BOARD OF COUNTY COMMISSIONERS
EL PASO COUNTY, COLORADO

Case No. APP-18-005

Appellants: Sharon Schaefer on behalf of Take Action El Paso County, LLC ("**Appellant**")

Appellee: Mountain Springs Recovery LLC ("**Appellee**")

Re: Appeal of Administrative Determination that Proposed Drug Rehabilitation Facility Located at 1865 Woodmoor Drive Is a "Rehabilitation Facility" Pursuant to Chapter 1 of the El Paso County Land Development Code (the "**Appeal**")

Date: December 18, 2018

HEARING BRIEF OF APPELLEE

On July 18, 2018, Appellee submitted an application (the "**Application**") for approval of a site development plan for a substance abuse rehabilitation facility (the "**Facility**") located on certain real property at 1865 Woodmoor Drive (the "**Property**") in unincorporated El Paso County (the "**County**") to the County's Planning and Community Development Department (the "**PCDD**"). The Property is located in the County's C-2 Commercial zoning district (the "**C-2 District**") pursuant to the El Paso County Land Development Code (the "**Code**"), which allows rehabilitation facilities as a use-by-right. Following PCDD staff review of the Application, PCDD staff approved the Application in accordance with County review and approval procedures on November 7, 2018 (the "**Approval**"). The Appeal, filed on December 7, 2018, challenges the Approval.

As this Hearing Brief explains, the Appeal finds no basis in the law and must therefore be denied. Furthermore, as more fully set forth herein, reversal of the Approval by the Board of County Commissioners (the "**BOCC**") on the bases set forth in the Appeal would constitute an actionable violation of federal law.

I. BACKGROUND

Appellee is the owner and operator of substance abuse rehabilitation facilities throughout the United States. As an operator, Appellee's mission is to provide the highest quality treatment services, delivered with passion and integrity. Appellee believes that substance abuse is a treatable disease, and that with assistance, prospective residents of the Facility can overcome addiction issues.

On August 9, 2018, Appellee or one of its affiliated entities, purchased the Property. The Property is presently improved with five structures constituting a now-vacant former Ramada motel. The five structures include four structures containing motel rooms, one structure containing a central office and clubhouse, and associated recreation facilities, parking lot, and landscaping. Appellee purchased the Property with the intent to redevelop the former motel into the Facility.

The Facility will offer an institutional-type setting providing 24-hour on-site services to individuals with a primary diagnosis of substance abuse-related issues. Once fully operational, the Facility will have 150 beds available for residents. Residents will reside at the Facility during treatment periods, and will be under constant supervision of Facility staff. On average, a resident will remain at the Facility for approximately 30 days. Services that will be provided at the Facility will include diagnostic evaluations, individual and group counseling and therapy services, and certain forms of medical care including medical evaluations and resident monitoring. The Facility will be licensed by the Colorado Department of Human Services, Office of Behavioral Health.

On May 10, 2018, Appellee submitted a request to PCDD staff for a zoning verification confirming that the Facility would be a permitted use in the C-2 District (see **Exhibit 1**). On May 22, 2018, PCDD issued a letter confirming that the Facility would indeed be permitted in the C-2 District (see **Exhibit 2**). Appellee subsequently submitted its Application on July 10, 2018, and PCDD staff approved the Application on November 7, 2018 (see **Exhibit 3**). BOCC Resolution No. 18-389 provides that a "specific interpretation or application of the Code use provisions by the Executive Director [of PCDD]" may be appealed within 30 days by an aggrieved party. Appellant filed the Appeal on December 7, 2018.

II. STANDARD OF REVIEW

Resolution No. 18-389 governs the Appeal. Pursuant to Section I.D of Resolution No. 18-389, the burden of proof is on the Appellant to establish that the Approval was in error.

III. ARGUMENT

A. Appellant Has Not Met The Requirements Of Resolution No. 18-389 And This Appeal Should Be Dismissed.

Section I.B of Resolution No. 18-389 requires an appellant to file:

> [A] written notice of appeal to the [PCDD] setting forth in detail the name and interest of the appealing party, the nature of the appeal, the legal description of the property affected, the reasons and any written or photographic documentation supporting the appeal, along with the applicable fee, and any other information or documentation as may be required by the Department for the adequate review of the appeal.

In addition, Section I.A of the Resolution requires an appeal to be filed by an "aggrieved party."

Appellant in this case has neither established that it is an aggrieved party nor has it met the requirements of Section I.B of Resolution No. 18-389. It appears that the Appellant is registered at 1659 Woodstone Way, which is located nearly three quarters of a mile from the Property. The Appeal contains a series of generalized, unspecific concerns regarding substance abuse rehabilitation, yet Appellant has not established how it is aggrieved by the Approval or has not set forth "in detail the . . . ***interest of the appealing party***." Moreover, while the Appeal appears to indicate that it challenges the determination by PCDD staff that the Facility is a permitted use in the C-2 District, it provides no reasons supporting this contention. Again, the Appeal contains only broad statements regarding substance abuse treatment generally, and does not contain a single reference to the Code or any rationale supporting Appellant's position that the Facility is not permitted thereunder. On this basis, the Appeal should be dismissed prior to hearing by the BOCC.

B. The Facility Is Permitted In the C-2 District By The Code.

The Code is clear. Code § 1.15 defines "Rehabilitation Facility" as follows: "An institutional use-type facility, and not a group home, whether public, quasi-public, not-for-profit, providing accommodation, treatment and medical care for patients suffering from alcohol or drug-related illness." The Facility clearly meets this definition. As the description above demonstrates, the Facility is an institutional-type facility, it provides accommodation, treatment, and medical care for individuals suffering from addiction.

Rehabilitation Facility is listed as an allowed use in the C-2 District. Thus, the Facility is allowed in the C-2 District.

C. Federal Law Requires The BOCC To Deny The Appeal.

The Approval correctly interpreted the Code to allow the Facility on the Property. In addition, the Board should uphold the use interpretation because it is required to do so under the FHA and the ADA. The Appeal is premised entirely upon unfounded fears and prejudices associated with people recovering from addiction, and otherwise finds no basis in the Code.

1. Appellee Is Protected By The FHA and ADA

The Appellee is a member of a protected class under the FHA and the ADA. The FHA provides protection to, among other groups, persons with disabilities or "handicaps." 42 U.S.C. § 3604(f). "Handicap" is defined in the FHA as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment." 42 U.S.C. § 3602(h). Specifically, the FHA prohibits discrimination "in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of (A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter." 42 U.S.C. § 3604(f)(1). Federal courts have universally found that zoning or other land use controls that make unavailable or deny housing to persons with disabilities constitute violations of the FHA. *See, e.g., City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995).

Similarly, the ADA requires that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. In turn, the ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public

entity." 42 U.S.C. § 12131(2). As with the FHA, services, programs, or activities of a public entity have been universally interpreted by courts to include zoning and other land use controls. *See Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997).

Past drug or alcohol addiction has been conclusively determined to constitute a handicap or disability under the FHA and ADA pursuant to federal regulation, 24 C.F.R. § 100.201, and courts, including in the U.S. District Court for the District of Colorado, *see St. Paul Sober Living, LLC v. Bd. of Cnty. Comm'rs of Garfield Cnty.*, 896 F. Supp. 2d 982 (D. Colo. 2012). While current, illegal use of a controlled substance is specifically excluded from protection under the ADA and FHA, courts have not interpreted this exclusion to limit protection for treatment facilities that have an "inevitable, small percentage of failures," but where the program "indisputably does not tolerate" drug use. *Innovative Health*, 117 F.3d at 48.

As a developer and prospective operator of a residential facility for persons recovering from past drug or alcohol addiction and other behavioral conditions, the Appellee is protected under the FHA and ADA, as are the future residents of the Facility. The Appellee is a "person associated with" one or more persons with disabilities as established under the FHA. 42 U.S.C. § 3604(f)(1)(C).

2. The Facility Is A "Dwelling" Within The Meaning Of The FHA

The Facility constitutes a "dwelling" under the FHA. 42 U.S.C. § 3602(b); *see also Lakeside Resort Enters. v. Bd. of Supervisors of Palmyra Twp.*, 455 F.3d 154 (3d Cir. 2006). The prospective residents of the Facility will reside in the Facility for the period of their treatment, which is sufficient to consider the Facility a dwelling.

3. Reversing The Approval Would Violate The FHA And ADA

The BOCC's reversal of the Approval would constitute disparate treatment under the FHA and would be a discriminatory action under the ADA. A governmental body violates the ADA and the FHA when it engages in disparate treatment, including facial discrimination or intentional discrimination, against a protected group. *See Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Proj., Inc.*, 135 S. Ct. 2507, 2533 (2015). Proof of disparate treatment can be demonstrated by showing that the governmental

body acted because of the disability, *see Cinnamon Hills Youth Crisis Ctr. v. St. George City*, 685 F.3d 917, 920 (10th Cir. 2012), or by "simply produc[ing] direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the defendant," *see Pac. Shores Props. v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013). The discriminatory purpose need only be one motivating factor behind the challenged action for the local government to be held liable under the FHA or ADA. *See Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015). The use of discriminatory "code words" by members of the community precipitating an action of a local government adverse to people with disabilities is supportive of the conclusions that the local government is engaging in disparate treatment. *See Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 505-06 (9th Cir. 2016) ("[T]he relevant cases clearly hold that a city's denial of a zoning change following discriminatory statements by members of the public supports a claim of discriminatory intent.")

Community members have continually throughout this case made comments to the County and in social media forums of an express or implied discriminatory nature regarding the Appellee and the anticipated residents of the Facility. The entire purpose of this Appeal is to preclude the location of a substance abuse treatment facility on the Property. In the event that the BOCC reverses the Approval on the basis of the Appeal, the BOCC would also be liable for engaging in disparate treatment. *See, e.g., Ave. 6E Invs.*, 818 F.3d at 505-06.

Moreover, the only discernible distinction between the Facility and other medical uses allowed in the C-2 District such as a Convalescent Hospital or Hospital is the fact that prospective residents of the Clinic are people recovering from addiction or other disorders. The ADA demands equal treatment for these individuals in their access to housing and medical care. The C-2 District allows a Convalescent Hospital as a use by right on the Property, and allows a Hospital as a special use. The ADA requires that medical facilities and facilities treating drug and alcohol addiction be treated equally with one another. Again, it is the County's duty to ensure that medical facilities treating drug and alcohol addiction or other similar conditions are treated on an equal basis as all other medical facilities.

IV. CONCLUSION

In light of the foregoing arguments, Appellee respectfully requests that the BOCC deny the Appeal.

Respectfully submitted this 18th day of December, 2018.

/s/ Brian J. Connolly
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