

FAIR HOUSING LAW ISSUES IN LAND USE AND ZONING

CONGREGATE LIVING ARRANGEMENTS FOR PEOPLE WITH DISABILITIES

The following discussion paper has been prepared to assist cities and counties in reviewing their jurisdiction's zoning ordinance for compliance with federal and state fair housing laws that protect people with disabilities. Technical assistance is provided in identifying zoning regulations, policies and practices that discriminate against congregate living arrangements for people with disabilities and remedying those illegal provisions. A checklist is included for zoning ordinance review and assessing compliance with fair housing laws.

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I. Introduction.

During the past decade, there has been increasing integration of people with physical, mental and developmental disabilities into the community and a corresponding expansion in the number and type of group living arrangements available for people with disabilities. The greater presence of congregate living arrangements in the community has led some cities and counties to restrict through zoning the development, siting and use of housing for people with disabilities in ways that conflict with federal and state fair housing law protections.

A recent report to the Department of Housing and Urban Development (HUD), “The California Land Use and Zoning Campaign,” identified through audits of 90 jurisdictions statewide land use and zoning barriers to the funding, development, siting and use of congregate housing for people with disabilities.¹ The Report found, among other problems, that many local governments in their land use and zoning activities do not understand how fair housing laws apply to congregate living arrangements for people with disabilities and that this has led to discriminatory practices that deny housing opportunities to people with disabilities.²

The purpose of this discussion paper is two-fold: it assists cities and counties in identifying land use and zoning policies and practices that discriminate against congregate living arrangements for people with disabilities and it presents ways that local jurisdictions may cure discriminatory provisions for compliance with fair housing laws. According to “The California Land Use and Zoning Campaign Report,” there are several prevalent practices of local jurisdictions that have the effect of denying housing to people with disabilities and this discussion paper addresses each of them:

- zoning ordinances may not be used to deny housing based upon the disability of the residents;
- imposing special restrictions on disability related services violates fair housing laws;
- congregate living arrangements cannot be regulated like a business; and
- regulating congregate living arrangements by default will likely lead to a denial of housing and violation of fair housing laws.

We encourage cities and counties to use this discussion paper in reviewing their zoning ordinance and identifying illegal restrictions imposed on congregate living arrangements for people with disabilities, and where necessary, revising their ordinance for compliance with fair housing laws. A checklist at the end of this discussion paper is provided for jurisdictions to use in conducting a self-evaluation and revising their land use and zoning policies, practices and procedures as they impact the development, siting and use of congregate living arrangements for people with disabilities.

II. Fair Housing Laws and Discrimination Against People With Disabilities.

A. Federal and State Fair Housing Laws Prohibit Land Use and Zoning Practices That Discriminate Against Congregate Living Arrangements for People with Disabilities.

A decade ago, the Fair Housing Amendments Act of 1988 (hereafter “the Act”) went into effect, extending fair housing protections to individuals with disabilities in virtually every housing activity or transaction.³ The Act, which seeks “to end the unnecessary exclusion of persons with handicaps from the American mainstream,”

prohibits cities and counties from making housing opportunities unavailable to people with disabilities through discriminatory land use and zoning rules, policies, practices, services and procedures.⁴

The legislative history of the Act specifically recognizes that zoning regulations have discriminated against people with disabilities by limiting housing opportunities to live in the community and, specifically, group home residences.

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 to live in communities. This has been accomplished by such means as the enactment or imposition . . . of 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 discriminating against people with disabilities.⁵

(Emphasis added.)

California's legislature, in enacting amendments to the state's Fair Housing and Employment Act, specifically recognized the importance of congregate living arrangements for people with disabilities and, that historically land use practices have discriminated against the development and use of such homes thereby denying housing opportunities.⁶ In a statement of legislative intent that accompanied the amendments, the following findings were made:

- a. That public and private land use practices, decisions, and authorizations have restricted, in residentially zoned areas, the establishment and operation of group housing, and other uses.
- b. That people with disabilities . . . are significantly more likely than other people to live with unrelated people in group housing.
- c. That this act covers unlawful discriminatory restrictions against group housing for these people.⁷

(Emphasis added).

City and county zoning ordinances that restrict congregate living arrangements for people with disabilities deny housing opportunities to people with disabilities and this is discrimination under both federal and state fair housing laws.

B. The Law Prohibits Both Intentional Discrimination and Zoning Rules and Regulations That Have the Effect of Discriminating Against Housing For People With Disabilities.

A zoning regulation violates fair housing laws if it is discriminatory on its face or, its rules or practices have the effect of discriminating against people with disabilities. To prove discriminatory intent, an individual need only show that disability was one of the factors considered by the city or county in making a land use or zoning decision.⁸ For example, a zoning provision that specifically prohibits the development of group homes for people with disabilities in a single family residential zone is discriminatory on its face.

Discrimination under the Fair Housing Act may also be established by proving that a particular practice has a disparate impact on people with disabilities. Effect, not motivation, is the touchstone.⁹ For example, a zoning ordinance that limits the number of unrelated persons that may reside together in a single family residential zone through a restrictive definition of “family,” without singling out any particular group, has the effect of discriminating against people with disabilities who frequently live together in congregate living arrangements.

Both of the foregoing examples of zoning regulations are illegal under fair housing laws because either intentionally or, in effect, the restrictions deny housing opportunities to people with disabilities.

Jurisdictions that through their zoning ordinance provisions intentionally single out housing for people with disabilities and treat it adversely must eliminate such discriminatory provisions. Jurisdictions that fail to remedy intentionally discriminatory zoning provisions by revising their ordinance violate fair housing laws.

Local governments must also cure zoning provisions that have a discriminatory effect on congregate living arrangements for people with disabilities. First, a jurisdiction has an obligation to conduct a self-evaluation and make certain that its zoning laws and procedures do not have a discriminatory impact on congregate living arrangements for people with disabilities. A jurisdiction must not apply or enforce any zoning rules or regulations that have a discriminatory effect on such congregate living arrangements. It is essential that all cities and counties employ this self-regulatory process. We have provided, at the end of this discussion paper, a checklist for jurisdictions to use when they review and revise their zoning ordinance for compliance with fair housing laws.

Second, all local governments should also have a process through which an individual with a disability or a developer of specific housing for people with disabilities can request relief from the application of a discriminatory provision. Both federal and state fair housing laws require that jurisdictions make reasonable accommodations to people with disabilities and the most effective way of providing this to individuals is to include a procedure within the local zoning ordinance.¹⁰ The reasonable accommodation procedure is discussed in more detail in Section IV, below. It is important that jurisdictions understand that a zoning provision that is discriminatory on its face or, intentionally discriminates against people with disabilities, is not remedied by an offer of reasonable accommodation.¹¹

III. Prohibited Practices That Discriminate Against People With Disabilities By Denying Housing Opportunities.

A. Zoning Ordinances May Not Be Used To Deny Housing Based Upon the Disability of the Residents.

Traditionally, one way that local governments have regulated land use is by distinguishing between types of dwellings or living arrangements, including single family dwellings, multi-family dwellings, room and boards and boarding/lodging houses. Through these basic classifications, local governments have restricted zone location and often density, i.e. number of persons per dwelling unit. Zoning regulations based on the type of housing are permissible but, the Fair Housing Act prohibits land use and zoning decisions based on certain personal characteristics of the residents, including that they are individuals with disabilities.¹² For example, a city that permits the siting of fraternities and sororities in residential districts but not congregate living arrangements for people with disabilities imposes restrictions based on the personal characteristics of the residents and in doing so violates fair housing laws.

B. Imposing Special Restrictions On Disability Related Services Also Violates Fair Housing Laws.

Congregate living arrangements often have on site managers that provide residents with disabilities assistance with activities of daily living. This assistance provides the necessary support that makes it possible for many individuals with disabilities to live independently in the community as opposed to residing in an institutional setting.

Many group homes for individuals with disabilities also provide supportive services to the residences. Supportive services are those that are provided to residents of a housing development and that are based on the individual's particular needs and circumstances. These services include, but are not limited to, counseling, vocational training, case management, medical services, rehabilitative services, skills development, and recreational activities. These services may be essential for people with disabilities to live successfully in a congregate setting.

Some local governments impose special restrictions on congregate living arrangements that have an on-site manager or provide supportive services to its residents. However, the same restrictions are not imposed on families who have full time babysitters for their children or, have tutors or physical therapists at their home on a regular basis. Imposing additional requirements or restrictions on congregate living arrangements that provide assistance or supportive services is illegal because it is based on the characteristics of the residents, that they are individuals with disabilities who need these additional aids.¹³

C. Congregate Living Arrangements Cannot Be Characterized As A Business Nor Regulated As Such.

Some jurisdictions, contrary to fair housing laws, impose business license requirements on group homes for people with disabilities. There is an all too common misperception that a group home is transformed into a business because the residents pay money to live at the home. Court have found that simply because operation of a home may entail some management functions, such activities do not change the essential character of the home from a residence to a "business" or "commercial" use.

[M]aintaining records, filing accounting reports, managing, supervising, and providing care for individuals in exchange for monetary compensation are collateral to the prime purpose and function of a family housekeeping unit. Hence, these activities do not, in and of themselves, change the character of a residence from private to commercial.¹⁴

Group homes for individuals with disabilities purposefully function like a family providing the emotional and psychological support that is necessary for the residents to live successfully in an independent setting within the community. This congregate living arrangement for people with disabilities, which is a residential use, does not transform to a business use simply because services are provided at the premises and the residents pay to live there. A single family home remains a residential use despite the fact that a family employs personnel to maintain the premises or, the parents charge rent to a 21 year old daughter who works and lives at home. Fair housing laws require that group homes for people with disabilities be treated the same as other similarly sized and situated residences. Jurisdictions are prohibited from singling out congregate living arrangements for people with disabilities and imposing restrictions on them that are not also imposed on other like residences for non-disabled persons.¹⁵

D. Regulation of Congregate Living Arrangements By Default Will Likely Run Afoul of Fair Housing Laws.

The California Land Use and Zoning Campaign Report found that many cities and counties that did not address congregate living arrangements in their zoning ordinance mistakenly categorized this residential use with some other type of living arrangement and unlawfully denied housing opportunities to people with disabilities.¹⁶ The most common practice reported was to treat a group home for people with disabilities like a room and board, boarding house or, nursing home. This practice violates fair housing laws because it imposes illegal restrictions on the development, siting and operation of group homes for people with disabilities and, consequently, denies housing opportunities.

For example, in most jurisdictions, boarding and lodging houses offer temporary residency and, as such, are restricted to multi-family or commercial districts. Room and boards offer a similar temporary housing option for individuals and, are also usually restricted to multi-family or commercial zones. When a city or county applies these same siting restrictions to congregate living arrangements for people with disabilities it denies housing opportunities, often in compatible residential zones, to those protected by fair housing laws.

The effect of categorizing group homes for individuals with disabilities as nursing homes or hospitals, another practice reported by The California Land Use and Zoning Campaign Report, is that institutions are strictly regulated in most city and county codes. These uses require a conditional use permit for development and generally are restricted in siting to hospital or commercial zones. A conditional use permit approval process should not be required for the development, siting or use of congregate living arrangements for people with disabilities when the same is not imposed on families similarly sized and situated.¹⁷ And, a commercial or hospital zone is not the appropriate setting for a group home for individuals with disabilities that functions as a family.

Cities and counties in their zoning policies, practices and procedures must not erroneously classify congregate living arrangements for people with disabilities as any other use that results in restricting housing opportunities for people with disabilities and denying fair housing law protections.

IV. Reasonable Accommodation Must Be Provided Where Zoning Regulations Have an Adverse Impact or Discriminatory Effect on Housing For People With Disabilities.

The Fair Housing Act reasonable accommodation provisions offer cities and counties a means of addressing on a case by case basis the fair housing considerations that often arise in the application of land use and zoning regulations to congregate living arrangements for people with disabilities. Under fair housing laws, cities and counties have an affirmative duty to make reasonable accommodations in rules, policies and practices when it is necessary to afford the person equal opportunity in housing.¹⁸ While the Act intends that all people have equal access to housing, the law also recognizes that people with disabilities may need extra tools to achieve that equality. In the land use and zoning context, reasonable accommodation means providing people with disabilities or developers of housing for people with disabilities, flexibility in land use and zoning regulations and procedures, or waiver of certain requirements when it is necessary to achieve equal access to housing.¹⁹

As explained earlier, reasonable accommodation is an appropriate remedy where a zoning provision has a discriminatory effect. However, reasonable accommodation will not cure a provision that is discriminatory on its face or, intentionally discriminatory. Reasonable accommodation is appropriate and necessary where, for example, a local government restricts room and boards to mixed use or commercial zones but the jurisdiction

has a room and board specifically for people with disabilities. Here, the local government must make a reasonable accommodation by waiving this specific siting restriction and permitting the room and board for people with disabilities to locate in a multi-family or single family residential zone. To enforce the restriction against the group home and fail to make reasonable accommodation violates fair housing laws.

Technical assistance for jurisdictions on fair housing reasonable accommodation obligations and a model procedure for local zoning ordinances is available in a separate document.²⁰

V. Conclusion.

This discussion paper has identified a number of prevalent zoning practices that discriminate against congregate living arrangements for people with disabilities, either intentionally or in effect. Cities and counties may regulate by type of housing but may not restrict the development, siting and use of housing based on the personal characteristics of the residents, including that they are people with disabilities. Likewise, jurisdictions may not impose special restrictions because disability related services are provided to residents of congregate living arrangements. Additionally, congregate living arrangements for people with disabilities cannot be regulated as businesses because the use is residential. Finally, jurisdictions that mistakenly categorize group homes for people with disabilities as room and boards, boarding housing or nursing homes will likely violate fair housing laws by imposing illegal restrictions on the development, siting or use of housing for people with disabilities.

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² *Id.*, Audit Findings and Discussion.

³ 42 U.S.C. § 3601 et seq. The Act protects an individual with a physical or mental impairment that substantially limits one or more major life activities; anyone who is regarded as having such an impairment or; anyone who has a record of having such an impairment. The Act also protects individuals in recovery from drug or alcohol abuse. However, individuals currently using illegal substances are not protected under the law unless they have an independent disability. 42 U.S.C. § 3602(h); 24 C.F.R. § 100.201.

⁴ H.R. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988).

⁵ H.R. Rep. No. 711, 100th Cong., 2d Sess. 24 (1988).

⁶ Fair Housing and Employment Act, Cal. Govt. Code § 12900 et seq.

⁷ Stats. 1993 ch. 1277, § 18.

⁸ *Oxford House-C v. City of St. Louis*, 843 F.Supp. 1556 (E.D. Mo. 1994); *Potomac Group Home Corp. v. Montgomery County*, 823 F.Supp. 1285 (D. Md. 1993).

⁹ *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *Martin v. Constance*, 843 F.Supp. 1321 (E.D. Mo. 1994).

¹⁰ 42 U.S.C. § 3604(f)(3)(B). The Fair Housing Act creates an affirmative duty to provide reasonable accommodation in policies, practices and services when it may be necessary for people with disabilities to have equal opportunity to use and enjoy a dwelling.

¹¹ *Bangerter v. Orem City Corporation*, 46 F.3d 1491 (10th Cir. 1995). See also, discussion of reasonable accommodation, *infra*.

¹² *United States v. Village of Palatine*, 37 F. 3d 1230 (7th Cir. 1994); *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F.Supp. 614 (D.N.J. 1994); *Stewart McKinney Foundation Inc., v. Town Plan & Zone Comm'n of the Town of Fairfield*, 790 F.Supp. 1197 (D. Conn. 1992).

¹³ *United States v. California Mobile Home Park Management Co.*, 29 F.3d 1413 (9th Cir. 1994)(The Ninth Circuit found that fees having an unequal impact and imposed for permission to engage in protected conduct merit close scrutiny where a mobile home park sought to impose a parking fee for a home health care attendant necessary to assist a tenant with a disability.)

¹⁴ *Rhodes v. Palmetto Pathway Homes, Inc.*, 400 S.E. 2d 484 (S.C. 1991) citing *Gregory v. State Dept. of Mental Health Retardation and Hospitals and JT Hobby & Sons v. Family Homes*.

¹⁵ *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Commission of Town of Fairfield*, 790 F.Supp. 1197 (D. Conn. 1992); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992).

¹⁶ See n. 1.

¹⁷ *Marbrunak, Inc. v. City of Stow*, 974 F. 2d 43 (6th Cir. 1992); *United States v. Schuylkill Township*, 1991 WL 117394 (E.D. Pa. 1990) reconsideration denied (E.D. Pa. 1991).

¹⁸ See n. 10.

¹⁹ *Turning Point, Inc. v. Caldwell*, 74 F.3d 941 (9th Cir. 1996).

²⁰ A model reasonable accommodation procedure for local governments to include in their zoning ordinance for compliance with state and federal fair housing laws is available from Mental Health Advocacy Services, Inc., 1336 Wilshire Blvd., Suite 102, Los Angeles; telephone (213) 484-1628.