The Fair Housing Act Amendments Act of 1988 and Group Homes for the Handicapped

By John H. Foote

Hazel & Thomas, P.C., Manassas, Virginia
Reprinted from the Journal of the Section on Local Government Law of the Virginia State Bar, Vol. III, No, 1, September 1997

Introduction

Regulation of group homes for persons with one or more handicapping conditions is a volatile issue throughout the United States. Since the General Assembly's first foray into the field in 1977, directing certain local zoning controls over group homes for the mentally ill, mentally retarded, and developmentally disabled (see Va. Code Ann. § 15.1-486.2, now repealed, and its current version, § 15.1-486.3), there have been major changes in federal law with direct impact on local authority to deal with the location and control of group homes. Indeed, that law now creates significant and important restrictions on the extent of permissible local regulation. This article outlines the current state of affairs affecting group homes for the handicapped. It offers clear warning to local governments that ordinances and policies which are discriminatory in purpose or effect, or which fail to make reasonable accommodation for the needs of the handicapped, can have costly consequences.

Congregate living arrangements among unrelated people are nothing new, of course, nor is their treatment by the courts. There has been legislation and litigation over what constitutes a "family" for years. Localities are not powerless to define the term: more than twenty years ago, the United States Supreme Court held that local ordinances defining "family" to mean one or more persons related by blood, adoption or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit, are constitutional. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). But facially neutral classifications can have unintended results or affirmatively discriminatory purposes or effects, and not long after *Belle Terre*, the Court held that a definition of "family" which criminalized a grandmother's desire to live with her two grandsons -- who were not brothers but cousins -- was an unconstitutional deprivation of her due process rights. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

The Fair Housing Amendments Act

Restrictions on the definition of family, however, are only one aspect of America's approach to housing and housing discrimination. For many years Congress has made it national policy to eliminate such discrimination in all its forms, through the Fair Housing Act of 1968. The original Act (Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619) banned, among other things, housing discrimination on the basis of race, color, religion, and national origin, and provided for a variety of enforcement mechanisms. The Act was amended in 1974 and again in 1988, however, and it was these latter changes, known as the Fair Housing Amendments Act of 1988 (the "FHAA"),

which made truly substantive revisions in the law, and which form the source of the principal restrictions on local control of group homes. See PL 100-430, 102 Stat. 1619 (1988), 42 U.S.C. 3601, et seq.

Even before the FHAA, the United States Supreme Court had held in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), that the Equal Protection Clause prohibits a city from requiring a special use permit for group homes for mentally retarded persons, when such permits are not required for other similar residential uses. But it was the FHAA that truly altered the landscape. Drawing heavily on existing law with respect to handicap discrimination in federally-supported programs (See § 504 of the Rehabilitation Act of 1973, 29 U.S.C. 701), the Act made it unlawful for any one of a number of covered entities, including local governments to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of –

> (A) that buyer or renter,
>
> (B) a person residing in or intending to reside in that dwelling after it is so sold, rented or made available; or
>
> (C) any person associated with that buyer or renter.
>
> 42 U.S.C. 3604(f)(1)

The Act defines discrimination to include not only traditional discriminatory practices, but also "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B). While localities need not do everything humanly possible to accommodate a disabled person, the "reasonable accommodation" requirement imposes affirmative duties to modify local requirements when they discriminate against the handicapped. *Liddy v. Cisneros*, 823 F. Supp. 164, 176 (S.D. NY 1993).

The Act defines handicap extremely broadly as

> (1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities,
> (2) a record of having such an impairment, or
> (3) being regarded as having such an impairment.

Although there are exceptions to this definition, including those "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others" (42 U.S.C. 3604(f)(9)), and people afflicted with the "current, illegal use of or addiction to a controlled substance" (42 U.S.C. § 3602(h)), handicap does include people who take drugs legally, or people who were once, but no longer are, illegal drug users. *United States v. Southern Management Corp*., 955 F.2d 914, 919-23 (4th Cir. 1992).

Congress understood that one of the central problems for the establishment of group homes is baseless hostility on the part of neighbors and even local governments themselves. It manifestly intended, therefore, to preempt state and local laws that effectuated or perpetuated housing discrimination. The House Judiciary Committee said that:

> [t]he FHAA, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion. . . .
>
> While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment of or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discrimination against persons with disabilities. The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decision and practices. The Act is intended to prohibit the application of special requirements through land-use regulation, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individual to live in the residence of their choice in the community . . .
>
> Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner, which discriminates against people with disabilities. Such discrimination often results from false or overprotective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited.
>
> House Committee on the Judiciary,
> Fair Housing Amendments Act of 1988,
> H.R. Rep. No. 711, 100th Cong. 2d Sess., at 18, 24.

Thus, with specific regard to the exercise of local powers, the Act says clearly that "[a]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. 3615 (emphasis supplied).

Judicial treatment of "handicap." The decisions interpreting the FHAA have been far reaching in determining what constitutes a handicap. In fact, it is difficult to conceive a disability that does not constitute a handicap. Thus the FHAA has been held to cover not only rather obviously handicapped folks, such as the wheelchair-bound, or visually impaired, but also those who are disadvantaged by alcoholism and drug addiction (e.g.,*Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450 (D. N.J. (1991)), those beset by emotional problems and mental illness or retardation (e.g.,*Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614 (D. N.J. 1994)), and old age. *United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220, 224 (D.P.R. 1991). It extends to communicable diseases, including AIDS and HIV. *Support Ministry v. Village of Waterford,* 808 F. Supp. 120, 133-35 (N.D. N.Y. 1992). The homeless can be deemed handicapped, if only because their homelessness is related to other, specific handicaps. *Stuart B. McKinney Foundation v. Town of Fairfield,* 790 F. Supp. 1197 (D. Conn. 1992).

It has been estimated that one out every six persons in America is handicapped under this definition. Housing Discrimination: Law and Litigation, by Robert G. Schwemm (Clark, Boardman, Callaghan 1990), § 11.5(2), p. 11-56.

Judicial Treatment of Discriminatory Housing Practices

FHAA group home cases turn on one -- or more frequently all -- of three different theories: discriminatory intent, discriminatory effect, or failure to make "reasonable accommodation" to the needs of the handicapped. While the decisions often involve all three, there are several identifiable sub-classifications of FHAA cases worthy of note.

Family Composition Rules

Many cases involve local ordinance definitions of "family" that preclude group homes. Rarely do these definitions survive scrutiny in the group home context. Although lower courts had been roughly handling "family composition rules" for some time, in *City of Edmonds v. Oxford House, Inc*., 514 U.S. 725 (1995) the Supreme Court held that such rules are plainly subject to the FHAA and while limitations on unrelated residents is not per se invalid, they must be scrutinized carefully for their discriminatory intent or effect.

An example of these cases is *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450 (D. N.J. 1991), the federal court rejected a state court ruling that residents of a group home for recovering alcoholics were not a single family under the Township's ordinance, and that they were not handicapped. The court noted that those handicapped by alcoholism or drug abuse are persons more likely than others to need a living arrangement in which sufficiently large groups of unrelated people live together in residential neighborhoods for mutual support during the recovery process. The Township produced no evidence of a nondiscriminatory reason for its position. See also *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D. N.J. 1991)(nine residents necessary to make a group home for recovering alcoholics viable.)

Special use permits and the imposition of restrictive conditions

Several cases have involved requirements for special use permits, or the imposition of particular conditions on those permits. While the Eastern District of Virginia has held that the mere requirement for a special use permit does not violate the Act (*Oxford House v. City of Virginia Beach*, 825 F. Supp. 1251 (E.D. Va. 1993)), in fact courts rarely uphold denials of such permits, or the imposition of burdensome conditions. In *Bangerter v. Orem City, Utah*, 46 F.3d 1491 (10th Cir. 1995), for example, the court of appeals found that requirements that a group home for mentally retarded adults give assurances its residents would be properly supervised on a 24-hour-a-day basis, and that the home establish a community advisory committee to deal with neighbor's complaint, were not imposed on other communal living arrangements under the City's zoning ordinance, and were intentionally discriminatory.

In *Turning Point, Inc. v. City of Caldwell, Idaho*, 74 F.3d 941 (9th Cir. 1996), the City asserted that a homeless shelter for 16 residents in a single-family district was a "boarding house" that required a special use permit to exceed twelve persons. A permit was granted, but for a limited number of residents, and subject to requirements for resident staff, parking spaces, a new sidewalk and landscaping and an annual review of the permit. The court rejected these restrictions as having no relationship to legitimate zoning purposes, and set occupancy at 25 based on testimony from the Fire Chief. It reduced the parking requirement, eliminated the sidewalk and landscaping, and struck the annual review requirement. See also *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 46-48 (6th Cir. 1992) (invalidating requirement that a home for four mentally retarded adult women install an alarm system interconnected to ceiling sprinkler system, doors with push bars swinging outwards with lighted exit signs, and fire walls and flame retardant wall coverings, as based on false and overprotective assumptions); *North Shore-Chicago Rehabilitation, Inc. v. Village of Skokie*, 827 F. Supp. 497, 499-502 (N.D. Ill. 1993) (enforcement of requirements on home for traumatically brain-damaged adults that home consist of five or fewer residents on a permanent basis, with paid professional staff, license from state, local occupancy permit and compliance with local, was discriminatory and constituted a failure to make reasonable accommodation).

Dispersal Requirements

A number of localities have imposed requirements that group homes be geographically dispersed in an effort to deinstitutionalize target populations. Dispersal rules do not generally survive. In *Larkin v. State of Michigan*, 883 F. Supp. 172, 177 (E.D. Mich. 1994) a state statutory scheme precluded issuance of a license if it would "substantially contribute to an excessive concentration" of such facilities, and required notification be given to the City Council to review the number of existing and proposed facilities within 1500 feet of a proposed facility and to its neighbors. The City argued that its dispersal requirement prevented formation of "ghettos" and normalized the environment. The Court found no rational legal basis for these provisions, and held that they were facially discriminatory, since "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."

In *United States v. Village of Marshall*, 787 F. Supp. 872, 878 (W.D. Wis. 1991), a Wisconsin statute required that group homes be separated by 2,500 feet. A group home for six mentally ill persons was proposed 1619 feet from another existing home. The trial court found no evidence to support this requirement and held that the reasonable accommodation requirement mandated the grant of permission.

In *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 622-23 (D. N.J. 1994) a state statute permitted six residents but required a special use permit for more than six, but which could be denied if located within 1500 feet of an existing residence or community shelter for victims of domestic violence, or the number of persons other than resident staff residing at the existing residence exceed the greater of 50 persons or .5% of the municipal population. The court invalidated the statute on the ground that there was no evidence that developmentally disabled persons present a danger to the community: "The record is devoid of any evidence upon a fact finder could reasonably conclude that community residences housing more than six developmentally disabled persons would detract from a neighborhood's residential character." See also *Horizon House v. Township of Upper South Hampton*, 804 F. Supp. 683, 695-97 (E.D. Pa. 1992) (aff'd without opinion, 995 F.2d 217 (3rd Cir. 1993) (1000 foot dispersal rule was on based unfounded fears about people with handicaps and facially invalid).

Not all courts have agreed with this approach. In *Familystyle of St. Paul v. City of St. Paul, Minn.*, 923 F.2d 91 (8th Cir. 1991) the court was faced with a request for a special use permit to expand an existing campus of homes from 119 to 130 mentally ill persons. The City issued temporary permits on condition that Familystyle work to disperse its facilities consistently with Minnesota's deinstitutionalization policy, which required that community residential facilities for the mentally impaired be located at least one-quarter mile apart. The court rejected the argument that the dispersal requirements impermissibly limited housing choices, holding that nondiscrimination and deinstitutionalization are compatible goals. Contrary to the legislative history and treatment by other courts, the Eight Circuit suggested that the FHAA did not intend simply to eliminate state and local zoning authority.

Neighbor Notification Requirements

Yet another class of cases has involved requirements that neighbors be specifically notified of the advent of group homes. None of these schemes has survived. In *Potomac Group Home v. Montgomery County*, 823 F. Supp. 1285, 1296-99 (D. Md. 1993), the court struck a requirement that neighbors of each group home adjacent and opposite and neighborhood civic associations be notified prior to the location of a group home for disabled elderly, as unsupported by legitimate justification. "The requirement is as offensive as would be a rule that a minority family give notification and invite comment before moving into a predominantly white neighborhood." See also *Horizon House*, supra, (notification requirement based on discriminatory intent and effect and violation of reasonable accommodation rule).

Reasonable Accommodation Requirements

Finally, a special subset of cases, have involved a locality's failure to make "reasonable accommodation" for the needs of the handicapped. The Act requires localities to make such accommodation by amendment to or variance of local ordinances and policies when they stand in the way of the location and operation of group homes. An accommodation is reasonable unless it requires a "fundamental alteration in the nature of a program or imposes undue financial and administrative burdens." *Southeastern Community College v. Davis*, 442 U.S. 397, 410-412 (1979) (interpreting § 504 of the Rehabilitation Act). Mere adherence to existing zoning requirements and land use policies is generally insufficient to protect the locality, if those requirements and policies contravene the Act. A good example of the extent to which the courts will go is *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3rd Cir. 1996), where the court of appeals said there that although "what the 'reasonable accommodation' standard requires is not a model of clarity", a failure to amend ordinances to permit nursing homes for handicapped persons in residential zones is a failure to make reasonable accommodation.

In *Judy B. v. Borough of Tioga*, 889 F. Supp. 792, 799-800 (M.D. Pa. 1995), United Christian Ministries wanted to convert a motel into SROs for the disabled. They were denied a use variance, and the denial was upheld by the state courts, but the federal court held that the denial was a failure to make reasonable accommodation, and that changes must be affirmatively made so that people with handicaps may use and enjoy a dwelling. Granting a use variance would require an "extremely modest" accommodation in the zoning rules, and the proposed use was fundamentally consistent with the neighborhood. See also *United States v. City of Philadelphia*, 838 F. Supp. 223 (E.D. Pa. 1993), aff'd 30 F.3d 1488 (3rd Cir. 1994) (requirement for a rezoning constituted a failure to make reasonable accommodation).

While localities must make reasonable accommodations, it does appear that they must first be given an opportunity to do so. In *United States v. Village of Palatine, Illinois*, 37 F. 3d 1230 (7th Cir. 1994) the Oxford House program, which has a policy of refusing to seek local permits, declined to seek a required special use permit, The court held that it had never invoked the procedures that would have permitted reasonable accommodation to be made. See also *Oxford House-C v. City of St. Louis,* 77 F.3d 249 (8th Cir. 1996) (restriction to eight residents by-right not discriminatory, and Oxford House's refusal to apply for permits to house more than eight residents rendered reasonable accommodation claim unripe).

Neighborhood Opposition as a Defining Characteristic

As has been suggested, there is frequently hostile citizen opposition to the location of group homes. It is perhaps fatal for the locality to accede to such pressure, which the courts invariably find to be based on groundless fears.

In *Stuart B. McKinney Foundation v. Town of Fairfield*, 790 F. Supp. 1197, 1221-22 (D. Conn. 1992) the court invalidated a requirement for a special exception for the use of a two-family residence as a home for seven HIV-positive persons. Despite efforts to act quietly, the location of the home was leaked to the press, and there was a large gathering at a local firehouse and much political uproar. The trial court noted that meetings were

marked by many bigoted remarks. Subsequently, the Planning Director sent the home a letter asking thirteen questions, including inquiry into standards of admission, number of people who would live at the property, average anticipated length of residence, type of medical care, how the determination of departure date was made, leases, payment of rent and other expenses, staffing, services and facilities to be provided and transportation. The City admitted that there were no legitimate dangers to public health and safety from HIV-positive residents, and the court found that the City's practices evidenced a clear discriminatory intent. See also *Support Ministry v. Village of Waterford*, 808 F. Supp. 120, 133-35 (N.D. N.Y. 1992) (citizen opposition and government hostility manifested when Town passed ordinance to assure the defeat of a group home for AIDS victims and named opponents to the Zoning Board of Adjustment. Uncontradicted evidence showed that it was "[c]rystal clear" that local ordinance was enacted to prevent Support Ministries from establishing its home.)

In *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D. N.J. 1991), the Mayor and other city officials led hostile responses to a group home, and the Zoning Administrator had first announced that Oxford House was a permitted use but after a City Council meeting at which much opposition was expressed by the neighborhood, changed her position. The court found the City's conduct intentionally discriminatory.

A Cautionary Tale

Localities must not underestimate the time and difficulty that FHAA cases can cost. The lengthy saga of Smith & Lee Associates is instructive. The case involved efforts by a private group home operator to locate a foster care home for twelve elderly handicapped residents in a single-family residential district. Michigan law authorized adult foster care homes for six or fewer residents in all residential neighborhoods, but in order to house more than six the home required local approval, which was denied.

The district court first held that the City had been guilty of discriminatory intent, disparate impact, and failure to make reasonable accommodation, and imposed a $50,000 civil penalty on the City. *Smith & Lee Associates, Inc. v. Taylor, Michigan*, 798 F. Supp. 442 (E.D. Mich. 1992). The court of appeals reversed. *Smith & Lee Associates, Inc. v. Taylor, Michigan*, 13 F.3d 920, 929-32 (6th Cir. 1993). It upheld the constitutionality of Taylor's definition of "family", and reversed the lower court's finding as to discriminatory intent. As to reasonable accommodation it concluded that the district court could not simply order the locality to advise Smith & Lee that it could proceed.

On remand, however, the district court again held that City had been motivated by discriminatory animus, and directed the City to amend its ordinance and to pay Smith & Lee profits from the impermissible limitation on the number of residents. *United States v. City of Taylor, Michigan*, 872 F. Supp. 423, 429-443 (E.D. Mich. 1995).

On a second appeal, *Smith & Lee Associates, Inc. v. Taylor, Michigan*, 102 F.3d 781 (6th Cir. 1996), the court of appeals held that the trial judge had erred in finding discriminatory intent, but that he had been correct to find that the City had failed to make reasonable accommodation by adapting its processes to accommodate the group home.

The court said that although Taylor had no duty to approve Smith & Lee's zoning application, it could not lawfully deny that application because of the demonstrated hostility of the City government to the handicapped. The FHAA is concerned with achieving equal results and not just formal equality, and imposes an affirmative duty to reasonably accommodate handicapped people.

Conclusion

This article has only touched on major issues that are presented by local regulation of group homes. But the message is clear: local regulation cannot discriminate against the handicapped, and, moreover, localities must take affirmative steps to accommodate them. Finally, localities must steel themselves to the opposition that the location of group homes almost invariably attracts. To accede to political pressures growing out of ignorance and bias can lead to judicial intervention at the best, and substantial civil penalties at the worst.