FILED
United States Court of Appeals
Tenth Circuit

July 18, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

COURAGE TO CHANGE RANCHES HOLDING COMPANY, a Colorado nonprofit corporation, d/b/a Soaring Hope Recovery Center; JOAN GREEN; JOHN GREEN,

Plaintiffs - Appellants,

v.

EL PASO COUNTY, COLORADO,

Defendant - Appellee.

No. 21-1227

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:18-CV-01122-WJM-KMT)

Rachel B. Maxam (Raymond K. Bryant, Civil Rights Litigation Group, PLLC, Denver, Colorado, with her on the briefs), Law Office of Rachel B. Maxam, PLLC, Westcliffe, Colorado, for Plaintiffs-Appellants.

William T. O'Connell, III of Wells, Anderson & Race, Denver, Colorado (Steven Klaffky of El Paso County Attorney's Office, Colorado Springs, Colorado, with him on the briefs), for Defendant-Appellee.

Before **MATHESON**, **KELLY**, and **PHILLIPS**, Circuit Judges.

PHILLIPS, Circuit Judge.

Under the 1988 Fair Housing Act Amendments (FHAA), municipalities cannot discriminate against disabled residents by denying them housing opportunities available to nondisabled residents.[1] 42 U.S.C. § 3604(f). But zoning disputes still arise, including when people recovering from drug and alcohol addictions try to live in group homes in single-family residential areas. *See generally Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013).

Sometimes, zoning officials might relent to housing discrimination after campaigns by neighborhood homeowners concerned that the presence of people recovering from addiction will degrade their quiet neighborhoods. *See id.* at 1148–55. In other situations, local governments may ban or more strictly regulate group homes for disabled persons without an adequate justification. *See Larkin v. Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 287–88, 290 (6th Cir. 1996). In either situation, the result is the same: group homes for disabled persons are zoned out of the neighborhoods of nondisabled homeowners. *Pac. Shores*, 730 F.3d at 1154 (explaining how a zoning ordinance motivated by discriminatory animus caused many group homes for disabled persons to close); *Larkin*, 89 F.3d at 291 (explaining how a facially discriminatory statute

[1] The FHAA and the early caselaw interpreting it use "handicap" to describe a disability. We will use the terms "disability" and "disabled," which have the same legal meaning but more accurately reflect modern usage. *See Budnick v. Town of Carefree*, 518 F.3d 1109, 1113 n.5 (9th Cir. 2008) (citation omitted).

imposed a de facto quota on the number of disabled persons who could live in a neighborhood). The FHAA prohibits both scenarios. *Pac. Shores*, 730 F.3d at 1163–64; *Larkin*, 89 F.3d at 289–92.

Here, we are confronted by the second scenario. Courage to Change Recovery Ranch, more recently known as Soaring Hope Recovery Center, provided treatment and housing for people recovering from drug and alcohol addictions in a single-family neighborhood in El Paso County, Colorado. But Soaring Hope claims that the County's strict occupancy limits, standards for group homes for disabled persons, and policies restricting what treatment options Soaring Hope could provide in a single-family zone led Soaring Hope to close its home in a single-family neighborhood (the Spruce Road home).

We hold that the County violated the FHAA by imposing facially discriminatory occupancy limits on group homes for disabled persons without a legally permissible justification. Though Soaring Hope has shown standing to challenge the occupancy limits, which directly injured it, Soaring Hope has not shown standing to challenge the standards for group homes for disabled persons—no evidence shows that the County enforced the standards against Soaring Hope.

We also hold that the district court erred by granting summary judgment against Soaring Hope on its zoning-out claim for intentional discrimination. Soaring Hope raised a genuine issue of material fact about whether the County had prohibited certain therapeutic activities in its Spruce Road home while

allowing those same activities in other structured group-living arrangements and residential homes, so we remand for the district court to further address the zoning-out claim. But we affirm on all other grounds.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm in part, reverse in part, and remand.

BACKGROUND

I. Factual Background

A. Soaring Hope seeks to locate in a single-family neighborhood.

Soaring Hope was established in the Colorado Springs area to "provide a state-of-the-science, fully integrated addiction treatment regime strategically designed to break the cycle of addiction." Suppl. App. vol. 1, at 30. According to Soaring Hope, it distinguished itself from other recovery programs by addressing the root causes of addiction and mental illness instead of merely addressing symptoms. To be eligible for Soaring Hope's services, residents must have stopped using drugs or alcohol. Soaring Hope never provided medically assisted detoxification with methadone or Suboxone. But a Soaring Hope physician helped wean residents off legally prescribed drugs, such as psychiatric medications, that were "complicating their recovery." App. vol. 1, at 167.

Soaring Hope consistently sought out residential areas for its treatment program so that its residents could "feel like they [were] part of the community and not segregated from the rest of society." *Id.* at 184. Soaring Hope also

claimed that a neighborhood setting would promote its residents' safety "by keeping them away from locations where alcohol and drugs are more readily accessible." *Id.* at 157.

The County's Land Development Code (the Code) provides two categories of land uses: allowed uses and special uses. Allowed uses require no additional permitting process, but special uses require another application. In determining whether to grant a special use, the County considers factors including whether the special use will harmonize "with the character of the neighborhood," whether it will "create unmitigated traffic congestion," and whether it will jeopardize the "public health, safety, and welfare" of County residents. App. vol. 3, at 807–08. The County won't grant a special-use application unless the "zoning district . . . allows the proposed special use." *Id.* at 807.

Until 2014, the Code allowed rehabilitation facilities, which provide institutional treatment for people recovering from drug and alcohol addiction, to operate as a special use in single-family zones. In 2012, Soaring Hope requested a special-use permit to operate an "Addiction Recovery Rehabilitation Facility" in a single-family home in Colorado Springs (the Appaloosa home). App. vol. 1, at 270–78. Soaring Hope described itself as a state-licensed treatment provider for substance-abuse disorders, and it listed therapeutic strategies such as talking circles, nutritional compounds, and off-site meetings and field trips. The County denied Soaring Hope's request for a

special-use permit for the Appaloosa home. *See Green v. El Paso County*, No. 18-cv-1122-WJM-MKT, 2020 WL 4429387, at *2 (D. Colo. July 31, 2020).

In January 2013, Judith Miller, one of Soaring Hope's founders, filed a complaint with the U.S. Department of Housing and Urban Development, asserting that the County's zoning policies violated federal law. In November 2013, the U.S. Department of Justice (DOJ) notified the County that it had opened an FHAA investigation into the County's zoning practices. The County responded to the DOJ by stating "that the Courage to Change Recovery Ranch operation as presently configured and as described to the County . . . qualifies . . . as operating a group home for disabled persons." App. vol. 1, at 283. The County further advised that it wouldn't require a special-use permit so long as the Appaloosa property "continue[d] to qualify as a group home for disabled . . . persons," and the County sent Soaring Hope a letter to that effect. *Id.* The County also informed the DOJ that it was "acting expeditiously to amend its [Code] to comply with the law." *Id.* at 284. At the time of the DOJ investigation, the Code required a special-use permit not only for rehabilitation facilities but also for group homes for disabled persons, regardless of occupancy level. *Green*, 2020 WL 4429387, at *3. The County represented to the DOJ that it would amend the Code to allow "all Adult Care Homes which provide congregate living for disabled . . . persons within the scope of the Fair Housing Act, ADA and Rehabilitation Act to be occupied by up to 12 such

persons per home, as well as such additional necessary persons required for the care and supervision of the permitted number of . . . disabled persons." *Id.*

B. The County amends the Code.

In 2014, prompted by the DOJ investigation, the County amended the Code to try to comply with the FHAA, Americans with Disabilities Act (ADA), and Rehabilitation Act (RA). The amended Code defined a rehabilitation facility as "[a]n institutional use-type facility, and not a group home . . . providing accommodation, treatment, and medical care for patients suffering from alcohol or drug-related illness." App. vol. 1, at 292. By contrast, the Code defined a group home as a "home intended to provide a normal residential family setting for certain unrelated groups of people." *Id.* Under the Code, group homes could serve four populations: persons with mental illnesses, persons with developmental disabilities, persons with other disabilities (including drug or alcohol addiction), and persons over 60. Outside the group-home context, the Code defined a "family" as an unlimited number of related persons, or no more than five unrelated persons "living together in a dwelling unit." *Id.*

The amended Code clarified that "group homes for disabled persons" included sober-living homes for people in recovery from drug or alcohol addiction. Further, the amended Code required group homes for disabled persons housing six or more occupants to comply with three "Standards": (1) making quarterly reports to affirm that the residents were disabled,

(2) avoiding ministerial activities by restricting in-home meetings to residents, family members, and caregivers, and (3) applying for a special-use permit to seek a reasonable accommodation. Group homes for disabled persons, developmentally disabled persons, and persons with mental illnesses could house up to five residents as an allowed use and six to ten residents as a special use.

The amended Code defined group homes for the aged as providing "personal services[,] protective oversight[,] social care due to impaired capacity to live independently[,] and regular supervision that shall be available on a twenty-four-hour basis, but not to the extent that regular twenty-four-hour medical or nursing care is required." App. vol. 1, at 292. Group homes for the aged could house eight residents as an allowed use and nine or more residents as a special use. Other structured group-living arrangements also had higher occupancy limits than group homes for disabled persons. Family foster-care homes, adult day cares, crisis centers, day-treatment centers, and residential-care facilities could house eight people as an allowed use. Day-care homes could house twelve people as an allowed use. The County considered day-care homes, family foster-care homes, and adult day cares to be residential facilities.

The amended Code didn't impose occupancy caps on rehabilitation facilities, but it did require them to obtain a special-use permit to operate in two multifamily zoning districts. Rehabilitation facilities could operate as an allowed use in three commercial zoning districts and three obsolete zoning

districts. Before 2014, rehabilitation facilities were a special use in most zoning districts, including single-family districts, but those facilities weren't an allowed use in any zoning district. After 2014, rehabilitation facilities weren't an allowed or special use in any single-family zoning district in the County.

The amended Code gave County officials discretion in drawing lines between a rehabilitation facility and a group home for disabled persons. Craig Dossey, the executive director of the County's Development Services Department, testified that a group home for disabled persons could provide physical therapy and mental-health treatment in the home without converting into a rehabilitation facility. Relatedly, Mark Gebhart, a deputy director of the County's Planning and Community Development Department, testified that physical therapists, fitness instructors, doctors, and mental-health professionals could provide services in group homes for the aged without violating the Code. Similarly, the amended Code permitted residents in single-family homes to hold civic meetings and receive medical and therapeutic treatment. But a group home would be deemed a rehabilitation facility if "multiple different types of treatments [were] performed in a very programmed manner." App. vol. 2, at 477–78. The County was more likely to classify a group home as a rehabilitation facility if it had a "commercial component."

C. Activities at the Spruce Road home spark a zoning dispute.

In fall 2014, Soaring Hope began renting a five-bedroom home on Spruce Road from Joan and John Green to operate its treatment program. Residents

"live[d] in a 'family' like living environment under the supervision of Soaring Hope staff." App. vol. 1, at 164. Up until September 1, 2016, Soaring Hope integrated a diverse range of treatments at the Spruce Road home, including neurofeedback technologies, nutraceutical supplements (like vitamins) to balance residents' neurotransmitter levels, cognitive-behavioral therapy, spiritual practices, family therapy, and career-rehabilitation services. Residents participated in trauma-sensitive yoga, hikes in the nearby mountains, and Native American spiritual traditions such as sweat-lodge ceremonies and talking circles. After residents completed the program, Soaring Hope continued to offer nutraceutical supplements for them to purchase wholesale. Despite the family-like environment, Soaring Hope provided around-the-clock supervision and regularly drug tested staff and residents.

The Spruce Road home was in a residential area containing large homes, parks, and hiking trails. According to Miller, Soaring Hope residents needed to live in a residential community so they could lean on other people in recovery for support, stay away from drugs and alcohol, and build basic living skills. Miller also claimed group therapy should include at least eight participants at a time so that each participant would feel more comfortable and less intimidated.

In April 2016, Soaring Hope submitted a special-use application to the County for the Spruce Road home. In the attachments to its application, Soaring Hope detailed its activities at the Spruce Road home. Soaring Hope listed over twenty staff members in its application.

In July 2016, the County sent a letter to Miller and the Greens informing them that the Spruce Road home "is instead categorized as a rehabilitation facility, not a group home for . . . disabled persons, and for that reason the current application will be returned to you." App. vol. 2, at 383–84. The County explained that "[m]edically assisted drug and alcohol dependence rehabilitation is clearly the primary purpose of the patients' stay at the Spruce Road facility, and not an incidental aspect of residential use." *Id.* at 384. As support, the County pointed to Soaring Hope's extensive therapies, the high staff-to-patient ratio, and the immersive nature of the treatment program that left little room for residents to "have outside lives or activities." *Id.* at 384–85. The County also considered Soaring Hope's marketing of wholesale nutraceuticals a mainly commercial activity.

The County informed Soaring Hope that the Spruce Road home "as presently configured is in violation of the [Code], and an enforcement file has been opened." *Id.* at 386. The County promised to suspend enforcement of the Code for thirty days to allow Soaring Hope to take one of three actions: (1) appeal the decision to the Board of County Commissioners for $887; (2) apply for a variance for over $4,000; or (3) "bring the use into compliance by eliminating the rehabilitation facility uses and bringing the use and number of residents into compliance with a group home use." *Id.* at 386.

Miller responded to the County's letter as follows:

> [W]e fully agree with you that our land use request is categorized as a rehabilitation facility . . . . We have never been, nor do we wish to be, a group home for . . . disabled persons, and I have been puzzled all through this application process about why we were being considered a group home rather than a rehabilitation facility.

Id. at 388.

During summer 2016, Miller's and Gebhart's email exchanges reflected Miller's confusion about the difference between applying for a variance and a special use. Miller wanted to apply for a variance to provide rehabilitation therapies and serve eight clients in the Spruce Road home. Gebhart explained that Soaring Hope would need to apply for a variance to operate a rehabilitation facility, or for a special-use permit to operate a group home for more than five disabled persons. At one point, Miller expressed confusion: "I never have been a group home and don't want to be—I have always for the past 13 years been [an] addiction recovery home." Suppl. App. vol. 3, at 64.

Gebhart advised Miller that by August 11, 2016, Soaring Hope must "eliminate [its] rehabilitation-facility uses and bring [its] use and number of residents into compliance with a group home use with [five] or less . . . disabled persons." Suppl. App. vol. 2, at 81. On August 11, Miller wrote to Gebhart that Soaring Hope had decided to move its therapy sessions "to a commercial office/conference room." App. vol. 2, at 390. But by August 15, Miller informed Gebhart that Soaring Hope was struggling to relocate its therapy sessions and now wanted to apply for a variance.

On August 31, 2016, the County issued a notice of violation to Soaring Hope for operating a rehabilitation facility in a residential area where it wasn't an allowed use. The County advised that Soaring Hope needed to "bring the property into compliance [or] contact the Code Enforcement Officer . . . within ten (10) calendar days." *Id.* at 392. On September 23, 2016, Miller informed Gebhart that to comply with the Code, Soaring Hope had moved all its therapies off-site to its commercial office, moved its yoga practice to a commercial studio, and closed its talking circles to the public. Soaring Hope continued to provide around-the-clock supervision, nutraceutical supplements, and regular drug testing for residents.

Despite these changes, the County held a zoning hearing in October 2016 to discuss Soaring Hope's zoning violations and to find a solution. Rick Bolin, one of Soaring Hope's executive staff members, appeared for Soaring Hope. The County asked Soaring Hope to agree to a Stipulation to settle the zoning dispute. Under the Stipulation, Soaring Hope would agree that it had violated the Code by operating a rehabilitation facility in a residential area and would also agree to "curtail any rehabilitation facility uses immediately." *Id.* at 456. In exchange, the County would stay enforcement of the Code until November 3, 2016, to allow Soaring Hope time to file a variance application and to work with the County to identify appropriate uses of the Spruce Road home. The Stipulation also imposed parking limitations and HIPAA-compliant inspections on Soaring Hope and the Spruce Road home. Bolin agreed to the Stipulation on

Soaring Hope's behalf. During the hearing, Bolin expressed Soaring Hope's appreciation for the opportunity to work with the County "to ensure that any activities in the house are appropriate and that all therapeutic activities are not taking place in the group home." *Id.* at 404.

On November 3, 2016, Bolin informed the County that Soaring Hope no longer planned to apply for a variance because it had become fully compliant as a group home. And the County's investigations confirmed Bolin's conclusion. Between November 2016 and February 2018, the County conducted at least six inspections of the Spruce Road home. During its inspections, the County found only a few minor infractions of the Stipulation's parking condition. By January 30, 2017, Gebhart informed the County that "Soaring Hope . . . is currently operating in compliance with [the County's] zoning regulations applicable to a Group Home for . . . Disabled Persons." Suppl. App. vol. 3, at 13.

In February 2018, the County informed Miller and Bolin that Soaring Hope had "complied with the terms of the Stipulation," and that the County would now close its enforcement case for the Spruce Road home. *Id.* at 22. The County still expected Soaring Hope to comply with zoning regulations, but it would no longer enforce the Stipulation. The parties agreed at trial that from September 1, 2016, to May 1, 2019, Soaring Hope "operated the Spruce Road Home as a 'Group Home for . . . Disabled Persons' in compliance with the Land Development Code." App. vol. 4, at 1051.

After the zoning dispute and Stipulation in 2016, Soaring Hope experienced increasing financial hardship. On May 1, 2019, Soaring Hope closed the doors of its Spruce Road home.

II. Procedural Background

In 2018, Soaring Hope, along with the Greens,[2] sued the County in the United States District Court for the District of Colorado, alleging twelve claims, including ones under the FHAA, ADA, and RA. Under all three statutes, Soaring Hope alleged intentional discrimination, disparate impact, and failure to provide a reasonable accommodation. Under FHAA § 3617, Soaring Hope brought another claim for interference, coercion, or intimidation. Soaring Hope also challenged the County's actions under the Equal Protection Clause, and it challenged the County's Code as unconstitutionally vague and overbroad.

The County moved for summary judgment on all claims, arguing that Soaring Hope's "case against the County is baseless and predicated on a fundamental misunderstanding of basic land use law and failure to appreciate the uses of the Spruce Road facility." App. vol. 2, at 533.

[2] Joan and John Green were plaintiffs to the claims dismissed at summary judgment, and they join Soaring Hope in appealing these claims. Their legal challenges are identical to Soaring Hope's challenges. For ease of reference, we will refer to Soaring Hope and the Greens collectively as "Soaring Hope," with the understanding that our holdings on the claims dismissed at summary judgment apply with equal force to all appellants.

In turn, Soaring Hope moved for partial summary judgment on three of its claims: (1) that the Code facially discriminates against disabled persons; (2) that the Code defines rehabilitation facility unconstitutionally vaguely; and (3) that the County refused a reasonable-accommodation request by denying Soaring Hope's special-use application in 2016.

The County explained its five-person occupancy cap on group homes for disabled persons: "[F]ive is the occupancy cap on the number of unrelated, nondisabled . . . individuals who can live together in a single-family home not regulated by state statute." App. vol. 2, at 492. The County argued that group homes for the aged and child- or family-care centers weren't proper comparators "because the functions and occupancy limits of these types of homes are regulated by state statute." *Id.* at 556.

A. The District Court's Rulings on Summary Judgment

The district court denied Soaring Hope's motion for partial summary judgment and partially granted the County's motion for summary judgment. *Green*, 2020 WL 4429387, at *18. First, the court found that "there is no genuine dispute that the Spruce Road Property was anything but a Rehabilitation Facility in 2016." *Id.* at *7. In the October 2016 Stipulation, Soaring Hope agreed it had violated the Code by operating "as a rehabilitation facility in a residential area." *Id.*; App. vol. 2, at 456. The court found that the parties entered the Stipulation voluntarily and admitted it for trial. *Green*, 2020 WL 4429387, at *7. Even apart from the Stipulation, the court noted that

in her July 2016 letter to the County, Miller had admitted that the Spruce Road home was a rehabilitation facility. *Id.* And the court relied on the County's July 2016 letter describing the activities at the Spruce Road home and Soaring Hope's decision not to appeal the County's findings as evidence that the property was a rehabilitation facility. *Id.* at *8–9.

The court then turned to Soaring Hope's FHAA, ADA, and RA claims. Because the legal standards for discrimination are the same under all three statutes, the court reviewed Soaring Hope's FHAA claims with the understanding that its analysis and holdings for Soaring Hope's intentional-discrimination, disparate-impact, and reasonable-accommodation claims under the FHAA would also apply to Soaring Hope's ADA and RA claims. *Id.* at *10.

The court concluded that Soaring Hope had established a prima facie case of intentional discrimination under the FHAA because of the difference in the Code's occupancy limits between group homes for the aged, foster-care homes, and group homes for disabled persons. *Id.* at *11–12. After noting that "the ordinance for Group Homes imposes different occupancy levels for [disabled] persons than for other types of group homes," the court denied the County's motion for summary judgment on Soaring Hope's facial-discrimination claims. *Id.* at *12 & n.12. But the court also denied Soaring Hope's motion for summary judgment on its facial-discrimination claims, observing that "a reasonable factfinder could find that the different occupancy levels are based on *bona fide* governmental concerns." *Id.* at *12.

The court granted summary judgment to the County on Soaring Hope's claims that the County had intentionally discriminated by classifying the Spruce Road home as a "rehabilitation facility" and by denying Soaring Hope's special-use permit. *Id.* at *12. Because the court found no genuine dispute of material fact about whether the County properly characterized the Spruce Road home as a rehabilitation facility in summer 2016, the court concluded that Soaring Hope couldn't make a prima facie case of intentional discrimination based on the rehabilitation-facility classification. *Id.* Similarly, the court granted summary judgment to the County on Soaring Hope's claim that the County intentionally discriminated against it by "zoning out" all rehabilitation facilities. *Id.* The court noted that rehabilitation facilities were still allowed in some other zoning areas and that Soaring Hope had failed to "identify any other treatment facilities that [were] allowed to operate within a single-family residential zoning district." *Id.* at *13. The court also granted summary judgment to the County on Soaring Hope's claim that the October 2016 Stipulation's parking and inspection requirements were intentionally discriminatory. *Id.* Soaring Hope had agreed to the Stipulation, so it couldn't use it to show discriminatory intent. *Id.*

The court also granted summary judgment to the County on Soaring Hope's reasonable-accommodation theory. *Id.* at *15. Because the County prohibited rehabilitation facilities in the Spruce Road home's zoning district as

an allowed or special use, the court held that Soaring Hope's special-use application wasn't reasonable. *Id.*

Finally, the court turned to Soaring Hope's FHAA § 3617 claim of interference, coercion, or intimidation. The court ruled that the County's enforcement action against Soaring Hope was a proper exercise of its zoning power, not intimidation or interference. *Id.* It noted that Soaring Hope had voluntarily agreed to the Stipulation's terms. *Id.* at *16. The court granted summary judgment to the County on this claim because Soaring Hope could not make a prima facie case.[3] *Id.*

B. Jury Trial and Appeal

Soaring Hope's facial-discrimination claims proceeded to a jury trial. The parties stipulated that Soaring Hope's residents at the Spruce Road home were disabled and thus qualified for protection under the FHAA and ADA. But the jury found that Soaring Hope had not proven its FHAA or ADA claims against the County by a preponderance of the evidence. So the district court entered judgment for the County and dismissed Soaring Hope's claims with prejudice.

[3] The court also granted summary judgment to the County on Soaring Hope's disparate-impact claim of discrimination and its constitutional claims. *Green*, 2020 WL 4429387, at *13–14, *16–18. Soaring Hope doesn't appeal the dismissal of these claims.

Soaring Hope timely filed its appeal. On appeal, Soaring Hope challenges the district court's denial of partial summary judgment on its facial-discrimination claims and the district court's grant of summary judgment to the County on Soaring Hope's other intentional-discrimination theories, its reasonable-accommodation claim, and its claim of interference, coercion, or intimidation.[4]

STANDARD OF REVIEW

We review de novo a district court's grant of a motion for summary judgment. *Adair v. City of Muskogee*, 823 F.3d 1297, 1304 (10th Cir. 2016) (citation omitted). We also review de novo a district court's denial of a summary-judgment motion on a purely legal issue. *Wilson v. Union Pac. R.R. Co.*, 56 F.3d 1226, 1229 (10th Cir. 1995) (citations omitted). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). But we will reverse a grant of summary judgment if "the evidence, construed in the light most favorable to the non-moving party, is such that a reasonable jury could return a verdict for the non-moving party." *Adair*,

[4] On appeal, Soaring Hope also challenges two jury instructions and the defenses the district court allowed the County to raise at trial. Our discussion of Soaring Hope's other challenges will moot trial-related issues, so we won't discuss the jury instructions or allowable trial defenses.

823 F.3d at 1304 (quoting *Carter v. Pathfinder Energy Servs., Inc.*, 662 F.3d 1134, 1141 (10th Cir. 2011)).

DISCUSSION

The FHAA prohibits housing discrimination based on disability, making it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a [disability]." 42 U.S.C. § 3604(f)(1). The FHAA also prohibits housing discrimination based on disability in the "terms, conditions, or privileges of sale or rental of a dwelling." § 3604(f)(2). Discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled person] equal opportunity to use and enjoy a dwelling." § 3604(f)(3)(B).

Similarly, Title II of the ADA protects against disability-based housing discrimination by public entities, 42 U.S.C. § 12132, and the RA protects against disability-based housing discrimination by public entities receiving federal financial assistance. 29 U.S.C. § 794. The legal frameworks for intentional discrimination and reasonable accommodation are identical under the FHAA, ADA, and RA. *See, e.g.*, *Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City*, 685 F.3d 917, 919 (10th Cir. 2012) (explaining the identical summary-judgment standards for intentional discrimination, disparate impact, and reasonable accommodation under the FHAA, ADA, and RA). Our analysis

for Soaring Hope's FHAA claims thus applies equally to its ADA and RA claims.

First, we will discuss Soaring Hope's facial-discrimination claims: that the Code's provisions facially discriminate based on disability and that the County failed to adequately justify that discrimination. As part of that discussion, we will assess whether Soaring Hope has standing to challenge the Code's Standards that apply only to group homes for disabled persons with six or more occupants.

Then, we will evaluate Soaring Hope's other theories of intentional discrimination. Finally, we will consider Soaring Hope's failure-to-accommodate claim and its FHAA § 3617 claim of interference, coercion, or intimidation.

I. Facial Discrimination

A. Does Soaring Hope have standing to challenge the Code's provisions?

First, we must determine whether Soaring Hope has standing to challenge the Code's provisions. We conclude that Soaring Hope has standing to challenge the Code's occupancy limits because the County enforced these occupancy limits against Soaring Hope, which allegedly caused Soaring Hope financial harm. But whether Soaring Hope has standing to challenge the Code's Standards poses a closer question. The Standards apply only to group homes for

disabled persons with six or more occupants.[5] At many points in the record (including in its complaint), Soaring Hope denied ever having more than five occupants at once in the Spruce Road home during the period for which it seeks damages (September 1, 2016, to the present).

So we directed the parties to brief whether Soaring Hope has standing to challenge the Standards. After reviewing the supplemental briefs and the record, we hold that Soaring Hope lacks standing to challenge the Standards.

We review issues of standing de novo. *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004) (citation omitted). To establish the "irreducible constitutional minimum of standing," Soaring Hope must show that it "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up) (citations omitted). Then, Soaring Hope must show that its injury is "fairly traceable" to the County's actions and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560–61 (cleaned up) (citations omitted).

[5] As mentioned, these group homes must (1) make quarterly reports to affirm that the residents are disabled, (2) avoid conducting ministerial activities and restrict in-home meetings to residents, family members, and caregivers, and (3) apply for a special-use permit when seeking a reasonable accommodation.

What's more, Soaring Hope must show that it has Article III standing "for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (citation omitted). In its complaint, Soaring Hope sought injunctions, declaratory relief, and damages against the County. To have standing to seek injunctive relief, Soaring Hope must show a "real or immediate threat that [it] will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (citation omitted). Likewise, to have standing to seek a declaratory judgment, Soaring Hope must show that the dispute is "definite and concrete, touching the legal relations of parties having adverse legal interests" and that the dispute is capable "of specific relief through a decree of a conclusive character." *Atlas Biologicals, Inc. v. Kutrubes*, 50 F.4th 1307, 1330 (10th Cir. 2022) (citations and quotations omitted). And to have standing to seek damages, Soaring Hope must show that it "suffered a past injury that is concrete and particularized." *Tandy*, 380 F.3d at 1284 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210–11 (1995)).

In May 2019, Soaring Hope closed the Spruce Road home and has not reopened it. Because Soaring Hope no longer offers residential services, it can show no "real or immediate threat" that the County will apply the Standards to it. *Lyons*, 461 U.S. at 111 (citation omitted). Nor can it show a "definite and concrete" dispute about the Standards that affects its and the County's current legal interests. *Atlas Biologicals*, 50 F.4th at 1330 (citations omitted). So Soaring Hope lacks standing to enjoin the County from enforcing the Standards

or to seek a declaratory judgment that the Standards are unlawful. That leaves Soaring Hope to show that the Standards caused Soaring Hope a concrete and particularized injury for which it can seek damages. *Tandy*, 380 F.3d at 1284 (citation omitted).

Soaring Hope urges us to apply a more lenient definition of injury, claiming that "it is enough that Soaring Hope was the subject of discrimination the FHA[A] was meant to prevent, which expressly includes the ability of groups like Soaring Hope to provide housing and services to disabled persons." Soaring Hope claims that it has standing to challenge the Standards "even if there was no concrete 'injury' such as actual damages." For support, it cites *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), an FHAA case in which plaintiffs challenged racial-steering practices that provided false information to Black residents seeking housing. In *Havens*, the Supreme Court found that a Black tester who had experienced racial steering had standing to sue under a "statutorily created right to truthful housing information." *Id.* at 374. But the Court didn't lower the bar for Article III standing: the plaintiff still needed to "allege that as a result of the defendant's actions he has suffered 'a distinct and palpable injury.'" *Id.* at 372 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). So too here. To have standing to challenge the Standards, Soaring Hope must allege an injury that is "distinct and palpable" and traceable to the Standards themselves.

At trial, Soaring Hope sought damages "from September 1, 2016 to the present." But the record shows that the Spruce Road home never housed more than five occupants during that time. In September 2016, Soaring Hope limited the treatments offered at the Spruce Road home to comply with the Code as a group home with five residents. App. vol. 2, at 393–94. And at the October 2016 zoning meeting with the County, Bolin testified that "every single day that the house has been operating for the last six months . . . at no point has there been more than five residents in the house on any day." *Id.* at 442. By November 2016, Soaring Hope had opted to comply with the Code as a group home for five residents rather than apply for a variance. Then, the County's investigations after November 2016 confirmed that Soaring Hope was housing no more than five residents at a time. And Soaring Hope referred to Bolin's testimony in its complaint to support its claim that "Soaring Hope has at no point ever had more than five (5) residents on any given day." App. vol. 1, at 49.

Despite all that, Soaring Hope now asserts that it housed more than five residents at a time. Specifically, it points to Miller's deposition testimony that until July 2016, when the County denied Soaring Hope's special-use permit, Soaring Hope housed between three and eight residents at the Spruce Road home. But at the October 2016 zoning meeting, Bolin explained that the Spruce Road home sometimes housed more than five residents in a month but no more than five residents at once. App. vol. 2, at 442. And in summer 2016, Miller

assured Gebhart by email that "we are always in compliance with [five] or less residents." Suppl. App. vol. 2, at 81. Overall, the record establishes that the Standards didn't apply to the Spruce Road home while it operated as a group home because it housed no more than five residents at once.

Still, Soaring Hope argues that it suffered injuries from the Standards in three ways: (1) the County's denying its special-use application in summer 2016; (2) the Code's requiring that Soaring Hope apply to increase its occupancy only by a special-use application; and (3) the County's enforcing the restrictions on ministerial activities against Soaring Hope. Soaring Hope's first theory fails because in denying Soaring Hope's special-use application in July 2016, the County was enforcing the Code's rehabilitation-facility definition, not the Standards. And Soaring Hope's second theory fails because after the County classified the Spruce Road home as a rehabilitation facility in summer 2016, Soaring Hope chose not to apply for a special-use permit to operate as a group home with more than five occupants. Requiring Soaring Hope to proceed with a special-use application to increase its group-home occupancy isn't enough to confer standing to seek damages when Soaring Hope chose not to complete that application. Soaring Hope hasn't suffered a "distinct and palpable injury" from the special-use process in the Standards. *Havens Realty Corp.*, 455 U.S. at 372 (quoting *Warth*, 422 U.S. at 501).

Soaring Hope's third theory also fails. In July 2016, the County informed Soaring Hope that Soaring Hope's "circle talks" resembled ministerial

activities prohibited by the Standards, which supported the County's conclusion that the Spruce Road home was a rehabilitation facility and not a group home. So to conform with the Code, Soaring Hope "ended the practice of welcoming outside participants." In Soaring Hope's view, these facts support that "the County applied the Standards to Soaring Hope without regard to the number of residents." But in its July 2016 letter, the County classified the Spruce Road home as a rehabilitation facility and not a group home. Because the Code's prohibition on formal group meetings applies only to group homes with six or more occupants (not to rehabilitation facilities), the County's July 2016 letter classifying Soaring Hope as a rehabilitation facility doesn't support a conclusion that the County enforced the Standards against Soaring Hope.[6]

Because Soaring Hope did not operate as a group home with six or more occupants during the timeframe in which it seeks damages, it hasn't shown a concrete and particularized injury arising from the Standards. *Lujan*, 504 U.S. at 560 (citations omitted); *Tandy*, 380 F.3d at 1284 (citation omitted). Nor has Soaring Hope shown that the County enforced the Standards against it. Before September 2016, the Spruce Road home operated as a rehabilitation facility, and after September 2016, the Spruce Road home operated as a group home for

[6] Soaring Hope still has standing to challenge the County's allegedly discriminatory actions in allowing group meetings in other residential homes but not in the Spruce Road home. *See infra* Section II.C. But these allegedly discriminatory actions are examples of the County's enforcing the rehabilitation-facility definition, not the Standards.

five or fewer persons. Thus, the Standards, which apply only to group homes for disabled persons with six or more persons, never applied to the Spruce Road home. *See* App. vol. 1, at 294.

We hold that Soaring Hope has standing to challenge the Code's occupancy limits but lacks standing to challenge the Standards.

B. The County's Procedural Challenge

Before we reach the merits of Soaring Hope's facial-discrimination challenge to the Code's occupancy limits, we must resolve a procedural issue. The County argues that Soaring Hope waived appellate review of the district court's denial of its motion for partial summary judgment by failing to raise a motion for judgment as a matter of law at the close of evidence under Federal Rule of Civil Procedure 50(a). This waiver issue turns on whether Soaring Hope moved for summary judgment on a purely legal issue. If so, then Soaring Hope wasn't required to make a Rule 50(a) motion to preserve the issue in its summary-judgment motion. *Wilson*, 56 F.3d at 1229 (citing *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 842 (10th Cir. 1994)). We will review the denial of a motion for summary judgment without a Rule 50(a) motion when the summary-judgment motion was based on a legal issue rather than the sufficiency of the evidence. *Ruyle*, 44 F.3d at 841–42.

We abated this case after the Supreme Court granted certiorari in *Dupree v. Younger*, which poised the Court to resolve a circuit split about whether appellate courts can review a purely legal question resolved at summary

judgment despite the movant's failure to make a Rule 50(a) motion at trial. 143 S. Ct. 645 (Jan. 13, 2023) (mem.). Consistent with our circuit's rule, the Court has now held that "a post-trial motion under Rule 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment." *Dupree v. Younger*, 143 S. Ct. 1382, 1389 (2023). The Court defined "a purely legal question" as "one whose answer is independent of disputed facts." *Id.* at 1390. And the Court explained that if a question is purely legal, "factual development at trial will not change the district court's answer." *Id.* But beyond this short definition, the Court avoided adopting a bright-line rule about what counts as a purely legal question. *Id.* at 1390–91.

Soaring Hope moved for partial summary judgment on its claim that the County's Code facially discriminated based on disability. We conclude that Soaring Hope moved for partial summary judgment on purely legal issues: (1) whether the Code was facially discriminatory and (2) whether the County provided legally permissible justifications for this facial discrimination. Under our precedent, whether a zoning ordinance is facially discriminatory is a legal issue that can be discerned from the face of the ordinance; it requires no more proof of discriminatory motive. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 & n.16 (10th Cir. 1995) ("[T]he discriminatory intent and purpose of the Act and Ordinance are apparent on their face."). We also conclude that whether the County's justifications for facial discrimination are legally permissible presents a purely legal question. Both issues involve a "'context-free inquiry

into the meaning' of a statute or legal doctrine." *Valdez v. Macdonald*, 66 F.4th 796, 815 (10th Cir. 2023) (citations omitted).

Our approach to considering facial discrimination is analogous to our approach to interpreting contracts, and we have held that contract interpretation is a purely legal issue. *Haberman v. Hartford Ins. Grp.*, 443 F.3d 1257, 1264 (10th Cir. 2006). Just as we interpret an unambiguous contract by looking at the language of the contract itself, *e.g.*, *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169, 1176 (10th Cir. 2021) (citation omitted), we determine whether an ordinance is facially discriminatory by looking at the ordinance itself and whether it "facially single[s] out" disabled persons, *Bangerter*, 46 F.3d at 1500 & n.16.

True, to confirm facial discrimination, we still must compare the ordinance's treatment of disabled persons with its treatment of another similarly situated group. *See id.* at 1502 (explaining that on remand, the plaintiff "must support his basic claim that his group home was subjected to conditions not imposed on other group homes" in the same zoning area). But facial-discrimination claims are unlike discrimination claims relying on circumstantial evidence, in which the question of a "similarly situated [comparator] ordinarily presents a question of fact for the jury." *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1117 (10th Cir. 2007) (citations omitted). Rather, when a claim challenges a facially discriminatory policy, courts can often discern the similarly situated group from the face of the policy

itself and undisputed facts. *See, e.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 116–17, 121 (1985) (identifying the relevant comparator in an age-discrimination case by looking only at the facially discriminatory policy). Because Soaring Hope presents a facial-discrimination claim, we can discern the similarly situated group as a matter of law from the face of the Code and from undisputed facts.

Likewise, whether a defendant's justification for facial discrimination is permissible under the FHAA is a pure question of law. At summary judgment and on appeal, the County has provided the same two justifications for the difference in occupancy limits: (1) groups of five unrelated roommates are the relevant comparators to group homes for disabled persons, and (2) the occupancy limits for other structured group-living arrangements, including group homes for the aged, are controlled by state statute.[7] In its reply defending its motion for partial summary judgment, Soaring Hope didn't challenge the

[7] At trial, the County provided the same two justifications, but it also raised a new justification for the different occupancy caps in its closing argument. Because the County "knew of group homes for the aged who had more than five residents," the County claimed that it set the occupancy limit for group homes for the aged at eight to avoid creating a nonconforming use. Also at trial, the County offered a new variation on its state-licensing justification, arguing that "[b]ecause the State has the ability to step in and remedy any problems [for group homes controlled by state statute], [it] makes sense to have a little bit higher occupancy cap."

Though *Dupree* cautions that new facts at trial will have no bearing on a purely legal question resolved at summary judgment, 143 S. Ct. at 1390, the County's new justifications at trial are new legal arguments, not new facts. So we will address them.

sufficiency of the evidence to support the County's offered justifications but instead challenged whether they were even legally permissible. *See* App. vol. 2, at 511 ("The County does not try to contend that [its] occupancy limits on [group homes for disabled persons] are based on legitimate governmental interest[s]. Rather, the County only argues that other types of group-living arrangements are not 'relevant comparators.' *This argument is inapposite to law*." (emphasis added) (citation omitted)).

In denying summary judgment to Soaring Hope on the facial-discrimination issue, the district court determined that "a reasonable factfinder could find that the different occupancy levels are based on *bona fide* governmental concerns." *Green*, 2020 WL 4429387, at *12. But the district court erred by framing the question of permissible justifications here as fact-based. To determine whether a justification for facial discrimination is permissible, we must "look to the language of the FHAA itself, and to the manner in which analogous provisions of Title VII have been interpreted." *Bangerter*, 46 F.3d at 1503. That is a legal question for a judge, not a factual question for a jury. Factual development can show whether a legally permissible justification is supported by the evidence. *See id.* at 1505 (explaining how factual development beyond the pleadings can show whether the benign-discrimination justification has been met). But "factual development at trial will not change the district court's answer" on whether a justification for facial discrimination is legally permissible in the first place. *Dupree*, 143 S.

Ct. at 1390. Whether a justification for facial discrimination is legally permissible is a "pure issue of law . . . that [can] be settled once and for all and thereafter . . . govern numerous cases without any fact-bound and situation-specific aspects." *Valdez*, 66 F.4th at 815 (cleaned up) (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006)).

Soaring Hope didn't base its motion for partial summary judgment, or its reply in defense of its motion, as a challenge to the sufficiency of the County's evidence. *See Wilson*, 56 F.3d at 1229. Instead, it challenged the County's facial discrimination and purported justifications in purely legal terms. *Ruyle*, 44 F.3d at 841–42. Because Soaring Hope moved for summary judgment on its facial-discrimination claim based on purely legal issues, Soaring Hope's failure to make a Rule 50(a) motion at the close of evidence doesn't bar our review. *Wilson*, 56 F.3d at 1229.[8]

[8] The County also argues that we should dismiss Soaring Hope's appeal outright for its failure "to comply with the conferral and service requirements" in Federal Rule of Appellate Procedure 30(b)(1). On top of Soaring Hope's four volumes of appendices, the County provided us with three volumes of supplemental appendices for our review. Yet the County still asks us to forgo any discussion of the merits of Soaring Hope's appeal because of Soaring Hope's failure to timely serve the County with a Rule 30(b)(1) designation and statement. We have never dismissed an appeal for failure to comply with Rule 30(b)(1), and we decline to do so here. Given that the parties' appendices adequately facilitate our review, we decline the County's request to dismiss Soaring Hope's appeal based on Rule 30(b)(1).

C. Occupancy Limits

1. Are the Code's occupancy limits facially discriminatory?

First, we address Soaring Hope's claim that the occupancy limits in the Code are facially discriminatory based on disability. A plaintiff can establish a prima facie case of intentional discrimination under the FHAA in either of two ways: (1) direct evidence of discriminatory intent or (2) circumstantial evidence under the *McDonnell Douglas* burden-shifting framework. *Cinnamon Hills*, 685 F.3d at 919. When a defendant "expressly treats someone protected by the FHAA in a different manner than others," a plaintiff "need not prove the malice or discriminatory animus of [the] defendant to make out a case of intentional discrimination." *Bangerter*, 46 F.3d at 1501 (citation omitted). In that situation, the evidence of discriminatory intent appears on the face of the ordinance. *Id.* at 1500.

The County's Code imposes lower occupancy caps on group homes for disabled persons than on group homes for the aged and other residential facilities.[9] Soaring Hope argues that the Code's occupancy caps facially discriminate based on disability. To determine whether the Code's occupancy caps do so, *Bangerter* instructs that we must compare the Code's treatment of group housing for disabled persons to its treatment of similarly situated groups.

[9] The Code identifies three types of group homes for disabled persons. Because the Code applies the same occupancy caps to all three types of homes, we will refer to them collectively as "group homes for disabled persons."

Id. at 1502. That leaves us needing to resolve the parties' disagreement about which housing arrangement in the Code is the relevant comparator to group homes for disabled persons.

Soaring Hope argues that the relevant comparators are group homes for the aged and other categories of structured group-living arrangements in the Code. By contrast, the County argues that the relevant comparators are groups of unrelated roommates, which the Code limits to five per dwelling. According to the County, other structured group-living arrangements "are not relevant comparators because the limits imposed on those facilities are set by state statute." After reviewing the Code's language, the applicable Colorado statutes, and our precedent, we reject the County's arguments. As a matter of law, we agree with Soaring Hope that the other structured group-living arrangements governed by the Code, especially group homes for the aged, are the relevant comparators to group homes for disabled persons.

We reach this conclusion without exceeding the proper scope of appellate review under *Dupree* and *Valdez*. The Code sufficiently identifies other structured group-living arrangements and provides enough information to determine whether they are proper comparators to group homes for disabled persons. *See Bangerter*, 46 F.3d at 1501 ("Disparate treatment analysis . . . involves differential treatment of similarly situated persons or groups." (citations omitted)). And the County did not adequately present facts—at summary judgment or trial—to show the comparators are not similarly situated.

Instead, it (1) asserted the proper comparator is a group of unrelated roommates, App. vol. 2, at 492, and (2) presented "justifications" for the Code's differential treatment of disabled persons that, as we explain below, are not legally sufficient, App. vol. 4, at 1027-31 (summarizing the County's justifications).

On appeal, the County cites no trial evidence that would interfere with our ability to resolve Soaring Hope's summary-judgment arguments on a legal basis. *See Ortiz v. Jordan*, 562 U.S. 180, 184 (2011) ("Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion."). We thus may review Soaring Hope's appeal of the denial of its summary-judgment motion within the constraints of *Dupree* and *Valdez*.

a. The Code's Language

The Code's language reveals many more similarities between group homes for disabled persons and other structured group-living arrangements than between group homes for disabled persons and single-family homes with five unrelated roommates. The Code defines "Group Home" as its own category of residential use "intended to provide a normal residential family setting for certain unrelated groups of people." App. vol. 1, at 292. And it provides in its exhaustive list of group homes those for persons with mental illnesses, for persons with developmental disabilities, for disabled persons, and for aged persons. The Code categorizes group homes for the aged and group homes

serving people with various disabilities as the same type of residential use. *Id.* Looking at this provision alone, group homes for disabled persons are much more closely related to group homes for the aged than to homes with five unrelated roommates.

Group homes for the aged and group homes for disabled persons also function similarly. Group homes for the aged include assisted-living residences, which provide "personal services[,] protective oversight[,] social care due to impaired capacity to live independently[,] and regular supervision that shall be available on a twenty-four-hour basis, but not to the extent that regular twenty-four-hour medical or nursing care is required." *Id.* Similarly, group homes for disabled persons, including sober-living arrangements, provide for staff care and supervision of residents whose disabilities "substantially limit[] one [or] more major life activities." *Id.* Based on the language of the Code, professional care and supervision are central functions of both group homes for disabled persons and group homes for the aged. *Id.* But the Code doesn't say that professional care and supervision are central functions for a "family" of unrelated roommates dwelling together. *Id.* Thus, as seen, the Code treats group homes for disabled persons much more like group homes for the aged than like groups of five unrelated roommates.[10]

[10] Though we draw this conclusion from the Code's language alone, we note that other undisputed facts are in accord. Based on interpretations of the 2014 Code amendments by the County's counsel, caregivers in group homes for (*footnote continued*)

Based on undisputed facts, group homes for disabled persons are also more like other structured group-living arrangements in the Code, such as family foster-care homes and adult day-care homes, than single-family homes of five unrelated roommates. As Gebhart testified in a deposition, family foster-care homes, day-care homes, adult day cares, and other group facilities are residential facilities "where people actually live and sleep in the home." App. vol. 2, at 325–26. And the County admitted this fact at summary judgment. App. vol. 1, at 136 (¶ 78); App. vol. 2, at 489 (¶ 78). Family foster-care homes and adult day cares allow eight-person occupancies as allowed uses, and day-care homes allow twelve. And for all structured group-living arrangements in the Code, "[t]he enrollment or occupancy numbers . . . do not include additional necessary persons required for the care and supervision of the enrollees or occupants." App. vol. 1, at 296. While functioning as a group home for disabled persons, Soaring Hope employed staff around the clock. This structured environment is more like the other types of structured group-living

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the aged and group homes for disabled persons are excluded from the total-occupancy limit. So, including staff, more than five people can occupy a group home for disabled persons at a time, including overnight. Staff often provide around-the-clock supervision and care in group homes for disabled persons, as they did at the Spruce Road home, but the County doesn't count these staff toward the occupancy limit. That group homes for disabled persons often have more than five people staying overnight further distinguishes these homes from a setting of five unrelated roommates.

arrangements in the Code, such as day-care homes and adult day cares, than single-family homes with up to five unrelated residents.

b. Language of the Colorado Statutes

The County points to Colorado statutes to support its argument that groups of unrelated roommates living together should be the relevant comparators for group homes for disabled persons, on grounds that the occupancy caps for group homes for the aged and other structured group-living arrangements are "set by state statute." Resp. Br. 13–14. After examining Colorado Revised Statute § 30-28-115 (2014), which the Code cites and which governs group homes for the aged, for developmentally disabled persons, and for persons with mental illnesses, we reject the County's argument.

Certainly, the 2014 Colorado Statute provides that "the establishment of group homes for the aged for the exclusive use of not more than eight persons sixty years of age or older per home is a matter of statewide concern," and it permits these group homes in zoning for "single-family residential units." § 30-28-115(2)(b)(II). But the same statute provides that a "state-licensed group home for *eight persons* with intellectual and developmental disabilities is a residential use of property for zoning purposes," including single-family residential zoning. § 30-28-115(2)(a) (emphasis added). And "a state-licensed group home for *eight persons* with mental illness is a residential use of property for zoning purposes." § 30-28-115(b.5) (emphasis added). Apparently, the County found it necessary to honor the "eight persons" language in

§ 30-28-115 for group homes for the aged but not for group homes for persons with developmental disabilities or mental illnesses. We are unpersuaded by the County's claim that state statutes such as § 30-28-115 justify the discrepancies in the Code's occupancy limits.[11]

c. Tenth Circuit Precedent

Our precedent reaffirms our conclusion on the identity of relevant comparators for group homes for disabled persons. In *Bangerter*, we faced a similar factual scenario to this case. There, a city imposed conditions on group homes for disabled persons that it didn't apply to other group-living arrangements in residential areas. *Bangerter*, 46 F.3d at 1494 n.1. We compared the ordinance's treatment of group homes for disabled persons with its treatment of group homes for nondisabled persons. *Id.* ("[T]he bare record before us suggests that group homes for [disabled persons] are treated differently . . . from other group home uses . . . ."). And we called group homes for nondisabled persons a "similarly situated group" to group homes for disabled persons, even though some structured group-living arrangements (including group homes for the aged) were regulated by state statute. *See id.* at 1502.

[11] The County's variation on its relevant-comparator argument at trial—that state-licensed group homes have higher occupancy caps "[b]ecause the State has the ability to step in and remedy any problems"—fails to persuade us for the same reasons.

In *Cinnamon Hills*, we found no actionable discrimination when a city applied its zoning regulations equally to structured group-living arrangements for people with and without disabilities. 685 F.3d at 920–22. A residential program for youths with mental illnesses sought to relocate to the top floor of an operating motel, but a city ordinance prohibited residential stays in motels that exceeded twenty-nine days. *Id.* at 919–20. We found that the only people exempted from the ordinance—"law enforcement, emergency personnel, and 24-hour business caretakers"—weren't "similarly situated to disabled youth." *Id.* at 921. We noted that boarding schools and housing for colleges and trade schools were "the most similarly situated nondisabled comparators," and that these residential facilities were bound by the same zoning ordinance as the group home for disabled youths. *Id.* In *Cinnamon Hills*, we addressed a theory of discrimination based on circumstantial evidence, which requires a more fact-intensive inquiry to determine the relevant comparator. *See id.* at 920. But our reasoning in *Cinnamon Hills* still supports that in identifying relevant comparators for group homes for disabled persons, we look to other structured group-living arrangements in the zoning scheme.

After examining the Code, Colorado's statutes, and our precedent, we hold that the relevant comparators for group homes for disabled persons are other structured group-living arrangements in the Code, including group homes for the aged.

This being so, we conclude that the Code's occupancy caps for disabled persons are facially discriminatory. Like the ordinance in *Bangerter*, the Code "facially single[s] out" disabled persons by applying five-person occupancy limits to group homes for disabled persons while allowing eight or more occupants in all other structured group-living arrangements. *Id.* at 1500. We find evidence of discriminatory intent and purpose on the face of the Code. *See Bangerter*, 46 F.3d at 1500. Soaring Hope has established that the Code subjects group homes for disabled persons "to explicitly differential—i.e.[,] discriminatory—treatment." *Id.* at 1501.

2. Did the County adequately justify the discrimination?

The district court recognized that Soaring Hope had made a prima facie case of intentional discrimination: "[T]here is no doubt that the ordinance for Group Homes imposes different occupancy levels for [disabled] persons than for other types of group homes." *Green*, 2020 WL 4429387, at *12. But the court still denied Soaring Hope's motion for partial summary judgment, ruling that "a reasonable factfinder could find that the different occupancy levels are based on *bona fide* governmental concerns." *Id.*

Because Soaring Hope has established facial discrimination, the burden shifts to the County to justify it. *Larkin*, 89 F.3d at 290. As we discussed in *Bangerter*, a governmental entity may try to justify facial discrimination. 46 F.3d at 1502–05. Now, we must decide whether the County has asserted a permissible justification for its facially discriminatory zoning ordinance.

In *Bangerter*, we approved two governmental justifications for facial discrimination: public safety[12] and benign discrimination. 46 F.3d at 1503. But we must narrowly construe any "exceptions to the FHAA's prohibitions on discrimination." *Id.* (citation omitted). In describing the public-safety justification, which we based on the language of the FHAA itself, we emphasized that "[r]estrictions predicated on public safety cannot be based on blanket stereotypes about [disabled persons] but must be tailored to particularized concerns about individual residents." *Id.* As for the benign-discrimination justification, we relied on Title VII caselaw to allow "special restrictions upon the disabled that are really beneficial to, rather than discriminatory against, [disabled persons]." *Id.* at 1504. Like the public-safety justification, we emphasized that the benign-discrimination justification must not be "based upon unsupported stereotypes or upon prejudice and fear stemming from ignorance or generalizations." *Id.*

Some courts have read *Bangerter* as permitting *only* the two named justifications of public safety and benign discrimination. *See Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007); *Larkin*, 89 F.3d at 290. But *Bangerter* contemplates the possibility of other legitimate justifications. In the context of a motion to dismiss under Rule 12(b)(6), we noted that

[12] The County has expressly disclaimed public safety as a justification for the different occupancy caps in the Code.

"additional justifications for [the city's] actions might be developed once evidence is taken." *Bangerter*, 46 F.3d at 1503 n.19.

The County argues that we should read *Bangerter* as allowing any bona fide justification for facial discrimination.[13] But this sounds like rational-basis review, which we rejected outright in *Bangerter*. *Compare Green*, 2020 WL 4429387, at *12 ("There may well be rational explanations for the different occupancy levels."), *with Bangerter*, 46 F.3d at 1500–02 (rejecting the district court's approach of considering whether "the permitting process was rationally related to the legitimate governmental interest of ensuring integrated housing for the disabled").

By contrast, Soaring Hope argues that we should limit any other justifications to those that resemble the justifications we recognized in *Bangerter*: discrete, cabined justifications rooted in the language of the FHAA and antidiscrimination caselaw. We agree with Soaring Hope.

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[13] In *Bangerter*, we explained that a "legitimate, bona fide governmental interest" could justify facially *neutral* discrimination if "no alternative would serve that interest with less discriminatory effect." 46 F.3d at 1504–05. The County cites this statement in support of its position that under *Bangerter*, any bona fide justification for facial discrimination will suffice. Resp. Br. 12–13 (citing *Bangerter*, 46 F.3d at 1504–05). But the County reads our statement out of context. We were summarizing caselaw "[i]n the context of facially neutral government actions that have a discriminatory impact on [disabled persons]." *Bangerter*, 46 F.3d at 1504. Here, we are dealing with facial discrimination, not facially neutral government actions with a discriminatory impact. We won't accept just any "legitimate, bona fide governmental interest" as a justification for facial discrimination. *Id.* at 1504–05.

In *Bangerter*, we explained that "[t]he proper approach is to look to the language of the FHAA itself, and to the manner in which analogous provisions of Title VII have been interpreted, in order to determine what justifications are available to sustain intentional discrimination against the [disabled]." 46 F.3d at 1503. Like the two justifications we recognized in *Bangerter*, any other justifications for facial discrimination must be rooted in either the language of the FHAA or antidiscrimination caselaw.

At summary judgment and on appeal, the County has offered two purported justifications for the discriminatory occupancy levels: (1) "[t]he occupancy limits imposed on group homes are set at the same levels that apply to unrelated, nondisabled individuals living together in a single family residence," and (2) "[o]ther group living facilities and the occupancy limits imposed on those facilities are not relevant comparators because the limits imposed on those facilities are set by state statute." Resp. Br. 13–14. The County argues that these are "bona fide justifications for the occupancy limits on group homes." *Id.* at 13. But what the County labels as "justifications" are mere reiterations of its argument that other structured group-living arrangements in the Code aren't relevant comparators for group homes for disabled persons. The district court didn't approve the County's purported justifications for the different occupancy levels. Rather, it broadly reserved a possibility that "[t]here may well be rational explanations for the different occupancy levels." *Green*, 2020 WL 4429387, at *12. We have already

concluded that the proper comparators are other structured group-living arrangements, especially group homes for the aged. And we have rejected the County's justification that it was bound by state statute to allow eight people in group homes for the aged. The same state statute also allowed up to eight people in group homes for persons with mental illnesses and developmental disabilities, and the County set those occupancy limits to five. *Compare* Colo. Rev. Stat. § 30-28-115(2)(a) (2014), *with* App. vol. 1, at 296.

We reject the County's asserted justifications for facial discrimination as outside the FHAA and other antidiscrimination laws and cases.

a. FHAA Provisions

First, we evaluate the County's asserted justifications for the Code's facial discrimination by examining the FHAA. Section 3607(b)(1) most closely resembles the County's two proffered reasons, providing that "[n]othing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). But in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728 (1995), the Supreme Court ruled that a city's definition of "family" in a single-family zoning area wasn't exempt from the FHAA as a total-occupancy limit designed to prevent overcrowding. The city's definition of "family" in *Oxford House* was much like the County's definition here: no more than five unrelated persons per dwelling. *Id.* at 729; App. vol. 1, at 292. And like the city's definition in *Oxford House*, the County's definition of

family isn't a total-occupancy limit. 514 U.S. at 738. Relying on the reasoning in *Oxford House*, we conclude that the County's first reason—that five is the limit on unrelated, nondisabled individuals allowed to live as a family—isn't sufficiently tied to the language of § 3607(b)(1) to justify facial discrimination.

We also conclude that the County's second reason—that it must comply with state statutes governing other group-living arrangements—can't justify facial discrimination based on § 3607(b)(1). Section 3607(b)(1) applies only to *maximum* occupancy limits, not to land-use restrictions. *Oxford House*, 514 U.S. at 734–36. Here, the Code imposes the five-person occupancy limit on group homes for disabled persons while allowing higher occupancy limits for other group homes. And in 2014, when the County amended the Code, the Colorado statute governing group-living arrangements allowed for eight residents in these homes, not just five. Colo. Rev. Stat. § 30-28-115(2)(a) (2014). The County amended the Code to comply with the Colorado statute only for group homes for the aged, not for group homes for people with developmental disabilities or mental illnesses. Thus, the County fails to explain how its inconsistent application of the Colorado statute serves its goal of complying with state statutes governing group-living arrangements. *See Larkin*, 89 F.3d at 291 (explaining that even a legitimate governmental goal won't support facial discrimination if the government fails to explain how its discriminatory policy serves that goal).

b. Antidiscrimination Caselaw

Next, we compare the County's proffered justifications for facial discrimination with the justifications allowed by *Bangerter*. There, we based a benign-discrimination justification on antidiscrimination caselaw and affirmative-action cases. 46 F.3d at 1504–05. In a footnote, we analogized potential justifications for facial discrimination in the housing context to the "bona fide occupational qualifications" that can justify facial discrimination in the employment context. *Id.* at 1501 n.17 (first citing 42 U.S.C. § 2000e-2(e); and then citing *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 200–01 (1991)). Other circuits have done so too. *E.g.*, *Cmty. House*, 490 F.3d at 1049.

Under Title VII, an employer may discriminate based on "religion, sex, or national origin" when the protected trait "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). But we must interpret bona fide occupational qualifications narrowly to mean "objective, verifiable requirements [that] concern job-related skills and aptitudes." *Johnson Controls*, 499 U.S. at 201.

We see no analogy in Title VII caselaw or the bona fide occupational-qualification defense to the County's two asserted justifications here. Rather than explain why group homes for disabled persons objectively need lower occupancy limits from other group homes, and why those lower occupancy

limits are reasonably necessary to the zoning scheme, the County just argues that other group homes aren't the relevant comparators.[14] Because we have rejected the County's relevant-comparator argument under the Code and Colorado state statutes, the County lacks a justification for its facial discrimination on occupancy limits. *Cf. Larkin*, 89 F.3d at 290 (rejecting a state agency's justifications for facial discrimination because it failed to show that its justifications were "warranted by the unique and specific needs" of disabled persons (citation omitted)).

We hold that the Code's occupancy limits are facially discriminatory based on disability, and the County has failed to adequately justify that discrimination. We hold that the County's justifications do not suffice for the reasons stated. Consistent with *Bangerter*, our holding does not foreclose the possibility that valid justifications for facial discrimination may exist in other cases, if these justifications are rooted in the text of the FHAA or antidiscrimination caselaw.

II. Other Theories of Intentional Discrimination

The district court granted summary judgment to the County on many of Soaring Hope's intentional-discrimination claims, including its claims that the

[14] The same is true of the County's justification first raised at trial: the need to avoid nonconforming uses for existing group homes for the aged. The County's nonconforming-use justification explains that existing group homes for the aged may need an occupancy limit of eight so that they don't have to reduce their occupancy. But the nonconforming-use justification still fails to explain why group homes for disabled persons must be limited to five residents.

County intentionally discriminated against it by classifying it as a rehabilitation facility, by zoning out treatment options for disabled persons from residential areas, and by imposing additional conditions on the Spruce Road home in the October 2016 Stipulation. *Green*, 2020 WL 4429387, at *12–13. Soaring Hope appeals the district court's grant of summary judgment on all these claims. We agree with many of the district court's determinations on these claims, but we disagree with the district court's reasoning and holding on Soaring Hope's "zoning-out" claim. We address each claim in turn.

A. Rehabilitation-Facility Classification for the Spruce Road Home

We agree with the district court that the County was entitled to summary judgment against Soaring Hope's claim that the County discriminated against Soaring Hope in summer 2016 by classifying its Spruce Road home as a "rehabilitation facility." *See Green*, 2020 WL 4429387, at *7, *12. When the County designated Soaring Hope as a rehabilitation facility, Miller responded by stating, "[W]e fully agree that our land use request is categorized as a rehabilitation facility." App. vol. 2, at 388. She added, "We have never been, nor do we wish to be, a group home for . . . disabled persons." *Id.* And Soaring Hope agreed to a Stipulation admitting to its "violation as a rehabilitation facility in a residential area." *Id.* at 456.

Given the multiple admissions by Soaring Hope representatives that it operated as a rehabilitation facility before September 2016, no genuine dispute

of material fact exists about whether the County discriminated by classifying Soaring Hope as a rehabilitation facility before then. Similarly, no genuine issue of material fact exists about whether the conditions in the October 2016 Stipulation were discriminatory. During the meeting at which the County approved that Stipulation, Soaring Hope's representative Bolin stated that "we are absolutely in agreement with the stipulation." *Id.* at 404. The district court found that Soaring Hope voluntarily agreed to the Stipulation, and Soaring Hope hasn't appealed that finding. *Green*, 2020 WL 4429387, at *7. The record supports a conclusion that Soaring Hope representatives agreed with the County that Soaring Hope had been operating as a rehabilitation facility and that they entered the Stipulation voluntarily.

B. Rehabilitation-Facility Classification in General

Soaring Hope also argues that the Code's rehabilitation-facility classification *itself* violates the FHAA because treatment homes for drug and alcohol addiction are covered dwellings under the FHAA. The FHAA defines a dwelling as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." 42 U.S.C. § 3602(b). Indeed, many courts have held that similar treatment homes are protected by the FHAA. *See Lakeside Resort Enters. v. Bd. of Supervisors*, 455 F.3d 154, 160 (3d Cir. 2006); *Pac. Shores*, 730 F.3d at 1157 (holding that state-licensed facilities providing substance-abuse treatment were covered dwellings). But classification as a covered "dwelling" is only the

beginning of the FHAA disparate-treatment inquiry; even in a covered dwelling, a plaintiff must still show unlawful discrimination. *See Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1216–17 (11th Cir. 2008).

In *Schwarz*, the Eleventh Circuit concluded that halfway houses providing outpatient treatment for drug and alcohol addiction were covered dwellings under the FHAA. *Id.* at 1216. But to establish disparate treatment, the halfway-house residents must show that they had "actually been treated differently than similarly situated [nondisabled] people." *Id.* (citation omitted). Because the city enforced its zoning rules evenly for both the halfway houses and dwellings for nondisabled persons, the halfway houses failed to establish their disparate-treatment claim. *Id.* at 1216–17.

So to show disparate treatment based on the rehabilitation-facility classification alone, Soaring Hope must go beyond a showing that rehabilitation facilities are covered dwellings under the FHAA. It must also show that the County treated rehabilitation facilities worse than other institutional-type treatment programs for nondisabled persons. *See Schwarz*, 544 F.3d at 1216; *Cinnamon Hills*, 685 F.3d at 920 (explaining that, to show disparate treatment, the plaintiff "must produce evidence suggesting that the city denied to it zoning relief granted to similarly situated applicants without disabilities"). Soaring Hope has provided no evidence that the 2014 Code allowed other institutional-type treatment facilities in single-family areas, so Soaring Hope can't show disparate treatment based on the rehabilitation-facility classification itself.

C. Zoning-Out Theory: Prohibited Activities at the Spruce Road Home

Even though the rehabilitation-facility classification wasn't discriminatory, Soaring Hope also argued that the County had used the rehabilitation-facility definition to limit the treatment options available for group homes for disabled persons in single-family areas. Soaring Hope alleged that the County prohibited certain treatment activities in the Spruce Road home while allowing those same activities in other group-home and single-family residential settings. We find Soaring Hope's "zoning-out" argument persuasive.

In response to the County's motion for summary judgment, Soaring Hope argued that the County directly discriminated against it by forcing it to remove its "rehabilitation facility activities" from the Spruce Road home while allowing medical treatments in other residential settings. App. vol. 3, at 605–06. Soaring Hope also argued that the County was attempting to "zone-out or segregate disabled persons from the rest of the community by requiring them to live in limited areas if they also want to receive treatment." *Id.* at 609. Soaring Hope emphasized that "[n]on-disabled persons are not similarly forced to live in commercial or industrial districts or apartment complexes if they want to conduct the same types of activities in their homes." *Id.*

Rather than address these arguments by Soaring Hope, the district court noted that the Code allowed rehabilitation facilities as a special use in two multifamily zoning districts without any occupancy cap, interpreting that the

Code gave rehabilitation facilities *preferential* treatment. *Green*, 2020 WL 4429387, at *12 & n.13. Ultimately, the court granted summary judgment to the County on Soaring Hope's "zoning-out" claim, reasoning that Soaring Hope had failed to "identify any other treatment facilities that are allowed to operate within a single-family residential zoning district." *Id.* at *13. But Soaring Hope hasn't limited its argument to the theory that the County zoned out rehabilitation facilities from residential areas. It has also argued that the County relied on the rehabilitation-facility definition to prohibit therapeutic activities in the Spruce Road home while allowing those same activities in other structured group-living arrangements and single-family homes.

As mentioned, we agree with the district court that Soaring Hope, by its own admissions, was properly characterized as a rehabilitation facility before September 1, 2016. But Soaring Hope operated as a group home with five or fewer occupants after September 1, 2016.[15] We focus on the activities that the County prohibited at the Spruce Road home *after* it began operating as a group home for disabled persons. The key then isn't whether "other treatment facilities . . . [were] allowed to operate within a single-family residential zoning district," *Green*, 2020 WL 4429387, at *13, but whether other structured

[15] Indeed, though not part of the summary-judgment record, the parties stipulated at trial that Soaring Hope operated as a group home for disabled persons in compliance with the Code from September 1, 2016, to May 1, 2019.

group-living arrangements were allowed to conduct activities that were prohibited at the Spruce Road home. *See Cinnamon Hills*, 685 F.3d at 920–21.

We apply a direct-evidence framework when the plaintiff presents "evidence which, if believed, proves that the decision in the case at hand was discriminatory—and does so without depending on any further inference or presumption." *Id.* at 919 (citations omitted). On the other hand, when the plaintiff presents circumstantial evidence of discrimination, we apply the *McDonnell Douglas* burden-shifting framework. *Id.* at 920 (citations omitted); *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–07 (1973). At summary judgment, Soaring Hope argued its zoning-out theory under both the direct-evidence framework and the *McDonnell Douglas* framework. On appeal, Soaring Hope expounds its zoning-out theory over five pages of its opening brief and contends that "these undisputed facts support a *prima facie* case for discrimination," but it doesn't specify which framework we should apply.

The district court recognized that Soaring Hope had argued its intentional-discrimination claims using both a *McDonnell Douglas* framework and a direct-evidence framework. *Green*, 2020 WL 4429387, at *11. And the district court explained that it would address "whether Plaintiffs have established a *prima facie* case under any theory of intentional discrimination." *Id.* So in granting summary judgment to the County on Soaring Hope's zoning-out theory, the district court necessarily found that Soaring Hope had failed to show a prima facie case of intentional discrimination under either the

McDonnell Douglas framework or the direct-evidence framework. *See id.* at *11–13.

Though the direct-evidence and *McDonnell Douglas* frameworks differ, both frameworks require Soaring Hope to establish that the County treated it differently from a similarly situated group of nondisabled persons. *Bangerter*, 46 F.3d at 1502 (explaining that a plaintiff relying on a direct-evidence framework must show "that he has suffered differential treatment when compared to a similarly situated group" (footnote omitted)); *Cinnamon Hills*, 685 F.3d at 920–21 (applying the *McDonnell Douglas* framework and finding that the plaintiff had failed to show that it was treated differently from "the most similarly situated nondisabled comparators"). In granting summary judgment to the County on Soaring Hope's zoning-out claim, the district court concluded that Soaring Hope had not shown that the County had used the rehabilitation-facility definition to treat Soaring Hope differently from nondisabled residents. *Green*, 2020 WL 4429387, at *13 (explaining that Soaring Hope had not "identif[ied] any other treatment facilities that are allowed to operate within a single-family residential zoning district" (citing *Cinnamon Hills*, 685 F.3d at 923)). But in drawing that conclusion, the district court sidestepped whether Soaring Hope had made a prima facie case of discrimination by showing that the County prohibited activities in the Spruce Road home that the County allowed in other residential settings.

From September 2016 until its closing in May 2019, Soaring Hope operated its Spruce Road home as a group home for disabled persons. We have already identified similarly situated comparators for group homes for disabled persons: group homes for the aged and other structured group-living arrangements. *See supra* Section I.C.1. The record reflects that the County prohibited certain therapies in the Spruce Road home while allowing the same therapies in other structured group-living arrangements.[16] Gebhart testified that the Code allowed fitness instructors, physical therapists, doctors, nurses, and mental-health professionals to work with residents in structured group-living arrangements, including group homes for the aged. Yet to comply with the Code, Soaring Hope was forced to relocate all its therapies—including its mental-health therapies and yoga—to a commercial zoning area.

We conclude that the County's disparate enforcement between group homes for disabled persons and single-family homes also creates an inference

[16] Some therapies that Soaring Hope relocated from the Spruce Road home to the commercial facility, such as neurofeedback therapy, seem incompatible with residential use. In her trial testimony, Miller agreed that neurofeedback therapy wasn't appropriate for a group-home setting. Soaring Hope's practice of offering wholesale nutraceuticals also seems more like a commercial use than a residential use. It is unlikely that the County discriminated against Soaring Hope by forcing it to relocate these commercial activities to a commercial area; nothing in the record suggests that any other structured group-living arrangement or residential home performed these activities. Instead, we focus our discussion on Soaring Hope's therapeutic activities that were allowed in other residential settings: yoga, group meetings, and mental-health therapy.

of discrimination—especially because the County claimed that single-family homes were the relevant comparators for group homes for disabled persons. Gebhart testified that residents in single-family homes could hold civic meetings and receive treatment from doctors, nurses, and mental-health professionals in their homes without violating the Code. But Soaring Hope was forced to close its talking circles to the public and transfer all medical and mental-health care off-site to comply with the Code.

The record supports a conclusion that the County treated nondisabled residents more favorably than it did Soaring Hope. The County allowed other structured group-living arrangements to engage in medical and mental-health therapies in their homes while prohibiting the same activities in the Spruce Road home. We hold that Soaring Hope established a genuine issue of material fact about whether the County discriminated against it by prohibiting certain activities in the Spruce Road home, such as therapy and medical treatment, while allowing those same activities in other single-family settings.

In evaluating Soaring Hope's prima facie case under the direct-evidence and *McDonnell Douglas* frameworks, the district court erred by finding no genuine dispute of material fact on whether the County had treated Soaring Hope differently than similarly situated groups of nondisabled residents; this element is necessary to establish a prima facie case under both the direct-evidence and *McDonnell Douglas* frameworks. *Bangerter*, 46 F.3d at 1502 (footnote omitted); *Cinnamon Hills*, 685 F.3d at 920–21. So we reverse and

remand for the district court to address both frameworks and decide whether Soaring Hope's "zoning-out" argument survives summary judgment under either framework.[17]

III. Failure-to-Accommodate Claim

Soaring Hope also appeals the district court's grant of summary judgment to the County against its failure-to-accommodate claim. To establish a failure-to-accommodate claim under the FHAA, Soaring Hope must show that its requested accommodation was reasonable and necessary to afford its disabled residents the "equal opportunity to use and enjoy a dwelling." § 3604(f)(3)(B). In *Cinnamon Hills*, we noted that "the object of the [FHAA's] necessity requirement is a level playing field in housing for the disabled." 685 F.3d at 923.

A. Reasonableness

Soaring Hope hasn't shown that its requested accommodation—operating a rehabilitation facility in a single-family zone through a special-use permit—was reasonable. A government entity may often need to modify its policies and practices to "accommodate the needs of the disabled" and to comply with the

[17] If the direct-evidence framework applies, then Soaring Hope can survive summary judgment just by making out a prima facie case. *Cinnamon Hills*, 685 F.3d at 919–20 (citations omitted). But if the *McDonnell Douglas* framework applies, then the burden will shift to the County to produce evidence of a legitimate, nondiscriminatory reason for the disparate treatment. *Asbury v. Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989) (citation omitted). If the County does so, then the burden will shift back to Soaring Hope to show that the County's reasons were pretext for discrimination. *Id.* (citation omitted).

FHAA, ADA, and RA. *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1149 (9th Cir. 2003) (citations omitted). But an accommodation isn't reasonable if it requires a "fundamental alteration in the nature of [a government] program" or imposes "undue financial and administrative burdens" on the government. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410, 412 (1979) (evaluating a reasonable-accommodation claim under the RA). Soaring Hope tried to accomplish through a special-use application what the County only made possible through a variance application. In other words, Soaring Hope sought to transform the County's zoning processes by squeezing a true request for a variance (which would otherwise cost thousands of dollars and involve public hearings), into an expedited special-use application. *See id.*

Soaring Hope needed to give the County "a chance to accommodate [it] through the [County's] established procedures for adjusting the zoning code." *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 253 (8th Cir. 1996) (citations omitted) (holding that a plaintiff couldn't challenge the city's failure to accommodate when the plaintiff refused to follow the city's established process of applying for a variance); *accord United States v. Village of Palatine*, 37 F.3d 1230, 1233 (7th Cir. 1994) (finding that a village didn't fail to reasonably accommodate the plaintiff when the plaintiff "never invoked the procedures that would allow the Village to make such an accommodation"). Because Soaring Hope never sought a variance to comply with the County's procedures

for reasonable accommodation, its special-use application wasn't a request for a *reasonable* accommodation.

B. Necessary to Give Equal Housing Opportunities to Disabled Persons

Soaring Hope also can't "establish a nexus between the accommodations that [it] is requesting, and their necessity for providing [disabled] individuals an 'equal opportunity' to use and enjoy housing." *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 459 (3d Cir. 2002); *see also Cinnamon Hills*, 685 F.3d at 924. In *Cinnamon Hills*, we emphasized that though "the [FHAA] requires accommodations necessary to ensure the disabled receive the *same* housing opportunities as everybody else, it does not require *more* or *better* opportunities." 685 F.3d at 923; *see also Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 605 (4th Cir. 1997) ("[T]he [FHAA] only requires an 'equal opportunity,' not a superior *advantage*." (citing *Alexander v. Choate*, 469 U.S. 287, 309 (1985))). Because the group home in *Cinnamon Hills* requested an accommodation that wasn't available to other nondisabled residents, we rejected its failure-to-accommodate claim. 685 F.3d at 923–24. Similarly, we find that Soaring Hope requested an accommodation that wasn't available to similarly situated nondisabled residents: operating a clinical facility in a single-family zone as a special use.

In awarding summary judgment to the County on Soaring Hope's failure-to-accommodate claim, the district court reasoned that Soaring Hope was

"seeking an opportunity which was wholly unavailable" because "a Rehabilitation Facility is not permitted as either an Allowed Use or Special Use in the relevant zoning district." *Green*, 2020 WL 4429387, at *15. Our reasoning differs slightly from the district court, but we reach the same conclusion that Soaring Hope did not seek an *equal* housing opportunity to its counterparts, but a *better* opportunity. *Compare* 42 U.S.C. § 3604(f)(3)(B), *with Cinnamon Hills*, 685 F.3d at 923.

In 2016, Soaring Hope submitted a special-use application to operate an "addiction recovery program" in a single-family zone.[18] App. vol. 2, at 343–82.

[18] Soaring Hope points out that in 2012, while doing business as Courage to Change, it submitted a letter of intent to seek special-use review to operate an "Addiction Recovery Rehabilitation Facility" in a single-family zone in its Appaloosa home. App. vol. 1, at 270–78. After the 2014 DOJ investigation, the County informed Courage to Change that it was properly operating as a "group home for disabled persons," and that "a special use permit [was] not required." *Id.* at 283. Soaring Hope claims that once it moved to the Spruce Road home, it "conduct[ed] the same activities as it did at the Appaloosa Home," suggesting that the County discriminated against it by classifying the Spruce Road home as a rehabilitation facility after classifying the Appaloosa home as a group home for disabled persons.

We aren't convinced by this argument. In its special-use application for the Appaloosa home, Courage to Change described only its talking circles, field trips, and nutritional supplements. It didn't inform the County of its neurotherapy, cognitive-behavioral therapy, or neurotransmitter-balancing treatments until 2015, when it requested a special use for the Spruce Road home. The mention of these treatments transformed the nature of Soaring Hope's special-use application. For this reason, we aren't persuaded that the County's earlier classification of the Appaloosa home as a group home supports an inference of discrimination when compared to the County's later classification of the Spruce Road home as a rehabilitation facility.

The County returned the application, finding that the Spruce Road home was a "rehabilitation facility, not a group home for . . . disabled persons." App. vol. 2, at 383–84. Under the Code, rehabilitation facilities are institutional and aren't an allowed or special use in single-family residential areas. App. vol. 1, at 292, 298. The County explained that Soaring Hope could apply for a variance instead of a special use, but Soaring Hope ultimately chose to comply with the Code as a group home for disabled persons rather than apply for a variance.

The district court limited its analysis to reasoning that "a Rehabilitation Facility is not permitted as either an Allowed Use or Special Use in the relevant zoning district." *Green*, 2020 WL 4429387, at *15. But the FHAA requires us to go further. Under the Code, rehabilitation facilities house people recovering from drug and alcohol addictions, all of whom are disabled under the FHAA. *Pac. Shores*, 730 F.3d at 1156 ("It is well established that persons recovering from drug and/or alcohol addiction are disabled under the [FHAA] and therefore protected from housing discrimination." (citations omitted)). By looking only at rehabilitation facilities in the Code, we would fail to compare disabled residents to nondisabled residents, as our caselaw requires. *See Cinnamon Hills*, 685 F.3d at 923 (evaluating a failure-to-accommodate claim by looking to a "comparable housing opportunity for nondisabled people"). So we must examine whether clinical or institutional facilities for nondisabled residents similar to rehabilitation facilities could operate within single-family zones.

Though the record is limited on this point, we conclude that clinical or institutional facilities for nondisabled residents could not operate within single-family zones. We have already determined that group homes for the aged are relevant comparators for Soaring Hope's facilities. *See supra* Section I.B.1. The Code allowed group homes for the aged, including assisted-living residences, to operate within single-family zones but didn't allow "twenty-four-hour medical or nursing care" in these homes. App. vol. 1, at 292. The ban on intensive nursing care in these homes supports a conclusion that group homes for the aged would violate the Code if they began to operate as clinical or institutional facilities.

By seeking a special-use permit to operate an institutional facility within a single-family area, Soaring Hope didn't seek a housing opportunity available to nondisabled residents. Instead, Soaring Hope sought a better housing opportunity than what was available to others. *See Cinnamon Hills*, 685 F.3d at 923–24. Because Soaring Hope didn't request a reasonable accommodation for a housing opportunity available to nondisabled residents, Soaring Hope's failure-to-accommodate claim fails.

IV. Claim of Interference, Coercion, or Intimidation

Soaring Hope also appeals the district court's dismissal of its claim that the conditions in the Stipulation were unlawful interference, coercion, or intimidation under 42 U.S.C. § 3617. Because we agree with the district court that Soaring Hope entered the Stipulation voluntarily, *see supra* Section II.A,

we conclude that no genuine dispute of material fact exists as to whether the conditions in the Stipulation were retaliatory or coercive.

CONCLUSION

We reverse and remand for the district court to enter judgment for Soaring Hope on its claim that the Code's occupancy caps were facially discriminatory based on disability and lacked adequate justification. But Soaring Hope lacks standing to challenge the Code's Standards that apply only to group homes with six or more occupants, so we dismiss Soaring Hope's challenge to the Standards.

We affirm the district court's grant of summary judgment to the County on Soaring Hope's failure-to-accommodate claim and its claim of interference, coercion, or intimidation. We also affirm the district court's grant of summary judgment to the County on several of Soaring Hope's intentional-discrimination claims—specifically, that the County discriminated against Soaring Hope by classifying it as a rehabilitation facility and encouraging it to sign the Stipulation.

But we reverse the district court's grant of summary judgment to the County on Soaring Hope's claim that the County intentionally discriminated against Soaring Hope by prohibiting therapeutic activities in the Spruce Road home that it allowed in other single-family residential settings. We remand for the district court to further address Soaring Hope's zoning-out claim.