

Fair Housing and Zoning Law

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2010 Zoning Workshop Series

October 28 from 6 to 9 PM.

The Department of Planning Services Presents a workshop on
Fair Housing, Zoning law and Service Dogs.



Department of Planning Services



124 W. Washington St., Suite B-4 Medina, OH 44256 (330) 722-9219 Fax: (330) 764-8456

INTRODUCTION

Eighty-Three years ago, Justice Oliver Wendell Holmes and the U.S. Supreme Court in *Buck v Bell*, 274 U.S. 200 (1927) ruled that a woman labeled as feebleminded could be legally sterilized. This was justified by the statement that “Three generations of imbeciles are enough.” This case has never been overruled.

One would hope this fear and prejudice of the disabled would no longer hold sway over us. Unfortunately, this is not the case. We have found a number of local land use and zoning code provisions enacted by communities to be at best problematic if not in violation of the Federal Fair Housing Act. This seminar being hosted by the Medina Planning Department give advocates an opportunities to discuss both the social and legal cost of illegally zoning out disabled persons. The need to work together has never been greater to bring true equal housing opportunities to all!

FEDERAL FAIR HOUSING ACT AND LOCAL LAND USE ORDINANCES

The Fair Housing Act (“FHA”), passed by Congress as Title VIII of the Civil Rights Act of 1968, prohibits housing discrimination on the basis of, *inter alia*, race, gender, and national origin. 42 U.S.C. § 3601 et seq. Under the FHAA, which Congress passed in 1988 to extend the coverage of the FHA to include people with disabilities, it is unlawful:

To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of-

- (A) that person; or
- (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 person.

42 U.S.C. § 3604(f)(2).

By its express terms, this section applies to “the provision of services or facilities” to a dwelling, such as sewer service, and courts have specifically allowed claims under this section to be brought against municipalities and land use authorities. *See generally, Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442 (3d Cir. 2002). Further, under 42 U.S.C. § 3604(f)(3)(B), discrimination includes “a 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.”

The Fair Housing Act protects people with mental retardation, mental illness, former alcoholics or drug addicts, epilepsy, cerebral palsy, visual and hearing impairments, AIDS, and other disabilities. People who use wheel chairs, service dogs, or a personal care attendant are all protected against housing discrimination.

The FHA applies to zoning codes since it is well established that the FHA prohibits discriminatory land use decisions by municipalities and their officials. In fact, 42 U.S.C. § 3615 provides that “any 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 [under the Fair Housing Act]” *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991) (on motion for preliminary injunction: city’s enforcement of zoning ordinance so as to prevent operation of local Oxford House in area zoned for single family residences violated Fair Housing Act); *Association of Relatives and Friends of AIDS Patients v. Regulations and Permits Administration*, 740 F. Supp. 95 (D.P.R. 1990)(government agency’s denial of land use permit to open AIDS hospice violated Fair Housing Act); *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D.Ill. 1989) (on motion for preliminary

injunction: city's refusal to issue special use permit under zoning law to developer wishing to remodel building into residence for persons with AIDS violated Fair Housing Act).

The single Congressional Report on the 1988 amendments to the FHA, the House of Representatives Report, reveals that the U.S. Congress was concerned that local government zoning restrictions be covered under the law. As the report clearly states: “[t]he Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices.” H.R.Rep. No. 711, 100th Cong., 2d Sess. 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2185. This legislative history is supported by the case law decided even prior to the amendments in the FHA. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir.), *aff’d*, 109 S. Ct. 276 (1988) (per curiam); *U.S. v. Parma*, 661 F.2d 562 (6th Cir. 1981).

Persons alleging violations of the FHAA under these sections may bring three general types of claims: (1) intentional discrimination claims (also called disparate treatment claims) and (2) disparate impact claims, both of which arise under § 3604(f)(2), and (3) claims that a defendant refused to make “reasonable accommodations,” which arise under § 3604(f)(3)(B). See *Lapid-Laurel*, 284 F.3d at 448 n.3.

To evaluate these claims under the FHAA, courts have typically adopted the analytical framework of their analogues in employment law, including their coordinate burden-shifting analyses once plaintiff has made a prima facie showing of discrimination under a specific claim. Consistent with the focus on language rather than a showing of discriminatory animus in evaluating facially discriminatory classification claims, courts have developed a “proxy” theory for such claims, recognizing that a regulation or policy cannot “use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination,” such as classifications based on

gray hair (as a proxy for age) or service dogs or wheelchairs (as proxies for handicapped status). *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992). proxy” cases where courts have had little difficulty leaping from the term “personal care home”—or something substantially equivalent—to discrimination based on handicapped status because it was obvious, in light of the language and the record evidence, that the term was used to classify plaintiff’s facility and treat it differently “because of” the disabled status of the facilities’ residents. See, e.g., *Larkin v. Mich. Dep’t of Social Servs.*, 89 F.3d 285 (6th Cir. 1996); *Cnty. Hous. Trust v. Dep’t of Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208, 225 (D.D.C. 2003) (“It is well settled that a defendant’s decision or action constitutes disparate treatment, or intentional discrimination, when a person’s disability was a ‘motivating factor’ behind the challenged action or decision.”); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1071 (N.D. Ill. 1996). *Children’s Alliance v. City of Bellevue*, 950 F. Supp. 1491 (W.D. Wash. 1997); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 694 (E.D. Pa. 1992), aff’d, 995 F.2d 217 (3d Cir. 1993). A review of these cases reveals a combination of four common elements that caused the courts to find a fair housing violation: first, the alleged discriminatory classification was actually defined by the challenged regulation in terms that largely coincided with the FHAA definition of “handicap”; second, the classification was used specifically to “single out” facilities for handicapped individuals for different treatment “because of” their disability; third, there was often direct or circumstantial evidence of discriminatory animus indicating an intent to discriminate “because of” the disabled status of the facilities’ residents; and fourth, the defendant’s purported reason for treating plaintiff’s facility differently was predicated on a justification for treating disabled persons differently that was of questionable legitimacy. In both *Larkin* and

Horizon House, the courts struck down laws that imposed distance requirements between residential care facilities for persons who were “handicapped” under the FHAA. In each case, the challenged law “singl[ed] out for regulation group homes for the handicapped” with a classification comprising only such facilities. *Larkin*, 89 F.3d at 290 (noting that the Act, by its very terms, applied “only to [adult foster care] facilities which . . . house the disabled, and not to other living arrangements”); *see also Horizon House*, 804 F. Supp. at 694 (concluding that defendant township’s reactionary enactment of an ordinance imposing a distance requirement between plaintiff’s “family care homes” “singled out for disparate treatment . . . those who are unable to live on their own [and] who, in the language of the Fair Housing Act, are ‘handicapped’”). In *Alliance for the Mentally Ill, Children’s Alliance, and Community Housing Trust*, the courts invalidated laws that singled out for regulation group homes for the handicapped by distinguishing “family” homes from either “residential board and care occupancies,” “group facilities,” or “community-based residential facilities,” each latter classification constituting a proxy for “handicapped” status. *Alliance for the Mentally Ill*, 923 F. Supp. at 1070 (noting that although the municipal fire code did not use the words “handicapped” or “disabled,” special provisions for “residential board and care occupancies”—defined as facilities that house four or more unrelated persons “for the purpose of providing personal care services”—applied primarily to handicapped persons); *Children’s Alliance*, 950 F. Supp at 1496 (determining that distinguishing “families” from “group facilities” based on the presence of a “staff” providing “care and supervision for and assistance with the daily living activities” was “a proxy for a classification based on the presence of individuals under eighteen and the handicapped as both groups require supervision and assistance” and, therefore, facially discriminated on the basis of familial and handicapped status); *Cnty. Hous.*

Trust, 257 F. Supp. 2d at 221-22 (concluding that the definition of a “community-based residential facility” as “a residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living” called for the application of different standards to persons on the basis of their disability, even though the law did not make such a distinction expressly)

WHERE TO GET HELP

If you suspect you have experienced housing discrimination or for more information about the housing rights of people with disabilities, contact:

THE HOUSING DISABILITY LAW PROJECT

3214 Prospect Avenue
Cleveland, Ohio 44115
216-431-7400 ext 100

WWW.HOUSINGADVOCATESINC.COM

THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

1-800- 669-9777,
TDD: 1-800-927-9275

OHIO CIVIL RIGHTS COMMISSION:

CLEVELAND REGIONAL OFFICE

Frank Lausche Building
615 W. Superior Avenue
Cleveland, Ohio 44113
(216) 787-3150

AKRON REGIONAL OFFICE

Akron Government Center
1161 S. High Street, Suite 205
(330)643-3100 (Voice/TTY)

THE MENTAL HEALTH LAW PROJECT

(1-202-467-5730)

THE U.S. DEPARTMENT OF JUSTICE

(1-202-514-4713)

SELECT FAIR HOUSING CASES ON LAND USE REGULATIONS

Marbrunak, Inc. v Stow, 974 F.2d 43 (6th Cir. 1992) - Zoning ordinance imposing special safety requirements on residence operated by non-profit corporation for benefit of four mentally retarded adult women violated FHAA because it imposed safety requirements more stringent than those applied to other single-family residences, and ordinance made no effort to tailor safety requirements to particular disabilities of residents, and requirement that non-profit corporation seek zoning variance was unduly burdensome.

Larkin v Michigan Dep't of Social Servs., 883 F. Supp 172 aff'd 89 F.3d 285 (6th Cir. 1996) Spacing and notice requirements of Michigan Adult Foster Care Licensing Act were preempted by FHA and facially discriminatory, and 1,500 foot spacing requirement allegedly promulgated to integrate disabled into community and to prevent clustering, and required notification to municipality or neighbors of housing facility for 4 disabled adults, were not justified to meet needs of handicapped.

Smith & Lee Assocs. v City of Taylor, 102 F.3d 781 (6th Cir. 1996) - District Court's finding that city's decision to deny zoning petition of company operating adult foster care home was motivated by discriminatory animus was erroneous, where city reasonably interpreted established zoning ordinance as characterizing 12 person adult foster care home as multiple-family use, and neither fact that city permitted homeowners in single-family neighborhoods to run home businesses while prohibiting for-profit company from operating 12 person adult foster care home, nor comments by city council member that fire safety and property values might be compromised by 12 person adult foster care home in single family neighborhood, showed discriminatory animus toward handicapped. However, allowing adult foster care home to house nine elderly disabled residents in home in single-family neighborhood where only 6 such residents were allowed under zoning ordinance was reasonable accommodation, as additional 3 residents would not alter character of neighborhood, and city's elderly and disabled consumers had need for more available adult foster care homes.

Hovsons, Inc. v Township of Brick, 89 F.3d 1096 (3rd Cir. 1996) - Conclusion of district court that township satisfied FHA's mandate that "reasonable accommodations" be provided to handicapped persons when township authorized nursing home construction within its hospital support zone but denied variance to build nursing home in residential zone was clear error, where no evidence supported claim that nursing homes were out of place in residential zones, and planned residential retirement communities were permitted in residential zone.

Elderhaven, Inc. v City of Lubbock, 98 F.3d 175 (5th Cir. 1996) - City's administration of its zoning laws reasonably accommodated needs of elderly disabled consumers, for purposes of 42 USCS § 3604, where undisputed evidence reflected city's willingness to interpret ordinance regulating groups of 3 or more unrelated persons flexibly, city no longer collected permit application fee under ordinance, inspection and permit process were intended to provide adequately for health and safety of residents, city had granted almost all of permit and special

exemption applications it had received, and complaint was only that city permitted 18 residents instead of 20 as requested by corporation representing elderly disabled persons.

Gamble v City of Escondido, 104 F.3d 300 (9th Cir. 1997) - Property owner seeking to build housing for elderly disabled adults failed to state claim under 42 USCS § 3604, where accommodation demanded was due in significant part to adult day care health facility occupying half of proposed building, for which accommodation was not required under statute.

Proviso Ass'n of Retarded Citizens v Village of Westchester, 914 F. Supp 1555 (ND Ill. 1996) - Developmentally disabled residents are entitled to summary judgment on 42 USCS § 3604(f)(3)(B) claim, where village claims that intended use of dwelling as community integrated living arrangement requires change in zoning classification and installation of expensive sprinkler system, even though waiving such requirement has not been argued or shown to increase risk to safety of residents or community, because residents' proposed accommodation of waiver of sprinkler requirement is reasonable.

Familystyle of St. Paul, Inc. v St. Paul, 923 F.2d 91 (8th Cir. 1991) - State statutes and city zoning ordinances requiring dispersal of group homes for mentally ill persons throughout communities did not violate 42 USCS § 3604, notwithstanding claim that dispersal requirements limited housing choices of mentally handicapped and therefore conflicted with language and purposes of Fair Housing Act, since dispersal requirement was part of licensing process as legitimate means to achieve state's goals in process of de-institutionalization of mentally ill.

Oxford House, Inc. v Babylon, 819 F. Supp 1179 (ED NY 1993) - Claim of residents of group home for recovering alcohol and/or drug dependents against town is granted summarily, where town sought to evict residents by enforcing zoning limitation on number of unrelated persons that could live in home, because (1) no genuine issue of material fact existed as to whether the eviction would discriminate against residents because of their handicap since recovering addicts are more likely than those without handicaps to live with unrelated individuals, and (2) showing of discriminatory effect far outweighs town's asserted interest in maintaining zone's residential character since town received no substantial complaints from neighbors, house is well maintained, and it does not alter residential character.

Thornton v City of Allegan, 863 F. Supp 504 (WD Mich. 1993) - Developer of adult foster-care facility is denied relief on claim under 42 USCS § 3604(f), where argument is that failure to grant special-use permit for facility amounted to not making "reasonable accommodations" for developer in violation of statute, because city more than reasonably accommodated developer, after rejecting first site as inconsistent with its land-use plan, by arranging through real estate agent developer's acquisition and its approval of alternate site for facility.

Epicenter of Steubenville v City of Steubenville, 924 F. Supp 845 (SD Ohio 1996) - Operator of handicapped adult-care facilities is granted preliminary injunction barring enforcement of city's ordinance imposing absolute one-year moratorium on establishment of new adult-care facilities, where ordinance was enacted as result of alleged problems with handicapped residents at operator's existing facility, because (1) ordinance clearly discriminates against handicapped, (2) proffered

justifications for ordinance were pretexts for true motive to exclude mentally impaired from moving into city, and (3) even if city's proffered reasons are taken as true, reasons fail to justify ordinance because ordinance is grossly overbroad.