❖ The Texas State Analysis of Impediments to Fair Housing (AI) identifies recovery housing as a viable affordable housing option for individuals in recovery and the AI reports that community opposition has impeded this housing, raising potential fair housing and ADA violations.

Recovery Housing Is Not Subject to The Boarding Home Facilities Act

- ❖ The Texas Boarding Home Facilities Act violates federal and state fair housing laws because it captures shared family-like households for individuals currently in recovery for substance use and regulates them differently than households of non-disabled individuals.
- ❖ Federal law is supreme to state law and state law takes precedence over local law. The Texas Boarding Home Facilities Act definition of “disability” does not comply with the federal Fair Housing Act, the ADA and Texas’ own fair housing laws.
- ❖ Recovery housing is neither a “boarding home” nor licensed “facility,” yet the Boarding Home Facilities Act erroneously creates a new category of housing which deviates from both Federal and Texas’ own fair housing laws.
- ❖ Over-regulation of recovery housing through local governments’ adoption of the Texas Boarding Home Model Standards violates the fair housing protections afforded shared family-like recovery housing and will not eliminate or remedy problem recovery homes.

- ❖ Local governments that enforce the Boarding Home Facilities Act against protected recovery housing are at great risk of violating Federal and State fair housing laws and the ADA, Title II.

Incentivized Certification: The Legal Approach To Quality Recovery Housing

- ❖ Voluntary certification of Texas recovery housing will lead to high quality, safe and affordable housing that the State needs to address its substance use crisis and to weed out bad providers.
- ❖ Clear and consistent operational standards, without over-regulation of shared family-like households, will protect residents, housing providers and the community.
- ❖ Texas currently recognizes and uses, for certain funded projects, two operational measures for quality recovery housing: the National Alliance for Recovery Residences (NARR) certification and the Oxford House charter. The NARR certification standards are comprehensive, addressing: organizational/administrative operations; fiscal management; property compliance with all local codes and safety requirements; grievance procedures for both providers and residents; and; good neighbor responsibilities.
- ❖ A NARR certification process is much more comprehensive than the Boarding Home Facilities Act, mistakenly relied upon by some local governments. The NARR certification process requires forming a legal business entity, adopting a written code of ethics, carrying liability insurance and much more, to ensure that recovery housing provides a home of quality with safe and ethical operating standards.
- ❖ The only clear-cut and effective path to standardizing and protecting quality homes and ridding bad actors who are harming the recovery community is through statewide use of the voluntary NARR certification and Oxford House charter. This two-option approach will successfully capture all recovery housing within Texas.
- ❖ Incentivizing providers will lead to voluntary certification and quality recovery housing. These incentives are cost-effective when weighed against the financial and societal damage of the public health crisis of substance use. Possible incentives for certified recovery housing include: low-interest loans; direct referrals; referrals for those with housing vouchers or other rental assistance and; inclusion in a State directory of certified recovery housing, promoting these homes over others.



LEGAL ALERT: OPTIMIZING TEXAS RECOVERY RESIDENCES IN COMPLIANCE WITH STATE AND FEDERAL FAIR HOUSING LAWS

This policy briefing explains that any legislative efforts to address recovery residences must comply with federal and state fair housing laws and the Americans with Disabilities Act. This brief is timely due to some local governments' mistaken use of the Boarding Home Facilities Act to regulate recovery residences. In order for the State to legally and effectively address its substance use disorder public health crisis, Texas must redirect the discussion and enact an incentivized accreditation for recovery residences that will standardize operational requirements statewide, preserving quality affordable housing opportunities.

Understanding The Current Crisis Of Substance Abuse, Nationwide and In Texas

The United States is struggling with a public health crisis due to substance abuse of alcohol and a wide range of both legal and illegal drugs and misuse of over-the-counter medications. Addiction is found throughout the country, hits every demographic, every socio-economic level and every age group, including children and adolescents.¹ This public health crisis demands increasing attention for the well-being of Texans. Statewide, in the reporting year 2018-2019, almost 5% of Texans age 18 or older had an alcohol use disorder and almost 6 ½ % had a substance use disorder. These disorders are even more pervasive and troubling in the 18-25 year-old demographic: more than 8% of young adults have an alcohol use disorder and almost 12 ½ % have a substance use disorder.² The continuing epidemic has only increased the frequency of these uses in the State and nationwide. SAMHSA "past month" use data presents a 2020 timely indication of drug and alcohol use. In 2020, 11.31 – 14.61% of Texans ages 18 years of age or older had engaged in illicit drug use in the past month.³ Binge alcohol rates of "past month use" for Texans 18 years of age or older in 2020 was 26.03 – 27.43%.⁴

While the substance use crisis continues to grow, the availability of a wide range of affordable treatments and recovery options falls far short of meeting the needs of individuals seeking to address their addictions. Texas has a severe shortage of substance use disorder treatment providers, ranking the third lowest in the nation. In 2015, there were 17.7 providers for every 1000 adults in need of treatment and recovery services compared to the national average of 32.1 providers for every 1000 persons with substance use disorder.⁵ Statewide, in 2020, 5.22 – 5.70% of Texans 18 years and older needed, but did not receive, treatment for illicit drug use.⁶ In 2020, the unmet treatment needs for alcohol abuse for this same age group was 7.67 – 9.12%.⁷ While approaches to recovery vary, it is well documented that nationwide and in Texas, there is a continuing and growing unmet need to assist individuals with substance use disorders.

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ENDNOTES

Substance Abuse and Mental Health Services Administration (hereafter SAMHSA), SAMHSA Data, Population Groups, available at www.samhsa.org.

² 2018-2019 NSDUH State-Specific Tables, CBHSQ Data, SAMHSA.

³ SAMHSA, Center for Behavioral Health Statistics and Quality, National Survey on Drug Use and Health, Quarters 1 & 4, 2020 (Figure 23e).

⁴ *Binge Alcohol Use in the Past Month: Among People Aged 18 or Older; by State, Average Percentages, 2019 and 2020* – Texas 26.03-27.43%, Figure 14e, Source: SAMHSA, Center for Behavioral Health Statistics and Quality, National Survey on Drug Use and Health, 2019 and Quarters 1 and 4, 2020.

⁵ Vestal, C. (2015, April 1). *How severe is the shortage of substance abuse specialists?* Available at <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/4/01/how-severe-is-the-shortage-of-substance-abuse-specialists>.

⁶ SAMHSA, Center for Behavioral Health Statistics and Quality, National Survey on Drug Use and Health, Quarters 1 and 4, 2020 (Figure 24e).

⁷ SAMHSA, Center for Behavioral Health Statistics and Quality, National Survey on Drug Use and Health, Quarters 1 and 4, 2020 (figure25e).

The Texas Department of Health Services Substance Public Health Agency Action Plan echoes SAMHSA’s reporting and also identifies the personal and societal consequences of substance use disorders. These adversities include drug overdoses and deaths, seizures and chronic health disorders, and motor vehicle fatalities.⁸ The economic cost of alcohol and drug abuse in Texas in 2000 was estimated to have been \$ 15.9 billion, accounting for not only health care costs but morbidity costs due to the reduction in productivity of individuals.⁹ A 2016 study found that substance use disorders contributed to two-thirds of the child protective services cases in Texas.¹⁰ In 2022, it is reasonable to assume that the economic harm to Texas due to substance use disorders has steadily increased due the proliferation of illicit drugs, the pandemic isolation experienced by Americans and the limited resources to address recovery.

There is no single approach to addressing substance use disorders, necessitating that a range of effective, affordable and accessible treatment and recovery options be available to individuals. For many people struggling with substance abuse, recovery residences present the most beneficial option for compelling reasons: affordability, peer support in a family-like living arrangement, and proximity to family, friends, work and school. The value of recovery residences has been succinctly described by many research institutes and health care providers:

“Recovery residences support individuals by providing a safe living environment and readily available community of recovery-related social support.”

“By providing affordable housing, peer support, and a resource rich neighborhood, recovery residences offer residents the opportunity to build financial, social, and community-based recovery capital. These continuing care facilities are shown to facilitate positive recovery outcomes (e.g., higher rates of employment, reduced substance use, lower criminal activity).”¹¹

The Texas Legislature is tasked with addressing recovery residences as a source of safe and affordable housing with a consistent statewide approach. In doing so, the State must comply with the civil rights statutes that protect individuals with disabilities currently in recovery for substance abuse.

Addressing Recovery Residences In Compliance with Federal and State Fair Housing Laws and The Americans With Disabilities Act, Title II

Any legislative approach to regulating or overseeing recovery residence must be scrutinized from a fair housing perspective. The federal Fair Housing Amendments Act of 1988 (hereafter “the Act”) provides fair housing protections to individuals with disabilities in virtually every housing activity or transaction.¹² The fundamental purpose of the Act is to prohibit practices that “restrict the choices” of people with disabilities to live where they wish or “that discourage or obstruct choices in a community, neighborhood or development.”¹³

The Act protects an individual with a physical or mental impairment that substantially limits one or more major life activities; anyone who is regarded as having any such impairment; or anyone who has a record of having

⁸ *Addressing Substance Abuse In Texas, Public Health Agency Action Plan*, Texas Department of State Health Services (2020-2022).

⁹ *Economic Costs of Alcohol and Drug Abuse in Texas in 2000*, U.S. Department of Justice, Office of Justice Programs (December 2002), available at www.ojp.gov.

¹⁰ Interim Report to the 85th Legislature, House Committee on County Affairs (2017), available at www.house.state.tx.us/_media/pdf/committees/reports/84interim/County-Affairs-Committee-Interim-Report-2016.pdf.

¹¹ Mericle, A. A., Mahoney, E., Korcha, R., Delucchi, K., & Polcin, D. L. (2019). Sober living house characteristics: A multilevel analyses of factors associated with improved outcomes. *Journal of Substance Abuse Treatment*, 98, 28-38. doi: 10.1016/j.jsat.2018.12.004 , www.recoveryanswers.org.

¹² Federal Fair Housing Amendments Act of 1988 (“the Act”), 42 U.S.C. §§ 3601 *et seq.*

¹³ Federal Regulations implementing the Act, 24 C.F.R. § 100.70(a) (1994).

such an impairment.¹⁴ Individuals currently in recovery from drug or alcohol abuse are also covered under the law.¹⁵ However, current users of illegal controlled substances are not protected under the law, unless they have a separate disability. The fair housing protections encompass recovery housing, those who operate the housing and the individuals who reside in them.

The State of Texas' fair housing statute is substantially equivalent to the federal Act, mirroring the definition of disability and excluding from the definition current users of illegal controlled substances.¹⁶ The Texas Fair Housing Act must afford individuals with disabilities the same or greater protections under the federal Fair Housing Amendments Act of 1988 based on the Supremacy Clause.

The Department of Housing Development (HUD) and the Department of Justice (DOJ), the two federal departments responsible for enforcing the civil rights statutes, recognize that unrelated individuals with disabilities who reside together as a cohesive group may be the functional equivalent of a family of related members. The cohesiveness is comparable to a "traditional family" in that the unrelated individuals with disabilities may take meals together, share household responsibilities and derive social and emotional support from one another. Together, HUD and DOJ caution against regulating housing for disabilities differently than households of nondisabled individuals:

A household where two or more persons with disabilities choose to live together, as a matter of association, may not be subjected to requirements or conditions that are not imposed on households consisting of persons without disabilities.

Imposing restrictions or additional conditions on group housing for persons with disabilities that are not imposed on families or other groups of unrelated individuals, by, for example, requiring an occupancy permit for persons with disabilities to live in a single-family home while not requiring a permit for other residents of single-family homes.¹⁷

A number of courts within the Fifth Circuit have recognized that Oxford Houses, a particular type of recovery residence, purposely function in a family-like way as it furthers the recovery process. A Louisiana District Court explained:

"The goal of the Oxford Houses is to create a supportive, family environment and to treat the residents of the Oxford House as a functional family. . . . "The Court finds that there is sufficient evidence in the record to show that this type of living arrangement has an ameliorative effect on the residents' disability/handicap. The affidavits of the residents show that prior to living in Oxford House, their prospects for recovery were bleak and the residents were unable to function. However, after moving into Oxford House, the residents are able to care for themselves, hold employment, and pay bills. The residents all stated that the supportive structure of Oxford House has enabled them to turn their lives around."¹⁸ (Emphasis added.)

¹⁴ The definition of "disability" is found at 42 U.S.C. § 3602(h); 24 C.F.R. § 100.201.

¹⁵ 24 C.F.R. § 100.201; United States v. Southern Management Corp., 955 F. 2d 914 (4th Cir. 1992); Oxford House v. Town of Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993).

¹⁶ Texas Fair Housing Act, Texas Property Code, Title 15, Chapter 301, § 301.003(6). Additional information about the Texas Fair Housing Act and state administrative enforcement of the Act is available at www.statutes.legis.state.tx.us (statute); www.twc.state.tx.us (Texas Workforce Commission); www.tdhca.state.tx.us (Texas Dept. of Housing & Community Affairs).

¹⁷ Joint Statement of the Dept. Of Housing & Urban Development and The Dept. of Justice, *State and Local Land Use Practices and the Application of the Fair Housing Act*, at 7, 3 (November 2016).

¹⁸ Oxford House Inc., et al. v. City of Baton Rouge, 932 F. Supp. 2d 683 (M.D. La. 2013); See also, Oxford House, Inc. v. City of Babylon, 819 F. Supp. 1179 (E.D. N.Y. 1993).

The Court concluded that the City must modify its definition of “family” as a fair housing reasonable accommodation to permit the Oxford House recovery residence to be located in a single-family residential zone. Fair housing laws provide legal protections for siting recovery housing in residential zones because they function in a “family-like” way and uphold the characteristics of residential neighborhoods. Recently, a Texas District Court in the Fifth Circuit, reviewing a recovery home, described it as offering “numerous benefits to its residents other than the general therapeutic atmosphere suitable for individuals in recovery” including the family-like functioning in which, “Residents share most things, from chores and free time to physical space, such as bedrooms, bathrooms, the living room, and the kitchen.”¹⁹

State and local governments that treat households of individuals with disabilities that reside together in a family-like manner, including those recovery residences, differently than other families by imposing greater or different requirements on these specific households, violate fair housing laws. When a government singles out housing for individuals with disabilities and treats it differently, it may also violate Title II of the Americans With Disabilities Act (ADA).²⁰ This federal statute prohibits discrimination on the basis of disability in all services, programs, and activities provided to the public by State and local governments including, land use, zoning and planning regulations and decision-making.

Discrimination may be intentional, meaning the regulation or procedural requirements were enacted with either a discriminatory motive or are being applied in a discriminatory manner. Although less obvious, a law or regulation may also violate fair housing laws if it has a discriminatory effect on housing for individuals with disabilities. A local government may not adopt any housing or housing-related statutes, regulations or ordinances or deny approvals for housing for individuals with disabilities based on stereotypes or unfounded fears about the residents. Local governments may violate fair housing laws if in their decision-making if they rely upon or adopt the discriminatory animus of those in the community opposing housing for individuals with disabilities.²¹ Local governments that impose impediments or deny equal access to the development of housing for individuals with disabilities will be suspect under both fair housing laws and the ADA, Title II.

In addition to not discriminating against people with disabilities, under both fair housing laws and the ADA, Title II, cities and counties have an affirmative duty to provide reasonable accommodations in their rules, policies, practices and procedures where it may be necessary to provide individuals with disabilities equal opportunity in housing.²² Reasonable accommodation means providing individuals with disabilities, or developers of housing for people with disabilities, flexibility in restrictive regulations and procedures, or waiver of certain requirements when it is necessary to achieve equal access to housing.²³ Failure to provide a reasonable accommodation is a separate basis of liability and does not require a showing of intentional discrimination. Further, granting a reasonable accommodation does not cure a discriminatory regulation. Examples of reasonable accommodations for households of individuals with disabilities, including recovery housing, could include: waiving legitimate zoning restrictions for locating a large household in a single-family residential zone; reducing parking requirements where residents do not drive or are not permitted to have cars at the home; applying single-family dwelling health and fire safety requirements to recovery homes and; non-enforcement of distance or spacing requirements not otherwise subject to legal challenge. Reasonable accommodations are considered on a “case-by-case” basis meaning that each request is reviewed on the specific set of facts presented.

The Fair Housing Amendments Act of 1988 and the ADA, Title II, are complementary, prohibiting rules and regulations as well as conduct that interferes with the development, siting and the use of housing for individuals

¹⁹ Swanston v City of Plano, 2021 WL 3847471.

²⁰ Americans With Disabilities Act, Title II, 42 U.S.C. §§ 12101 *et seq.*; 28 CFR Part 35 (implementing regulations).

²¹ U.S. v. City of Jackson, 359 F. 3d 727 (5th Cir. 2004); Oxford House v. City of Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993).

²² The reasonable accommodation mandate, 42 U.S.C. § 3604(f)(3)(B) (Fair Housing Act, 42 U.S.C. § 12111, See also, Joint Statement of HUD and DOJ, *Reasonable Accommodations Under the Fair Housing Act* (2004), www.hud.gov.

²³ Groome Resources Ltd., LLC v. Parish of Jefferson, 234 F. 3d 192 (5th Cir. 2000) (Texas is in the Fifth Circuit).

with disabilities, including recovery residences. The prohibitions of both the federal statutes are interpreted broadly to reach all practices that have the effect of interfering with rights granted by fair housing laws including coercion, intimidation and threats. The protections afforded individuals with disabilities also extends to those who provide housing to members of this protected class.²⁴ And as noted earlier, the Texas Fair Housing Act is substantially equivalent to the federal fair housing statute, providing an additional protection against discrimination in housing.

Texas Recovery Residences Are Not Subject to The Boarding Home Facilities Act

We recognize and support the State's interest in having recovery residences that operate consistently in a safe and healthy manner with ethical standards but the Boarding Home Facilities Act, which was recently expanded through SB 500, is a legally flawed approach to achieving this goal. The use of the Act to regulate recovery homes cannot be reconciled with federal and state fair housing laws and Texas' commitment to furthering fair housing opportunities for individuals with disabilities. Consequently, counties and municipalities that use the Boarding Home Facilities Act for the purpose of regulating recovery residences are in danger of violating federal and state fair housing laws and Title II of the ADA.

In 2009, the Texas Legislature amended the State's Health & Safety Code to address "boarding home facilities" and directed the Health & Human Services Commission to adopt model standards for the operation of boarding home facilities. The Texas Boarding Home Model Standards were published in 2010; since then some cities and counties have voluntarily adopted the standards and begun permitting or licensing boarding home facilities.²⁵ In June 2021, the Texas legislature passed SB 500, expanding the Boarding Home Facilities Act to create a misdemeanor criminal offense for operating a boarding home facility without a permit and directing a study of "state and local regulation of group homes."²⁶ This legislation provides that for any county or municipality that requires a person to obtain a permit to operate a boarding home facility, the failure to do so shall be a criminal offense. The State exercises no oversight of how local governments implement and use the Board Home Facilities Act or the Model Standards, leaving it to the discretion of cities and counties with the likelihood of great variation statewide.

The Boarding Home Facilities Act provisions display a misunderstanding of federal and state fair housing laws and the Act all but ignores that recovery residences provide housing to individuals with disabilities and are protected under the anti-discrimination statutes. The Act also indicates a confusion about how recovery residences operate, a fundamental problem that is most evident by the crafting the "boarding home facilities" definition and regulation through the Model Standards.

The Boarding Homes Facilities Act is facially discriminatory as applied to recovery residences. Federal and state fair housing laws prohibit singling out a household of unrelated individuals with disabilities that function in a cohesive family-like way and regulating it differently than households of related individuals. Yet, this Act specifically targets members of a protected class who choose to reside together in a group living arrangement. Recovery residence providers who fail to engage in their local government's adopted Boarding Home Facilities Act are subject to criminal sanctions; this draconian result directly conflicts with recovery residences' legal statute under fair housing laws as a legitimate housing opportunity for individuals with disabilities. It should be noted that the Act remains facially discriminatory even with the inclusion of "elderly persons" which is not a protected class under fair housing laws. A high percentage of "elderly persons" are protected as individuals with disabilities either because they have substantial impairments that limit a major life activity or are regarded as having an impairment.

²⁴ The Act, 42 U.S.C. 3617.

²⁵ Texas Health & Safety Code § 260.003.

²⁶ Texas Health & Safety Code § 260.0051.

A regulation violates fair housing laws provided the substantial majority of those harmed, but not 100%, are members of a protected class of individuals.

A review of specific provisions of the Act raise additional fair housing violations should the entire Act not be deemed facially discriminatory. The Act inserts into the Texas housing landscape a term that blurs the line between State licensed facilities, boarding/lodging dwelling and recovery residences which are not subject to facility licensure. In the absence of clarity, local governments will misstep by interpreting the Act to over-regulate recovery residences, as some have done already, and restrict or deny recovery housing opportunities for individuals with disabilities in violation of fair housing laws. The “boarding home facility” dwelling definition confuses two dissimilar terms, “boarding home” where lodging is provided and “facility,” typically the designation for a state licensed program.

- 2) "Boarding home facility" means an establishment that:
 - (A) furnishes, in one or more buildings, lodging to three or more persons with disabilities or elderly persons who are unrelated to the owner of the establishment by blood or marriage; and
 - (B) provides community meals, light housework, meal preparation, transportation, grocery shopping, money management, laundry services, or assistance with self-administration of medication but does not provide personal care services as defined by Section 247.002 to those persons.²⁷

The Boarding Home Facilities Act is not applicable to recovery residences because they are neither “boarding homes” where lodging is provided nor are they “facilities” under Texas law. A traditional residential land use category, “boarding or lodging home,” provides an individual with a room for occupancy but not access to and use of the entire dwelling. Boarding/lodging homes are not structured to provide a cohesive household. In contrast, recovery residences provide a family-like residence where social and emotional peer support is cultivated and encouraged as part of the recovery process.

The term “facility” describes a category of a state licensed program where treatment is an essential and required element, coupled with substantial oversight and monitoring of residents. For example, Texas licensed residential substance abuse treatment facilities provide “24-hour, seven days a week multi-disciplinary professional clinical support to facilitate recovery from addiction.”²⁸ These facilities provide a structured living environment in which the residents are assisted with activities of daily living, including medication management. State licensed treatment facilities do not provide an independent living residence. Recovery residences are distinctly different from state licensed facilities; they do not provide treatment and they are not fully responsible for custody and control of a resident’s medications. The boarding home facility definition distorts well-established basic distinctions between the types of housing options available to individuals with disabilities in recovery. The definition is so confusing and imprecise that even if a portion of the definition were upheld, it would surely result in a challenge due to statewide variation among the jurisdictions implementing and enforcing the Act.

The Boarding Home Facilities Act is further legally flawed because it employs a definition of “disability” that conflicts with federal and state fair housing laws, narrowing the definition of a class of protected individuals. The Act defines a “person with a disability” as one “with a mental, physical, or intellectual or developmental disability that substantially impairs the person's ability to provide adequately for the person's care or protection and who is: (A) 18 years of age or older; or (B) under 18 years of age and who has had the disabilities of minority removed.”²⁹ Significantly broader, federal and Texas fair housing laws provide a three-part definition of “disability:” a physical or mental impairment that substantially limits a major life activity; a record of an

²⁷ Texas Health & Safety Code § 260.001.

²⁸ Residential Treatment, Texas Administrative Code: Title 25, Part I, Chapter 448, Subchapter I, Rule § 448.903

²⁹ Texas Human Resources Code § 48.002(8).

impairment or being regarded as having an impairment.³⁰ There is no legal justification for narrowing the statutory definition of “disability” where the identical federal and state fair housing act definitions control. Federal law is supreme to state and local law and may not conflict with it. This divergent definition is also in conflict with the State’s own fair housing statutory definition.

The Texas Boarding Home Model Standards, like other provisions of the Act, fail to align with fair housing law protections and individual privacy rights. The Act’s Model Standards when applied to recovery residences greatly exceeds a local government’s ability to mandate an operational structure for all homes; the Model Standards blatantly ignore that recovery residences provide an independent living arrangement that functions similarly to households of related individuals. While the law has affirmed that unrelated individuals with disabilities may reside together similarly to a household of related individuals, the Model Standards treat households of individuals with disabilities differently, dictating certain activities that must take place in the recovery residence. For example, the Model Standards require that boarding home facility operators provide residents with three meals daily and to “complete and document an annual assessment and conduct periodic monitoring to ensure that a resident is capable of self-administering medication and completing basic elements of personal care.” Federal and Texas State fair housing laws protect the right of individuals with disabilities to reside in housing of their choice and to be treated like a household of similarly situated nondisabled persons. The Model Standards infringe upon the statutory protections and must not be applied to recovery residences.

Regulation of recovery housing as a boarding home facility will require compliance with a jurisdiction’s standards, based on the State’s model, and likely result in restrictive zoning. If a municipality designates a boarding home facility as a commercial use, a recovery home so designated will not be permitted in residential zones. It is not uncommon for local governments to mischaracterize recovery residences as a business or commercial use. Those seeking to locate recovery homes have often been told by local governments that the use is a “business” and not permitted in residential zones. However, courts throughout the country have confirmed that simply because the use of a dwelling may entail some management functions, such activities do not change the essential character of a single family or multi-family dwelling from a residence to a “business” or commercial use.

This Court finds persuasive the reasoning of other jurisdictions which have held that the incident necessities of operating a group home such as maintaining records, filing accounting reports, managing supervising, and providing care for individuals in exchange for monetary compensation are collateral to the prime purpose and function of a family housekeeping unit. Hence, these activities do not, in and of themselves, change the character of a residence from private to commercial.³¹

A zoning code that regulates housing for individuals with disabilities as a commercial use when the same use designation is not applied to similarly situated families singles out individuals with disabilities in a discriminatory manner in violation of fair housing laws and Title II of the ADA. A single family occupying a residential dwelling engages in comparable management functions when it employs a housekeeper or gardener and there is an exchange of money. Or, parents may charge rent to an adult child living at home. These activities do not change the residential use of the home, nor do comparable activities that assist with the sound functioning of a home for individuals with disabilities. The payment of rent does not transform a dwelling with a residential use to a business or commercial use. And, as explained earlier, fair housing laws protect the siting of recovery housing that functions in a “family-like” way in residential zones.

³⁰ See note xiii.

³¹ Rhodes v. Palmetto Pathway Homes, Inc., 400 S.E. 2d 484 (S.C. 1991) citing Gregory v. State Dept. of Mental Health Retardation and Hospitals and JT Hobby & Sons v. Family Home.

The Boarding Home Facilities Act and the Model Standards not only violate fair housing laws and the ADA but they over-regulate recovery residences, which provide independent living and will lead to inconsistencies throughout the State due to a local government's own interpretation and implementation of the statute and standards. While Texas seeks to ensure quality recovery residences, the Act and the Model Standards will not accomplish this goal and will subject government entities to legal liability for discriminating against individuals with disabilities currently in recovery.

Incentivized Accreditation: The Legal Approach To Quality Recovery Residences

The Texas Legislature's task of overseeing that recovery residences provide a source of safe and affordable housing in a consistent way is achievable, within reach and legally sound. A two-pronged approach will likely capture most recovery homes, both Oxford Houses and those that do not follow that model. Oxford Houses, which are recognized by the State, have their own accreditation process with comprehensive standards of operations. The NARR accreditation process, which is currently used on a limited basis within the State, could be significantly expanded through an incentivized approach for all other recovery residences. This two-pronged approach will not only provide a legal basis for overseeing recovery residences but it will lead to consistency in comprehensive quality standards throughout Texas.

Oxford Houses are already a part of the recovery community and recognized by the State. This briefing will not review Oxford House standards which are well-established throughout Texas, as well as the nation, and provide one avenue for confirmation of operational standards.

Throughout the nation, sixteen states currently utilize an accreditation process to set a standard of excellence for recovery home operations and to provide a level of oversight. The National Association of Recovery Residences (NARR) has established four levels of recovery homes based on intensity of support and type of staffing. The requisite standards for operating safe, healthy and ethical recovery homes continue to be proven effective.³² Member standards are comprehensive, addressing the following: organizational/administrative operations; fiscal management; property compliance with all local codes and safety requirements; levels of recovery support; grievance procedures for both providers and residents; and good neighbor responsibilities. Unlike the Boarding Home Facilities Model Standards, the NARR accreditation process requires forming a legal business entity, adopting a written code of ethics, carrying liability insurance and much more to ensure that recovery residences provide a home of quality with safe and ethical operating standards. While no process can guarantee a perfect outcome, NARR has a track record for certifying and overseeing much of the recovery residence community. In addition, accreditation has greatly helped in weeding out bad providers within the recovery community; both referral and funding go to those recovery residences with the NARR "gold standard" accreditation.

The NARR accreditation process is particularly effective because the four levels of accreditation account for variations in recovery approaches based on the needs of the individual addressing a substance use disorder. Level I recovery housing is democratically run alcohol-and-drug-free wherein the home maintains a recovery culture and community through behavioral standards, house rules and peer accountability. Oxford Houses are the most widely known examples of Level I recovery housing. A NARR Level II home provides an alcohol-and-drug-free residence with house standards, rules and peer accountability and frequently a "house manager," one who is senior in residency, oversees the shared living arrangement for purposes of maintaining health and safety and rules. A NARR Level III recovery residence also provides an alcohol-and-drug-free environment and, additionally, offers structured programming, life skills and other non-clinical services for those residing at the residence. Level III recovery residences are designed to assist individuals who need lengthier support at a higher level of intensity than Levels I and II. Level III recovery residences have staff that are trained and credentialed for the delivery of

³² www.narronline.org

supportive services and often these staff may be graduates of the residence. Level IV recovery residences provide the greatest structure with credentialed staff and clinical and administrative supervision. In addition to clinic services, life skills development is provided. This type of recovery residence might be appropriate for NARR accreditation or state licensing depending on precisely what the home offers residents.

Within the State of Texas, the NARR accreditation process is recognized; it is used both on a voluntary basis and, in some instances, is a requirement for certain recovery homes. The Texas Recovery-Oriented Housing Network (TROHN) oversees the accreditation process for the State. TROHN certified recovery residences that voluntarily choose to comply with the NARR operations standards and this accreditation represents “the gold standard” for recovery residences.

Currently, NARR accreditation is required for funding in two substance use disorder projects. The Texas Health & Human Services Commission (HHSC) funds *Recovery Residences for Emerging Adults (RRH-EA)*, an intervention model for young adults which offers a safe and healthy supportive living environment for a person in recovery with peer support. The University of Texas facilitates this program as part of Be Well, Texas. RRH-EA defines “recovery housing” as a “shared living environment free from substances and centered upon peer support and connection to services that promote sustained recovery from substance use disorders.”³³ A second University of Texas project, Project *HOMES*, provides funding for NARR Level II (those with monitoring, a house manager and peer run groups) and Level III (with a facility manager and life skills services) recovery homes for individuals recovering from opioid addiction and using medication assisted recovery (MAR). This research project, a partnership of Texas HHSC and University of Texas, evaluates recovery residences outcomes with and without peer recovery coaches. Project HOMES will involve recovery residences statewide and these recovery residences must be NARR certified Level II or III in order to receive funding and participate in the study.³⁴

The most effective way to encourage use of the NARR standard is to incentivize accreditation. Local behavioral health authorities may condition low-interest loans and referrals on accreditation as well as requiring that housing vouchers and other rental assistance be used only at certified homes. The state could prepare a directory of certified recovery residences, promoting these homes over others. There are likely other enticements that would encourage recovery residences to obtain NARR accreditation.

There is great benefit to having a single entity manage an accreditation process for consistency in the recovery community and also to avoid local opposition that may interfere with housing opportunities for individuals with disabilities in recovery. The Texas State Analysis of Impediments to Fair Housing (AI) identifies recovery residences (also referred to as “sober homes”) as a viable affordable housing option for individuals in recovery who are addressing their substance use disorders. The AI is a federally-mandated review in which states must identify impediments to fair housing and make recommendations and commit to action plans for removing the barriers to housing. The Texas AI reports that community opposition has impeded the development, siting and use of housing for individuals with disabilities currently in recovery, raising potential fair housing and ADA violations.

Impediment 1: Not in My Backyard Syndrome (“NIMBYism”) can limit affordable housing development, which could limit housing choice for protected classes in some communities.

NIMBYism can trigger opposition to “sober homes” for persons recovering from substance abuse, as shown in comments provided during consultations. Advocates noted the shortage of housing options to support persons recovering from drug and

³³ Be Well, Texas, www.bewelltexas.org; www.getwaiveredtx.com/wp-content/uploads/2022/01/FY22-RRH_EA_RFA_pdf.

³⁴ <https://www.uth.edu/news/story.htm?id=8696abde-f810-47e9-bdbe-66804d65fe45> (March 8, 2021).

alcohol addiction; and posited that this issue is and will continue to be an increasing problem as Texas faces the opioid crisis.³⁵

In response to Impediment 1, the State recommends, among other general approaches, “Maximize accessible housing choice by promoting preservation and limiting displacement, continuing to encourage development in high opportunity areas, and encouraging creative, innovative solutions”. A second recommendation to address Impediment 1 also applies to recovery residences, “Reduce Stigmatizing Language and Practices.” And, a third broad recommendation to which the State committed, Recommendation 4: “Actively Engage in the Enforcement of the Fair Housing Act.”³⁶ The State’s implementation of the NARR accreditation process through incentives is responsive to overcoming Impediment 1.

The Take Away

The Texas legislature has the opportunity to adopt a voluntary accreditation process for recovery residences that complies with fair housing laws and optimizes this important source of affordable housing for those in recovery. The recommended approach is responsive to the goal of providing safe and ethically operated recovery residences throughout the state with consistent operational standards and accountability and leading to a welcome reduction in “bad players” within the recovery community.

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³⁵ Texas Analysis to Impediments to Fair Housing (2019), Chapter 10, pp. 473, 475.

³⁶ Texas Analysis to Impediments to Fair Housing (2019), Chapter 10, pp. 482 – 489.