Hannah Elliott

From: Smith, Adam <asmith@schwabe.com>
Sent: Wednesday, February 7, 2024 2:15 PM
To: Will VanVactor; John Eisler
Subject: Sunshine Behavioral Health Correspondence [IMAN-PDX.FID4560231]
Attachments: 2024.02.05 Sunshine ADA FHAA Process Accommodation Letter_Clean(45016683.pdf

Gentlemen,

Attached is the correspondence we discussed during our meeting on January 18, 2024. As we discussed, the letter requests a deviation to the County's process for our upcoming land use application as a reasonable modification / accommodation under the ADA and FHAA.

I assume the matter will be discussed with the County Court during an executive session and that we will then receive an answer to our request soon after that meeting. For our internal scheduling purposes, my client is asking when we can expect to receive that response?

Thanks again for the productive meeting on January 18. I look forward to continuing to work with you both on this project.

-Adam

Adam Smith
Shareholder
Pronouns: he, him, his
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Schwabe

February 7, 2024

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Admitted in Oregon and Colorado
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VIA E-MAIL

Will Van Vactor
Community Development Director
Crook County, Oregon
Will.VanVactor@crookcountyor.gov

RE: Request for Modification to County's Permitting Process for Substance Use Disorder Treatment Center at 14427 SW Alfalfa Rd, Powell Butte, OR 97753
Our File No.: 141868-281985

Dear Will:

As you know, our firm represents Sunshine Behavioral Health Group, LLC ("Applicant"), who intends to apply for a modification of an approved conditional use permit (C-CU-2337-07) for property located at 14427 SW Alfalfa Rd, Powell Butte, Oregon 97753 (the "Property") to allow a substance use disorder ("SUD") treatment center at the Property. Based on the recommendations of County staff, Applicant is bifurcating its CUP application and the request described herein for a reasonable accommodation/modification to the County's process for rendering a permit decision on that application.

For context, Applicant is proposing to use the existing facilities at the Catholic Diocese of Baker's Cascade View Retreat Center to provide treatment to no more than 100 individuals suffering from SUD. The existing CUP for the Property, approved in 2007, assumes eight full-time and eight part-time Diocesan staff, an office and part-time residence for the bishop, meeting rooms and conference centers for up to 225 people, summer camp facilities, and cabins and RV parking for summer camp use. Applicant intends to modify these facilities to provide temporary housing for no more than 100 people as opposed to providing camping and RV facilities. Applicant's proposed use of the Property will be less intensive on any given day than the previous facility and impacts will be spread out over the course of the year, as opposed to being concentrated under the existing use.

With this background in mind, Applicant submits this request for a reasonable accommodation/modification to the approval process to modify a CUP. SUD centers often face community opposition based on the neighboring community's concerns about the residents living in the facilities. However, as we previously discussed, persons recovering from drug and alcohol addiction are protected from housing discrimination by the Americans with Disabilities Act ("ADA") and the Federal Fair Housing Amendments Act ("FHAA"). The FHAA and ADA allow local governments to grant reasonable accommodations/modifications to policies, practices, and

services when necessary to provide equal housing opportunities to individuals with disabilities.[1] Given the protections afforded by the ADA and FHAA, Applicant requests a reasonable accommodation/modification to the County's process for rendering a decision on our upcoming application. Instead of the typical method of processing such an application, which we understand requires Planning Commission approval, Applicant requests that the County process its application administratively, with any appeal of that administrative decision then being heard by the County Court.

1. The County Should Grant Applicant's Request for a Reasonable Accommodation / Modification under the FHAA and ADA.

Crook County Code ("CCC") requires the County to "hold a public hearing on any proposed * * * modification after giving notice to the permittee and other affected persons." CCC 18.172.100(3). Applicant requests a reasonable accommodation/modification to allow an administrative approval of a modification to the existing CUP for the property. Pursuant to CCC 18.172.015(1), most land use decisions issued by Crook County are first decided by the Community Development Director with any appeal then going before the Planning Commission. The process outlined in CCC 18.172.100 is an exception to that general rule. Nonetheless, in this case that exceptional process could result in neighboring landowners introducing extraneous information that could ultimately lead to a discriminatory decision not based on applicable approval criteria, thereby exposing the County to ADA/FHAA litigation. For example, in Malheur County, neighbors used the conditional use permitting process to keep a residential home for disabled occupants from operating by erroneously arguing that the permit applicant was opening a home for sex offenders. *Rise, Inc. v. Malheur County*, 2012 US Dist LEXIS 449944 at * (D Or, Feb 13, 2012). The conditional use permit was eventually denied by the Malheur County planning commission, and the plaintiff in the matter sued the County under the ADA and FHAA. The fact pattern in *Rise, Inc. v. Malheur County* is readily distinguishable, but the case nonetheless provides an illustration of the limitations of the traditional land use system to address ADA and FHAA issues.

Differing from employment law or with regard to government facilities, many local governments struggle with the interplay between federal FHAA/ADA requirements and local land use

[1] Under the FHAA, a "reasonable accommodation" is generally understood as a change to a rule, policy, procedure, or service." 42 U.S.C. § 3601 *et seq.* Courts have further described that "[t]he FHAA requires a reasonable accommodation to zoning rules when necessary to afford a handicapped person the 'equal opportunity' to obtain housing." *See, e.g., Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F3d 737, 745 (7th Cir 2006).

Differing from the FHAA, Title II of the ADA does not contain specific provisions requiring "reasonable accommodations" or "reasonable modifications." However, courts regularly defer to the ADA implementing regulations which require "reasonable modifications in policies, practices, or procedures * * *." *Id.* at 751 (citing 28 CFR § 35.130(b)(7).

Courts often intertwine the terms "reasonable accommodation" under the FHAA and "reasonable modification" under the ADA. *See, e.g., McGary v. City of Portland*, 386 F3d 1259 (9th Cir 2004). Accordingly, this letter uses the term "reasonable accommodation/modification" throughout.

provisions, and case law can be hard to find with courts often even confusing the two aforementioned federal statutes. Specifically because the FHAA/ADA case law is so varied, the federal government has promulgated several advisory documents. We recommend reviewing the *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: State and Local Land Use Laws and Practices and the Application of the Fair Housing Act*, November 10, 2016 ("Joint Statement"). Questions 22 and 24 of the above-cited Joint Statement directly address the process issues raised in this letter:

> Question 22: "Where a local land use or zoning code contains specific procedures for seeking a departure from the general rule, courts have decided that the procedures should ordinarily be followed. If no procedure is specified, or if the procedure is unreasonably burdensome or intrusive or involves significant delays, a request for a reasonable accommodation may, nevertheless be made in some other way * * *."
>
> Question 24: "A local government has an obligation to provide prompt responses to reasonable accommodation requests, whether or not a formal reasonable accommodation procedure exists. A local government's undue delay in responding to a reasonable accommodation request may be deemed a failure to provide a reasonable accommodation."

In this particular case, a Planning Commission proceeding on Applicant's land use application could lead to an "undue delay" because any appeal of the Planning Commission's decision would then go before the County Court. Even if many land use applications are appropriately adjudicated by the Planning Commission, exceptions should be made for those applications that are truly unique. Applicant's anticipated application is one such example because it is, in essence, a request to set aside certain CCC provisions in a manner contemplated by federal ADA and FHAA statutes to ensure that some of our community's most disenfranchised members receive the services they desperately need. Rather than being adjudicated by Planning Commissioners whose purview is purposely narrow, the inherent policy choices invoked by Applicant's upcoming application are best answered directly by Crook County staff and then the County's duly elected officials.

A. FHAA Reasonable Accommodations/Modification Are Appropriate in this Case

A local government commits discrimination under section 3604(f)(3)(B) of the FHAA if it refuses "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [the disabled] equal opportunity to use and enjoy a dwelling." *Gamble v. City of Escondido*, 104 F3d 300, 307 (9th Cir 1997). A dwelling is defined as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof." 42 U.S.C. § 3602(b). Group homes, such as those used for drug and alcohol recovery, are considered "dwellings" under the FHAA. 42 U.S.C. § 3602(b); *Schwarz v. City of Treasure Island*, 544 F3d 1201, 1213–16 (11th Cir. 2008) (defining halfway houses as "dwellings" under the FHAA); *Lakeside Resort Enters., LP v. Bd. of Supervisors of Palmyra Twp., 455 F3d 154, 160* (3d Cir. 2006) (defining drug and alcohol treatment centers as "dwellings" under the FHAA); *Pacific*

Shores v. City of Newport Beach, 730 F3d at 1157 (defining group homes for individuals recovering from alcohol addiction as "dwellings").

A state or local government violates the FHAA by failing to grant a reasonable accommodation request if

> "(1) [the applicant] suffers from a handicap as defined by the FHAA; (2) the [County] knew or reasonably should have known of [the applicant's] handicap; and (3) accommodation of the handicap 'may be necessary' to afford [the applicant] an equal opportunity to use and enjoy their dwelling."

McGary v. City of Portland, 386 F3d 1259, 1261–62 (9th Cir 2004) (quoting *Giebeler v. M & B Assocs.*, 343 F3d 1143, 1147 (9th Cir 2003)).

As discussed below, Applicant's request meets the criteria for the County to grant Applicant's reasonable accommodation request.

(1) The Applicant's clients suffer from a handicap as defined by the FHAA.

Applicant is making this accommodation/modification request on behalf of its current and future residents with disabilities. Persons recovering from drug and/or alcohol addiction are defined as "persons with disabilities" under the ADA and FHAA. *See City of Edmonds v. Washington State Bldg. Code Council,* 18 F3d 802, 803, 804 (9th Cir.1994); *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F3d 1142, 1156–57 (9th Cir. 2013); *Hernandez v. Hughes Missile Systems Co.*, 362 F.3d 564, 568 (9th Cir.2004); 42 U.S.C. § 3602(h); 42 U.S.C. § 12132. Therefore, this criterion is met.

(2) The local government knew or reasonably should have known of the handicap.

Based on this correspondence and the forthcoming application, the County now knows (or reasonably should know) that the Applicant's proposed facility will serve a population with a disability. This application concerns utilizing existing facilities on the Property for the Applicant's SUD treatment center. Therefore, this criterion is met.

(3) The accommodation of the handicap may be necessary to afford the Applicant an equal opportunity to use and enjoy their dwelling.

As discussed above, group homes are considered dwellings under the FHAA.

An accommodation is reasonable under the FHAA "when it imposes no fundamental alterations in the nature of the program or undue financial or administrative burdens." *Myers v. Highlands at Vista Ridge Homeowners Ass'n, Inc.*, 6:20-CV-00562-MK, 2022 WL 4452414, at *23 (D Or Sept

8, 2022), *report and recommendation adopted*, 6:20-CV-00562-MK, 2022 WL 4447495 (D Or Sept 23, 2022) (quoting *Giebeler*, 343 F.3d at 1157 (citations and quotation marks omitted)).

Some burdens "may be more subjective and require . . . [an] . . . appreciati[on of] the intangible but very real human costs associated with the disability in question." *Valencia v. City of Springfield, Illinois*, 883 F3d 959, 968 (7th Cir 2018), *citing Wisconsin Cmty. Servs., Inc. v. City of Milwaukee*, 465 F3d 737, 752 (7th Cir 2006). This refers to "those intangible values of community life that are very important if that community is to thrive and is to address the needs of its citizenry." *Id.* "Whether the requested accommodation is necessary requires a 'showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability.'" *Id.* (citing *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 838 (7th Cir. 2001) (quoting *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995)). "In other words, [applicants] must show that without the required accommodation they will be denied the equal opportunity to live in a residential neighborhood." *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F3d 775, 784 (7th Cir 2002). In the context of a zoning waiver, "'equal opportunity' means the opportunity to choose to live in a residential neighborhood." *Id*.

Allowing Applicant's modification application to be considered administratively is necessary to provide individuals suffering from SUD with a treatment center in Central Oregon, and Crook County in particular. Without the accommodation, the upcoming application is at greater risk of being inappropriately denied. Although presumably experts in CCC provisions and land use matters germane to Crook County, it is unlikely that the Planning Commission equally understands the authority granted to the County by the ADA and FHAA or the County's obligation to comply with those federal laws. If the upcoming application is denied, then Applicant will clearly be unable to provide necessary services at the existing and approved community center to disabled individuals seeking SUD treatment in a location of their choosing.

Further, Applicant's request does not fundamentally alter the County's operations and imposes no undue financial or administrative burdens on the County. As previously noted, the County regularly processes land use permits administratively and is equipped with staff sufficient to review and decide on this application. Additionally, the County Court regularly hears land use appeals and is well-equipped to do so in this instance. Therefore, no administrative or financial burden would exist as a result of Applicant's reasonable accommodation/modification request. As such, this criterion is met.

B. An ADA Reasonable Accommodation/Modification is Appropriate in This Case.

Like the FHAA, the ADA "provides a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The definition of a disability under the ADA is substantively identical to that in the FHAA: "[t]he term 'disability' means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment []." 42 U.S.C. § 12102(1). Under

the ADA, the County impermissibly fails to approve a reasonable accommodation/modification when

> (1) [the applicant] "is an individual with a disability"; (2) [the applicant] "is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities"; (3) [the applicant] "was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity"; and (4) "such exclusion, denial of benefits, or discrimination was by reason of [the applicant's] disability."

McGary, 386 F3d at 1265 (quoting *Thompson v. Davis*, 295 F3d 890, 895 (9th Cir 2002)). Each of these factors are addressed below.

(1) The Applicant is an individual with a disability.

Persons recovering from drug and/or alcohol addiction are defined as "persons with disabilities" under the ADA. *Hernandez v. Hughes Missile Systems Co.*, 362 F.3d 564, 568 (9th Cir. 2004). Therefore, this criterion is met.

(2) The Applicant is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities.

SUD treatment centers, such as the Applicant's proposed facility, are a public concern and regulated by the government to ensure proper execution and care. Any property owner in Crook County may submit a land use application to improve their property. Therefore, Applicant is qualified to participate in or receive the benefit of the County's services.

(3) The Applicant was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity. Such exclusion, denial of benefits, or discrimination was by reason of the Applicant's disability.

As with the FHAA, "under the ADA, a public entity must reasonably accommodate a qualified individual with a disability by making changes in rules, policies, practices, or services when needed." *Oconomowoc Residential Programs, Inc*., 300 F3d at 784; *see also* 28 C.F.R. § 35.130(b)(7) (stating in regulations interpreting Title II of the ADA, "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity"). The "'reasonable accommodation' provision prohibits the enforcement of zoning ordinances and local housing policies in a manner that denies people with disabilities access to housing on par with that of those who are not disabled.'" *Id*. at 783 (quoting *Hovsons, Inc. v.*

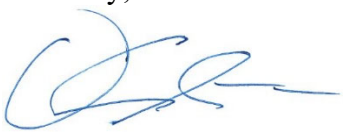
Township of Brick, 89 F3d 1096, 1104 (3d Cir 1996)). As discussed above, insisting that Applicant's upcoming application be decided by the Planning Commission increases the risk of the application being inappropriately denied because such a forum provides an opportunity for opposing parties to provide overtly discriminatory testimony as occurred in *Rise, Inc. v. Malheur County*. Additionally, it can be presumed that the Planning Commission lacks the understanding of the County's obligations under the ADA and FHAA. Should discriminatory information form the basis of the County's denial of the upcoming application, the County will have denied individuals suffering from SUD the opportunity to choose to live in a neighborhood of their choice. *Oconomowoc Residential Programs*, 300 F3d at 784.

CONCLUSION

For the reasons states above and pursuant to the FHAA and ADA, the County should grant Applicant's request for a reasonable accommodation/modification altering the process the County uses to consider the upcoming application to modify an existing conditional use permit for the subject Property.

Thank you for considering our request. We look forward to continuing to work with the County to provide necessary substance use disorder treatment at the uniquely situated Property.

Sincerely,



D. Adam Smith