

City Attorneys' Spring Conference-California League of Cities
Date: May 4, 2007
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City Attorney, City of Newport Beach

PRESENTATION OUTLINE

INTRODUCTION: Case study of situation in Newport Beach, and how it developed.

1. **Federal restrictions** on cities' ability to regulate alcohol and drug recovery facilities, sober living homes, and community care facilities. *The reasoning of federal statutes and cases applies to all handicapped housing groups, whether they are licensed homes for the developmentally or physically disabled, licensed alcohol and drug facilities or sober living homes not subject to licensure.*
 - a. **Federal Statutes and Regulations** – Fair Housing Act Amendments, Americans with Disabilities Act, Code of Federal Regulations
 - i. Where is “handicapped” defined? (Code of Federal Regulations and federal case law)
 - ii. Relevant provisions of FHAA – 42 USC § 3604(f)
 - iii. Occupancy restrictions exempt from FHAA – 42 USC § 3607(b)(1)
 - b. **Federal Cases** – Courts interpreting the federal statutes above overturn city zoning restrictions if **any** of the following elements are found:
 - i. Discriminatory Intent,
 - ii. Discriminatory or Disparate Impact; or
 - iii. Failure to make a “reasonable accommodation” or exception from zoning laws to accommodate needs of disabled to acquire housing
2. **State restrictions** on cities' abilities to regulate alcohol and drug recovery facilities, sober living homes, and community care facilities.
 - a. **California Fair Employment and Housing Act (California Government Code § 12955)** – Contains provisions similar to the FHAA and prohibits housing discrimination based on disability or familial status
 - b. **California Health and Safety Code § 17760 et. seq. (Department of Alcohol and Drug Programs)** – applies only to facilities licensed by the California Department of Alcohol and Drugs, generally referred to as “ADP.”)
 - c. **California Health and Safety Code § 1500 et. seq. – The Community Care Licensing Act** – applies only to facilities licensed by the California Department of Social Services. Distancing required for some facilities.

3. Issues That Confuse Residents and Enforcement Officers, or What is it? How can you tell?

- a. **Size matters** - When is a “six-or-fewer facility” not a six-or-fewer facility? (When it should be licensed as an integral facility? Health and Safety Code section 11834.09 and 9CCR section 10508)
- b. **Group homes without federal or state protection**
- c. **Privacy Issues** – Privacy protection attaches to residents of ADP-licensed facilities, but does not attach to residents of a sober living home. No privacy protection for parolee homes? There is some question whether privacy protection might attach to a sex offender when he or she is in an ADP-licensed facility.
- d. **Distinguishing a sober living home from an unlicensed recovery facility** –
- e. **Distinguishing when a Community Care License is required for a sober living home or an alcohol and drug recovery and treatment facility.** –

4. Local Control Issues,

a. Land use issues??

- i) Who is in charge? State Department of Alcohol & Drug Programs? Community Care Licensing? Department of Corrections?
- ii) FEP v. CUP – Why using the CUP process is problematic for cities
- iii) Distancing and over concentration v. “fair share” or local need
What is the local demand and what are the impacts that support distancing?
What do the courts say about it? What does state law say about it?

c. What local regulations are applicable?

–must group homes conform to city ordinances applicable to all residential uses, or request and receive a reasonable accommodation?

Attachments:

1. **January 2007, City of Newport Beach; Background summary of state and federal law affecting residential care and rehabilitation facilities;**
2. **Federal and State Statutes and Cases Limiting local regulations of Residential Recovery Facilities.**

**Background summary of state and federal law
affecting residential care and rehabilitation facilities**

City of Newport Beach – January, 2007

Understanding the legislative and regulatory climate that surrounds residential recovery homes and other residential care and group living facilities begins with awareness of the different types of group residential facilities which may provide housing for handicapped residents in all cities in California. It also requires an understanding of the state and federal statutes providing protection for handicapped residents (Because “handicap” is partially defined by the Federal Fair Housing Act and the Americans with Disabilities Act as (1) a physical or mental impairment which (2) substantially limits (3) one or more of a person’s major life activities, persons recovering from alcohol and drug dependencies are considered to be handicapped under federal law.) Finally, it requires some familiarity with federal cases that have interpreted the federal statutes.

For organizational purposes, this summary will focus first on the types of residential care and recovery facilities likely to be found within the City of Newport Beach, and the state laws that regulate them. Limitations on the City’s ability to regulate the facilities will be noted under the individual facility type. Whenever a facility houses handicapped residents, however, the Fair Housing Act and Americans with Disabilities Act will generally place an additional umbrella of protection over the facility in addition to that provided by state law.

- **Residential care and treatment facilities** are **licensed** residential facilities in which persons recovering from drug and alcohol dependencies are treated and supervised by facility staff. The license is granted by the California Department of Alcohol and Drug Programs (which generally refers to itself as “ADP”). A licensed residential care and treatment facility may have any number of residents, so long as that resident capacity is approved and licensed by the ADP, and the number of total occupants does not exceed what is allowed by the California Building Code. The ADP also approves the number of staff members which live onsite; this may greatly expand the number of persons residing at the facility (total occupancy may still not exceed the number allowed in that particular facility by the California Building Code.) (For California law dealing with licensed facilities, see California Health and Safety Code § 11760 et seq.) These homes may offer a variety of treatment levels. For example, some are licensed to provide detoxification, and some are not.

A licensed recovery or treatment facility in California *must* be licensed by the ADP. There are a number of statutory fines for operating without a license, including a \$200/day fine for any facility which continues to offer treatment without a license after ADP issues its Notice of Violation. *Certification* by the ADP is optional, and requires that the applicant provide more qualifications or services than the basic license requires. For example, representatives of ADP

have told the Newport Beach City Attorney's Office that an ADP license to provide detoxification only requires that a staff member onsite be certified in CPR and first aid. Certification requires substantially more in the way of staff qualifications. Certification is supposed to provide more quality control for the ADP, and enables the facility operator to bill its residents' insurance carriers, according to the ADP.

- **Licensed recovery or treatment facilities with six or fewer residents** must be treated as a single-family use in California, and no zoning requirement may be applied to that facility that is not applied to other single-family residences in the same zone. "Six or fewer persons" does not include the licensee or members of the licensee's family, or persons employed as facility staff, who may also live onsite. This means that it is possible for substantially more than six persons to reside in a "six or fewer" facility and still be protected as a single-family residential use. In addition, a "six or fewer" facility may not be charged any business taxes, local registration fees, use fees, or other fees to which other single-family homes are not subject. (California Health and Safety Code §§ 11834.20, 11834.22, 11834.23.) *The City of Newport Beach classifies these facilities as "Residential Care, Limited" in its Zoning Code. They may be located in any residential zone in the City.*
- **Licensed recovery or treatment facilities with seven or more residents** do not have to be automatically treated as a single-family use under state law. *State law* leaves the larger facilities somewhat more subject to local zoning control. However, *federal statutes and case law* remove most of the control that states have left to cities by requiring cities to make exceptions from their usual zoning requirements as a "reasonable accommodation" of the residents' handicap. (More on this in the section dealing with the Federal Fair Housing Act, below.) *The City of Newport Beach classifies these facilities as "Residential Care, General" in its Zoning Code. They may be located in R-1.5, R-2, and MRF residential zones but must first apply for and receive a Federal Exception Permit (FEP) from the City.*
- **Sober living homes** are homes **which do not require an ADP license**, in which residents are persons recovering from alcohol and drug dependencies who need a sober living environment to maintain sobriety. Currently, there is no state law regulating sober living homes, *but there is substantial federal law protecting them (see discussion of Fair Housing Act and interpreting caselaw, below.)* In order to be classified as a sober living home, no treatment can be given onsite. If treatment is given onsite, the home is a recovery or treatment facility operating without a license.

A variety of living situations are currently classified as "sober living homes." A sober living home might operate as a "local franchise" of a national sober living

network such as Oxford House, in which individuals recovering from alcoholism or addiction live together and share household expenses and chores for a limited period of time. The home might operate independently, or be owned and operated by a non-profit or for-profit entity.

Residents of a sober living facility may have peer-led group support meetings at the home without licensing being required. However, if a counselor comes onsite and gives counseling to the residents or other recovery treatment is offered in the home, the sober living home is supposed to obtain a license from ADP. There is ongoing discussion among legislators, cities, the ADP and recovery facility industry groups about the possibility of requiring licensing for sober living homes that offer some program offerings and supervision rather than just a sober living environment. Draft legislation has referred to this type of home as “**adult recovery maintenance facilities**” to differentiate them from pure sober living environments, but no regulations for these facilities are currently in place.

- **Sober living homes with six or fewer residents** are not addressed in state law, but federal case law gives them a great deal of protection, and requires cities to make exceptions from their usual zoning requirements as a “reasonable accommodation” of the residents’ handicap. *The City of Newport Beach classifies these facilities as “Residential Care, Limited” in its Zoning Code. Because of the protections they enjoy under federal law, they may currently be located in any residential zone in the City.*
- **Sober living homes with seven or more residents** are not addressed in state law, but federal case law gives them a great deal of protection, and requires cities to make exceptions from their usual zoning requirements as a “reasonable accommodation” of the residents’ handicap. *The City of Newport Beach classifies these facilities as “Residential Care, General” in its Zoning Code. They may be located in R-1.5, R-2, and MRF residential zones but must first apply for and receive a Federal Exception Permit (FEP) from the City.*
- **Community Care Facilities** are licensed facilities in which nonmedical care is given to persons who, for a variety of reasons, need care, assistance and frequently supervision to sustain the activities of daily living. A community care facility may be non-residential, providing day care to adults or children. Other community care facilities offer residential services. These may include group homes for mentally ill or developmentally disabled children and adults, foster care homes, or group homes for adolescents. *Community Care Facilities in California are licensed through the California Department of Social Services, not the ADP. Community Care Facilities are regulated by the Community Care Act, which is located in the California Health and Safety Code in Sections 1500 et seq. (See California Health and Safety Code Section 1502 for more details.) The Community Care Act expressly does not apply to sober living homes or*

alcoholism or drug abuse recovery or treatment facilities. Cal. Health & Safety Code Section 1505(i) and (j).

- **Any residential community care facility with six or fewer residents** must be treated as a single-family use in California, and no zoning requirement may be applied to that facility that is not applied to other single-family residences in the same zone. (Cal. Health & Safety Code Section 1566.2)
- **In Health and Safety Code Section 1520.5, the California Legislature declared a policy against overconcentration of residential care facilities which “impair the integrity of residential neighborhoods.” However, this policy is applied only to three types of community care residential facilities. Under Health and Safety Code Section 1520.5, the Department of Social Services may not grant a new license for any of these three types of facilities if they propose to locate within 300 feet of an existing residential care facility. These three types of facilities are:**
 - **Group homes for troubled adolescents** – *overconcentration not permitted.* (Note: if the group home is providing alcohol or drug treatment to the minor residents, it will also require a license from ADP.)
 - **Adult care facility** – 24-hour residential care and supervision for adults ages 18-64 (not senior facilities) located in the community. Residents are usually mentally ill, developmentally disabled, or suffering from Alzheimer’s. *Overconcentration not permitted.*
 - **Small family home** – Home in which up to six children are given 24-hour residential care by home’s resident licensee(s). Social Services reports that children in these homes are usually medically fragile. *Overconcentration not permitted.*
- **The Department of Social Services reports that, unlike the ADP, they require any facility housing seven or more residents to obtain local zoning clearance prior to issuing a license.**

Federal Laws Affecting Residential Rehabilitation Facilities

The Fair Housing Act Amendment (42 U.S. Code Sections 3601-3631) (FHAA) protects handicapped individuals from discrimination by government entities and sellers or renters of property. No city regulation may:

- be enacted for discriminatory reasons, or involve discriminatory treatment of the handicapped;
- have a disparate impact or effect on the availability of handicapped housing; or
- fail to provide reasonable accommodation of the needs of the handicapped for housing opportunities

The Code of Federal Regulations includes alcoholism and drug addiction not caused by current use of an illegal substance in its definition of “handicapped” at 24 CFR Section 100.201(a)(2).

Federal courts across the country have applied the statutory provisions of the FHAA to situations in which cities have attempted to prevent a sober living home or licensed residential recovery or treatment facility or other group home from opening in a residential zone. Facility operators have also challenged city attempts to limit the number of residents to fewer than the operators found financially feasible, when allowing the operators’ preferred number of residents would violate a city zoning code. The cities nearly always lost the cases. The reasons were nearly always either because the city’s public record showed evidence of discriminatory intent on the part of the city or its residents, or because the city declined to make an exception from its standard zoning policies and practices to accommodate the handicap in question. One court even struck down a state agency’s attempts to enforce state-imposed distancing restrictions between facilities. *Larkin v. State of Michigan Department of Social Services*, 819 F.Supp.1179 (Court of Appeals, Sixth Circuit 1996)

The following pages provide more detailed federal law information, from an article titled “A Place to Call Home,” written by the State of Tennessee’s Fair Housing Council. The full text of this article is available on the City of Newport Beach’s website under “General Information,” “Group Homes and Residential Care Facilities.”

Before 1988, the laws regarding discrimination in housing against people with disabilities was a patchwork of state laws and local ordinances. Providers of housing for people with disabilities had some success in fighting local governments’ discriminatory zoning decisions by challenging them on constitutional grounds in federal court. Others could sue on the basis of laws in their own states or cities.

However, in 1988 Congress passed the Fair Housing Amendments Act of 1988, which amended the federal Fair Housing Act to add protection from discrimination on the basis of “handicap” (which is legally synonymous with “disability,” the term we will use throughout this guide) and familial status, which means the presence or anticipated presence of children under 18 in a household.

The Act defines “handicap” 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.⁵

For purposes of this discussion, there are two major substantive provisions with special relevance to the siting of housing for people with disabilities. First, the Act broadly prohibits discrimination against people with disabilities by making it illegal to refuse to rent, sell or negotiate; to discriminate in “terms and conditions”; to lie about the availability of housing; or to “otherwise make unavailable or deny” housing to them. Second, the Act places an affirmative responsibility on local governments to provide a “reasonable accommodation” to housing for people with disabilities, usually in the form of a zoning change where necessary. We will examine these two broad categories in more detail.

Prohibitions Against Discriminatory Behavior

The Fair Housing Act prohibits a range of practices that would prevent a person with a disability from obtaining housing or engaging in a housing-related transaction because of that person’s disability. Simply stated, the law does not allow housing providers to shun people simply because they have a disability. Individuals are protected from such practices as discriminatory advertising, lying about the availability of housing, discriminatory financing or insurance underwriting, intimidation and harassment.

In the context of housing for groups of people with disabilities, this kind of discrimination has taken the form of private restrictive covenants or zoning regulations that specifically prohibit housing for people with disabilities. For example, laws that single out and disadvantage housing for people with disabilities can be violations of the Fair Housing Act. Similarly, an insurance company would be in violation of the Act if it refused to insure a home simply because people with disabilities would be living there. We will examine further examples of these kinds of discrimination below.

Reasonable Accommodation

A “reasonable accommodation” is a modification or waiver of “rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling.” Under this theory, housing for people with disabilities is entitled to a favored status, because it must reasonably be accommodated in ways that housing for people without disabilities need not be.

On an individual basis, a reasonable accommodation might entail an

apartment complex allowing a blind person to have a guide dog even if the complex has a policy against pets. But as it applies to the siting of housing for people with disabilities, the Act's requirement of a reasonable accommodation has been held to entitle housing for people with disabilities to locate in an area zoned for single-family homes, even though other unrelated groups, such as students, may legally still be barred from such areas.

Case Law Involving Discrimination Against Housing for People with Disabilities

As one might expect, much litigation followed passage of the 1988 amendments to the Fair Housing Act as providers of housing for people with disabilities sought to challenge such barriers to siting as "single-family" zoning that prevents a group home from locating where only groups of related people had been permitted; spacing requirements prohibiting housing for people with disabilities within a certain distance of existing housing; special safety and health rules that apply only to group homes; burdensome procedural requirements for group homes; state enforcement of private restrictive covenants, and protests by neighbors. We will examine each of these major areas of litigation in more detail.

Single-Family Zoning

Plaintiffs seeking to challenge the discriminatory zoning decisions of municipalities have had broad success in court. One of the most significant recent cases was *City of Edmonds v. Oxford House, Inc.* The group home in this case was occupied by ten to twelve recovering drug addicts. The home had been denied permission to remain in a neighborhood zoned for single families, which Edmonds' zoning ordinance defined as an unlimited number of people who are related or up to five unrelated adults. Oxford House sued when the city failed to make a reasonable accommodation by allowing the group home to remain in the neighborhood.

The city relied on language in the Fair Housing Act that exempted "reasonable occupancy restrictions" from scrutiny, but the Supreme Court ruled in favor of Oxford House, finding that Edmonds' rule was not an occupancy restriction, since occupancy restrictions "ordinarily apply uniformly to all residents of all dwelling units. Their purpose is to protect health and safety by preventing dwelling overcrowding." On the other hand, under the restriction Edmonds tried to use to keep Oxford House out of a single-family residential zone, "(s)o long as they are related 'by genetics, adoption, or marriage,' any number of people can live in a house."

Other cases have involved the failure of municipalities to waive zoning regulations because of political pressure from neighborhood groups. For example, in *Oxford House, Inc. v. Town of Babylon*, the city in question had sought to evict an Oxford House facility from a single-family zone and denied Oxford House's request for a reasonable accommodation in the form of a modification in the city's definition of "family." The court held in that case that Oxford House's request was reasonable and that the city's failure to accommodate it was a violation of the Fair Housing Act.

Unless a home for people with disabilities is entitled to move into a neighborhood as a matter of right because it is consistent with the existing zoning, providers should seek a special-use permit, variance or some other change in zoning before locating.

In *United States v. Village of Palatine*, a group home sought to locate in a single-family residential zone without first seeking a variance, fearing that the required public hearing would ignite a "firestorm of vocal opposition" that would be harmful to the residents. The operators of the home argued that the routine administrative hoops placed before them constituted illegal discrimination and that the city should waive them as a reasonable accommodation. However, the court held that the home's interest in shielding its residents from public protest "does not outweigh the Village's interest in applying its facially neutral [zoning] law to all applicants for special use approval." The court also held, however, that a home need not pursue a zoning variance when the variance process is required of housing for people with disabilities but not other housing, when the procedure is applied in a discriminatory way, or when the process is "manifestly futile" as evidenced by the fact that a city may be in the habit of rejecting requests for zoning relief because of community opposition.

A municipality is not required to grant a variance or some other zoning relief in every case. Representatives of a group home must show that a reasonable accommodation is "necessary" and that without the accommodation it would be denied the opportunity to enjoy equal housing in the community of its choice. Further, the municipality can reject a request for zoning relief if it would constitute a "fundamental alteration" or "undue burden." The opposition of neighbors is not enough justification. However, in one case a court held that a city could reject a rezoning request if the housing sought to be located would cause traffic congestion or demands on drainage or sewerage.

(For purposes of brevity, article excerpt ends here – see website for more details and further information.)

Prepared for the City of Newport Beach
by the Newport Beach City Attorney's Office

Federal and State Statutes and Cases
Limiting Local Regulation of
Residential Recovery Facilities

State and federal laws, and the court cases interpreting them, limit cities' ability to regulate:

- residential alcohol and drug recovery and treatment facilities,
- residential care facilities
- sober living homes
- many (but not all) other group living arrangements.

SECTION ONE

Federal Statutes, Regulations and Case Law

The federal **Fair Housing Act Amendments** (FHAA) and the **Americans with Disabilities Act** (ADA) set stringent limits on what cities can do to regulate the location and size of residential treatment facilities, sober living homes, and residential care facilities. Federal court decisions interpret and expand on the statutory law, and in some cases create confusion with diverging opinions on selected issues.

Americans with Disabilities Act

The federal **Americans with Disabilities Act**, passed in 1990, prohibits discrimination against individuals with disabilities. A subsequent U.S. Supreme Court decision, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) clarified that the ADA required states to place individuals with mental disabilities in community settings rather than institutions when the state's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with mental disabilities.

Handicapped Status Established

The broad protections of the FHAA and similar provisions in the ADA apply to individuals who are in recovery from addiction and are living temporarily in alcohol and drug treatment facilities and sober living homes. This is because individuals who are not currently using illegal drugs, but who are recovering from an addiction to alcohol or drugs, are defined as "handicapped" under the Code of Federal Regulations and federal court opinions.

Code of Federal Regulations §100.201. (Definitions)

CFR §100.201 (Definitions)

"Handicap means, with respect to a person, a physical or mental impairment which substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such impairment. This term does not include current, illegal use of or addiction to a controlled substance . . ."

CFR §100.201(a) ” *Physical or mental impairment* includes:

(2) Any mental or psychological disorder . . . The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as . . . drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.”

Selected quotes from case on handicapped status:

U.S. v. Southern Management Corp.

955 F.2d 914

C.A.4 (Va.),1992.

February 03, 1992

“(In an earlier case,) the Supreme Court . . . reasoned that the ‘negative reactions of others to the impairment’ could limit a person's ability to work regardless of the absence of an actual limitation on that person's mental or physical capabilities . . . (and) effectively expanded the scope of the term ‘limitation on major life activities’ to include limitations on one's capability to maintain or obtain a job as well as the ability to perform a job . . . The inability to obtain an apartment is, we feel, on a par with the inability to obtain a job.” *U.S. v. Southern Management*, 955 F.2d at 919.

“The clients are clearly impaired, and their ability to obtain housing (a major life activity) was limited by the attitudes of the . . . officials. Thus, we conclude that the clients qualify as having a handicap under the general definition at [42 U.S.C. § 3602\(h\)\(1\)-\(3\)](#).” *Id.* at 919.

“The House report submitted with the proposed amendments to the Fair Housing Act, which report remained unchanged in the Senate substitute, makes reference to ‘current addicts’ and unequivocally expresses the intent not to exclude ‘recovering addicts:’” *Id.* at 921.

“Our ruling is fair notice regarding the ambit of the Act's coverage of drug addicts/abusers. The Rehabilitation Act's current definition, [29 U.S.C. § 706\(8\)\(C\)\(ii\)\(I-III\) \(1991\)](#), should serve as a definitive guidepost for all future controversies under the Fair Housing Act. We emphasize that our ruling is fairly narrow in its scope. We hold that [42 U.S.C. § 3606](#) does not per se exclude from its embrace every person who could be considered a drug addict. Instead, we believe that Congress intended to recognize that addiction is a disease from which, through rehabilitation efforts, a person may recover, and that an individual who makes the effort to recover should not be subject to housing discrimination based on society's ‘accumulated fears and prejudices’ associated with drug addiction.” *Id.* at 923. (footnotes omitted)

Fair Housing Act Amendments

The FHAA does not pre-empt local authority over zoning laws. However, it *applies* to local government entities, and prohibits them from making or implementing local zoning or land use rules or policies that exclude or discriminate against protected classes, such as individuals with disabilities. Relevant excerpts from the FHAA follow:

Fair Housing Act § 3604

“. . . it shall be unlawful –

(1) 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 USC §3604(f))

“For purposes of this subsection, 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 . . . “ (42 USC §3604(f)(3)(B))

“Nothing in this subsection requires that a dwelling be made available to an individual 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 USC §3604(f)(3)(C)(9))

Fair Housing Act § 3607(b)(1)

“[A]ny reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling,” are exempted entirely from FHAA coverage.

The FHAA protects disabled individuals from discrimination by government entities and sellers or renters of property. Court cases interpreting the FHAA have established that no city regulation may:

- Be enacted for a discriminatory reasons, or involve discriminatory treatment of the handicapped;
- Have a disparate impact on the availability of handicapped housing (this occurs when outwardly neutral practices impact housing availability for a disabled group more than other similarly situated groups;
 - “Similarly situated groups” usually means other groups of unrelated individuals wishing to share a dwelling but not live as a single housekeeping unit or other family-like structure. (See *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997)
- Refuse to make reasonable accommodations

Reasonable accommodation is determined on a case-by-case basis, and should be the least drastic measure necessary to achieve its purpose. The reasonable accommodation requirement applies to zoning ordinances and other land use regulations. Local governments may deny a request for a reasonable accommodation if it would:

- Fundamentally alter the nature of the ordinance, neighborhood, or local zoning procedures;
- Undermine the legitimate purpose and effects of existing zoning regulations; or
- Impose undue financial and administrative burdens on the municipality. (See *U.S. v. Village of Marshall, Wisc.*, 787 F.Supp. 872, 878 (W.D. Wisc. 1991)

Selected quotes from cases interpreting the Fair Housing Act:

Issue One – Discriminatory Intent

Oxford House, Inc. v. Town of Babylon

(In this case, residents of a sober living home for sought an injunction to prevent the town from enforcing its zoning ordinance to evict them. The court held that: (1) the zoning ordinance was discriminatory; (2) evicting residents would not advance town's interest; (3) discriminatory effect outweighed town's interest; and (4) town failed to reasonably accommodate group home residents.)

“Recovering alcoholics or drug addicts require a group living arrangement in a residential neighborhood for psychological and emotional support during the recovery process. As a result, residents of an Oxford House are more likely than those without handicaps to live with unrelated individuals. Moreover, because residents of an Oxford House may leave at any time . . . the town's eviction of plaintiffs from a dwelling due to the size or transient nature of plaintiffs' group living arrangement actually or predictably results in discrimination.” *Oxford House v. Town of Babylon*, 819 F.Supp at 1183. (footnote omitted)

“Even if the Town's proposed enforcement of its zoning ordinance advances a legitimate governmental interest, the Court nevertheless finds that plaintiffs' showing of discriminatory effect far outweighs the Town's weak justifications . . . Plaintiffs in the present case have set forth substantial evidence to indicate that the Town had the intent to evict them because they were recovering alcoholics.” *Id.* at 1184.

“On September 3, 1991, a public meeting was held to discuss the East Farmingdale Oxford House. So many neighbors came to the meeting that Supervisor Pitts suspended the normal rules . . . These neighbors were ‘hostile’ to (the sober living home), expressing their fears regarding the safety of children and senior citizens. ^{FN8} No one from the community or the Town Board spoke in favor of the East Farmingdale Oxford House.” *Id.* (citations omitted)

“^{FN8}. One speaker exclaimed that an elderly neighbor with a bad heart would die of fright if one of the Oxford House residents broke into his house.” *Id.*

“The citizens of East Farmingdale made it clear that they did not want recovering individuals living in their neighborhood. One individual stated, ‘I don't want [my son] subjected to irrational, unpredicted [sic] behavior from people.’ Another demanded, ‘[w]hat [can you] do to help us remove this threat from our community[?]’ In response to their concerns, Supervisor Pitts made the following statements:

’Merely not wanting to have someone there doesn't necessarily mean that we can stop them, but what it does mean is that there are all kinds of laws about single room occupancy, occupancy limitations in the town, motel/hotel in the town.’

’I don't want to sit up here and say we can keep them out, because we've had other instances with group homes in the town where we have been unable to keep group homes out of the town.’

’If it is coming under the laws of the State of New York, we're going to have a real hard time because it's a fight we fought before, and it's a fight we've unfortunately lost before.’

A Town of Babylon councilman also spoke at the Town meeting, stating,

’So I wish I could say absolutely, we'll keep them out. But we're not an army. I mean if they move in tomorrow, we can't go in there and yank them out of their beds either. I'd like to say that...’” *Id.* (citations omitted)

Oxford House-C v. City of St. Louis

77 F.3d 249

C.A.8 (Mo.),1996.

February 23, 1996

(A case in which the court did not find discrimination on the part of the city imposing its zoning restrictions on a sober living home.)

“Cities have a legitimate interest in decreasing congestion, traffic, and noise in residential areas, and ordinances restricting the number of unrelated people who may occupy a single family residence are reasonably related to these legitimate goals.” *Oxford House v. City of St. Louis*, 77 F.3d at 252.

“We do not believe these isolated comments reveal City officials enforced the zoning code against the Oxford Houses because of the residents’ handicap, especially considering the Oxford Houses were plainly in violation of a valid zoning rule and City officials have a duty to ensure compliance.” *Id.*

“The Fair Housing Act does not ‘insulate [the Oxford House residents] from legitimate inquiries designed to enable local authorities to make informed decisions on zoning issues.’ *City of Virginia Beach*, 825 F.Supp. at 1262. Congress did not intend for the Act to remove handicapped people from the ‘normal and usual incidents of citizenship, such as participation in the public components of zoning decisions, to the extent that participation is required of all citizens whether or not they are handicapped.’ In our view, Congress also did not intend the federal courts to act as zoning boards by deciding fact-intensive accommodation issues in the first instance.” *Oxford House v. City of St. Louis* at 253. (citations omitted)

Issue Two – Disparate or Discriminatory Impact

Gamble v. City of Escondido

104 F.3d 300

C.A.9 (Cal.),1997.

January 10, 1997

“(First,)[u]nder the disparate impact theory, a plaintiff must prove actual discriminatory effect, and cannot rely on inference. Second, the (plaintiff’s) position relies on a comparison between physically disabled groups and single families to establish the discriminatory effect. The relevant comparison group to determine a discriminatory effect on the physically disabled is **other groups of similar sizes living together**. Otherwise, all that has been demonstrated is a discriminatory effect on group living. . . No evidence has been presented suggesting that the City’s permit denial practices disproportionately affect disabled group living as opposed to other kinds of group living.” *Gamble v. City of Escondido*, 104 F.3d at 306-307 (citation and internal quotation marks omitted, emphasis added).

“A municipality commits discrimination under Section 3604(f)(3)(B) of the FHA if it refuses ‘to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [the physically disabled] equal opportunity to use and enjoy a dwelling.’” *Id.* at 307.

“These portions of the statute affirmatively require the City to make reasonable accommodations for handicapped residences . . .The statute does not, however, require reasonable accommodation for health care facilities. The record establishes that a significant portion of the building size is

devoted to the proposed adult health care facility. It occupies nearly half the square footage of the building and the bottom floor of the two-story building.” *Id.* (citations omitted)

Oxford House, Inc. v. Town of Babylon

819 F.Supp. 1179

E.D.N.Y., 1993.

April 28, 1993

“Defendant in the present case asserts that the ordinance is designed to keep boarding houses, rooming houses, multiple family dwellings, and other similar arrangements out of residential neighborhoods. The Town contends that it enforces the ordinance against all violators; the enforcement of the ordinance furthers a legitimate governmental interest in maintaining the residential character of the areas zoned for single family dwellings; and any discriminatory effect it may have on plaintiffs is due to plaintiffs' transiency and failure to live as a family, not because of their handicap.

”Although a town's interest in zoning requirements is substantial, the Court finds that evicting plaintiffs from the East Farmingdale Oxford House is not in furtherance of that interest. Five Town officials testified that the Town has received no substantial complaints from plaintiffs' neighbors within the past year. Furthermore, the house is well maintained and does not in any way burden the Town or alter the residential character of the neighborhood. The presence of the East Farmingdale Oxford House in a single family, residential district does not undermine the purpose of the Town's zoning ordinance. Therefore, defendant cannot justify evicting plaintiffs as being in furtherance of its asserted governmental interest.” *Oxford House v. Town of Babylon*, 819 F.Supp. at 1183 (citations and internal quotation marks omitted).

Issue three – Reasonable Accommodation

Oxford House, Inc. v. Town of Babylon

819 F.Supp. 1179

E.D.N.Y., 1993.

April 28, 1993

“[T]Court finds that defendant's conduct constituted discrimination as it is defined in [42 U.S.C. § 3604\(f\)\(3\)\(B\)](#). Under the FHA, it is a discriminatory practice to refuse to make “a reasonable accommodation in rules, policies, practices, or services when such accommodation may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling.” [42 U.S.C. § 3604\(f\)\(3\)\(B\)](#). Courts have unanimously applied the reasonable accommodations requirement to zoning ordinances and other land use regulations and practices.

“In the present case, plaintiffs requested that the Town modify the definition of a ‘family’ as it was applied to them. Plaintiffs have demonstrated that as recovering alcoholics and drug addicts, they must live in a residential neighborhood because an Oxford House ‘seeks to provide a stable, affordable, and drug-free living situation so as to increase the likelihood that a person will stay sober.’ In *Township of Cherry Hill*, the court held that the location of the houses in a drug-free, single family neighborhood played a crucial role in an individual's recovery by ‘promoting self-esteem, helping to create an incentive not to relapse, and avoiding the temptations that the presence of drug trafficking can create.’ This Court finds that reasoning persuasive.” *Oxford House v. Town of Babylon*, 819 F. Supp. at 1185. (citations omitted)

“Plaintiffs have also established that the requested accommodation was reasonable. An accommodation is reasonable under the FHA if 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. Because one of the purposes of the reasonable accommodations provision is to address individual needs and respond to individual circumstances, courts have held that municipalities **must** change, waive, or make exceptions in their zoning rules to afford people with disabilities the same access to housing as those who are without disabilities.” *Id.* at 1186 (citations omitted, emphasis added).

Keys Youth Services, Inc. v. City of Olathe, KS

248 F.3d 1267

C.A.10 (Kan.),2001.

May 11, 2001

“[W]e can affirm the court's reasonable accommodation ruling for a separate reason. Even assuming that Keys presented its economic necessity argument to the City Council, we conclude that the requested accommodation-housing ten troubled adolescents instead of eight-is not ‘reasonable’ in light of Olathe's legitimate public safety concerns. Common sense dictates that when a defendant possesses a legitimate nondiscriminatory reason for a housing decision, a plaintiff's requested accommodation must substantially negate the defendant's concern in order to be considered reasonable.” *Keys Youth Services v. City of Olathe* at 1276.

Smith & Lee Associates, Inc. v. City of Taylor, Mich.

102 F.3d 781

C.A.6 (Mich.),1996.

December 16, 1996

“The statute links the term ‘necessary’ to the goal of equal opportunity. See [42 U.S.C. § 3604\(f\)\(3\)\(B\)](#) (‘accommodation ... necessary to afford ... equal opportunity’). Plaintiffs must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice. See [Bronk v. Ineichen, 54 F.3d 425, 429 \(7th Cir.1995\)](#) (‘[T]he concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability.’)” *Smith & Lee Associates, Inc. v. City of Taylor, Michigan* at 795.

Oxford House-C v. City of St. Louis

77 F.3d 249

C.A.8 (Mo.),1996.

February 23, 1996

“The Fair Housing Act does not insulate [the Oxford House residents] from legitimate inquiries designed to enable local authorities to make informed decisions on zoning issues. Congress did not intend for the Act to remove handicapped people from the normal and usual incidents of citizenship, such as participation in the public components of zoning decisions, to the extent that participation is required of all citizens whether or not they are handicapped. In our view, Congress also did not intend the federal courts to act as zoning boards by deciding fact-intensive accommodation issues in the first instance.” *Oxford House v. City of St. Louis*, 77 F.3d at 253. (citations and internal quotation marks omitted)

SECTION TWO

California State Statutes

State laws also impact local land use practices with respect to alcohol and drug abuse recovery and treatment facilities, residential care facilities and sober living homes. The **California Fair**

Employment and Housing Act (California Government Code § 12955) contains provisions similar to the FHAA and prohibits housing discrimination based on disability or familial status.

The **California Health and Safety Code** regulates the licensing of *residential care facilities* (licensed by the California Department of Health Services, hereinafter “DSS”) **and** the licensing of *alcohol and drug abuse recovery and treatment facilities* (licensed by the California Department of Alcohol and Drug Programs, hereinafter “ADP”.) *Sober living homes* are not licensed by any government agency, and are not addressed in the Health and Safety Code (except to be specifically excluded from provisions of Code, in some sections). Whether a particular facility is an alcohol and drug abuse recovery and treatment facility or a sober living home depends primarily on whether “nonmedical services” are offered on-site at the home. If nonmedical services are offered onsite, the facility must be licensed as an alcohol and drug abuse recovery and treatment facility.

Cities attempting to regulate alcohol and drug abuse recovery and treatment facilities must be aware of and comply with the following sections of the California Health and Safety Code:

- **Health and Safety Code § 11834.02 Definitions**

“(a) As used in this chapter, ‘alcoholism or drug abuse recovery or treatment facility’ or ‘facility’ means any premises, place, or building that provides 24-hour residential nonmedical services to adults who are recovering from problems related to alcohol, drug, or alcohol and drug misuse or abuse, and who need alcohol, drug, or alcohol and drug recovery treatment or detoxification services.

(b) As used in this chapter, ‘adults’ may include, but is not limited to, all of the following:

(1) Mothers over 18 years of age and their children.

(2) Emancipated minors, which may include, but is not limited to, mothers under 18 years of age and their children.

(c) As used in this chapter, ‘emancipated minors’ means persons under 18 years of age who have acquired emancipation status pursuant to Section 7002 of the Family Code.

(d) Notwithstanding subdivision (a), an alcoholism or drug abuse recovery or treatment facility may serve adolescents upon the issuance of a waiver granted by the department pursuant to regulations adopted under subdivision (c) of Section 11834.50.”

- **Health and Safety Code § 11834.26. Nonmedical services**

“(a) The licensee shall provide at least one of the following nonmedical services:

(1) Recovery services

(2) Treatment services

(3) Detoxification services”

- **Health and Safety Code § 11834.30. Operation of unlicensed facility.**

“No person, firm, partnership, association, corporation, or local governmental entity shall operate, establish, manage, conduct or maintain an alcoholism or drug abuse recovery or treatment facility to provide recovery, treatment or detoxification services within this state without first obtaining a current valid license issued pursuant to this chapter.”

- **Health and Safety Code § 11834.20**

“The Legislature hereby declares that it is the policy of this state that each county and city shall permit and encourage the development of sufficient numbers and types of alcoholism or drug abuse recovery or treatment facilities as are commensurate with local need.

The provisions of this article apply equally to any chartered city, general law city, county, city and county, district, and any other local public entity.

For the purposes of this article, ‘six or fewer persons’ does not include the licensee or members of the licensee's family or persons employed as facility staff.”

- **Health and Safety Code § 11834.22. Exemption from fees and taxes**

“An alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons shall not be subject to any business taxes, local registration fees, use permit fees, or other fees to which other single-family dwellings are not likewise subject. Nothing in this section shall be construed to forbid the imposition of local property taxes, fees for water service and garbage collection, fees for inspections not prohibited by Section 11834.23, local bond assessments, and other fees, charges, and assessments to which other single-family dwellings are likewise subject. Neither the State Fire Marshal nor any local public entity shall charge any fee for enforcing fire inspection regulations pursuant to state law or regulation or local ordinance, with respect to alcoholism or drug abuse recovery or treatment facilities which serve six or fewer persons.”

- **Health and Safety Code § 11834.23. Facilities considered residential use of property**

“Whether or not unrelated persons are living together, an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons shall be considered a residential use of property for the purposes of this article. In addition, the residents and operators of such a facility shall be considered a family for the purposes of any law or zoning ordinance which relates to the residential use of property pursuant to this article.

For the purpose of all local ordinances, an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons shall not be included within the definition of a boarding house, rooming house, institution or home for the care of minors, the aged, or the mentally infirm, foster care home, guest home, rest home, sanitarium, mental hygiene home, or other similar term which implies that the alcoholism or drug abuse recovery or treatment home is a business run for profit or differs in any other way from a single-family residence.

This section shall not be construed to forbid any city, county, or other local public entity from placing restrictions on building heights, setback, lot dimensions, or placement of signs of an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons as long as the restrictions are identical to those applied to other single-family residences.

This section shall not be construed to forbid the application to an alcoholism or drug abuse recovery or treatment facility of any local ordinance which deals with health and safety, building standards, environmental impact standards, or any other matter within the jurisdiction of a local public entity. However, the ordinance shall not distinguish alcoholism or drug abuse recovery or treatment facilities which serve six or fewer persons from other single-family dwellings or distinguish residents of alcoholism or drug abuse recovery or treatment facilities from persons who reside in other single-family dwellings.

No conditional use permit, zoning variance, or other zoning clearance shall be required of an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons that is not required of a

single-family residence in the same zone.

Use of a single-family dwelling for purposes of an alcoholism or drug abuse recovery facility serving six or fewer persons shall not constitute a change of occupancy for purposes of Part 1.5 (commencing with Section 17910) of Division 13 or local building codes. However, nothing in this section is intended to supersede Section 13143 or 13143.6, to the extent those sections are applicable to alcoholism or drug abuse recovery or treatment facilities serving six or fewer residents.”

- **Health and Safety Code § 11834.24. Permits, licenses, clearance or similar authorizations; denial prohibited**

“No fire inspection clearance or other permit, license, clearance, or similar authorization shall be denied to an alcoholism or drug abuse recovery or treatment facility because of a failure to comply with local ordinances from which the facility is exempt under Section 11834.23, if the applicant otherwise qualifies for a fire clearance, license, permit, or similar authorization.”

- **Health and Safety Code § 11834.25. Transfer of real property; facility considered residential use of property**

“For the purposes of any contract, deed, or covenant for the transfer of real property executed on or after January 1, 1979, an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons shall be considered a residential use of property and a use of property by a single family, notwithstanding any disclaimers to the contrary.”

SECTION THREE

Other Issues

Overconcentration and Distancing Requirements

Many members of the public reviewing the California Health and Safety Code become understandably confused by the different Code sections. Some important differences are:

- One large section of the Health and Safety Code (referred to as “The Community Care Licensing Act”) contains provisions that apply *only* to DSS-licensed residential facilities.
- In particular, confusion about when 300-foot distancing is required between facilities has come up because the Community Care Licensing Act requires the DSS to deny a license to any new community care facility that applies to locate within 300 feet of any existing community care facility. DSS reports that this distancing requirement is applied to the three following types of community care facilities:
 - children’s group homes (usually housing adolescents)
 - adult residential care facilities (usually serving developmentally or mentally disabled non-senior adults)
 - small family homes (housing up to six children in a community setting)
- **This policy against overconcentration and requirement for 300-foot distancing is not present in the sections of the Health and Safety Code regulating alcohol and drug recovery homes and residential facilities for the elderly. Alcohol and drug treatment facilities and sober**

living homes are also expressly exempted from the distancing requirements in the Health and Safety Code. (See Cal. Health and Safety Code §1505)

- To provide for the distancing discussed above, in **Health and Safety Code § 1520.5. (Overconcentration of residential care facilities; license denial; ownership change; facilities considered)** the Legislature stated:
 - “a) The Legislature hereby declares it to be the policy of the state to prevent overconcentrations of residential care facilities that impair the integrity of residential neighborhoods. Therefore, the director shall deny an application for a new residential care facility license if the director determines that the location is in a proximity to an existing residential care facility that would result in overconcentration.
 - b) As used in this section, "overconcentration" means that if a new license is issued, there will be residential care facilities that are separated by a distance of 300 feet or less, as measured from any point upon the outside walls of the structures housing those facilities. Based on special local needs and conditions, the director may approve a separation distance of less than 300 feet with the approval of the city or county in which the proposed facility will be located.
 - c) At least 45 days prior to approving any application for a new residential care facility, the director, or county licensing agency, shall notify, in writing, the planning agency of the city, if the facility is to be located in the city, or the planning agency of the county, if the facility is to be located in an unincorporated area, of the proposed location of the facility.
 - d) Any city or county may request denial of the license applied for on the basis of overconcentration of residential care facilities.
 - e) Nothing in this section authorizes the director, on the basis of overconcentration, to refuse to grant a license upon a change of ownership of an existing residential care facility where there is no change in the location of the facility.
 - f) Foster family homes and residential care facilities for the elderly shall not be considered in determining overconcentration of residential care facilities, and license applications for those facilities shall not be denied upon the basis of overconcentration.
 - g) Any transitional shelter care facility as defined in paragraph (11) of subdivision (a) of Section 1502 shall not be considered in determining overconcentration of residential care facilities, and license applications for those facilities shall not be denied upon the basis of overconcentration.”

Legislation requiring distancing between alcohol and drug abuse recovery and treatment facilities is frequently introduced in the California State Legislature, and is routinely defeated. Broader public awareness and support of such legislation might increase the legislation’s chances of becoming law.

Selected quotes from cases on distancing and overconcentration:

Federal Court decisions on overconcentration and distancing have been inconsistent. The more recent cases come down firmly against state and local attempts to impose overconcentration and distancing requirements. Federal statutory clarification of this issue would be helpful, because the confusion generated by conflicting federal court decisions leaves state and local governments without clear guidelines in an important area.

Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.

923 F.2d 91

C.A.8 (Minn.), 1991.

January 08, 1991

(A case upholding the validity of state statute and local zoning ordinances limiting the placement of residential facilities for retarded or mentally ill persons because the dispersal requirements constituted the legitimate governmental interest of deinstitutionalization. This case stands alone, and later cases have dismissed it.)

“Familystyle sought special use permits for the addition of three houses to its existing campus of group homes, intending to expand its capacity from 119 to 130 mentally ill persons. Twenty-one of Familystyle's houses, including the three proposed additions, are clustered in a one and one-half block area. On the condition that Familystyle would work to disperse its facilities, the St. Paul City Council issued temporary permits for the three additional houses. Familystyle failed to meet the conditions of the special use permits, and the permits expired. After St. Paul denied renewal of the permits, Familystyle exchanged its license for one excluding the three additional houses.

Relying upon the provisions of the Fair Housing Amendment Act of 1988, Familystyle challenges the city ordinance and state laws that bar the addition of these three houses to its campus.

Familystyle argues that the Minnesota and St. Paul dispersal requirements are invalid because they limit housing choices of the mentally handicapped and therefore conflict with the language and purpose of the 1988 Amendments to the Fair Housing Act. We disagree. We perceive the goals of non-discrimination and deinstitutionalization to be compatible. Congress did not intend to abrogate a state's power to determine how facilities for the mentally ill must meet licensing standards. Minnesota's dispersal requirements address the need of providing residential services in mainstream community settings. The quarter-mile spacing requirement guarantees that residential treatment facilities will, in fact, be “in the community,” rather than in neighborhoods completely made up of group homes that re-create an institutional environment—a setting for which Familystyle argues. We cannot agree that Congress intended the Fair Housing Amendment Act of 1988 to contribute to the segregation of the mentally ill from the mainstream of our society. The challenged state laws and city ordinance do not affect or prohibit a retarded or mentally ill person from purchasing, renting, or occupying a private residence or dwelling.” *Familystyle*, 923 F.2d at 93-94.

Larkin v. State of Mich.

883 F.Supp. 172

E.D.Mich., 1994.

November 01, 1994

(A case striking down a state 1,500-foot distancing requirement between community residential facilities.)

“Defendants claim that a legitimate governmental interest exists for their statutory scheme, that is, the integration of handicapped individuals into mainstream society, thereby ensuring that no one area or neighborhood becomes saturated with similar institutions. Defendants argue that the Michigan statutory scheme prevents the formation of ‘ghettos’ of AFC homes, which would result in reinstitutionalization. Defendants claim that they are trying to provide a ‘normal’ environment for handicapped persons through these dispersal requirements, which are the best methods available to promote this compelling governmental concern.” *Larkin*, 833 F.Supp. at 176-177.

”Plaintiffs claim that the ‘ghettoization’ to which Defendants refer resulted from earlier state exclusionary zoning policies which prevented homes for handicapped persons from locating in

single-family residential zones. These discriminatory policies were prohibited by the Michigan Legislature in 1976, at the same time that the legislature also established the restrictions at issue in the present case. It follows, then, that if the zoning policies which resulted in the growth of handicapped ‘ghettos’ have long since been removed, the threat of such ‘ghettoization’ should be eliminated. Defendants do not assert any reason why adult foster care homes will currently choose to congregate in the same areas.

”Plaintiffs also doubt that integration is the real reason for the adoption of the dispersal provisions. The court in [*Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F.Supp. 683, 695 \(E.D.Pa.1992\)](#), *aff’d*, [995 F.2d 217 \(3d Cir.1993\)](#), for example, found evidence that the dispersal rule was based on unfounded fears about people with handicaps. [Horizon House, 804 F.Supp. at 695](#).^{FN2} *Horizon House*, on which plaintiffs rely, involved a township ordinance similar to that of the State of Michigan. It imposed a distance requirement of 1,000 feet for group homes for mentally retarded persons. The court held that the ordinance violated the FHAA because it was facially invalid, purposefully discriminatory, and had a disparate impact upon the housing choices of handicapped persons. The court found that preventing the “clustering” of people with disabilities to promote their “integration” into the community was not an adequate justification under the FHAA. The court further held that the ordinance had no rational basis and was a violation of equal protection.

“[FN2](#). The court is aware that property values are often concerns as well, but notes that this is not a legal basis for such restrictions. Defendants agree.” *Larkin* at 177. (citations omitted)

”The court . . . believes that there is no rational basis for the 1,500-foot spacing requirement and the provision that all neighbors within 1,500 feet be notified of the proposed site. As such, the court finds that [M.C.L. § 125.583b\(4\)](#) and [§ 400.716\(3\)](#) violate the FHAA. As there is no rational basis for such requirements, the court also finds that Defendants State of Michigan and Michigan Department of Social Services violated the Equal Protection Clause through their enactment and enforcement of these provisions. The court finds that the Michigan statutory scheme at issue has a discriminatory effect on handicapped persons.” *Id.*

Children's Alliance v. City of Bellevue

950 F.Supp. 1491

W.D.Wash.,1997.

January 08, 1997

“To rebut a finding of facial discrimination . . . the defendant must show either (1) that the ordinance benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes. This scrutiny requires an examination of the characteristics of the specific individuals impacted by the ordinance.” *Children’s Alliance v. City of Bellevue*, 951 F.Supp. at 1498 (citation omitted).

”Bellevue's justifications cannot satisfy the scrutiny established by *Larkin* and *Bangerter*. Generalized interests in public safety, stability, and tranquility have been enough to redeem ordinances that drew distinctions between groups when subjected to rational basis review. But under the stricter level of scrutiny appropriate here, these interests are only sufficient if they are threatened by the individuals burdened by the Ordinance.

”Bellevue asserts that its interests in stability and tranquility support limiting to commercial zones those Class II homes not operated by Resident Staff or those which accept short-term residents. According to Bellevue, the Group Facilities within Class II meeting these criteria have a commercial character and are disruptive, thus rendering these homes inappropriate for residential neighborhoods. While these two justifications have been upheld under rational basis review, they cannot withstand the more rigorous scrutiny required by *Larkin*. At any rate, there is no evidence

demonstrating that the presence of Resident Staff, as opposed to shift staff or staff who do not hold the license for the facility, distinguishes a commercial operation from a residential one. Furthermore, the Court cannot reconcile these supposed interests with the fact that the land use code allows bed and breakfast establishments, commercial enterprises with short-term occupants, in any residential neighborhood.” *Children’s Alliance* at 1498-1499 (citations omitted).

”As to the concern for public safety, that too must fail because the Court finds that defendant is operating under stereotyped notions about certain types of group home residents rather than specific concerns raised by individuals. For example, Bellevue’s city attorney stated that the evidence of crime committed by individuals with a prior criminal history prompted Bellevue’s concern for public safety. But Bellevue offers no evidence showing that residents of Class II facilities are more dangerous than if they lived with their relatives or than the residents of Class I facilities. Defendant’s public safety rationale does not stand up under scrutiny and defendant cannot invoke the statutory exemption from the FHA found in [42 U.S.C. § 3604\(f\)\(9\)](#) because it has not demonstrated how any specific individuals attempting to reside in a Class II facility constitute a ‘direct threat.’” *Children’s Alliance* at 1499. (citations omitted)

”Defendant contends that its dispersal requirement is intended to help residents of group homes rather than harm them. Page two of the preamble to the Ordinance professes an intention of ensuring sufficient dispersion of Group Facility uses to allow persons with handicaps equal opportunity to enjoy the benefits of residence in single-family, multi-family, and other zoning districts,’ and at page nine of its response memorandum to plaintiffs’ motion, docket no. 49, defendant cited an interest in ‘furthering the integration of such facilities into their neighborhoods and preventing the development of mini-institutional ghettos.’ Courts should be wary of justifications purporting to help members of the protected class; the court should assess whether the benefits of the requirement ‘clearly’ outweigh the burdens.” *Id.* (citations omitted)

”Because Bellevue has *no* group homes for youth, concerns of clustering or the creation of an institutionalized setting cannot be supported by the evidence. Even if other types of group-care facilities would support these concerns, the Ordinance as written is overbroad due to its unjustifiable impact on group homes for youth. Furthermore, defendant has not pointed to any evidence demonstrating that those burdened by the restriction would benefit from it.” *Id.* (citations omitted)

Occupancy Restrictions Permitted – what is an occupancy restriction?

Some exemptions are provided for in the FHAA, including an exception for occupancy restrictions in 42 USC 3607(b)(1).

City of Edmonds v. Oxford House, Inc.

514 U.S. 725, 115 S.Ct. 1776

U.S. Wash., 1995.

May 15, 1995

(A US Supreme Court decision, in which a city attempted to characterize its definition of “family” as an occupancy restriction, exempted from the FHAA. The Court reasoned that the definition of “family” was a description of a type of residential use pattern, whereas an occupancy restriction concerned itself purely with the maximum number of persons who could inhabit a dwelling.)

“This case presents the question whether a provision in petitioner City of Edmonds’ zoning code qualifies for [§ 3607\(b\)\(1\)](#)’s complete exemption from FHA scrutiny. The provision, governing areas zoned for single-family dwelling units, defines ‘family’ as ‘persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons.’” *Oxford House v. City of Edmonds*, 514 U.S. at 728.

“The defining provision at issue describes who may compose a family unit; it does not prescribe ‘the maximum number of occupants’ a dwelling unit may house. We hold that [§ 3607\(b\)\(1\)](#) does not exempt prescriptions of the family-defining kind, *i.e.*, provisions designed to foster the family character of a neighborhood. Instead, [§ 3607\(b\)\(1\)](#)’s absolute exemption removes from the FHA’s scope only total occupancy limits, *i.e.*, numerical ceilings that serve to prevent overcrowding in living quarters.” *Id.*

“Land use restrictions aim to prevent problems caused by the ‘pig in the parlor instead of the barnyard.’ [Village of Euclid v. Ambler Realty Co.](#), 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926). In particular, reserving land for single-family residences preserves the character of neighborhoods, securing ‘zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.’ . . . To limit land use to single-family residences, a municipality must define the term “family”; thus family composition rules are an essential component of single-family residential use restrictions. *Id.* at 732-733. (citations and internal quotations omitted)

”Maximum occupancy restrictions . . . cap the number of occupants per dwelling, typically in relation to available floor space or the number and type of rooms. These restrictions ordinarily apply uniformly to *all* residents of *all* dwelling units. Their purpose is to protect health and safety by preventing dwelling overcrowding.” *City of Edmonds v. Oxford House*, 514 U.S. at 733.

Issues Specific to California

Two cases decided in California state courts restrict the regulatory ability of California cities even more than cities in some other states.

City of Santa Barbara v. Adamson

27 Cal.3d 123 (1980)

(In this case, the California Supreme Court found that the portion of a city’s zoning code that defined “family” as either related persons living in a single household unit, or no more than five unrelated persons living together in a single housekeeping unit violated the right to privacy guaranteed by the California State Constitution. Part of the reasoning for this was that the Santa Barbara zoning code allowed unlimited numbers of related people to live together, which could be more injurious to the goals of the zoning code than a smaller number of related persons.)

“As long as a group bears the generic character of a family unit as a relatively permanent household, it should be equally entitled to occupy a single family dwelling as its biologically related neighbors. We do not here address the question, How many people should be allowed to live in one house? . . . We merely hold invalid the distinction effected by the ordinance between (1) an individual or two or more persons related by blood, marriage, or adoption, and (2) groups of more than five other persons.” *Santa Barbara v. Adamson*, 27 Cal.3d at 134. (citations omitted)

Briseno v. City of Santa Ana

6 Cal.App.4th 1378 (1992)

(In this case, the California Court of Appeals answered the question (“How many people should be allowed to live in one house?”) that the California Supreme Court did not address in *Santa Barbara v. Adamson*. To address dense occupancy of apartments within the city, the City of Santa Ana adopted occupancy standards that allowed fewer persons to live in its dwelling units than would be allowed under the state’s Uniform Housing Law.)

“[D]oes the Uniform Housing Law preempt local occupancy ordinances generally? We believe it does.” *Briseno v. City of Santa Ana*, 6 Cal.App.4th at 1381-1382.

“[M]unicipalities can modify the uniform codes only if local climactic, geological, or topographical conditions exist (that would justify the modification of the code), and only if the municipality makes an express finding that such conditions exist.” *Id.* at 1383.

“FN3. We think it highly unlikely, if not impossible, that the City could make such findings. There is nothing remarkable about the topography of Santa Ana; it is built on a plain. Similarly, the climate is as mild as most of the rest of Southern California. Finally, we are unaware of any relevant geological eccentricities in Santa Ana.” *Id.*

“The relationship of individuals living in a dwelling unit has no relevance to the health and safety of those living in a dwelling, certainly insofar as an ‘occupancy standard’ is concerned. An occupancy standard is merely a ‘numbers’ game; a dwelling unit is overcrowded because there are too many people living in it, regardless of whether they are related.” *Id.* at 1384.

As a result, while the zoning codes of cities in some other states may restrict the number of unrelated persons who live together as a single housekeeping unit in certain residential zones, zoning codes in California cities may not. The size of single housekeeping units in California are limited by the occupancy standards of the state’s Uniform Housing Law. California cities may, however, place appropriate zoning restrictions on non-single housekeeping units, such as boarding houses and group homes whose residents are not handicapped.

#