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January 6, 2025

**BY EMAIL AND HAND DELIVERY**

Phillip Neuer, Esq.  
Chair, Zoning Board of Adjustment  
Township of West Orange  
66 Main Street  
West Orange, New Jersey 07052

**Re: Zinnia Health, LLC  
33 Mount Pleasant Ave.  
Block 88, Lot 26  
Our File No.: 16018.1000**

Dear Chairman Neuer:

In connection with the above-referenced application, which is scheduled for a continued hearing before the Zoning Board of Adjustment on January 6, 2025, please accept the following. Primarily because of the participation in these hearings by a formal objector, I have determined that it is important to place on the record certain principles of law that are relevant to this matter. I had planned to address these principles generally in my closing but I realized that the Board's counsel, Mr. Fisher, deserved to be advised of at least the relevant authorities in time to assist the Board in its deliberations and, of course, professional courtesy requires that Mr. Dolan, on behalf of the objector, be provided with a copy of this letter as well.

The Americans with Disabilities Act, 42 U.S.C. sec. 12000, ("ADA") prohibits public entities from discriminating against individuals or their providers on the basis of a disability. The ADA applies to local zoning decisions. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. sec. 12132. "This statement constitutes a general prohibition against discrimination by public entities, regardless of activity." New Directions Treatment Servs. v. City of Reading, 490 F. 3d 293, 301 (3d Cir. 2007). See also Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44 (2d Cir. 1997) ("[T]he ADA... clearly encompasses zoning decisions by the city because making such decisions is a normal function of a governmental entity"), abrogated on other grounds as noted by Zervos v. Verizon N.Y., Inc., 252 F. 3d 163, 171 n7 (2d Cir. 2001)); Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F. 3d 725, 732 (9th Cir. 1999) ("[W]e decline to draw an arbitrary distinction - to prohibit public entities from discriminating against persons with disabilities in some of their activities and not in others... Although we recognize

that zoning is a traditionally local activity, Congress has spoken. Accordingly, we hold that the ADA applies to zoning.”).

In the zoning context, the ADA and the Fair Housing Act (“FHA”) are generally interpreted the same with respect to potential claims of discrimination. The ADA and FHA prohibit all forms of discrimination by local governments through their exercise of zoning powers, either 1) directly through intentional discrimination, 2) indirectly through application of laws that have a discriminatory effect, or 3) by failure to reasonably accommodate persons with disabilities by granting land use relief. Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1343 (D.N.J. 1991). Lakeside Resort Enterprises, LP v. Board of Sup’rs of Palmyra Tp., 455 F.3d 154 (3d Cir. 2006)(land use board’s denial of conditional use application for drug- and alcohol-treatment facility violated FHA).

It has long been established that people with behavioral health issues and/or recovering from substance abuse disorders meet the statutory definition of “qualified persons with disabilities” under the ADA. Lakeside, 455 F.3d at 156 n.5; U.S. v. Borough of Audubon, N.J., 797 F. Supp. 353, 359 (D.N.J. 1991), aff’d, 968 F.2d 14 (3d Cir. 1992)(addictions substantially limited “their ability to live independently and to live with their families,” bringing them within the FHA’s definition of disability); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 460 (D.N.J. 1992)(clients of a group home for recovering alcoholics and drug addicts were within scope of protection under the FHA); Oxford House-Evergreen, 769 F. Supp at 1342(same).

As stated above, the ADA and FHA provide that a local government must reasonably accommodate persons with disabilities in the context of land use applications. To prevail on a reasonable accommodation claim, a plaintiff must show that the requested accommodation was “(1) reasonable and (2) necessary to (3) afford handicapped persons an equal opportunity to use and enjoy housing.” Lapid-Laurel v. Zoning Bd. Of Adjustment, 284 F.3d 442, 457 (3d Cir. 2002). The burden then shifts to the municipality to prove that making the requested accommodation would impose (1) undue financial and administrative burdens; (2) an undue hardship on the municipality; or (3) a fundamental alteration in the nature of the zoning program. Lapid-Laurel, at 462.

Courts have addressed the reasonable accommodation standard in the context of proposed behavioral health facilities and alcohol- and drug-treatment facilities. For example, in Giercyk v. City of Estell Manor Plan/Zoning Bd., No. A-2729-15T2, 2017 WL 6421047 (N.J. Super. Ct. App. Div. Dec. 18, 2017), the applicant sought approval from the Board to open a drug and alcohol rehabilitation facility. No new construction or expansion of the building was proposed. Id. at 4. In response to a neighbor’s safety concern, the Board imposed a condition on approval that the applicant construct a fence between the subject property and the neighbor’s property.

The applicant applied for an interpretation of the zoning ordinance that the proposed use was identical to the prior use and therefore permitted by a previously granted use variance. In the alternative, the applicant sought a use variance because institutional uses were not permitted in the Zone. Id. at 1.

The Board determined that the proposed use differed from the previous use because of a difference in the resident population. However, the Board granted a use variance and a site plan waiver. The Board found that the proposed use was inherently beneficial because it provides “essential health care for an underserved population ....” Id. at 2.

A neighboring property owner challenged the Board's decision. The trial court upheld the Board's approval and the Appellate Division affirmed. The trial court summarized the reasonable accommodation standards explained above and then applied those standards to find that the project justified the requested relief. That relief was reasonable and necessary because of the absence of such facilities to provide this essential care, because there was no zone in which the use was permitted and because the property had previously included a similar use. The Board also concluded that there was no evidence that granting the variance would cause undue financial and administrative burdens, undue hardship upon the community, or require a fundamental alteration of the zoning plan. Id. at 3-4.

In a matter involving a nursing home and complaints by neighbors, United States v. Commonwealth of Puerto Rico, 764 F. Supp. 220 (D.P.R. 1991), the government sought a temporary injunction prohibiting the closure of a nursing home in pending litigation regarding whether an order of closure by a zoning agency violated the FHA. The nursing home, which served individuals with mental and physical disabilities, moved to a new location. The zoning agency refused to permit its operation in the new location because the entity did not obtain the required permits. The entity applied for a use variance. Id. at 220-222.

The agency denied the variance because the intended use would devalue the surrounding properties and there was inadequate parking. Id. at 222. The applicant appealed and alleged discrimination in violation of the ADA. The court determined that there was a high likelihood that the agency decision “was based on pressure from neighbors whose real concern is a distaste for or fear of the handicapped.” Id. at 224. The court reasoned that the only rule cited by the agency in its denial was the parking rule and that even if this rule applied, “the ‘reasonable accommodation’ provision would require ARPE to waive the parking requirement in this case where the actual use of the home will never necessitate the provision of the amount of parking technically required by the rule.” Id. Therefore, the court granted the preliminary injunction.

We also want to bring to the Board's attention that on September 9, 2014, the West Orange Township Council adopted Resolution 172-14, attached hereto, declaring West Orange to be a “Stigma Free Town” and declaring that the Township “supports the elimination of any stigma associated with mental health illness and will promote public awareness of mental health issues and the removal of any barriers to recovery and to work to overcome stigma, stereotyping and discrimination.” Of course, we recognize that this Board must be satisfied that this application meets the relevant standards of the Municipal Land Use Law.

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We respectfully request that the Board and its counsel give appropriate consideration to these principles as a part of its deliberations on this application. I look forward to completing our presentation on January 16, 2024.

Very truly yours,

/s/ William C. Sullivan, Jr.

WILLIAM C. SULLIVAN, JR.

For the Firm

cc: Diana Chandler  
Alexander Fisher, Esq.  
Matthew Dolan, Esq.  
Scott Burman  
Harrison Katzen  
John McDonough