Oregon Advocacy Center

Working for the rights of individuals with disabilities

1DISABILITY DISCRIMINATION AND GROUP HOMES

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The Fair Housing Act, as amended in 1988, makes it unlawful to discriminate:

> ...in the sale or rental, or otherwise make unavailable or deny, a dwelling to any buyer or renter...

because of the handicap of the renter/buyer, anyone intending to live in that dwelling, or any person associated with the buyer or renter. 42 U.S.C. 3604(f)(1). Because of the expansive standing recognized under the Fair Housing Act [FHA], these prohibitions may be enforced by any person who is seeking housing or providing housing (including developers and financiers), as well as an organization or agency whose advocacy purposes are being frustrated. See Trafficante v. Metropolitan Life Ins., 409 U.S. 205 (1972); United States v. Mobile Home Park Management Co., 29 F.3d 1413 (9th Cir. 1994).

The definition of "handicap" includes those who have a physical or mental impairment that substantially limits one or more life functions, those with a record of impairment, and those regarded as impaired. 42 U.S.C. 3602(h). The definition is expansive, and covers persons with mental illness, developmental disabilities, physical impairments, positive HIV status, AIDS, wet and dry alcoholics, and recovering drug addicts. Further, since the definition of handicap rides upon whether one or more major life functions are impaired, people needing housing in group home settings may be per se handicapped simply because their inability to live independently demonstrates an inability to care for oneself, which is a major life function. See United States v. City of Audubon, 797 F.Supp. 353, 358-9 (D.N.J. 1991); United States v. Massachusetts Indus. Finance Agency, 910 F.Supp. 21, 26 (D.Mass. 1996).

The purpose of the act is to permit people with disabilities to live where they wish, irrespective of the views, prejudices and desires of neighbors, governments or the real estate industry. The Congressional history makes clear that "generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusions." H.R. Rep. No. 100-711, 100th Cong. 2d Sess. at 18, 1988 U.S. Code Cong. & Admin. News at 2173.

The law prohibits both facially neutral policies or decisions that have a discriminatory effect, as well as those having a discriminatory purpose. It should be

noted that a decision which is reached for several reasons, only one of which demonstrates discriminatory intent, is still prohibited. Support Ministries v. Village of Waterford, 808 F.Supp. 120, 134, n.5 (N.D.N.Y. 1992)[HIV infected status]. Further, the fact that the policy or practice has a benign purpose does not insulate it from the FHA. See Alliance for the Mentally Ill v. City of Naperville, 923 F.Supp. 1057, 1069 (N.D.Ill. 1996)[facially discriminatory code designed to protect the mentally ill from hazards is illegal].

The FHA also requires local governments to make "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped person] equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B).
When requested, such a modification must be made except under very limited circumstances, that is, unless it would create an undue administrative or financial burden, or result in a fundamental alteration of the nature of the affected program. Courts have required waivers of provisions in leases, contracts, rules, ordinances, restrictive covenants, zoning codes and other rules under this provision. See, Smith & Lee Associates v. City of Taylor, Mich., 102 F.3d 781 (6th Cir. 1996)[waiver of six person limit on number of persons in area zoned for single family use].

There is no question that the FHA governs local zoning regulations, as well as local land use and health and safety laws. City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995), affirming 18 F.3d 802 (9th Cir. 1994)[occupancy limits in land use code subject to FHA]. If a zoning decision, practice or restrictive covenant has the effect of limiting the ability of handicapped persons to live where they choose, it violates the FHA. For example, limiting the use of a property to a "private residence" has a discriminatory effect, and is thus illegal. Martin v. Constance, 843 F.Supp. 1321 (E.D.Mo. 1994).

Congress explicitly intended for the FHA to apply to zoning ordinance and other laws that would restrict placement of group homes. See H. Rep. No. 100-711, supra, at 1988 U.S. Cong. & Admin News 2185. That position has been adopted by the United States Supreme Court. City of Edmonds, supra [house for recovering alcoholics and drug addicts]; see also Smith, supra [elderly disabled group home]; Children's Alliance v. City of Bellevue, 950 F.Supp. 1491 (W.D.Wash. 1997)[ordinance discriminates against disabled children in group homes]; Potomac Group Home v. Montgomery County, 823 F.Supp. 1285 (D.Md. 1993)[group home for disabled persons]

PARTICULAR ISSUES ARISING OUT OF ATTEMPTS TO REGULATE GROUP HOMES:

(1) Maximum Occupancy Restrictions -

The FHA provides an express exemption for "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). The purpose of such an exemption is to permit a jurisdiction to govern overcrowding. However, there is no such exemption for limits designed to preserve the family character of a neighborhood (as compared with total number of occupants) City of Edmonds, supra. Several courts have struck down

occupancy restrictions on the number of unrelated persons who can live together. Turning Point, Inc. v. City of Caldwell, 74 F.3d 941 (9th Cir. 1996)[homeless shelter may have 15 residents]; Support Ministries v. City of Waterford, 808 F.Supp. 121 (N.D.N.Y. 1992)[6 person limit unreasonable]; Oxford House-Evergreen v. City of Plainfield, 769 F.Supp. 1329 (D.N.J. 1991)[strikes 6 person limit for home for recovering alcoholics and drug addicts]; Oxford House, Inc. v. Town of Babylon, 819 F.Supp. 1179 (E.D.N.Y. 1993). Other courts have found that changes must be made to occupancy limits in the form of "reasonable accommodations." See, Smith & Lee Associates, Inc. v. City of Taylor, 102 F.3d 781 (6th Cir. 1996)[court orders an increase in occupancy limit from 6 to 9].

(2) Dispersal Requirements -

Dispersion requirements (such as rules specifying the distance required between group homes) are prohibited under the FHA because their effect is to make dwellings of choice unavailable to the disabled. See, Larkin and Michigan Protection and Advocacy Service v. Michigan, 883 F.Supp. (E.D. Mich. 1995), aff'd 89 F.3d 285 (6th Cir. 1996)[violation of FHA not to waive 1,500 foot concentration rule as reasonable accommodation]; Horizon House Developmental Services, Inc. v. Township of Upper Southhampton, 804 F.Supp. 683, 693, aff'd 995 F.2d 217 (3rd Cir. 1993)[striking down 1,000 foot dispersal requirement]; Children's Alliance v. City of Bellevue, 950 F.Supp. 1491 (W.D.Wash. 1997)[same]; Association for the Advancement of the Mentally Handicapped v. City of Elizabeth, 876 F.Supp. 614 (D.N.J. 1994)[1,500 foot dispersal from another such home, school or day care center]; North Shore Chicago Rehabilitation v. Village of Skokie, 827 F.Supp. 497 (N.D.Ill. 1993)[600 foot dispersal ordinance];

Similarly, concentration limitations (such as restrictions on the number of group homes per square mile) violate the FHA. See, New Horizons, Inc. v. Metropolitan Government of Nashville and Davidson County, 898 F.2d 154 (6th Cir. 1990)[striking a zoning requirement prohibiting more than one family care or group care community facility in a single residential block][decided under state law]. However, a court in one case did allow the city to apply a dispersal requirement to prevent the clustering of 21 group homes within a one and a half block area. Familystyle of St. Paul v. City of St. Paul, Minn., 923 F.2d 91 (8th Cir. 1991)

(3) Neighborhood Notification Requirements

Courts have routinely struck down requirements that group homes notify their neighbors that they are proposing to move into the neighborhood. Potomac Group Home Corp. v. Montgomery County, MD, 823 F.Supp. 1285 (D.Md. 1993)[hearing and notification requirement]; Larkin v. State of Michigan, 89 F.3d 285 (6th Cir. 1996)[notification of neighbors requirement would facilitate organized opposition to home and animosity towards residents]; Children's Alliance v. City of Bellevue, 950 F.Supp. 1491 (W.D.Wash. 1997)[requirement for city permit and community hearing process]. The Act makes irrelevant any expressions of discomfort or opinions by neighborhood residents that persons with disabilities do not belong in their neighborhoods, or would reduce the market value of their homes. Further, the research literature clearly shows that group homes do not have a negative impact on property

values, do not increase crime, and do not contribute to the deterioration of communities. However, to the extent that all citizens, whether or not they are handicapped, must participate in public hearings and zoning decisions, group home applicants may be required to do so.

(4) Permanent Residency Requirements

A locality may not deny a permit to a group home on the grounds that its residents will not be permanent occupants. North Shore-Chicago Rehab. v. Village of Skokie, 827 F.Supp. 497 (N.D.Ill. 1993)[striking requirement that residents be "permanent"]; Oxford House, Inc. v. Township of Cherry Hill, 799 F.Supp. 450 (D.N.J. 1992)[same]; Oxford House, Inc. v. Town of Babylon, 819 F.Supp. 1179, 1183 (E.D.N.Y. 1993)[barring eviction of home because of "size or transient nature" of group home arrangement].

(5) Licensing Requirements

May the state, county or local government zoning officials require that group homes be licensed in order to operate? No. Persons with disabilities cannot be limited in their choice of dwellings to facilities that are licensed by the state. Further, to the extent that local governments seek to impose licensing requirements beyond those required by the state, such as safety and fire regulations, they must be "individualiz[ed]...to the needs or abilities of particular kinds of developmental disabilities," Marbrunak Inc. v. City of Stow, 974 F.2d 43, 47 (6th Cir. 1992)[invalidating safety requirements of zoning ordinance re: group home for mentally retarded women], and must have a "necessary correlation to the actual abilities of the persons upon whom it is imposed." Potomac Group Home Corp. v. Montgomery County, 823 F.Supp. 1285, 1300 (D.Md. 1993). Otherwise, they are invalid; Bangerter v. Orem City Corporation, 46 F.3d 1491 (10th Cir. 1995)[restrictions on public safety cannot be based on blanket stereotypes];Alliance for the Mentally Ill v. City of Naperville, 923 F.Supp. 1057 (N.D. Ill. 1996)[fire prevention code discriminates on face].

(6) Residents of a Correctional Transition, Halfway House or Drug Rehabilitation Program

Under the FHA, persons with criminal records are not a protected class. Nor are persons who are currently using drugs. However, persons with disabilities are, including persons who are recovery alcoholics and drug addicts. H.Rep. 100-711, supra, 1988 U.S. Code Cong. & Admin. News at 2183; 24 C.F.R. 100.201(a)(2)(1989); City of Edmonds, supra.[group home for unrelated recovering alcoholics and drug addicts within FHA protections] U.S. v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992)[record of drug or alcohol addiction constitutes a handicap]. If a person with a criminal record also has a disability (such as persons under the control of the PSRB, who have been found guilty but mentally ill), that person may not be denied housing because of that disability. Congress foresaw the potential for concern in this area, and specifically excluded from coverage those whose tenancy would constitute a "direct threat" to the health or safety of individuals. 42 U.S.C. 3604(f)(9). However, the FHA requires that "direct threat" restrictions be based on individual assessments. Bangerter v. Orem City Corp., 46 F.3d 1491, 1503 (10th Cir. 1995). To exclude such a person or

group of people, a municipality must make a showing "on the basis of a history of overt acts or current conduct," H.R. Rep. 100-711, at p. 29, and must show that there is no reasonable accommodation that would reduce that risk. Roe v. Sugar River Mills Associates, 820 F.Supp. 636 (D.N.H. 1993); Roe v. Housing Authority of the City of Boulder, 909 F.Supp. 814 (D.Colo. 1995). What is important is the basis upon which a home may be opposed by neighbors or government officials. If opposition is based upon status, rather than conduct, then it must be carefully scrutinized under the FHA.

AMERICANS WITH DISABILITIES ACT

Both the Federal Fair Housing Act and Title II of the Americans with Disabilities Act apply to zoning and other decisions made by a city or county involving group homes for people with mental disabilities.

The Fair Housing Act makes it unlawful to discriminate "...in the sale or rental, or otherwise make unavailable or deny, a dwelling to any buyer or renter" because of the handicap of the renter or buyer, anyone intending to live in that dwelling, or any person associated with the buyer or renter. 42 U.S.C. 3604(f)(1).

Title II of the Americans with Disabilities Act similarly applies to land use decisions.
Title II provides that:

> ...no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by such entity. 42 U.S.C. 12132.

The Ninth Circuit Court of Appeals has held that the ADA applies to zoning decisions. Bay Area Addiction Research and Treatment v. City of Antioch, 179 F.3d 725 (9th Cir. 1999). At issue in that case was a city's decision to adopt an ordinance forbidding substance abuse clinics within 500 feet of a residential area, after the methadone clinic had been notified in writing that the clinic would be a permitted land use. The court found that the city's actions constituted intentional discrimination on the basis of disability. The question that remained for the district court was whether the individual clients "pose a significant risk to the health or safety of others that cannot be ameliorated by means of reasonable modification." The court made clear that a public entity's determination that a person poses a direct threat to others may not be made on the basis of stereotypes or generalized fears, or "the prejudiced attitudes or the ignorance of others." It requires an individualized assessment be made of the "nature, duration and severity of the risk" and "the probability that the potential injury will actually occur.