

M E M O R A N D U M

TO: David Atkins, Chairman
Westwood Planning Board

FROM: Daniel J. Bailey, Interim Town Counsel

CC: Nora Loughnane
Michael Jaillet
Abby McCabe

RE: Zoning Regulation of Substance Abuse Treatment Facilities and Hospitals

DATE: March 12, 2019

QUESTIONS PRESENTED

- I. Can a town prohibit substance abuse treatment facilities and hospitals?
- II. If a town cannot prohibit substance abuse facilities and hospitals, what can it do to regulate or control those uses?
- III. How would an application for a building permit for a substance abuse facility be handled under the current Westwood Zoning Bylaw?

BRIEF ANSWERS

A municipality cannot prohibit a substance abuse treatment facility through its zoning bylaws. A municipality may, however, impose reasonable restrictions on such a facility, including location restrictions, and security and dimensional requirements. In contrast to a substance abuse treatment center, a municipality can likely prohibit full scale hospitals through its zoning bylaws.

A person seeking to locate a substance abuse facility anywhere in Westwood today would apply to the building inspector for a building permit and the following process would occur:

- The building inspector would likely reject that application, on the basis that the Westwood Zoning Bylaw does not specifically allow a substance abuse treatment facility anywhere in town.
- The applicant would appeal the building permit denial to the Zoning Board of Appeals, which would hold a hearing and decide whether to confirm or overturn the building inspector's decision.
- If the Zoning Board confirmed the building inspector's denial of the building permit, the applicant could then appeal to Land Court or Superior Court.

- If the Zoning Board overturned the building inspector's denial, a building permit would be issued to the applicant. The Board of Selectmen and any "person aggrieved" by the decision of the Zoning Board would have the right to appeal to Land Court or Superior Court.

Background

Amendments have been proposed to the Westwood Zoning Bylaws (the "Zoning Bylaws") that would, among other things, seek to alter the zoning definitions for certain medical facilities. These proposed amendments have prompted the question of whether substance abuse treatment facilities and hospitals can be prohibited, or at least heavily regulated, through the Zoning Bylaws.

DISCUSSION

- I. The Federal Americans With Disabilities Act, the Federal Rehabilitation Act, the Federal Fair Housing Act, and the Massachusetts Zoning Act bar the prohibition of substance abuse treatment facilities.

The Massachusetts Zoning Act, G.L. c. 40A, § 3, ¶ 4 prohibits town bylaws that have a discriminatory effect on disabled persons:

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination.

Persons who are currently suffering from drug addiction are considered to be disabled under G.L. c. 40A, § 3. See S. Middlesex Opportunity Council, Inc. v. Town of Framingham, 752 F. Supp. 2d 85, 95 (D. Mass. 2010) ("Federal regulations define 'handicap' to include drug addiction or alcoholism that 'substantially limits one or more major life activities.'"). Facilities that serve such disabled persons, such as substance abuse treatment facilities, are generally entitled to protection, in order to serve the disabled population. Granada House, Inc. v. City of Boston, 1997 WL 106688 at *9 (Mass. Super. Feb. 28, 1997) ("Massachusetts would look to federal law, including the [Fair Housing Act], in interpreting the phrase 'disabled person' and 'persons with disabilities', and that by so doing, the [Massachusetts Zoning Act] must be read to bar the City's discriminatory treatment of a group home for recovering drug and alcohol users under the Code."); Spectrum Health Systems, Inc. v. City of Lawrence, No. 2015-288-C (Essex Superior Ct.) ("Based upon the record now before this Court, the plaintiff Spectrum is entitled to those protections set out under G.L. Ch. 40A, § 3, as amended."). Such protections are designed to prevent communities from categorically banning the construction of

such facilities, which would, in turn, discriminate against disabled populations who require these services.

Substance abuse treatment facilities are likewise protected by the Americans with Disabilities Act (42 U.S.C. §§, 12132 et seq.) (the "ADA"), the Rehabilitation Act (29 U.S.C. § 794(a)) (the "RA"), and the Fair Housing Act (42 U.S.C. § 3604(f)(1) et seq.) (the "FHA").¹ Federal courts have repeatedly found that local zoning laws which treat disabled individuals differently than non-disabled individuals are barred by federal law. See U.S. v. City of Baltimore, 845 F.Supp. 2d 640, 647-648 (D. Md. 2012) (Baltimore's zoning code requirement that residential substance abuse treatment programs obtain a conditional approval before locating in any district for which they were otherwise eligible was facially discriminatory in violation of the ADA and FHA). Discrimination does not only take the form of outright bans or disparate treatment; overly burdensome procedural zoning requirements can also be found to be discriminatory. *Id.* at 648 ("[C]ourts have found ADA and FHA violations not only in cases of specific zoning actions such as outright permit denials, but also in cases of burdensome procedural zoning requirements uniquely placed on disabled individuals.")

Any attempt by the Town to categorically ban substance abuse facilities would likely be viewed as discriminatory. Because the Zoning Bylaws allow for medical offices, doctor's offices, and veterinary hospitals it is likely that the Attorney General or any reviewing court would find an outright ban on substance abuse facilities (which would likely be viewed as similar to the facilities mentioned above) to be discriminatory under G.L. c. 40A, §3, as well as the ADA, the RA, and the FHA.² By specifically targeting substance abuse facilities for different treatment (a complete ban on the use) a court would likely find the Bylaw to be discriminatory on its face, because it would treat similar uses differently.³

Likewise, any other significant municipal restrictions on substance abuse facilities that are not imposed on similar facilities are likely to be found discriminatory. See Brockton Fire Department v. St. Mary Broad Street, LLC, 181 F. Supp. 155, 157 (D. Mass. 2016) (ruling that the City of Brockton could not enforce the Massachusetts Sprinkler Law, G.L. c. 148, § 26H, against sober homes because such enforcement would constitute "facially disparate imposition of the Sprinkler Law on a group residence sheltering disabled individuals" where the law was not similarly imposed on homes housing families of similar size). Similarly, imposing buffer requirements or particularly onerous lighting or parking restrictions would likely also be viewed as discriminatory. See *Opinion of the Attorney General, Case 8248*, June 12, 2017 (AG rejecting Town of Millbury bylaw that imposed onerous buffer restrictions on drug rehabilitation facilities in town when such restrictions were not placed on other, similar uses).

¹ Because analysis under the ADA and RA is substantially the same this memo will only refer to the ADA.

² It is likely that such bans would be found discriminatory under the ADA, RA, and FHA as well, but since analysis under G.L. 40A, § 3 is sufficient to answer the question this memo will not go into significant detail on these statutes.

³ Such an analysis by the court would be highly fact specific, but it is likely that facially disparate treatment would be viewed as discriminatory.

The Town can impose location restrictions and reasonable dimensional requirements. See *Opinion of the Attorney General*, Case 8742, June 19, 2018 (AG Opinion approving the Town of Wilmington’s adoption of zoning amendments that limited substance abuse treatment facilities to two of the town’s industrial districts and subjecting facilities to special permit and site plan review). Such reasonable restrictions will generally be allowed, provided they do not act as an outright ban and are not applied in a discriminatory manner. See *id.* (In approving the Town of Wilmington’s adoption of zoning amendments imposing site plan review on substance abuse treatment facilities, AG noted that the town would need to take special care to ensure the site plan review was not discriminatory).

II. A municipality can ban full scale hospital development because a hospital is not a protected class and the banning of such a facility is not discriminatory.

Unlike substance abuse treatment facilities, it is likely that the Town can prohibit the construction of full scale hospitals. To begin, no statute explicitly protects hospitals from being banned by a zoning bylaw (as opposed to other uses, such as religious or education uses, or uses for disabled persons, which are explicitly protected by Massachusetts statute). Because no statute explicitly protects the creation of a full scale hospital, it is implied that a zoning bylaw may in fact prohibit such a use.⁴ The exception would be if the prohibition of such a use was discriminatory.

The prohibition of a full scale hospital would likely not be discriminatory under G.L. ch. 40A, § 3. Full scale hospitals are significantly different, both in scale and intensity, than any other use allowed currently by the Zoning Bylaws. This difference, combined with the fact that they do not specifically serve a particular disabled population (as compared to a substance abuse treatment facility) makes it far less likely that a court would find a hospital use a protected class.

III. Application for substance abuse treatment facility under current Westwood Zoning Bylaw requirements.

The current Zoning Bylaw neither authorizes nor prohibits substance abuse treatment facilities. A person seeking to obtain approval for such a facility would under current law submit a building permit application to the building inspector. The building inspector would likely deny the application for a building permit on the basis that the use is not allowed anywhere in Westwood.

The applicant would then appeal the building inspector’s decision to the Westwood Zoning Board of Appeals (“Zoning Board”). The appeal would include legal briefs arguing that the Town does not have authority to prohibit or regulate a substance abuse treatment facility. It would take a unanimous vote of the 3-member Zoning Board to reverse the building inspector’s decision.

⁴ We did not identify any case law indicating that a hospital use is, in and of itself, a protected use that cannot be banned.

A Zoning Board decision affirming the building inspector's decision to deny a building permit could be appealed by the applicant to the Land Court in Boston or to Norfolk County Superior Court in Dedham. That would commence a legal proceeding to determine whether the Zoning Board's decision was legally correct.

A Zoning Board decision directing the building inspector to issue the building permit could be appealed to Land Court or Superior Court by the Select Board or by any "person aggrieved" by that decision. Abutters and abutters to abutters within 300 feet of the proposed facility are assumed by law to be persons aggrieved. Any such appeal would result in a legal proceeding to determine whether the Zoning Board's decision was legally correct.