

Recovery Houses and Local Zoning Laws

Recovery Houses are considered single family residences for purposes of zoning. Since March 12, 1989, the effective date of the 1988 Amendments to the Federal Fair Housing Act, it has been a matter of law. Those amendments make it unlawful for any jurisdiction to discriminate against congregate living for the disabled. Recovering alcoholics and drug addicts are within the scope of the term "disabled". Therefore, Recovery Houses are not subject to zoning laws regulating the number of unrelated individuals who may live in a single family dwelling. A Recovery House is not a treatment facility. It is simply an alcohol and drug free living environment which provides and opportunity for recovering individuals to live as a family unit focused on the need to change their individual lifestyle to one absolutely free of alcohol and drug use through the power of Jesus Christ.

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

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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 § 15.1-486.2, now repealed, and its current version, § 15.1-486.3), there have been major changes in federal law with direct impact on local authority to deal with the location and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 which 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 which 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 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 subclassifications 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 provision, 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.

An Overview of Judicial Enforcement of the Fair Housing Amendments Act of 1988

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Adequate housing is essential to community care for people diagnosed as seriously mentally ill.^[1-5] Without housing, people may be hospitalized longer than necessary.^[6] A loss of housing may also increase the risk of hospitalization for someone who has been discharged from psychiatric care.^[7] Surveys of mental health consumers^[8-8b] and families^[9] suggest that for many individuals obtaining adequate housing is a more pressing need than treatment.

Despite its overriding importance, people diagnosed as mentally ill often face discrimination when attempting to obtain housing.^[9-10] There are many reasons for this, including fear on the part of property owners of decreased property values and simple prejudice.^[11-13] Regardless of cause, discrimination has been a major impediment to access to housing.^[14-15]

In an attempt to counter such discrimination, Congress enacted the Fair Housing Amendments Act of 1988 (FHAA). This law amended the 1966 Fair Housing Act, which barred discrimination because of race.

Congress had two goals in enacting the FHAA. The first was to enable people with disabilities to obtain housing free from discrimination in communities of their choice the second was to use access to housing to integrate people with handicaps into the mainstream of American life.^[14-16]

The FHAA is one of two recent major civil rights statutes designed to eliminate discrimination on the basis of mental disability. (The other is the Americans with Disabilities Act which bars discrimination because of physical or mental disability in employment, transportation, telecommunication, and public accommodation). This article examines representative court cases applying the FHAA to determine whether this law is being implemented in a manner consistent with Congress' goals. The article first describes the pertinent sections of the FHAA, then discusses restrictions which the courts have found to violate the FHAA and restrictions which the courts have found permissible. The article concludes with a summary of emerging trends in enforcement of the FHAA. In general, it is the author's conclusion that the FHAA is becoming a very important tool in the fight to eliminate barriers to housing for those with mental disabilities.

The FHAA

The FHAA prohibits discrimination in the sale or rental of any dwelling on the basis of a prospective buyer's or renter's "handicap". A "handicap" is "(1) a physical or mental impairment which substantially limits one or more ... major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment..."[17] The definition covers individuals with HIV, as well as recovering alcoholics and substance abusers. It excludes current users of illegal drugs and those addicted to a controlled substance. It also excludes people who are "a direct threat to health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." [18]

Actions which discriminate against someone having a handicap within the statutory definition are prohibited. It is also discriminatory to refuse to make a "reasonable accommodation" to a person with a handicap enabling him or her to use a dwelling. These provisions are discussed in more detail below.

The FHAA also strengthens enforcement provisions of the original Fair Housing Act. For example, it gives the Department of Housing and Urban Development authority to go beyond efforts at conciliation and initiate judicial enforcement actions.[19]

The FHAA covers virtually all real estate transactions, except a private sale in which a seller who owns no more than three single-family homes sells a single-family home without the use of a real estate broker.[20]

Discrimination under the FHAA

Under the FHAA, certain actions by the owner or seller of housing or a municipality may be discrimination. In addition, a failure to take certain actions (to make "reasonable accommodation") may constitute discrimination as well.

Actions which courts have found violate the FHAA

In some instances, municipalities create special rules or restrictions for housing applicable only to the mentally disabled. The FHAA has been used in a number of cases to invalidate such rules. For example, in Marbrunak, Inc., v City of Stow, Ohio[21], a non-profit corporation sought to establish a "family consortium" home for people with mental illness. The city advised that the home would have to meet safety requirements not generally applicable to single-family dwellings, including the installation of special sprinkling systems and doors. These requirements assumed that the residents would require such measures because of their disability. A federal appeals court found a violation of the FHAA, because the City had not shown its special requirements were "warranted by the unique and specific needs and abilities of those handicapped persons." [21] The court ruled that the expense to the provider of meeting "needless" safety requirements limited the ability of handicapped individuals to live in the residence of their choice.

In Cason v Rochester Housing Authority[22], the city housing authority denied housing to three individuals diagnosed as schizophrenic after concluding they could not live independently. Caseworkers had observed that one applicant had "repeatedly complained about small matters unrelated to the (evaluation) visit" another was said to have poor hygiene as well as a variety of physical and mental ailments making independent living difficult. The court found these conclusions unwarranted, and ruled that the housing authority rules had a discriminatory impact upon the mentally disabled because no other prospective residents had to show the capacity to live independently to obtain housing. The court characterized the differential treatment as stemming from "unsubstantiated prejudices and fears regarding those with mental and physical disabilities." [22]

Another type of restriction challenged under the FHAA are those found in restrictive covenants (contractual provisions governing the use of or modification to property in a particular location.) In Rhodes v Palmetto Pathway Homes, Inc.,^[23] a provider sought to establish a group residence for individuals with mental disability in a subdivision subject to restrictive covenants prohibiting commercial activity and requiring that property be used only for private residences. The South Carolina Supreme Court ruled for the provider, finding first that the "business activities" necessary to operate the home (maintaining financial records, providing some program services in exchange for the functional equivalent of rent from the residents) did not convert the residence from private to commercial use. Second, the Court found that a judicial refusal to enforce such restrictive covenants advanced the FHAA policy of making it possible for people with handicaps to live in a home in the community of their choice.

In another restrictive covenant case,^[24] a federal court overturned a local court order closing a home for thirty five elderly, handicapped individuals. Neighborhood residents had obtained the court order on the ground that the home violated covenants governing the use of properties in the neighborhood. The neighbors had complained that the home was depressing property values and that it caused discomfort because ambulances and hearses were present on occasion. The federal court found that the local court's order violated the FHAA because it was motivated by discriminatory intent on the part of the neighbors.

The courts have been as stringent in striking down restrictions on access to housing by people with Acquired Immune Deficiency Syndrome (AIDS). For example, a federal court overturned the denial of a special use permit to an applicant seeking to create a hospice for those in the terminal stages of AIDS because the home would violate local zoning ordinances restricting the land to agricultural use.^[25] The court found that this rationale masked a desire on the part of residents in the neighborhood to avoid people with AIDS.

Taken together, these cases suggest public or private restrictions which apply only to people with handicaps, including mental disability, violate the FHAA because they restrict access to housing. As the next section suggests, a failure to make a "reasonable accommodation" so that someone with a mental disability may enjoy access to housing may also be discriminatory.

Application of the reasonable accommodation rule

It is discriminatory for an owner or landlord to refuse to make a "reasonable accommodation" which would enable a person with a handicap to have an equal opportunity to use a dwelling.^[26] While accommodations placing "undue financial and administrative burdens" on owners are not required,^[27] the "reasonable accommodation" rule shifts to owners of property and to government the burden of demonstrating that certain restrictions on the use of property are reasonable.

One unusual but interesting application of the "reasonable accommodation" rule is illustrated by a case in which a tenant in an apartment with a no pet policy fought eviction after purchasing a cat.^[27] The tenant, armed with the affidavit testimony of three mental health professionals, argued that, because of his mental illness, possession of the cat was necessary therapeutically. The landlord, with its own psychiatrist, argued to the contrary. Both sides filed for summary judgment (a legal process for deciding a case without trial on the facts). The court, applying the FHAA, ruled that the issues of the therapeutic necessity of the cat and whether the landlord had to waive the no pet rule as a "reasonable accommodation" were issues that could only be decided after trial. The implication of this case, particularly if its reasoning is followed in later cases, is that tenants may challenge lease restrictions by arguing that their mental "handicap" requires the owner to waive certain restrictions. In short, the FHAA may open to challenge restrictions that previously might have been summarily upheld.

A more common use of the "reasonable accommodation" test is to challenge enforcement by a municipality of an ordinance restricting the siting of a residence. For example, in Parish of Jefferson v Allied Health Care, Inc.,^[28] a community residence provider bought two duplexes, converting each to a home for six adults. Local zoning prohibited more than four unrelated persons from living in a single family home, so as many as eight people could live in each duplex. The provider built a passageway between the residences for administrative and programmatic convenience. The Parish ruled that the open passageway between the two buildings converted them into single family residences and therefore the number of people who could reside there would be limited. The court found otherwise, holding that the Parish had to permit the passageway as a "reasonable accommodation" necessary to permit people with mental disability to live in the community.

Special state and municipal rules for housing for people with mental disability

Some states and municipalities enacted special laws for housing for the mentally disabled which pre-date the FHAA. For example, "dispersal legislation" requires that each unit of housing for persons with mental illness be a certain distance from similar housing.^[29] The underlying theory is that this will promote community integration because housing for the mentally disabled will not be concentrated within small, segregated areas. Other states require that a provider wishing to create a community residence must provide the local government with notice the government then may hold a public hearing on the proposed site and suggest alternative sites.^[30]

The legislative history to the FHAA acknowledges the continuing authority of state and local government to protect health and safety through zoning and other restrictions. It also notes that land-use requirements, special-use permits, and other rules not applied to any other group have created barriers to housing for people with disabilities.^[31] In considering challenges to these state and municipal laws, the courts have reached differing conclusions regarding their legality.

Some courts have invalidated such laws. In Ardmore v. City of Akron,^[32] the operators and residents of a proposed group home for people with mental retardation challenged an ordinance requiring group homes to be at least 2,000 feet apart and requiring a public hearing before a permit to operate the home could be obtained. The court found the ordinance discriminatory. Similarly, in United States v. Village of Marshall,^[33] a federal court upheld a challenge to a state law requiring facilities for the disabled to be at least 2500 feet apart. An operator of community residences had been denied a permit to create a community residence because the site was only 1619 feet from another community residence. The court ruled that the Village had to permit the siting of the home as a reasonable accommodation, in part because the residences were separated by an unbridged river, and so as a practical matter were more than 2500 feet apart, and in part because the residence would not violate the intent of the state law, which was to assure that housing for people with mental disability was not clustered.

In contrast, a court in Familystyle of St. Paul, Inc. v City of St. Paul^[34] upheld the denial of a permit to a housing provider wishing to establish three group homes in a one and one-half block area in which the provider operated 21 group homes. The City denied the permit based on a state law requiring community homes to be sited in a way that fostered community integration. The City argued that the concentration of homes already operated by the provider did not meet this goal, and that a license should be issued only if the provider "dispersed" the homes it operated. The court upheld the City because the statutory goal was to further deinstitutionalization, and because there was no evidence that the City intended to discriminate by denying the permit.

The Familystyle case is explicable if one considers that the intent of the challenged statute was to encourage integration rather than segregation of people with mental disability. However, in Elliott v City of Athens,^[35] two judges on a three judge panel of a federal court of appeals upheld a local

ordinance having nothing to do with social policies encouraging housing for the disabled. The ordinance barred more than four unrelated adults from living in single family homes near the University of Georgia. The city had denied a permit to a provider wishing to create a group home for twelve recovering alcoholics. The court rejected a challenge under the FHAA, ruling that the city's interest in preserving the single family characteristic of the neighborhood surrounding the University, and in avoiding overcrowding in individual homes, did not have to yield to the FHAA. The majority found that the handicapped were no more affected by the ordinance than were college students and other unrelated adults, and so the ordinance was not discriminatory. The dissenting judge sharply disagreed, arguing that the ordinance had been applied in a discriminatory manner.

On balance, these cases suggest that state and municipal laws creating special spacing requirements for individuals with mental disability and/or requiring public hearings are vulnerable to challenge under the FHAA, particularly if it can be shown that the laws create barriers to access to housing. However, as the Familystyle case and the Elliott case suggest, such laws will not necessarily be automatically invalidated: they may be applied, as they were in Familystyle, to prevent a provider from creating segregated clusters of community residences. The Elliott case ultimately may be an aberration, as the dissent suggests: at the same time, providers must be ready to counter arguments based upon competing values (for example, the preservation of the single-family character of a neighborhood) that may conflict with the establishment of community housing for significant numbers of unrelated adults.

Danger to others

A provision of the FHAA which may be of particular interest to individuals attempting to create housing for the mentally disabled, because it may be raised in opposition to such housing, is the exclusion from coverage of individuals who are "a direct threat to health or safety of other individuals or whose tenancy would result in substantial physical danger to the property of others."^[18] Congressional history states that "...there must be objective evidence from the person's prior behavior that the person has committed overt acts which caused harm or which directly threatened harm."^[36] In applying this standard, courts have required proof of individual dangerousness rather than permitting decisions to be based upon community speculation about the dangerousness of the larger group with which the individual might be identified. For example, in granting a preliminary injunction to the operator of a residence for recovering alcoholics and substance abusers, the court rejected arguments that the residents were dangerous because the only "proof" was the "speculative conclusions of the neighbors."^[37] Similarly, in a case addressing the siting of a facility for people who were HIV positive, the court noted that "the scientific and medical authority is that HIV-positive persons pose no risk of transmission to the community at large."^[38]

Summary

From the cases decided to date, it is possible to begin drawing a number of conclusions about judicial enforcement of the FHAA. First, courts will invalidate specialized requirements for individuals with mental disability unless it can be shown that such requirements are necessary for the person seeking housing. Special safety features for a community residence, or inquiries into the ability of people with disabilities to live on their own are prohibited unless applied to all people using such housing or unless there is proof of the need for special standards in individual cases.

Second, courts also appear to require proof of individual dangerousness and will not permit exclusion of people with disability from housing based on popular assumptions or misconceptions about the supposed dangerousness of the class to which the person belongs.

Third, the "reasonable accommodation" test may develop as an important tool to challenge rules historically taken for granted. The Crossroads Apartment case,[27] in which a tenant challenged a no-pet rule on therapeutic grounds, suggests that this test may permit cases to go to trial that in the past might have been disposed of summarily--simple eviction cases may be transformed into more complex cases involving mental health diagnosis and treatment.

Fourth, when special requirements are imposed on the operators of residences rather than upon individuals, for example, state laws requiring minimum space between residences, or requiring public hearings, the courts are willing to void such requirements either on their face or under the "reasonable accommodation" test unless there is a strong countervailing policy argument to the contrary. However, it is likely that there will be continuing litigation over such laws, particularly when the stated purpose of the law is to further deinstitutionalization or integration of those diagnosed as mentally disabled. While such laws often appear to conflict on their face with the FHAA, it is apparent from the Familystyle case that at least some courts are willing to entertain arguments that such provisions in fact further the creation of community based housing. At a minimum, it appears that courts are willing to inquire into the actual impact of such statutes before invalidating them.

While questions like this remain, the FHAA appears to be emerging as an important tool for mentally disabled people to obtain housing. While the FHAA is not a substitute for the creation of housing,[39] the courts to date have been receptive to its use in challenging laws and practices which create barriers to housing for those with mental disability. The utility of the FHAA should grow as cases like the ones described here accumulate.

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The Law & The Land: The City of Edmonds Case

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Fair Housing Amendments Act

Congress passed the Fair Housing Act as part of the Civil Rights Act of 1968. Initially, the Act prohibited housing discrimination on the basis of "race, color, religion, or national origin."

In 1974, Congress added protection on the basis of gender, and in the FHAA, the Act was extended to prohibit discrimination on the basis of handicap or familial status (families with children). Local zoning ordinances are subject to these provisions.

The FHAA's definition of handicapped includes those with physical or mental disabilities, recovering alcoholics and drug addicts (coupled with nonuse), many elderly persons and persons infected with the Human Immunodeficiency Virus (HIV). Discrimination, meanwhile, includes the "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations are necessary to afford [handicapped persons an] equal opportunity to use and enjoy a dwelling." However, the FHAA exempts reasonable restrictions "regarding the maximum number of occupants permitted to occupy a dwelling." The meaning of this maximum occupancy exemption was at issue in Edmonds.

City of Edmonds Case

Oxford House, Inc. is a nonprofit umbrella organization for 300 private, self-run, single-sex group homes for recovering alcoholics and drug addicts. Oxford House group homes are financially self-supporting, democratically governed, must be completely alcohol- and drug-free, and are required to expel any resident caught using alcohol or drugs.

According to Oxford House, the homes need at least six residents in order to be financially self-sufficient and provide a supportive atmosphere for recovery. Oxford House Edmonds, in a typical single-family residential zone in Edmonds, Washington, supports 10 to 12 residents.

In the dispute between the City and Oxford House Edmonds, the trial court ruled that the zoning provision fit within the FHAA's maximum occupancy exemption. Thus, no violation was found.

The U.S. Court of Appeals for the Ninth Circuit reversed, finding the maximum occupancy exemption inapplicable. Because the Ninth Circuit differed with the Eleventh Circuit decision in *Elliott v. Athens*, the U.S. Supreme Court granted certiorari.

The Supreme Court Decision

The sole question before the Supreme Court was whether the City of Edmonds' definition of family falls within the FHAA's absolute exemption for maximum occupancy restrictions. The Fair Housing Act's stated policy is "to provide, within constitutional limitations, for fair housing throughout the United States." In deciding the question before the Court, Justice Ginsburg, writing for the majority, noted that, as a remedial statute, the Act was to be afforded a "generous construction" and the maximum occupancy exemption narrowly construed "in order to preserve the primary operation of the [policy]."

The Court stated that the maximum occupancy exemption was enacted "against the backdrop of an evident distinction between municipal land use restrictions and maximum occupancy restrictions." Land use restrictions, typically found in zoning regulations, designate districts that permit compatible uses and exclude incompatible uses. Maximum occupancy restrictions, typically found in housing codes, limit the number of occupants per dwelling, usually in relation to living area or the number and type of rooms. These restrictions are designed to prevent overcrowding and "ordinarily apply uniformly to all residents of all dwelling units."

The Court concluded that a plain reading of the FHAA's maximum occupancy restriction "surely encompasses maximum occupancy restrictions" but "does not fit family composition rules typically tied to land use restrictions."

Put another way, the exemption clearly covers rules designed to prevent overcrowding of a dwelling but does not cover rules designed to preserve the family character of a neighborhood. As the Court puts it, because any number of related persons may live together, the City of Edmonds' family composition rule fails to answer the question of how many occupants may legally occupy a house.

The Significance of the Decision

Although decided on narrow grounds, Edmonds is an important victory for advocates for the rights of disabled persons - otherwise, municipalities could exclude congregate living arrangements from most residential neighborhoods.

Congress' paramount goal in enacting the FHAA was "to end the unnecessary exclusion of persons with handicaps from the American mainstream." The FHAA is intended to foster "the ability of [handicapped] individuals to live in the residence of their choice in the community."

According to the Oxford House's Supreme Court brief, the Edmonds single-family zoning ordinance excludes Oxford-House Edmonds from 97 percent of single-family rental housing in the city. A similar situation exists throughout the country. If the Supreme Court had ruled that typical single-family zoning ordinances were exempt from the FHAA, the exemption would have gutted the Act.

From another view, the Edmonds decision represents yet another federal intrusion into the once exclusively local province of planning and zoning.

Although the authors of this article believe the decision was a correct one, we do not believe that the plain language of the statute clearly and manifestly demonstrates Congress' intention to preempt the historically local province of land use. Rather, we find the statutory language ambiguous.

While the Edmonds decision is significant, it will not, as the City argued, "destroy the effectiveness and purpose of single-family zoning." Municipalities will still be able to maintain single-family zones. They will simply need to show some flexibility - by making reasonable accommodations - with housing for the handicapped.

Edmonds and other municipalities can continue to discriminate against other groups of people they deem undesirable, such as college students. For example, a group of six nuns would not be allowed to live together in Edmonds, unless, of course, they were all recovering substance abusers.

Unanswered Questions

Perhaps as important as what the Supreme Court decided in the Edmonds case is what it did not decide (see page 4). Two important points remain. First, a zoning ordinance generally may not, on its face, discriminate against the handicapped or other classes of persons protected under the Fair Housing Act.

Second, a municipality may not apply a facially neutral zoning ordinance in a discriminatory manner or with discriminatory intent.

Conclusion

The Edmonds case is just the tip of the iceberg. The multitude of group home cases in federal and state courts testifies to widespread fear and prejudice against recovering alcoholics and substance abusers, HIV-infected individuals and the mentally ill, even though numerous studies suggest that these fears are groundless.

One can only hope that this issue will quickly work itself out in the courts, in Congress and at the local government level. As Judge Sarokin of the United States District Court for the District of New Jersey said so well in *Oxford House-Evergreen v. City of Plainfield*:

There are few among us who do not have a friend or relative who has suffered the ravages of drugs or alcohol. They are persons who need our compassion and require our support. . . what this matter truly needs is not judicial action, whether it be state or federal, but for the parties to search their consciences, recognize the needs and hopes of the plaintiffs and the concerns and fears of the neighbors, and arrive at an accommodation which serves and enriches all who are involved in and affected by it.

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Questions the Edmonds Case did not Answer

What constitutes a reasonable accommodation?

The FHAA does not define the term; courts have, however, saying that it "does not cause any undue hardship or fiscal or administrative burdens on the municipality, or does not undermine the basic purpose that the zoning ordinance seeks to achieve."

A few lower federal court cases provide an additional glimpse of meaning. For example, part of *United States v. City of Philadelphia* involved a group home for chronic substance abusers in a residential neighborhood. The court found that the City's refusal of the home's request to substitute a side yard for a rear yard requirement was a failure to make a reasonable accommodation.

Likewise, a federal district court in Louisiana has ruled that a request for a variance to allow an open internal passageway between the two sides of a duplex, thereby creating a single group home residence, was a request for a reasonable accommodation.

Very likely, the accommodation requested will simply be that a municipality modify, waive or make exceptions in its zoning rules to allow for the establishment of a group home.

For example, in *Oxford House, Inc. v. Town of Babylon*, the town's failure to exempt an Oxford House from the town's limit of four unrelated persons (the group home apparently housed five residents) constituted a failure to make a reasonable accommodation, and hence qualified as discrimination under the FHAA.

Could an ordinance allowing group homes only in some zones, such as multi-family or higher density zones, constitute a reasonable accommodation?

Put another way, could a municipality exclude group homes from certain residential zones via a facially neutral single-family zoning ordinance, as the City of Edmonds attempted to do?

It appears highly unlikely that such a restriction constitutes a reasonable accommodation, considering that most single-family homes are located in single-family zones. In fact, one federal court cursorily rejected the notion.

May a municipality require a group home to apply for a special permit or conditional use under a facially neutral zoning ordinance?

The special permit process may be the best way for municipalities to make case-by-case reasonable accommodations. Churches and funeral homes are typical special permit uses. Developers of group homes fear, however, that public hearings may increase the chance of relapse for recovering addicts. While federal courts have been divided on this question, one appellate court has upheld the use of the special permit process.

May a municipality require a group home to apply for a variance under a facially neutral zoning ordinance?

A variance grants permission to violate the zoning ordinance. A person seeking to obtain a variance must typically demonstrate that the ordinance would impose an unnecessary hardship. A person seeking a special permit or conditional use, on the other hand, merely has to show compliance with the conditions of the ordinance.

The Seventh Circuit's decision in *Village of Palatine* would indicate that a municipality should be given a chance to make a reasonable accommodation through the variance process. However, federal district courts have disagreed on this question - for example, *Oxford House, Inc. v. City of St. Louis*, states that the variance process, including a public hearing, "stigmatizes recovering alcoholics and addicts, perpetuates their self-contempt, and increases the stress which can so easily trigger relapse."

What limit on the number of unrelated persons who may live together would not be discriminatory?

The Edmonds court hints that six may be a reasonable number. Determinations will most likely be made on a case-by-case basis. Municipalities can still enforce the maximum occupancy restrictions found in their housing codes.

Can a municipality impose separation requirements on group homes?

Yes, according to the United States Court of Appeals for the Eighth Circuit in *Familystyle of St. Paul, Inc. v. City of St. Paul*, which involved a residential treatment facility for the mentally ill. The court upheld laws requiring that group homes be located at least a quarter mile apart to guarantee that they are "in the community" rather than clustered.

The issue is far from settled, however. The *Familystyle* decision has recently come under criticism. Additionally, in *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, a federal district court in Pennsylvania struck down a similar spacing requirement, rejecting the notion that integration of the handicapped adequately justifies validating a facially discriminatory ordinance. Several state attorney generals have also opined that their states' spacing requirements are unlawful.