

MEETING DATE: 8-11-16

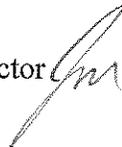
PLANNING COMMISSION

Case No. P16-19

**City of Medina
Text Amendments to
Planning & Zoning Code**



CITY of MEDINA
Planning Commission
August 11, 2016 Meeting

Case No: P16-19
Applicant: City of Medina
Subject: Text amendment – Transitional Housing regulation
Submitted by: Jonathan Mendel, Community Development Director 

Purpose and Intent:

Earlier this year, the Planning Commission requested staff evaluate whether the City of Medina should regulate in-patient substance abuse treatment facilities/transitional housing separately than the current Group Home use definition.

Current Regulatory Framework:

Currently, the Group Home use definition of the City of Medina's Planning and Zoning Code applies to any unrelated occupants in a residential setting receiving services:

1105.065 GROUP HOME.

"Group home" means any residential facility, licensed by the State of Ohio, designed to allow not more than sixteen (16) persons, needing specialized care, counseling, ongoing medical treatment or supervision to live in the same building or complex of buildings and engage in some congregate activity in a non-institutional environment as regulated by Chapters 5119, 5120 and 5123 of the Ohio Revised Code.

This existing use definition is likely broad in order to avoid excess differentiation as it relates to the types of clients and/or services provided. The particular land use impacts of a group home (i.e. permanent housing) in general with up to 16 persons will not dramatically vary. Traffic generation, etc. should be consistent across the various operational peaks for such uses and varying businesses.

Transitional Housing Uses:

Transitional housing is different from a Group Home in specific ways that warrant differentiation from Group Homes. The following outline the land use differences:

- Not permanent housing (usually 30-90 days) with regular turnover
- Can house more short term residents
- Greater potential traffic generation and parking needs due to short housing duration and turnover, typically employs staff that do not reside at the site.

Other Similar Use Definitions:

In reviewing other cities throughout the State of Ohio, there is a range of ways such land uses are handled. Some cities use essentially the same definition as Medina's *Group Home* definition, but with a different name, whereas other cities differentiate between the types of residents and the services provided (attached). These use definitions from other Ohio cities show the possible range of regulation and specificity that have been considered by other communities.

Fair Housing Act compliance and applicable case law:

There are many categories of individuals that fall under the 'reasonable accommodations' requirements of the federal Fair Housing Act as defined:

A person with a disability to include (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment.

The term "physical or mental impairment" includes, but not limited to, diseases and conditions such as drug addiction, among others. This inclusion of drug addiction as a covered condition/disease does not include individuals with current illegal use of a controlled substance. The above definition clarification is taken from a 2004 Joint Statement of the Department of Housing and Urban Development and the Department of Justice. Therefore, a new land use definition has been developed with Federal Fair Housing Act compliance in mind (attached – pages 1-4).

Additionally, there is case law from 2015 (*Get Back Up, Inc v City of Detroit; City Detroit Board of Zoning Appeals* [attached]) where the United Court of Appeals, Sixth District found that the City of Detroit's regulation of transitional housing for substance abuse treatment as a conditionally permitted use did not discriminate against persons with disabilities. This provides the City of Medina a basis for regulating transitional housing separately and differently than permanent housing like a group home.

Proposed use definition:

Below is the proposed use definition for transitional housing staff has developed with assistance from an expert land use attorney:

Proposed *Transitional Housing* use definition:

"Transitional housing" means a temporary housing arrangement designed to assist persons to obtain skills, financial wherewithal and/or the physical, psychological and emotional stability necessary for independent living in permanent housing in a community. Transitional housing is housing in which:

- a) An organization provides a program of therapy, counseling, supervision and/or training for the occupants;
- b) The organization operating the program may or may not be licensed or authorized by a governmental authority; and
- c) The program is for the purpose of assisting the occupants in one or more of the following types of care:
 - a. Protection from abuse and neglect;
 - b. Developing skills and the personal stability that is necessary to adjust to life in the community; and
 - c. Treatment of the effects of substance abuse, even if under criminal justice supervision.

The definition of "transitional housing" includes the terms "halfway house", "safe house", "temporary care home", and other similar uses. The definition of "transitional housing" does not include the terms "group home", as defined in the Code, or other similar permanent group living facilities.

Also, it is warranted to make a minor clarifying amendment to the existing "Group Home" definition in the City of Medina Planning & Zoning Code. The added text intends to make a clear distinction between the definitions of "Transitional Housing" and "Group Home".

Amendment to the existing *Group Home* use definition:

1105.065 GROUP HOME.

"Group home" means any residential facility meant as a permanent residence for persons, licensed by the State of Ohio, designed to allow not more than sixteen (16) persons, needing specialized care, counseling, ongoing medical treatment or supervision to live in the same building or complex of buildings and engage in some congregate activity in a non-institutional environment as regulated by Chapters 5119, 5120 and 5123 of the Ohio Revised Code.

Next Steps:

Once it is decided whether to create or not create a new use definition, the next steps are as follows:

1. Develop the remaining regulatory framework
 - Evaluate the appropriate zoning districts for such use(s)
 - Whether to make the use permitted or conditionally permitted
 - If conditionally permitted, determine appropriate conditionally permitted use regulations
 - Determine whether to create specific parking requirements for such use(s)
2. Forward the entire regulatory framework to City Council for legislative action

Transitional
Housing zoning
definitions – Other
Ohio cities

Transitional Housing zoning definitions

City of Medina

1105.065 GROUP HOME.

"Group home" means any residential facility, licensed by the State of Ohio, designed to allow not more than sixteen (16) persons, needing specialized care, counseling, ongoing medical treatment or supervision to live in the same building or complex of buildings and engage in some congregated activity in a non-institutional environment as regulated by Chapters 5119, 5120 and 5123 of the Ohio Revised Code.

(Ord. 109-14. Passed 6-23-14.)

ORC Chpts referenced above:

Chapter 5119: DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES

Chapter 5120: DEPARTMENT OF REHABILITATION AND CORRECTION

Chapter 5123: DEPARTMENT OF DEVELOPMENTAL DISABILITIES

City of Cleveland

§ 325.471 Mental Health Center

An institution providing in-patient or out-patient care or therapy for individuals affected by mental illness, developmental disabilities, alcoholism or substance abuse and others needing psychological therapy but which does not serve as a residence for such individuals.

(Ord. No. 656-05. Passed 6-6-05, eff. 6-15-05)

§ 325.36 Institutional H Occupancy Classification

"Institutional H Occupancy Classification" means a building classification based on occupancy which includes all buildings in which people suffering from physical limitation because of health or age are harbored for medical, charitable or other care or treatment, and includes, among others:

Hospitals;

Sanitariums and sanatoriums;

Infirmaries;

Nursing homes;

Convalescent homes;

Old folks homes;

Homes for the aged;

Rest homes;

Orphanages;

Nurseries for children under five (5) years of age.

(Ord. No. 1105-57. Passed 4-14-58, eff. 4-15-58)

City of Lorain, OH

1221.43 RESIDENTIAL SOCIAL SERVICE FACILITY.

“Residential social service facility” means a facility or home which provides resident services to a group of individuals of whom one or more are unrelated, and which may provide additional supervised programming services. Groups served may include the mentally retarded or handicapped, juvenile offenders, drug or alcohol offenders, releasees from state institutions, or wards of the court or welfare system. The category includes, but is not limited to, facilities licensed, supervised, or sponsored by any political subdivision or judicial authority. The category includes, but is not limited to, facilities commonly referred to as "halfway houses" or "group homes".

(Ord. 186-85. Passed 12-16-85.)

1221.65 SOCIAL SERVICES ESTABLISHMENT.

An organization offering aid to persons requiring assistance for psychological problems, drug and alcohol addictions, employment opportunities, health and physical ailments, learning disabilities and other circumstances.

(Ord. 27-14. Passed 3-3-14.)

2012 NAICS Definition

T = Canadian, Mexican, and United States industries are comparable.

Sector 62 -- Health Care and Social Assistance^T

The Sector as a Whole

The Health Care and Social Assistance sector comprises establishments providing health care and social assistance for individuals. The sector includes both health care and social assistance because it is sometimes difficult to distinguish between the boundaries of these two activities. The industries in this sector are arranged on a continuum starting with those establishments providing medical care exclusively, continuing with those providing health care and social assistance, and finally finishing with those providing only social assistance. The services provided by establishments in this sector are delivered by trained professionals. All industries in the sector share this commonality of process, namely, labor inputs of health practitioners or social workers with the requisite expertise. Many of the industries in the sector are defined based on the educational degree held by the practitioners included in the industry.

Excluded from this sector are aerobic classes in Subsector 713, Amusement, Gambling, and Recreation Industries and nonmedical diet and weight reducing centers in Subsector 812, Personal and Laundry Services. Although these can be viewed as health services, these services are not typically delivered by health practitioners

City of Cincinnati, OH

§ 1401-01-T. - Transitional Housing.

"Transitional housing" means housing designed to assist persons in obtaining skills necessary for independent living in permanent housing, including homes for adjustment and halfway houses.

Transitional housing is housing in which:

- (a) An organization provides a program of therapy, counseling or training for the residential occupants;
- (b) The organization operating the program is licensed or authorized by a governmental authority having jurisdiction over operation; and
- (c) The program is for the purpose of assisting the residential occupants in one or more of the following types of care:
 - (1) Protection from abuse and neglect;
 - (2) Developing skills necessary to adjust to life;
 - (3) Adjusting to living with the handicaps of physical disability;
 - (4) Adjusting to living with the handicaps of emotional or mental disorder or mental retardation;
 - (5) Recuperation from the effects of drugs or alcohol, even if under criminal justice supervision;or
- (6) Readjusting to society while housed under criminal justice supervision including, but not limited to, pre-release, work-release and probationary programs.

(Ordained by Ord. No. 15-2004, eff. Feb. 13, 2004)

§ 1401-01-D8. - Developmental Disability Dwelling. "Developmental disability dwelling" means an establishment licensed by the State of Ohio that is located in a single-family residence and provides accommodation, personal care, habilitation services and supervision in a family setting for not more than eight residents with developmental disabilities and employees caring for such residents.

(Ordained by Ord. No. 15-2004, eff. Feb. 13, 2004; a. Ord. No. 159-2008, § 2, eff. June 7, 2008)

City of Strongsville, OH

"Community-based residential care facility" means a dwelling unit operated, supported and/or monitored by persons other than the residents themselves that may or may not be licensed or certified under the laws of the State of Ohio or Federal government, in which live three or more people, who are unrelated by blood, marriage or adoption, and who need and receive personal assistance and/or supervision in order to live successfully in the community.

2004 Joint Statement
of HUD and DOJ –
Reasonable
accommodations under
the Fair Housing Act



U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY

Washington, D.C.
May 17, 2004

JOINT STATEMENT OF
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
AND THE DEPARTMENT OF JUSTICE

*REASONABLE ACCOMMODATIONS UNDER THE
FAIR HOUSING ACT*

Introduction

The Department of Justice ("DOJ") and the Department of Housing and Urban Development ("HUD") are jointly responsible for enforcing the federal Fair Housing Act¹ (the "Act"), which prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability.² One type of disability discrimination prohibited by the Act is the refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.³ HUD and DOJ frequently respond to complaints alleging that housing providers have violated the Act by refusing reasonable accommodations to persons with disabilities. This Statement provides technical assistance regarding the rights and obligations of persons with disabilities and housing providers under the Act relating to

¹ The Fair Housing Act is codified at 42 U.S.C. §§ 3601 - 3619.

² The Act uses the term "handicap" instead of the term "disability." Both terms have the same legal meaning. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that definition of "disability" in the Americans with Disabilities Act is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988"). This document uses the term "disability," which is more generally accepted.

³ 42 U.S.C. § 3604(f)(3)(B).

reasonable accommodations.⁴

Questions and Answers

1. What types of discrimination against persons with disabilities does the Act prohibit?

The Act prohibits housing providers from discriminating against applicants or residents because of their disability or the disability of anyone associated with them⁵ and from treating persons with disabilities less favorably than others because of their disability. The Act also makes it unlawful for any person to refuse “to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford ... person(s) [with disabilities] equal opportunity to use and enjoy a dwelling.”⁶ The Act also prohibits housing providers from refusing residency to persons with disabilities, or placing conditions on their residency, because those persons may require reasonable accommodations. In addition, in certain circumstances, the Act requires that housing providers allow residents to

⁴ Housing providers that receive federal financial assistance are also subject to the requirements of Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794. Section 504, and its implementing regulations at 24 C.F.R. Part 8, prohibit discrimination based on disability and require recipients of federal financial assistance to provide reasonable accommodations to applicants and residents with disabilities. Although Section 504 imposes greater obligations than the Fair Housing Act, (*e.g.*, providing and paying for reasonable accommodations that involve structural modifications to units or public and common areas), the principles discussed in this Statement regarding reasonable accommodation under the Fair Housing Act generally apply to requests for reasonable accommodations to rules, policies, practices, and services under Section 504. See U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2002-01(HA) (www.hud.gov/offices/fheo/disabilities/PIH02-01.pdf) and “Section 504: Frequently Asked Questions,” (www.hud.gov/offices/fheo/disabilities/sect504faq.cfm#anchor272118).

⁵ The Fair Housing Act’s protection against disability discrimination covers not only home seekers with disabilities but also buyers and renters without disabilities who live or are associated with individuals with disabilities 42 U.S.C. § 3604(f)(1)(B), 42 U.S.C. § 3604(f)(1)(C), 42 U.S.C. § 3604(f)(2)(B), 42 U.S.C. § (f)(2)(C). See also H.R. Rep. 100-711 – 24 (reprinted in 1988 U.S.C.A.N. 2173, 2184-85) (“The Committee intends these provisions to prohibit not only discrimination against the primary purchaser or named lessee, but also to prohibit denials of housing opportunities to applicants because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities.”). *Accord*: Preamble to Proposed HUD Rules Implementing the Fair Housing Act, 53 Fed. Reg. 45001 (Nov. 7, 1988) (citing House Report).

⁶ 42 U.S.C. § 3604(f)(3)(B). HUD regulations pertaining to reasonable accommodations may be found at 24 C.F.R. § 100.204.

make reasonable structural modifications to units and public/common areas in a dwelling when those modifications may be necessary for a person with a disability to have full enjoyment of a dwelling.⁷ With certain limited exceptions (*see* response to question 2 below), the Act applies to privately and publicly owned housing, including housing subsidized by the federal government or rented through the use of Section 8 voucher assistance.

2. Who must comply with the Fair Housing Act's reasonable accommodation requirements?

Any person or entity engaging in prohibited conduct – *i.e.*, refusing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling – may be held liable unless they fall within an exception to the Act's coverage. Courts have applied the Act to individuals, corporations, associations and others involved in the provision of housing and residential lending, including property owners, housing managers, homeowners and condominium associations, lenders, real estate agents, and brokerage services. Courts have also applied the Act to state and local governments, most often in the context of exclusionary zoning or other land-use decisions. *See e.g.*, City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 729 (1995); Project Life v. Glendening, 139 F. Supp. 703, 710 (D. Md. 2001), aff'd 2002 WL 2012545 (4th Cir. 2002). Under specific exceptions to the Fair Housing Act, the reasonable accommodation requirements of the Act do not apply to a private individual owner who sells his own home so long as he (1) does not own more than three single-family homes; (2) does not use a real estate agent and does not employ any discriminatory advertising or notices; (3) has not engaged in a similar sale of a home within a 24-month period; and (4) is not in the business of selling or renting dwellings. The reasonable accommodation requirements of the Fair Housing Act also do not apply to owner-occupied buildings that have four or fewer dwelling units.

3. Who qualifies as a person with a disability under the Act?

The Act defines a person with a disability to include (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

⁷ This Statement does not address the principles relating to reasonable modifications. For further information see the HUD regulations at 24 C.F.R. § 100.203. This statement also does not address the additional requirements imposed on recipients of Federal financial assistance pursuant to Section 504, as explained in the Introduction.

The term "substantially limits" suggests that the limitation is "significant" or "to a large degree."

The term "major life activity" means those activities that are of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, and speaking.⁸ This list of major life activities is not exhaustive. *See e.g., Bragdon v. Abbott*, 524 U.S. 624, 691-92 (1998)(holding that for certain individuals reproduction is a major life activity).

4. Does the Act protect juvenile offenders, sex offenders, persons who illegally use controlled substances, and persons with disabilities who pose a significant danger to others?

No, juvenile offenders and sex offenders, by virtue of that status, are not persons with disabilities protected by the Act. Similarly, while the Act does protect persons who are recovering from substance abuse, it does not protect persons who are currently engaging in the current illegal use of controlled substances.² Additionally, the Act does not protect an individual with a disability whose tenancy would constitute a "direct threat" to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by reasonable accommodation.

5. How can a housing provider determine if an individual poses a direct threat?

The Act does not allow for exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (*e.g.*, current conduct, or a recent history of overt acts). The assessment must consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat. Consequently, in evaluating a recent history of overt acts, a provider must take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat (*i.e.*, a significant risk of substantial harm). In such a situation, the provider may request that the individual document

⁸ The Supreme Court has questioned but has not yet ruled on whether "working" is to be considered a major life activity. *See Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 122 S. Ct. 681, 692, 693 (2002). If it is a major activity, the Court has noted that a claimant would be required to show an inability to work in a "broad range of jobs" rather than a specific job. *See Sutton v. United Airlines, Inc.*, 527 U.S. 470, 492 (1999).

⁹ *See, e.g., United States v. Southern Management Corp.*, 955 F.2d 914, 919 (4th Cir. 1992) (discussing exclusion in 42 U.S.C. § 3602(h) for "current, illegal use of or addiction to a controlled substance").

2015 USCA-6th Dist
Get Back Up, Inc. v
City of Detroit; City
Detroit Board of
Zoning Appeals

606 Fed.Appx. 792
United States Court of Appeals,
Sixth Circuit.

GET BACK UP, INC., Plaintiff–Appellant,
v.
CITY OF DETROIT; City of Detroit Board
of Zoning Appeals, Defendants–Appellees.

No. 13–2722.

|
March 13, 2015.

Synopsis

Background: Operator of residential substance abuse treatment facility sued city and city's board of zoning appeals, seeking permanent injunctive relief and claiming that city zoning ordinance requiring facility to obtain conditional use permit to operate in business district was invalid facially and as applied under Americans with Disabilities Act (ADA), Rehabilitation Act, and Fair Housing Act (FHA), and was void for vagueness. The United States District Court for the Eastern District of Michigan, Robert H. Cleland, J., 2013 WL 3305672, granted judgment for city, and 2013 WL 6729483, denied reconsideration. Operator appealed.

Holdings: The Court of Appeals held that:

[1] ordinance did not discriminate against persons with disabilities, and

[2] ordinance's criteria for approving conditional use permit were not unconstitutionally vague.

Affirmed.

West Headnotes (2)

[1] **Civil Rights**

⇌ Zoning, building, and planning; land use

Civil Rights

⇌ Public regulation; zoning

Zoning and Planning

⇌ Hospitals, Clinics, and Other Health-Related Facilities

Zoning ordinance requiring residential substance abuse treatment facility, but not hospitals and nursing homes, to obtain conditional use permit to operate in business district was not facially invalid, under ADA, Rehabilitation Act, and Fair Housing Act, since ordinance did not discriminate against persons with disabilities, but rather treated residential substance abuse treatment facilities same as many other residential uses, and hospitals and nursing homes were not materially similar to residential substance abuse treatment facilities. Rehabilitation Act of 1973, § 2 et seq., 29 U.S.C.A. § 701 et seq.; Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

Cases that cite this headnote

[2] **Constitutional Law**

⇌ Zoning, planning, and land use

Zoning and Planning

⇌ Permits, Certificates, and Approvals

Zoning ordinance's fifteen criteria for approving conditional use permit were not void as unconstitutionally vague; criteria required city board of zoning appeals to find, for example, that conditional use would not be detrimental to or endanger social, physical, environmental, or economic well-being of surrounding neighborhoods, that use would not injure use and enjoyment of other property in immediate vicinity, and that use would be compatible with adjacent land uses, but those criteria had common-sense meanings and were not so vague that they failed to provide fair notice to permit applicants or failed to provide standards to guide board's decisions.

Cases that cite this headnote

*792 On Appeal from the United States District Court for the Eastern District of Michigan.

BEFORE: BATCHELDER and ROGERS, Circuit Judges;
BECKWITH, *793 District Judge. *

Opinion

PER CURIAM.

This case is about whether a city zoning ordinance violates federal antidiscrimination laws when it requires a residential facility for the treatment of substance abuse to obtain a conditional use permit to operate in a business district. Get Back Up, Inc., operates a residential substance abuse treatment facility in the City of Detroit. After two public hearings regarding Get Back Up's conditional use permit application, the City's Board of Zoning Appeals denied Get Back Up a permit to operate its facility in an area of the City zoned for general business use. After its administrative appeals in the Michigan state courts failed, Get Back Up filed suit in federal court, alleging that the ordinance was invalid facially and as applied under the Americans with Disabilities Act, the Rehabilitation Act, and the Fair Housing Act. Get Back Up also alleged that the ordinance was void for vagueness. The ordinance is not facially invalid under the relevant statutes, and is not unconstitutionally vague. Other arguments are not adequately raised and affirmance is therefore required.

Get Back Up operates a 160-bed all-male residential facility in downtown Detroit, providing substance abuse treatment and counseling, education, and job training opportunities.¹ In August 2007, Get Back Up purchased an unused school building from Detroit Public Schools for approximately \$500,000. The building is located in a zoning district labeled B4-H, General Business/Residential Historic.

Detroit's zoning ordinance generally identifies uses of property within each type of zone by classifying them as "by right," prohibited altogether, or permitted if certain conditions are satisfied. By right uses do not need permission from the City, subject to some exceptions for site plan reviews and some parking requirements. Conditional uses must first obtain permission from the City before operating. As described by Section 61-3-201 of the zoning ordinance, conditional uses "because of their unique characteristics, cannot be properly classified in any particular district or districts without consideration, in each case, of the impact of those uses upon neighboring uses. Review of dimensional requirements, location, construction, development, and operation of each use is necessary to

ensure compatibility with the surrounding neighborhood." Conditional use applications must be reviewed and approved based on fifteen criteria set forth in Section 61-3-231 of the zoning ordinance. Those criteria are:

(1) The establishment, maintenance, location, and operation of the proposed Conditional Use will not be detrimental to or endanger the social, physical, environmental or economic well being of surrounding neighborhoods, or aggravate any preexisting physical, social or economic deterioration of surrounding neighborhoods; and

(2) The Conditional Use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes permitted; and

(3) The Conditional Use will not substantially diminish or impair property values within the neighborhood; and

*794 (4) The Conditional Use shall not be inconsistent with the goals and objectives of the City of Detroit Master Plan; and

(5) The establishment of the Conditional Use will not impede the normal and orderly development and improvement of surrounding property for uses permitted in the district. Plans for such development and improvement shall be evidenced in a written or published community plan, development plan, cluster board plan, or similar document; and

(6) Adequate utilities, access roads, drainage, and other necessary facilities have been or will be provided; and

(7) The Conditional Use will be compatible with the capacities of public services and public facilities that are affected by the proposed use; and

(8) The Conditional Use will be compatible with land uses on adjacent and nearby zoning lots in terms of location, size, and character. For purposes of this section, "nearby zoning lots" shall mean those lots on the same side of the same block face as the subject property; and

(9) The Conditional Use will not hinder or have a detrimental effect upon vehicular turning patterns, ingress/ egress, traffic flow, nearby intersections, traffic visibility and the clear vision triangle, and other vehicular and pedestrian traffic patterns in the vicinity; and

(10) The Conditional Use will in all other respects conform to ... this Zoning Ordinance. In the event a dimensional or other variance is needed, the [BSE] may approve the Conditional Use contingent on approval of the needed variance from the Board of Zoning Appeals as provided for in Sec. 61-3-219 of this Code; and

(11) The Conditional Use is consistent with any approved preliminary site plan; and

(12) The Conditional Use is so designed, located, planned, and to be operated so that the public health, safety, and welfare will be protected; and

(13) The Conditional Use shall not involve activities ... or conditions of operation that will be detrimental to the physical environment or to public health and general welfare by reason of excessive production of noise, smoke, fumes, glare, or odors; and

(14) The Conditional Use is consistent with and promotes the intent and purpose of this Chapter; and

(15) Where a public, civic, or institutional use is proposed on land zoned industrial, the impacts of the normal operations that are allowed in the district, including noise, smoke, fumes, glare, and odor, shall not adversely affect the employees, patrons, or users of the proposed public, civic, or institutional facility.

For the B4 general business zone in which Get Back Up's property was located, Section 61-9-73 of the ordinance lists by right uses, grouped by (a) residential use; (b) public, civic, and institutional use; (c) retail, service, and commercial use; manufacturing and industrial use; and (d) "other" uses not included in the first four categories. By right residential uses include boarding schools, child caring institutions, nursing homes, and religious residential facilities. By right public, civic, and institutional uses include adult day care centers, hospitals, libraries, and religious institutions. By right commercial uses include 37 types of businesses, including restaurants, medical clinics, retail stores, and offices. In contrast, Section 61-9-80 identifies conditional residential uses in B4 zones, including a "[r]esidential substance abuse service facility." Other conditional residential uses in B4 zoning districts are a multi-family dwelling, an *795 emergency shelter, a pre-release adjustment center, a fraternity or sorority, and a rooming house.

Get Back Up applied for a conditional use permit for the property in the fall of 2007, and on November 7, the Building Safety and Engineering Department held a public hearing. The City Planning and Development Department initially recommended that the Building Safety and Engineering Department deny the permit, but after Get Back Up submitted additional information, the departments approved the site plan and the conditional use on January 9, 2008, attaching 17 conditions to the permit.

The Russell Woods-Sullivan Area Homeowners' Association, representing the adjoining historical residential district, filed an appeal to the Board of Zoning Appeals. The Board of Zoning Appeals held a hearing and voted to reverse the Building Safety and Engineering Department's decision granting Get Back Up's conditional use permit.

Get Back Up appealed the Board of Zoning Appeals's decision to the Wayne County Circuit Court as provided by the zoning ordinance. The dispute bounced back and forth between the circuit court and the Board of Zoning Appeals, but the circuit court ultimately upheld the Board of Zoning Appeals's denial of the conditional use permit. Get Back Up's appeals to the Michigan Court of Appeals and the Michigan Supreme Court were unsuccessful.

Get Back Up filed a complaint in federal district court. Count One sought declaratory and injunctive relief under the Americans with Disabilities Act, the Rehabilitation Act, and the Fair Housing Act, alleging that the City's zoning ordinance unlawfully discriminates against substance abuse treatment facilities and is facially invalid. Count Two alleged that the fifteen factor standard for evaluating conditional use applications was unconstitutionally vague. Get Back Up challenged the ordinance as invalid, both facially and as applied to its conditional use application. Get Back Up sought an order invalidating the ordinances as unconstitutional, and enjoining the City from enforcing the Board of Zoning Appeals's decision.

Get Back Up filed a motion for a preliminary injunction. The parties then filed cross-motions for final judgment; Get Back Up sought a permanent injunction and the City filed a combined motion for judgment and response to Get Back Up's motion.

After holding a hearing and allowing Get Back Up to file a supplemental brief, the district court issued its order denying Get Back Up's motion and granting the City's motion. The

court reviewed the motions under FRCP 12(c), noting that the “central evidence” before the Board of Zoning Appeals established no material factual dispute because the parties had stipulated to the relevant facts. The court concluded that the zoning ordinance did not discriminate against the disabled, and was neutral in its treatment of disabled and non-disabled residents. The court discussed reasons that hospitals and nursing homes were materially different from a residential substance abuse service facility, and noted that the ordinance effectively “treats Get Back Up like a standard rooming house.” The court rejected Get Back Up’s as-applied challenge to the ordinance, finding that the Board of Zoning Appeals had reasons to deny the conditional use permit unrelated to prejudice against the disabled. The court held that Get Back Up’s void-for-vagueness challenge to the ordinance failed. Get Back Up claimed that each of the ordinance’s conditional use criteria provided no real standards, or at best impermissibly vague standards, to guide *796 the Board of Zoning Appeals in determining whether to grant a conditional use permit. The court cited cases finding that cities have the power to zone in accordance with the “public interest,” “public welfare,” and to protect the “enjoyment of property,” and reasoned that while these are general interests, they were not so vague as to amount to no standard at all.

Get Back Up sought reconsideration under FRCP 59. It argued that the City did not raise the issue that the district court found to be dispositive, “that a [residential substance abuse service facility] should not be classified with other public health facilities.” Get Back Up claimed that it was misled by the City’s failure to raise the argument, and that it should be permitted to show why a residential substance abuse service facility should be classified and treated as a “public health facility.” The district court denied Get Back Up’s motion, finding that the briefing merely repeated arguments Get Back Up made in its prior pleadings. It also rejected Get Back Up’s assertion that the court relied on arguments that the City did not raise, noting that Get Back Up was asked during the hearing which by right uses were materially similar to Get Back Up’s facility, and why they should be treated as such.

Get Back Up appeals the district court’s order granting judgment to the City of Detroit, and denying Get Back Up’s motion for permanent injunctive relief. Get Back Up also appeals the district court’s denial of its motion to reconsider that order. The only arguments that Get Back Up presents on appeal are a facial challenge to the City’s not grouping a residential substance abuse service facility with other

public health uses, and a void-for-vagueness challenge to the ordinance.²

[1] 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 in a B4 zoning district. In order to prevail on its Rehabilitation Act, Americans with Disabilities Act, and Fair Housing Act claims, Get Back Up must first show that the ordinance discriminates against the disabled. The City concedes that individuals at residential substance abuse service facilities are handicapped and disabled as defined by federal law. However, the ordinance does not discriminate by requiring Get Back Up to obtain a conditional use permit.

Residential substance abuse service facilities are treated the same as many other residential uses. Residential substance abuse service facilities are allowed to operate in B4 business districts if they obtain a conditional use permit. The same is true for a multi-family dwelling, an emergency shelter, a rooming house, a fraternity or sorority, or a single-family detached or a two-family dwelling, all of which are among the residential conditional uses for a general business district as listed in Section 61–9–80.

Hospitals and nursing homes are not materially similar to residential substance abuse facilities in a B4 zoning district. Get Back Up notes that hospitals and nursing homes may operate by right in B4 zoning districts and argues that this is discriminatory because residential substance abuse service facilities are identical to hospitals and nursing homes in every respect except one: residential substance abuse service facilities treat recovering addicts *797 and alcoholics. But hospitals and nursing homes differ from residential substance abuse service facilities in multiple respects.

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. Hospitals are no exception, as they tend to have a substantial impact on the characteristics of their immediate surroundings and the public health of the larger community. Hospitals are well-suited for a busy commercial district like the B4 zoning district, a district described by Section 61–9–71 of the ordinance as “provid [ing] for business and commercial uses of a thoroughfare-oriented nature.” These characteristics justify allowing hospitals to operate by right in such districts.

While nursing homes are a residential use, they differ from residential substance abuse service facilities in their impact on traditional zoning concerns and accordingly in their need for a conditional use application. Nursing home residents are often physically disabled and they rarely leave the premises, if ever. See *Drug Abuse Prevention Ctr. v. City of Kelso*, 84 Wash.App. 1044, 1044 (Wash.Ct.App.1996). As the district court observed, nursing homes are a uniquely sedate and unburdensome use, have relatively little impact on traditional zoning concerns like noise and traffic, and may warrant special treatment on the grounds that a city desperately needs nursing care. Because there are no materially similar uses that may operate by right in a B4 zoning district, the ordinance is not facially discriminatory.

The cases relied upon by Get Back Up are distinguishable. Most involved outright bans. See *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 345 (6th Cir.2002); *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 729 (9th Cir.1999); cf. *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 304 (3d Cir.2007) (noting the ban was waivable by majority vote). It is true that requiring facilities serving the mentally retarded to obtain a conditional use permit while allowing other residential uses to operate by right has been found to be discriminatory in *City of Cleburne v. Cleburne Living Center.*, 473 U.S. 432, 447, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). In that case, though, the Supreme Court declined to rule that such a requirement could never be imposed, even for a residential zoning category. *Id.* Instead, the Court looked to the specific categories in the ordinance to conclude that the requirements of the ordinance rested on “irrational prejudice against the mentally retarded.” *Id.* at 450, 105 S.Ct. 3249. And in the other cases cited by Get Back Up, the plaintiffs had direct evidence of discriminatory intent. See *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 307 (3d Cir.2007); *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 342 (6th Cir.2002); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir.1997).

[2] Finally, the ordinance's fifteen standards for approving a conditional use permit are not unconstitutionally vague,

as argued by Get Back Up. Zoning ordinances must be sufficiently clear to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,” and to “provide explicit standards for those who apply them.” *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The challenged criteria require the Board of Zoning Appeals to find, for example, that the conditional use will not be “detrimental to or endanger the social, physical, environmental or economic well being of surrounding *798 neighborhoods”, that the use will not injure “the use and enjoyment of other property in the immediate vicinity”, or that the use will be “compatible” with adjacent land uses. Beyond a few bare assertions, Get Back Up does not elaborate on how the ordinance is unconstitutionally vague and such perfunctory arguments are generally deemed waived, see *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 500 n. 1 (6th Cir.2007). Still, these terms have common-sense meanings and are not so vague in their application that they fail to provide fair notice to applicants or fail to provide standards to guide Board of Zoning Appeals decisions.

Get Back Up cites *H.D.V.–Greektown, LLC v. City of Detroit*, 2007 WL 2261418, 2007 U.S. Dist. LEXIS 56951 (E.D.Mich., Aug. 6, 2007), where the district court found that the same ordinance was overbroad and unconstitutionally vague, but Get Back Up's citation of *H.D.V.–Greektown* is misplaced because that case involved a First Amendment challenge to a prior restraint on protected expression. Vagueness doctrine applies with special force in the context of prior restraints, where an ordinance must provide “narrow, objective, and definite standards,” *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), and Get Back Up makes no argument why *H.D.V.–Greektown* should be applied outside of that context.

For the foregoing reasons, we affirm the judgment of the district court.

All Citations

606 Fed.Appx. 792

Footnotes

* The Honorable Sandra S. Beckwith, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

1 At one point in the procedural history, Get Back Up was allowed by the City to operate. Later, the parties stipulated that Get Back Up could continue operating during the pendency of its appeals.

- 2 Because, as Get Back Up's counsel conceded at oral argument, Get Back Up did not argue on appeal until its reply brief that the ordinance was invalid as applied, we do not address the as-applied challenge. We generally will not hear issues raised for the first time in a reply brief. *United States v. Crozier*, 259 F.3d 503, 517 (6th Cir.2001).

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