

Heather Dukes

5064 E. Yucca Street
Scottsdale, AZ 85254
602.320.8866

City Clerk
CITY OF SCOTTSDALE
3939 N. Drinkwater Boulevard
Scottsdale, AZ 85251

September 29, 2021

RE: Disability Accommodation/Reasonable Accommodation Application to the City of Scottsdale Board of Adjustment – 7910 and 7920 E. Wilshire Drive, Scottsdale, Arizona 85257 (the “Property”)

Dear City Clerk,

On behalf of my clients, Scottsdale Recovery II, LLC, a Delaware limited liability company, and Centered Living, LLC, an Arizona limited liability company (collectively the “Applicant”), I submit the enclosed reasonable accommodation and disability accommodation application (the “Accommodation Application”) to the Board of Adjustment pursuant to the federal and Arizona Fair Housing Acts¹ and Sections 1.801, 1.806 and 1.920 of the City of Scottsdale Zoning Ordinance (the “Zoning Ordinance”). The purpose of this Accommodation Application is to allow up to four disabled, sober adults to live within each condominium dwelling unit at the above-referenced Property within the Medium Density Residential (R-3) zoning district. To achieve this purpose, the Applicant respectfully requests that the Board of Adjustment grant one of the following accommodations from the Zoning Ordinance:

1. An accommodation allowing two to four disabled, sober adults to live as a “family “ in each dwelling unit on the Property within the R-3 zoning district, or
2. An accommodation allowing two to four disabled, sober adults to live in each dwelling unit on the Property as a “care home” within the R-3 zoning district and within 1,200 feet of another care home licensed as an assisted living facility for the elderly.

This Accommodation Application is supported by an enclosed email to Scottsdale Planning staff dated September 16, 2021.

¹ This Reasonable Accommodation Application is being filed pursuant to Federal Fair Housing Act 42 U.S.C. § 3604(f)(3)(B) and Arizona Fair Housing Act, Ariz. Rev. Stat. § 41-1491, as well as relevant caselaw pertaining to reasonable accommodations of zoning ordinances.

We would request that this Accommodation Application be scheduled for the November 3, 2021 Board of Adjustment hearing. The Applicant previously submitted an appeal of a Zoning Administrator's Interpretation which determined that the proposed sober living use of the Property would constitute a "Care Home" and would not be permitted in the R-3 zoning district (the "ZA Interpretation"; 6-BA-2021). The appeal of the ZA Interpretation is currently scheduled for the November 3rd Board of Adjustment hearing. Thus, scheduling the Accommodation Application as an agenda item for the same November 3rd hearing would be ideal. In the event the Accommodation Application is granted for the Property, the appeal of the ZA Interpretation would no longer be necessary.

The Applicant shall submit additional evidence and written materials in support of this Accommodation Application at least 14 calendar days prior to the Board's hearing in accordance with Section 403 of the Rules of Procedure for the Board of Adjustment.

If you need additional information or documentation in order to process this appeal, please do not hesitate to contact me at hdukesesq@gmail.com or by phone at 602.320.8866. Thank you.

Very truly yours,



Heather N. Dukes

602.320.8866 | hdukesesq@gmail.com

From: Heather Dukes

Sent: Thursday, September 16, 2021 3:21 PM

To: Curtis, Tim

Cc: Cluff, Bryan; Barnes, Jeff

Subject: Reasonable Accommodation Application for 7910 and 7920 E. Wilshire Drive

Dear Tim:

As we discussed, I am sending this email to further explain our FHA reasonable accommodation application to be submitted for the Scottsdale Recovery sober living property at 7910 and 7920 E. Wilshire Drive. I am also sending this email to confirm a few dates and procedural items.

Overview of Reasonable Accommodation Application

Currently, we have a pending interpretation appeal before the Board of Adjustment scheduled to be heard on November 3rd (Case No. 6-BA-2021 – requesting an interpretation that 2 to 4 sober, disabled individuals living in each dwelling unit would constitute a “family” and be permitted in the R-3 zoning district as a matter of right).

In addition to the pending interpretation appeal, my client will be filing an application requesting that the Board of Adjustment issue a reasonable accommodation to allow the proposed sober living use in the R-3 zoning district at this particular location pursuant to the federal Fair Housing Act [42 U.S.C. § 3604(f)(3)(B)] and the nearly identical protections set forth in Arizona’s Fair Housing Act [Ariz.Rev.Stat. § 41-1491]. The reasonable accommodation application should be scheduled at the same BOA hearing as the interpretation Case No. 6-BA-2021 (currently set for Nov 3, 2021).

The reasonable accommodation application will address both: (i) the disability accommodation tests set forth in Section 1.806 of the Zoning Ordinance and (ii) the reasonable accommodation tests identified in the 9th Circuit and Arizona case law.

The reasonable accommodation application will be supported by additional evidence that we are currently compiling. We will also be submitting information and evidence showing that the reasonable accommodation must be granted to Scottsdale Recovery and its disabled residents as result of the following:

- 1) The City’s Zoning Ordinance is facially discriminatory. The Ordinance prohibits care homes for the disabled in multifamily zoning districts but allows group homes and vacation rentals for non-disabled residents in multifamily zoning districts.
- 2) Scottsdale Recovery and its disabled residents have been subjected to disability-based disparate treatment as a result of the City’s implementation of the Zoning Ordinance and the interpretation issued in 6-BA-2021.
- 3) The Zoning Ordinance and the City’s implementation of the Ordinance have a discriminatory impact on persons with disabilities.

The Fair Housing Act Affords the Right to Request a Reasonable Accommodation in this Case

To assist the City in reviewing our reasonable accommodation application and scheduling the Board of Adjustment hearing for November 3rd, I am provided this summary of our rights to request a reasonable accommodation in this matter.

You have mentioned that the Zoning Ordinance limits the scope of disability accommodations that may be granted by the City. In particular, you have noted that disability accommodations to the Zoning Ordinance are applicable to development standards and separation requirements, not land uses allowed by zone.

You are correct in that Section 1.806 provides a list of criteria that must be satisfied in order for the Board of Adjustment to authorize “a disability accommodation from a development standard or separation requirement.” In addition, Section 1.920 of the Zoning Ordinance provides guidance as to when the Zoning Administrator may grant an administrative accommodation and requires that “all other requests for disability accommodation shall be submitted to the Board of Adjustment as a request for disability accommodation.” But, neither Section 1.806 nor Section 1.920 specifically prohibit a reasonable accommodation request pertaining to land uses allowed in certain zoning districts. Any attempt to do so would be contrary to the reasonable accommodation rights we are afforded under the federal and Arizona Fair Housing Acts. It would also violate the Supremacy Clause.

The Fair Housing Act is a “broad mandate to eliminate discrimination against and equalize housing opportunities for disabled individuals.” *Canady v. Prescott Canyon Estates Homeowners Ass’n*, 204 Ariz. 91, 93 (App.2002). “Because it is a broad remedial statute, its provisions are to be generously construed and its exemptions must be read narrowly.” *Id.*

The 1988 amendments to the federal Fair Housing Act (the “**FHAA**”) require cities and towns to accept and “make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such persons [with disabilities] equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B). Across the country, the “reasonable accommodation requirement has been applied to zoning ordinances and other land use regulations and practices.” *Canady*, 204 Ariz. at 94. The City’s disability accommodation procedure and its regulation of care homes are not exempt from Fair Housing Act mandates and the requirement to make reasonable accommodations of certain zoning ordinance provisions on a case-by-case basis. In fact, I have found no caselaw which has upheld a City’s right to preclude or reject a FHA reasonable accommodation request by disabled residents as a result of a local zoning ordinance limiting reasonable accommodation applications to only certain claims.

The application of the Supremacy Clause in this instance was also addressed in the 2016 Joint Statement issued by the Department of Housing and Urban Development and the Department of Justice titled “State and Local Land Use Laws and Practices and the Application of the Fair Housing Act” (the “**2016 Joint Statement**”). The 2016 Joint Statement advises cities and towns that the FHA makes it unlawful to refuse to accept and make reasonable accommodations to zoning ordinance provisions when such accommodations may be necessary to afford disabled persons an equal opportunity to use and enjoy a dwelling. The 2016 Joint Statement references the Supremacy Clause of the U.S. Constitution as the basis for enforcing federal laws such as the FHA regardless of scenarios when a city’s zoning ordinance has conflicting rules and requirements.

As established by the Supremacy Clause of the U.S. Constitution, federal laws such as the Fair Housing Act take precedence over conflicting state and local laws. The Fair Housing Act thus prohibits state and local land use and zoning laws, policies, and practices that discriminate based on a characteristic protected under the Act. Prohibited practices as defined in the Act include making unavailable or denying housing because of a protected characteristic.

Emphasis added. See 2016 Joint Statement, pg. 2. As a result of the Supremacy Clause, the City of Scottsdale may not limit the scope of a reasonable accommodation under the Fair Housing Act. Scottsdale Recovery is entitled to request a reasonable accommodation to allow a sober living use in the R-3 multifamily zoning district because such prohibition is discriminatory against disabled individuals and denies housing because of a protected characteristic.

Furthermore, the House Committee Report on the FHAA indicates that Congress intended the FHAA to apply to “local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps.” 1988 U.S.C.C.A.N. at 2185. In fact, the House Committee Report made it abundantly clear that any discriminatory rule or policy is not defensible simply because of the manner in which such rule or practice has traditionally been constituted or carried out. Instead, such rules, policies and practices must be modified in some instances to accommodate the needs of the disabled.

New [FHAA] subsection 804(f)(3)(B) makes it illegal to refuse to make reasonable accommodation in rules, policies, practices, or services if necessary to permit a person with handicaps equal opportunity to use and enjoy a dwelling. The concept of “reasonable accommodation” has a long history in regulations and case law dealing with discrimination on the basis of handicap . . . A discriminatory rule, policy, practice, or service is not defensible simply because that is the manner in which such rule or practice has traditionally been constituted. This section would require that changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling.

Giebeler v. M&B Associates, 343 F.3d 1143, 1148-49 (9th Cir.2003), citing H.R. REP. NO. 100-711, at 25 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2186 (internal citations omitted). With this legislative history in mind, courts have interpreted “the FHAA’s accommodation provisions with the specific goals of the FHAA in mind: ‘to protect the right of handicapped persons to live in the residence of their choice in the community,’ and ‘to end the unnecessary exclusion of persons with handicaps from the American mainstream.’” *Giebeler*, 343 F.3d at 1149, internal citations omitted.

In this case, the City of Scottsdale must accept Scottsdale Recovery’s request for a reasonable accommodation of the City’s Zoning Ordinance provision which prevents care homes from operating within the R-3 multi-family zoning district. The City of Scottsdale has adopted discriminatory rules and policies that are not defensible simply because the City has precluded all care homes in multi-family residential districts since its 2017 text amendment. Furthermore, there are no limitations in the FHAA which prevent Scottsdale Recovery from making this reasonable accommodation request. As set forth in the House Committee Report referenced above, the City of Scottsdale is required to consider and make changes to traditional rules or practices when it is necessary to permit a person with disabilities an equal opportunity to use and enjoy a dwelling, such as a condominium dwelling unit with several amenities and benefits that are instrumental in assisting disabled individuals who are choosing sobriety.

Caselaw Supports the Right to Request a Reasonable Accommodation in this Case

The following two cases support our request for a reasonable accommodation to allow the proposed sober living use at 7910/7920 E Wiltshire Drive in the R-3 zoning district:

In *Judy B. v. Borough of Tioga*, 889 F. Supp. 792 (M.D. Pa. 1995), the court held that requiring a local jurisdiction to either grant a use variance or waive requirements under the Zoning Ordinance, so that an entity could convert a former motel into residences for individuals with disabilities, constituted a reasonable accommodation under the FHA. In *Judy B. v. Borough of Tioga*, the motel property was located in a restricted commercial/industrial (CI) zone, that was surrounded on three sides by a medium-density residential district. The court emphasized that such relief would require an extremely modest accommodation in the borough's zoning rules, since the CI district where the property was located permitted uses such as professional and business offices, personal convenience services, and "other uses which shall be similar in character" as the proposed use. The court noted that the proposed use was consistent with the character of the surrounding neighborhood and would not adversely impact neighboring property owners, but rather would, if anything, subject the neighborhood to less traffic and fewer parking problems and disruptions than the former motel use or any/all of the uses expressly permitted in the CI zoning district.

In *Corporation of Episcopal Church in Utah v. West Valley City*, 119 F. Supp. 2d 1215 (D. Utah 2000), a church and association sought approval to build a residential treatment facility for recovery drug addicts and alcoholics in a residentially zoned area of the city. The Court granted summary judgment to the applicants because the city had refused to make a reasonable accommodation under the FHA after it denied a permit to build the facility because the zoning ordinance did not allow halfway houses and similar uses in the residential zoning district applicable to the property. The city argued that the accommodation requested by the applicants was unreasonable in that it would require a drastic change in policy, but the court responded that no evidence whatsoever had been established other than complaints of neighbors.

The facts in Scottsdale Recovery's case are very similar to the cases cited above, in which a local jurisdiction fails to make a reasonable accommodation for disabled individuals because a group living environment for disabled individuals is prohibited in a certain zoning district. The cases cited above confirm that a municipality's zoning ordinance is subject to the FHAA standards and is a proper subject matter for a reasonable accommodation request when such ordinances prevents disabled individuals from living in certain zoning districts.

The 2016 Joint Statement by HUD and Department of Justice Supports a Reasonable Accommodation in this Case

The court decisions referenced above are reinforced by the 2016 Joint Statement, which provides several examples of local land use and zoning laws that may violate the Fair Housing Act, many of which are at issue in the case at hand:

- *"Prohibiting . . . housing based on the belief that the residents will be members of a particular protected class, such as race, disability, or familial status. . . ." See 2016 Joint Statement, pg. 3.*
 - In this case, the City of Scottsdale has interpreted 2 to 4 disabled individuals living in a sober living environment to be a "care home." Care homes are prohibited in all multi-family residential dwelling units throughout the City with the knowledge that such residents are members of a disabled class.

- *“Imposing restrictions or additional conditions on group housing for persons with disabilities that are not imposed on families or other groups of unrelated individuals” Id.*
 - In this case, the City of Scottsdale has imposed a zoning ordinance restriction on group housing for persons with disabilities by prohibiting all care homes in multifamily residential zoning districts. Meanwhile, this restriction is not imposed on group housing for persons without disabilities. Group homes are permitted in multifamily residential districts.
- *“Refusing to provide reasonable accommodations to land use or zoning policies when such accommodations may be necessary to allow persons with disabilities to have an equal opportunity to use and enjoy housing.” Id.*
 - In this case, the City of Scottsdale cannot refuse to accept or provide a reasonable accommodation of the zoning ordinance policy preventing care homes in all multifamily residential districts because such accommodation is necessary to allow persons with disabilities to have an equal opportunity to use and enjoy multifamily housing.
- *“Prohibiting . . . multi-family housing may have a discriminatory effect on persons because of their membership in a protected class and, if so, would violate the Act absent a legally sufficient justification.” Id. At 5.*
 - In this case, the City of Scottsdale is prohibiting all multi-family housing for persons with disabilities wanting to live in a group living situation that the City’s defines as a “care home”. Persons with disabilities, including those in alcohol and substance use recovery, are members of a protected class that are being negatively impacted by the discriminatory effects of the Zoning Ordinance. The City has presented no legally sufficient justification for making care homes or sober living uses a prohibited use in multifamily residential districts.
- *“Prohibiting group homes in single-family neighborhoods or prohibiting group homes for persons with certain disabilities.” Id. at pg. 8.*
 - In this case, the City of Scottsdale Zoning Ordinance prohibits certain group homes for persons with disabilities in multi-family neighborhoods, which is discriminatory as well.
- *“Enacting an ordinance that has an unjustified discriminatory effect on persons with disabilities who seek to live in a group home in the community.” Id. at pg 8.*
 - In this case, the City of Scottsdale has enacted a Zoning Ordinance with an unjustified discriminatory effect on persons with disabilities who seek to live in a care home or a sober living environment in a multifamily residential district.
- *“Local zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the Fair Housing Act. For example, suppose a city’s zoning ordinance defines a “family” to include up to a certain number of unrelated persons living together as a household unit, and gives such a group of unrelated persons the right to live in any zoning district without special permission from the city. If that ordinance also prohibits a group home having the same number of persons with disabilities in a certain district or requires it to seek a use permit, the ordinance would violate the Fair Housing Act. The ordinance violates the Act because it treats people with disabilities less favorably than families and unrelated persons without disabilities.”*

- In this case, the City's interpretation of its Zoning Ordinance violates the FHAA in exactly this manner. A family of 2-4 unrelated adults living together as a household unit are allowed to live in any zoning district without special permission from the City of Scottsdale. On the other hand, the same Zoning Ordinance prohibits 2 to 4 unrelated, disabled adults living together as a household unit in all multifamily residential districts. The Zoning Ordinance violates the FHAA because it treats people with disabilities less favorably than families and unrelated persons without disabilities. Therefore, a reasonable accommodation request is justified and proper.

Scottsdale Recovery will be submitting a formal reasonable accommodation application under the FHAA to allow a sober living use at 7910 and 7920 E. Wilshire Drive, within the R-3 zoning district.

Please confirm the deadline for submitting this reasonable accommodation application in order for it to be heard and decided by the Board of Adjustment at the November 3rd hearing. Thank you.

Sincerely,

Heather Dukes
602.320.8866

Sent from [Mail](#) for Windows