MEMORANDUM OF LAW

DATE: April 13, 1994

TO: Ernest Freeman, Director, Planning Department

FROM: City Attorney

SUBJECT: Residential Care Facility Ordinance

This memorandum has been prepared in response to a number of questions you have raised concerning the impact of the Fair Housing Act Amendments of 1988 ("FHAA") and the Americans with Disabilities Act ("ADA") on the City's ability to regulate residential care facilities.F

This memorandum will not address the impact of the ADA on the City's ability to regulate residential care facilities. The ADA is a comprehensive federal law which prohibits discrimination against "disabled persons" with respect to employment, public services, public accommodations and telecommunications. (42 U.S.C. section 12101 et seq.) The ADA primarily addresses employment and accessibility concerns. All of the cases we have found to date which considered challenges to zoning ordinances that regulate group homes have focused only on the provisions of the FHAA.

In summary, you ask the following questions:

1. Does the FHAA affect the City's definition of "Residential Care Facility"?
2. Does the FHAA impact the City's ability to regulate residential care facilities through the conditional use permit process?
3. Would the City's requirement that residential care facilities be located at least a quarter mile from other similar facilities be upheld by a court?
4. What impact does AB 2244 have on the City's ability to regulate residential care facilities, particularly through the conditional use permit process?

ANSWERS

1. Handicapped persons often reside in the types of facilities described in Municipal Code section 101.0101.96. Therefore such facilities would be subject to the protection of the provisions of the FHAA. In addition, the City's definition of "Residential Care Facility" should

reflect the same language found in the FHAA's definition of "Handicap."

2. Group homes should not be subjected to more stringent requirements than other similar types of living arrangements. Moreover, ordinances that subject group homes to procedural requirements, such as obtaining a conditional use permit, not required of other similar type living arrangements could be considered to have a discriminatory effect on handicapped persons.

3. The most cautious approach is not to impose any separation requirement until further cases are decided. The City could also impose the same separation requirement imposed by the state for licensed facilities (i.e., 300 feet separation). Finally, should the City wish to maintain its current quarter mile separation requirement we suggest that the City consider the points identified in this memorandum.

4. A person who alleges that the City has discriminated against the disabled through its land use practices could now argue that the City has violated Government Code section 12955 as well as the provisions of the FHAA.

BACKGROUND

In 1988, the FHAA was adopted by Congress to prohibit discrimination against handicapped persons with respect to housing opportunities. The FHAA made it unlawful for anyone "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." (42 U.S.C. section 3604(f)(1).)

In addition, discrimination now 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." (42 U.S.C. section 3604(f)(3)(b).)

Since handicapped individuals often reside in residential care facilities, a number of questions have been raised regarding the impact of the FHAA on the City's ability to impose restrictions on such facilities. The City currently requires an operator of a residential care facility of seven or more beds to obtain a conditional use permit prior to locating within the City. In addition, residential care facilities must be located at least a quarter mile from other similar facilities. (Municipal Code section 101.0581, referred to herein as the "Residential Care Facility Ordinance.")

ANALYSIS

I. Does the FHAA affect the City's definition of "Residential

Care Facility"?

You ask whether the FHAA affects the City's definition of "Residential Care Facility." Municipal Code section 101.0101.96 defines a residential care facility to include "any building or place which is maintained and operated to provide sleeping accommodations, with or without food service(s) . . . for mentally disordered or otherwise disabled persons or dependent persons, or persons in rehabilitation or recovery programs . . . ."

The FHAA defines "Handicap" as the following:

> (1) A physical or mental impairment which substantially limits one or more of such person's major life activities;
>
> (2) a record of having such an impairment; or
>
> (3) being regarded as having such an impairment, but such term does not include current illegal use of or addiction to a controlled substance.

(42 U.S.C. section 3602(h).)

In addition to persons with mental illnesses, developmental disabilities and physical handicaps, the courts have determined that the following persons fall within the definition of "Handicap" as provided by the FHAA: HIV-infected persons (Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Commission of the Town of Fairfield, 790 F.Supp. 1197, 1209 (D. Connecticut 1992)); persons with alcohol and drug addiction (Oxford House, Inc. v. Township of Cherry Hill, 799 F.Supp. 450, 459 (D. New Jersey 1992)); and the elderly (Potomac Group Home v. Montgomery County, MD., 823 F.Supp. 1285, 1295 (D. Maryland 1993)).

Handicapped persons often reside in the types of facilities described in Municipal Code section 101.0101.96. Therefore such facilities would be subject to the protection of the provisions of the FHAA.

This also means that the City could run the risk that a court of competent jurisdiction would find that the City is in violation of the FHAA if residential care facilities were allowed to be established for some groups of handicapped persons but not for other groups who also fall under the definition of "Handicap." For example, the City's current definition of "Residential Care Facility" makes no reference to groups such as HIV-infected persons, who are also considered handicapped under the FHAA. If residential care facilities for HIV-infected

persons are treated differently than similar facilities for other handicapped persons, a court may find that the City has limited the housing opportunities of HIV-infected persons or that the City has discriminated against this particular group. Therefore we suggest that Municipal Code section 101.0101.96 be modified to include the FHAA's definition of "Handicap" so that all groups covered by the FHAA are treated the same.

II. Does the Fair Housing Act impact the City's ability to regulate residential care facilities through the conditional use permit process?

The FHAA may have an impact on the City's ability to regulate residential care facilities through the conditional use permit process. Federal case law sets forth two methods by which a person may prove that an ordinance or zoning decision violates the FHAA. First, a person may prove that a decision or ordinance violates the FHAA because the decision or ordinance was motivated by a discriminatory purpose or that there has been intentional discrimination against handicapped persons. Second, a person may prove a violation of the FHAA by showing that the decision or ordinance has a discriminatory effect or "disparate impact" on handicapped persons, without having to establish an actual intent to discriminate. Once discrimination has been established, the City has the heavy burden of demonstrating some legitimate nondiscriminatory reason for the action and that no less discriminatory alternatives were available. Oxford House, Inc. v. Township of Cherry Hill, 799 F.Supp. 450, 461.

In addition, the courts have interpreted the "reasonable accommodation" provision of the FHAA to mean that local governments must be flexible when imposing zoning and building code restrictions on group homes and when reviewing applications for permits, such as conditional use permits. United States v. Commonwealth of Puerto Rico, 746 F.Supp. 2d 220, (D. Puerto Rico 1991). See also, Oxford House, Inc. v. Township of Cherry Hill, 799 F.Supp. 450, 461.

a. Intentional discrimination.

In several cases, the courts have invalidated zoning decisions upon finding that the local public officials had actually intended to discriminate against handicapped persons. The courts looked at the statements made by the public officials, the impact the opposition had on the final decision and the written policies created by local agencies to determine whether there had been intentional discrimination. Baxter v. City of Belleville, 720 F.Supp. 720 (S.D. Illinois 1989). See also, Oxford House-Evergreen v. City of Plainfield, 769 F.Supp. 1329, 1343 (D. New Jersey 1991), and Casa Marie, Inc. v. Superior Court of Puerto Rico, 752 F.Supp. 1152 (D. Puerto Rico 1990).

In Baxter, the court found that there was clear evidence to support an applicant's claim that the fear of AIDS was a motivating factor in the city's decision to deny a conditional use permit to establish a hospice. The city council was primarily concerned with the transmissibility of AIDS, a decline in property values and the proximity of the hospice to a school. The district court found that this was sufficient evidence to show that the city had intentionally discriminated against the applicant when the city denied the permit. Baxter v. City of Belleville, 720 F.Supp. 720, 732.

Naturally, whenever a decision is made on an application for a conditional use permit, the decision maker should focus only on legitimate regulatory concerns. It should be kept in mind that the courts will look at statements made by the decision maker and the amount of neighborhood opposition to the permit application when determining whether the decision maker has intentionally discriminated against a particular applicant.

b. Discriminatory impact.

A court may also determine that a zoning decision or an ordinance is invalid if it has a discriminatory effect on handicapped persons. A number of courts have held that ordinances that impose a stringent requirement on group homes but not on other similar types of living arrangements, have a discriminatory effect on handicapped persons because such persons are more likely to live in a group home setting. Oxford House, Inc. v. Township of Cherry Hill, 799 F.Supp. 450. See also, Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43 (Sixth Cir. 1992). (In Marbrunak, the circuit court held that requiring group homes to comply with stringent fire safety regulations that were not required of single family dwellings was a violation of the FHAA.)

In Oxford, the district court issued an injunction preventing the Township of Cherry Hill from interfering with seven recovering alcoholics and substance abusers renting a single family home within a residential zone. Under the Cherry Hill ordinance people who wanted to rent a home within the Township's residential zone were required to first obtain a certificate of occupancy. Individuals related by blood or marriage were automatically granted a certificate of occupancy by the Township. However, groups of unrelated individuals were required to prove at a public hearing that they met a standard of permanency and stability. Oxford House, Inc. v. Township of Cherry Hill, 799 F.Supp. 450, 455.

The court held that Cherry Hill's ordinance violated the FHAA because the ordinance imposed a more stringent requirement on groups of unrelated individuals seeking to rent a single

family home than on groups related by blood or marriage. The court reasoned that people who are handicapped by alcoholism or drug abuse are more likely to need a living arrangement in which groups of unrelated individuals reside together. Therefore, Cherry Hill's ordinance had a discriminatory effect on handicapped people. Id. at 461.

Moreover, ordinances that subject group homes to procedural requirements that are not required of other similar type living arrangements have been found to have a discriminatory effect on handicapped persons. Potomac Group Home v. Montgomery County, 823 F.Supp. 1285. See also, Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Commission of the Town of Fairfield, 790 F.Supp. 1197.

In Potomac, a county ordinance required a prospective operator of a group home to apply for a "license." The prospective operator was required to notify neighboring property owners and civic organizations of its proposed group home site. In addition, the operator was subjected to evaluation by a program review board at a public hearing. Both of these requirements were not imposed upon other types of living arrangements. Potomac Group Home v. Montgomery County, 823 F.Supp. 1285, 1289.

The Maryland court held that the neighborhood notification requirement was invalid on its face because it was not imposed on other residential units. In addition, the court held that the review board hearings had a discriminatory effect on handicapped persons in violation of the FHAA. The court reasoned that other groups were not subjected to this kind of evaluation at public hearings and community prejudice often dominated the hearings. Id. at 1297.

In another case, the court held that requiring only the operator of a group home for HIV-infected persons to apply for a "special exception" in order to locate in a residential community was a violation of the FHAA. The Connecticut court was concerned that HIV-infected persons were held up to public scrutiny while unrelated non-HIV infected persons were not. Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Commission of the Town of Fairfield, 790 F.Supp. 1197, 1219.

Therefore, the City should treat group homes in the same manner as it treats other residential uses involving similar functions and densities. For example, if an owner of an apartment building is not required to apply for a conditional use permit in order to locate in a particular zone, then the City should not require an operator of a group home to apply for a conditional use permit in order to locate in the same zone.

c. Reasonable accommodation.

A number of courts have interpreted the "reasonable accommodation" provision of the FHAA to mean that local governments must be flexible when imposing zoning and building code restrictions on group homes for handicapped persons and in reviewing applications for special use permits, variances and other types of approvals.F

A number of cases have explained that accommodation is unreasonable if it imposes undue financial and administrative burdens or requires a fundamental alteration in the nature of a program. Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979). See also, Alexander v. Choate, 469 U.S. 287, 300 n.20, 105 S.Ct. 712, 720 n.20, 83 L.Ed.2d 661 (1985) and Nathason v. Medical College of Pennsylvania, 926 F.2d 1368, 1384 (3d Cir. 1991).

The courts examined whether the restrictions are genuinely necessary in light of the effect a group home might have on the community. United States v. Commonwealth of Puerto Rico, 746 F.Supp. 2d 220 (D. Puerto Rico 1991). See also, Oxford House, Inc. v. Township of Cherry Hill, 799 F.Supp. 450, 461.

In Commonwealth of Puerto Rico, the court held that the FHAA's "reasonable accommodation" provision would require that the Commonwealth's zoning agency waive parking requirements that were a basis for denying a variance to a group home for the handicapped. The court reasoned that the facility's parking needs were no greater than what an average family might need living in the same house. United States v. Commonwealth of Puerto Rico, 746 F.Supp. 2d 220, 224.

Local agencies are required to be flexible when imposing various zoning and building code restrictions on group homes for the handicapped and when reviewing applications for special use permits, variances, and other types of governmental approvals. This means that, at the very least, the City has a responsibility to make reasonable accommodations whenever possible to facilitate the location of a group home for handicapped persons within the City. Finally, the City should always consider whether an ordinance may impact housing opportunities for "handicapped" persons.

III. Would the City's requirement that residential care facilities be located at least a quarter mile from other similar facilities be upheld by a court?

We cannot predict with absolute accuracy whether the City's current quarter mile separation requirement would survive a challenge under the FHAA. (Municipal Code section 101.0581.) Not much has developed to help us evaluate this type of restriction on group homes. Moreover the two cases which did

address this issue, reached different conclusions.

The district court, in Familystyle of St. Paul v. City of St. Paul, 728 F.Supp. 1396 (D. Minnesota 1990), upheld a Minnesota statute which imposed a 1,320-foot separation rule between group homes. In Familystyle, state-licensed group homes for mentally ill and mentally retarded persons were required to be located at least a quarter mile from other state-licensed residential facilities, unless a special use permit is granted by the local government. Id. at 1398.

The court determined that the Minnesota statute had a discriminatory impact on handicapped persons. However, the court found that the state had a compelling governmental interest in the de-institutionalization of mentally ill persons and that the separation requirement directly served that interest. Id. at 1404.

However in Horizon House Developmental Services, Inc. v. Township of Upper Southampton, 804 F.Supp. 683 (E.D. Pa. 1992), the Pennsylvania district court did not uphold an ordinance adopted by the Township of Southampton, which imposed a 1,000-foot spacing requirement on group homes. The Pennsylvania court held that the ordinance violated the FHAA. The district court reasoned that the ordinance was invalid because it restricted the location where group homes could be established resulting in severely limiting the number of handicapped people that could live in Southampton. Id. at 694.

However the decision in Horizon House could be distinguished in that there were a number of problems with that ordinance. First, there was substantial evidence of intentional discrimination by the legislative body against handicapped persons. Second, there was nothing in the legislative record which justified the adoption of the ordinance. Finally, the ordinance adopted by Southampton had the effect of excluding disabled people from living in the area. Id. at 697.

Moreover, it has been well established that cities may apply separation requirements for certain uses. The court in Floresta, Inc. v. City Council, 190 Cal. App. 2d 599 (1961), upheld an ordinance prohibiting bars and other businesses serving alcoholic beverages from locating within a certain distance from other uses in order to preserve the community's character and quality of life.

Separation requirements have also been consistently upheld by the Supreme Court for location of adult entertainment businesses within a community, despite first amendment considerations. Young v. American Mini Theaters, 427 U.S. 50 (1976). In Young, the Supreme Court held that such a regulation was valid when it addressed legitimate land use concerns and left

a reasonable number of locations available to accommodate such uses. See also, City of Renton v. Playtime Theaters, Inc., 106 S.Ct. 925 (1986). (The Supreme Court held a regulation valid even though it effectively confined such uses to a 520-acre area of the City.)

But until more decisions are reached with respect to the validity of separation requirements for residential care facilities, we cannot predict whether the next court would uphold a separation requirement. In view of the ambiguity surrounding this issue, certainly the most conservative approach is not to impose any separation requirement for residential care facilities until further cases are decided.

However, in the present case, the City has already established its own separation requirement. Should the City wish to maintain its current separation requirement, we suggest that the following points be remembered. First, separation requirements should not result in narrowing the number of sites available within the City for group homes which would restrict housing opportunities for handicapped persons. Second, singling out group homes as the only type of use with a separation requirement could be considered to have a discriminatory impact on handicapped persons. Please note that even if the City was to comply with these suggestions, it is still possible that a court may find that the City's separation requirement has a discriminatory impact on handicapped persons.

Finally, the City may want to consider amending its current separation requirement to follow the separation requirement imposed by the state. California has adopted a separation requirement pursuant to Health and Safety Code section 1520.5 which provides that the state will not issue a license to a new residential care facility that intends to locate within 300 feet of a similar facility. The state legislature has explained that the separation requirement prevents an over concentration of residential care facilities within residential neighborhoods.

There has been some speculation by legal commentators that cities may be preempted from requiring that licensed facilities locate a greater distance than 300 feet from other similar facilities. ("Miscellaneous Limitations on Zoning Powers" by Joan R. Gallo, City Attorney's Departmental Spring Meeting League of California Cities, May 5-7, 1993, page 12. We have attached a copy for your convenience.) Although we find no case law that has yet to address this issue, we felt compelled to alert you to this potential problem. Again the more cautious approach would be to impose a 300-foot separation requirement on licensed facilities.

IV. What impact does AB 2244 have on the City's ability to

regulate residential care facilities, particularly through the conditional use permit process?

AB 2244 amended Government Code section 12955 to make it unlawful to discriminate through the use of land use practices because of race, color, religion, sex, familial status, marital status, disability, national origin, or ancestry. Discriminatory actions include the denial of use permits and restrictive zoning ordinances. (Government Code section 12955(L).)

You asked what impact this legislation has on the City's ability to regulate residential care facilities. Certainly, this means that someone who alleges that the City discriminates against the disabled through its land use practices could now argue that the City has violated Government Code section 12955 as well as the provisions of the FHAA.

However, AB 2244 does not seem to prohibit the City from enacting zoning ordinances which may have some impact on residential care facilities as long as the City does not use its land use authority to "discriminate" against persons with disabilities. Naturally, we would suggest that such facilities be treated in the same manner as other similar uses and that the City follow the provisions of the FHAA.

CONCLUSION

Based upon the above analysis we believe that group homes should not be subjected to more stringent requirements than other similar types of living arrangements. In addition the City should be flexible when imposing various zoning and building code restrictions on group homes for the handicapped and when reviewing applications for special use permits, variances, and other types of governmental approvals. Should you have any further questions please let us know.

JOHN W. WITT, City Attorney
By
Ann Y. Moore
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