

The Intersection of Federal Disability Law and Municipal Zoning

Steven H. Weller
Gunnar P. Seaquist

3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746
(512) 472-8021

sweller@bickerstaff.com
gseaquist@bickerstaff.com

I. Introduction



The Issue

- Developments in federal insurance law have expanded insurance coverage for substance abuse and mental health.
- A financial incentive for treatment facilities has been created.
- Treatment facilities may create controversy when mixed with existing uses in the communities where they seek to locate.
- In evaluating whether to approve a particular facility in a given location, local governments must be careful to fully consider applicable federal disability protections.



The Affordable Care Act (ACA)

The 2014 implementation of the ACA created the following changes relevant to mental health and substance abuse treatment.

- Insurers now must provide coverage for substance abuse or dependency as a pre-existing condition.
- Substance abuse treatment is now one of the 10 mandatory “Essential Health Benefits” for most individual and small group health plans.
42 U.S.C. § 18022(a) and (b).
- ACA further requires applicable plans to comply with the Mental Health Parity and Addiction Equity Act (MHPAEA), which requires coverage for mental health and substance abuse treatment at the same level as primary medical care.
42 U.S.C. 18031(j).



More Patients Could Equal Facilities

- It is estimated that an additional 32.1 million individuals will be able to access substance abuse treatment for the first time, and 30.4 million individuals with existing behavioral health coverage will receive expanded benefits.

Substance Abuse and Mental Health Services Administration ("SAMHSA")

- 5,188,706 Texans have received expanded mental health and substance abuse disorder benefits.

U.S. Department of Health and Human Services



Types of Facilities

- Drug and alcohol rehabilitation and treatment facilities
- Methadone clinics (opioid replacement therapy)
- Aftercare facilities or halfway houses (Oxford houses)
- Mental health facilities



Overview of Federal Disability Law

- Title II of the Americans With Disabilities Act of 1990 (the "ADA")
- The Rehabilitation Act of 1973 (the "Rehab Act")
- The Fair Housing Act (the "FHA")
- 42 U.S.C. § 1983 – Equal Protection



Does Federal Disability Law Apply to Zoning?

Yes. The administration of zoning laws must comply with the ADA, the Rehab Act and the FHA.

Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44–46 (2d Cir.1997); *Larkin v. State of Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir.1996).

What governmental land use activities are implicated?

- Application of current zoning ordinances
- Approval of variances from current zoning ordinances
- Adoption of new zoning ordinances
- Permitting under building codes and regulations



Persons Recovering From Drug and Alcohol Addiction

- Federal law indicates that persons with a disability include:

Persons that have completed a supervised drug rehabilitation program (or other rehab) and are no longer engaging in the illegal use of drugs;

Persons currently participating in a supervised rehab program.

42 U.S.C. § 12114(b).

The statute also excludes individuals who are “currently engaging in the illegal use of drugs” from the category of “individual[s] with a disability” under the ADA.

42 U.S.C. § 12114(a).



II. Suits By Treatment Facilities



Standing of Non-Disabled Entities or Persons By Association

A person or entity (like an inpatient or outpatient drug or alcohol treatment facility) has standing to sue under the ADA or Rehabilitation Act when it has suffered an injury as a result of discrimination against someone with whom they have an association.

MX Group, Inc. v. City of Covington, 293 F.3d 326 (6th Cir. 2002); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997); *J.D. v. Georgetown Independent School Dist.*, 2011 WL 297128410 (W.D. Tex. 2011); *Hooker v. Dallas Independent School Dist.*, 2010 WL 4025776 (N.D. Tex. 2010).



Standing By Association

Further the Department of Justice has adopted the following rule implementing Title II of the ADA:

“A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual **or entity** because of the known disability of an individual with whom the individual or entity **is known to have a relationship or association.**” (emphasis added)

42 U.S.C. § 12134(a); 28 CFR § 35.130(g).



Standing By Association

By way of example, the following plaintiffs are now in play:

- (i) inpatient and outpatient drug and alcohol treatment facilities,
- (ii) private schools treating persons with disabilities,
- (iii) family members/friends of disabled individuals.

But, federal courts in Texas have stated that an associational standing claim “requires a separate and distinct denial of a benefit or service to a non-disabled person.”



Damages Available to Facility Operators

***Money Damages**

- Actual damages (out of pocket, lost investment, etc.)
- Compensatory and business damages (benefit of the bargain, lost profits, loss of credit, loss of goodwill)
- Pre and post-judgment interest

Other Relief

- Equitable and injunctive relief
- Declaratory relief
- Attorneys' fees

No exemplary damages against a governmental entity.



*Standards for Obtaining Money Damages

- To obtain compensatory damages under the ADA or a Rehab Act claim, nearly all federal Circuit courts have held that a plaintiff needs to show either (i) intent to discriminate and/or (ii) deliberate indifference.

Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d at 331 (2d Cir.1998); *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir.2001); *Meagley v. City of Little Rock*, 639 F.3d 384,389 (8th Cir.2011); *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir.2012).



*Standards for Obtaining Money Damages

- Intent to discriminate = gov't action motivated by discriminatory animus or ill will to a disability.
- Deliberate indifference = when a policymaker acts with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the challenged policy or custom.



5th Circuit's Standard for Money Damages

- However, in a 2002 opinion the 5th Circuit stated that “there is no deliberate indifference standard applicable to public entities for the purposes of the ADA or the RA ... in order to receive compensatory damages for violations of the Acts, a plaintiff must show intentional discrimination.”

Delano-Pyle v. Victoria Cnty., 302 F.3d 567, 575
(5th Cir. 2002).

- The standard for money damages in the 5th Circuit is potentially unclear, or subject to change.



Arlington Heights Factors

Factors to be considered in evaluating a claim of intentional discrimination include:

- 1) the discriminatory impact of the governmental decision;
- 2) the decision's historical background;
- 3) the specific sequence of events leading up to the challenged decision;
- 4) departures from the normal procedural sequences; and
- 5) departures from normal substantive criteria."

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265–66, 97 S. Ct. 555, 50 L.Ed.2d 450 (1977)).

These factors are not exclusive or mandatory but merely a framework within which a court conducts its analysis.



III. Federal Disability Law in Action



Facially Discriminatory

New Directions Treatment Servs. v. City of Reading, 490 F.3d 293 (3rd Cir. 2007)

- Zoning statute stating that “a methadone treatment facility shall not be established or operated within 500 feet of a pre-existing school, public playground, public park, residential housing area, child-care facility, church, meetinghouse or other actual place of regularly stated religious worship....”
- Agreed with sixth and ninth circuit that a law that singles out clinics for different zoning procedures is facially discriminatory.

TAKEAWAY: Avoid singling out particular uses that may implicate a disability.



Discriminatory Application of Facially Neutral Ordinance

Pacific Shores Prop., LTC v. City of Newport Beach, 730 F.3d 1142 (9th Cir. 2013)

- In the face of public opposition, city passed zoning ordinance imposing permitting limitations on group living arrangements.
 - Attorney advised to include vacation rentals as they caused the same issues, but City did not do so due to public opposition.
 - Backdrop of negative community sentiment and direct evidence that ordinance was intended to limit/decrease the number of group homes for recovering alcoholics and addicts.
- “A willingness to inflict collateral damage by harming some, or even all, individuals from a favored group in order to successfully harm members of a disfavored class does not cleanse the taint of discrimination; it simply underscores the depth of the defendant's animus.”

TAKEAWAY: A facially neutral ordinance will not insulate a city's actions in the face of evidence of discriminatory intent.



Legitimate Zoning Interests

Get Back Up, Inc. v. City of Detroit, 606 Fed. Appx. 792 (6th Cir. 2015).

- Facial challenge to ordinance requiring a residential facility for the treatment of substance abuse to obtain a conditional use permit to operate.
 - Challenged ordinance permitted by right such residential and commercial uses as boarding schools, nursing homes, religious residential facilities, adult day care centers, hospitals, libraries, restaurants, medical clinics, retail stores, and offices.
 - By contrast, the ordinance identified conditional residential uses, including a “[r]esidential substance abuse service facility, multi-family dwelling, an emergency shelter, a pre-release adjustment center, a fraternity or sorority, and a rooming house.



Dissimilar Uses

Get Back Up, Inc. v. City of Detroit, 606 Fed. Appx. 792 (6th Cir. 2015)
(Cont'd).

- The Court found Next, Get Back Up's facial challenge to the zoning ordinance fails because the ordinance does not allow any materially similar use to operate by right.
- To the contrary, the court observed residential substance abuse service facilities were treated the same as many other residential uses.
- Notably, the Court found that hospitals and nursing homes are materially different uses than substance abuse facilities.
 - Most obviously, hospitals are not a residential use. Residential and non-residential uses differ widely in how they affect traditional zoning concerns like noise, traffic, parking, and utilities usage.
- As applied challenge waived, no direct evidence of discriminatory animus.

TAKEAWAY: Zoning categories anchored in distinct uses are generally defensible in the absence of animus, even if they negatively impact disabled individuals.



Fear of Crime

MX Group, Inc. v. City of Covington, 203 F.3d 326 (6th Cir. 2002).

- The Court held: “Where the discrimination results from unfounded fears and stereotypes that merely because Plaintiff’s potential clients are recovering drug addicts, they would necessarily attract increased drug activity and violent crime to the city, such discrimination violates the ADA and Rehabilitation Act”
 - Conflates motivation for zoning decision with whether City “regarded” individuals as substantially limited in the performance of a major life activity.

TAKEAWAY: Decisions based on unfounded fear and prejudice may be sufficient to show discrimination.



Fear of Crime

Conflicting authority:

But see A Helping Hand, LLC v. Baltimore Cnty., Md., 515 F3d 356 (4th Cir. 2008).

- “[t]he record does contain substantial evidence that the Clinic's clients were regarded as criminals and generally undesirable neighbors and, further, that this perception accords with the stigma that often attaches to recovering drug addicts... that...does not mean that they were necessarily regarded as significantly impaired in their ability to work, learn, care for themselves, or interact with others.”
 - Further, although there was evidence that *some* in the community regarded the Clinic's clients as limited, the evidence did not establish that belief was widespread.
- In reversing the trial court, the Circuit noted that the status of the clients as disabled, or regarded as disabled, was necessary elements of *both* the clinic and the Does' claims.

TAKEAWAY: Concerns over criminality do not necessarily establish the city regarded individuals as disabled.



Proof of Disability-Related Animus?

RHJ Medical Ctr. Inc v. City of Dubois, 564 Fed. Appx. 660 (3rd Cir. 2014).

Clinic sought a conditional use permit to operate within the City. The evidence showed the following statements:

- In a radio interview the mayor stated that “we hear and we read things about these methadone clinics in other areas and we don’t like them. The interviewer referred to RHJ’s patients as garbage.
- At the BOA hearing, citizens questioned RHJ about security “because drugs were involved.”
- One resident raised concerns about the potential for patients to overdose and expressed concern that the facility would bring violence to the City.
- A local attorney stated his concern that the clinic would decrease property values and potentially attract crime.



Proof of Disability-Related Animus?

RHJ Medical Ctr. Inc v. City of Dubois, 564 Fed. Appx. 660 (3rd Cir. 2014) (Cont'd)

- When it could not get a permit to operate, RHJ sued on behalf of itself and on behalf of its patients. The trial court found that RHJ lacked standing to maintain its ADA and Rehab Act claims, and dismissed. The Third Circuit affirmed.
- RHJ did not produce any evidence identifying patients that were substantially limited in a major life activity.
- RHJ did not establish that its patients were regarded as disabled because, although the record indicates that "some may have been prejudiced against [RHJ], given its association with recovering drug addicts," "in light of the plain language provided by the ADA's implementing regulation, this is not sufficient on its own to satisfy the 'regarded as' definition of disability."
- **"What they suggest is animus against the clinic and its patients. But animus is simply not enough to satisfy the 'regarded as' test."**



Oxford Houses

Oxford House, Inc., v. City of Baton Rouge, 932 F.Supp.2d 683 (M.D. La 2013).

- Oxford House is a national program that supports the opening of individual Oxford Houses throughout the United States, which are designed to create a supportive familial atmosphere to help their residents recover from alcohol and substance addiction.
- Baton Rouge zoning ordinance defined “family” as an individual or two or more related persons living together or no more than two unrelated people living together, unless the owner lives on the premises, in which case, four unrelated people may live together.
- Three Oxford houses in BR requested a reasonable accommodation to allow it to operate with more than four unrelated individuals and sued when its request was denied.



Oxford Houses

Oxford House, Inc., v. City of Baton Rouge, 932 F.Supp.2d 683 (M.D. La 2013).

- Court conducts an individualized analysis and finds residents are disabled based on their affidavits and hearing testimony.
- Court found that the use of the Oxford house was similar to the uses already permitted by the zoning code, and therefore the requested accommodation was reasonable and necessary, and that the City violated the FHA by refusing to grant it.

TAKEAWAY: If a disabled individual requests an accommodation for a use that is substantially similar to surrounding existing uses, it will likely be found to be reasonable.



Schools for the Disabled

Kelly-Fleming v. City of Selma, Texas, No. SA-10-675-XR, 2012 WL 1900556 (W.D. Tex. 2012)

- Plaintiffs sought a conditional use permit to operate school for students with disabilities in a residential zone.
- Although Plaintiffs were ultimately issued a permit, they alleged that the City delayed hearings and denied an initial rezoning application, which precluded the school from being completed and opened on time and resulted in lost profits to the school.
- The Court denied the City's motion for summary judgment finding that Plaintiffs had articulated a separate and distinct denial of a service (rezoning) and could state a claim for associational discrimination.

TAKEAWAY: Intentional delay or unorthodox practice in the zoning application of a protected entity can subject a city to liability if it results in harm.



Best Practices

- Incorporate protected uses into your zoning plans.
- Don't single out individual uses that might implicate a disability.
- Group similar uses.
- If uses are distinct, have evidence as to legitimate zoning differences.
- Train and prepare front line staff.
- Seriously consider accommodations.
- Are there similar uses nearby?
- Beware of "adopting" the public outcry.
- Follow zoning procedures.

