

A Place to Call Home

Addressing Opposition to Homes for People with Disabilities in Tennessee Neighborhoods

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Tennessee Fair Housing Council

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Introduction

Tennessee has an acute need for more housing for people with mental illness and other disabilities. Policymakers know it, advocates know it, consumers know it, and housing providers know it.

The impact of insufficient housing and support services for people with disabilities is great. Persons with mental illness, for example, go through systems of help – hospitals, mental health centers, homeless shelters, faith-based and social service agencies – looking for supports and a stable home. Unfortunately, safe and affordable places for them to call home are rare.¹

Examples of this housing shortage abound. Jails, hospitals and shelters all report increases in persons with mental illness who are cycling and recycling through their networks. People with mental illness, their family members, caseworkers and representatives all are frustrated by the low availability and questionable conditions of the housing where people with mental illness often must reside.

It is clear that home cannot truly exist for people with mental illness and other disabilities without an increase in adequate housing, enhancements of current community housing options, coupled with coordinated and effective community services support and delivery.

Unfortunately, some of the entities that seek to develop housing for people with disabilities have encountered and will encounter hostile neighborhood organizations, local politicians and city governments that hinder the projects through zoning ordinances, frivolous litigation and other strategies. This opposition is collectively known as NIMBY, which stands for Not in My Back Yard. This discrimination against people with disabilities, and against nonprofit and publicly funded housing for them, threatens to divert significant amounts of funding toward costly and unnecessary litigation or even to derail some projects altogether.

There is, unfortunately, no reason to believe this kind of opposition to housing for people with disabilities will stop. Developers of this housing can expect a range of responses from complaints to elected officials to

¹ TENNESSEE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES, CREATING HOMES INITIATIVE (2009), *available at* http://state.tn.us/mental/recovery/CHI_PACKET_MARCH_2009.pdf

litigation. While opponents of this housing often use zoning as a weapon, other barriers can arise even where zoning issues are not relevant.

This guide is not intended to be an exhaustive guide to NIMBY issues or a silver bullet that will make all NIMBY problems go away, but it should help providers of housing for people with disabilities anticipate, understand and deal with the obstacles they are likely to encounter when seeking sites for such housing. This guide will cover the following major areas:

- Legal issues: How the Fair Housing Act and other federal and state laws protect housing for people with disabilities.
- Myths about housing for people with disabilities: How “property values,” “crime” and objections to deinstitutionalization have been used as obstacles
- Successful and unsuccessful approaches to siting housing for people with disabilities: What processes might be appropriate in a given situation?
- Index of frequently asked questions: A quick reference that will, we hope, take you quickly to the information you need.

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CHAPTER 1: Federal and State Law and Housing for People with Disabilities

A number of statutes and court decisions provide guidance on whether and how governments can regulate or restrict housing for people with disabilities. As you will see, both state and federal law strongly support the rights of people with disabilities to live in appropriate housing, even in traditional residential neighborhoods.

The bulk of the law we will examine in this chapter comes from a statewide zoning law and three key federal civil rights statutes, at least one of which dates from the early 70s. In most respects, the law is well settled and has been for several years; however, litigation continues.

State and local law

While most of the statutes regarding discrimination against housing for people with disabilities are federal, providers of housing and other services for people with disabilities will find most helpful a state statutory provision that reads as follows:

For the purposes of any zoning law in Tennessee, the classification "single family residence" includes any home in which eight (8) or fewer unrelated persons with disabilities reside, and may include three (3) additional persons acting as support staff or guardians, who need not be related to each other or to any of the persons with disabilities residing in the home.²

This provision, which is known as a "zoning override," *supersedes any local zoning regulations to the contrary*³ and means that homes for fewer than eight people with disabilities and three caretakers must be treated as though they are single-family homes. This means they can generally locate in any residential neighborhood as a matter of right without seeking relief from zoning regulations, such as a variance or a special-use permit. They also may not be subjected to any procedures (public hearings) or special requirements (such as expensive fire safety equipment, unless the local government can show a genuine need) to which other single-family homes do not have to submit.

² TENN. CODE ANN. § 13-24-102.

³ TENN. CODE ANN. § 13-24-103.

However, the single-family classification does not apply to “such family residences wherein persons with disabilities reside when such residences are operated on a commercial basis.”⁴ In 1982, the Tennessee Court of Appeals discussed the boundaries of commercial operation in *Nichols v. Tullahoma Open Door, Inc.*:⁵

[T]he statutory scheme did not seek to exclude a group home not operating for profit ... on the basis that it was operating as a commercial business simply because defendant received subsidies and rent to repay the mortgage loan and to pay staff members. No commercial purpose for the group home has been shown and we are of the opinion that the home is not operating on a commercial basis.⁶

The import of this case is that providers of housing for eight or fewer people with disabilities that is operated on a non-profit basis will be protected by this state zoning law. However, for-profit providers (and providers of housing for more than eight people) are still protected by the Fair Housing Act, the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 and have the right to request relief from zoning requirements as a reasonable accommodation to their residents with disabilities. (Reasonable accommodations and these federal statutes will be discussed in detail below.)

The court in the *Nichols* case also rejected a challenge to the statute’s constitutionality, holding that the statute was not an unconstitutional taking of property,⁷ did not usurp local governments’ zoning powers⁸ and did not violate equal protection by granting rights to people with disabilities that were not granted to others.⁹

This state zoning provision has been held not only to supersede local

⁴ TENN. CODE ANN. § 13-24-104.

⁵ 640 S.W.2d 13 (Tenn. App. 1982)

⁶ *Id.* At 17.

⁷ *Id.*

⁸ *Id.* at 18.

⁹ *Id.*

zoning rules but also private restrictive covenants (which will be discussed in more detail below). In *Pioneer Subdivision Homeowners Ass'n v. Prof'l Counseling Servs., Inc.*,¹⁰ the Court of Appeals of Tennessee at Jackson affirmed the trial court's holding that the statute overrides a neighborhood's private restrictive covenant.

Several municipalities also have some version of this zoning relief built into their local codes. For example, Nashville's zoning ordinance contains the following definition of "family":

A group of not more than eight unrelated mentally retarded, mentally handicapped, or physically handicapped persons, including two additional persons acting as houseparents or guardians, living together as a single housekeeping unit in accordance with Tennessee Code Annotated § 13-24-102. For purposes of this subsection, 'mentally handicapped' and 'physically handicapped' includes persons being professionally treated for drug and/or alcohol dependency or abuse.¹¹

Nashville's ordinance specifically excludes people whose mental illness causes them to "pose a likelihood of serious harm" or who have been convicted of "serious criminal conduct related to such mental illness."

The city of Murfreesboro's zoning ordinance includes this in their definition of "family":

a group of not more than eight unrelated mentally retarded or physically handicapped persons which include two additional persons, acting as houseparents or guardians, who need not be related to each other, or any of the mentally retarded or physically handicapped persons in the group.¹²

The City of Memphis defines "family" in part as:

a group of eight or fewer unrelated mentally retarded, mentally handicapped or physically handicapped persons, (as certified by any authorized entity including governmental agencies or

¹⁰ 2002 Tenn. App. LEXIS 767.

¹¹ Metro Nashville Code of Laws § 17.04.060

¹² Murfreesboro City Code, Appendix A (Zoning Ordinance), § 2.

licensed medical practitioners), and may include three additional persons acting as houseparents or guardians, also need not be related to each other or to any of the mentally retarded, mentally handicapped or physically handicapped persons in the group, living together in a residence licensed, where required by law, by a duly authorized governmental agency, or in other instances, approved by the Planning Director who shall provide any such applicant with written notice of his determination. This (c) definition of "family" does not apply to residences wherein mentally retarded, mentally handicapped or physically handicapped persons reside when such residences are operated on a commercial basis.¹³

For providers of housing for people with disabilities, then, it is beneficial to look to applicable local zoning ordinances to see whether they may provide relief from zoning restrictions that might otherwise keep them out of single-family neighborhoods without an onerous special-use process. Further, in Nashville and Murfreesboro, it appears that there is no distinction between providers operating on a non-profit and "commercial" basis, as there is in the state law discussed above.

Most moderately-sized and large cities in Tennessee have their zoning ordinances available on their web sites, and all cities with zoning ordinances are required to make those ordinances available for public inspection, usually at City Hall. The definitions section of the ordinance, specifically the definition of "family," is usually the best place to start looking to see whether a given use is already permitted under existing zoning law.

Federal Law

A. The Fair Housing Act

Before 1988, the law 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.¹⁴ Others could sue on the basis of laws in their own states or cities.

¹³ Memphis Code, Title 15, § 12.3.1.

¹⁴ See especially *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

However, in 1988 Congress passed the Fair Housing Amendments Act of 1988,¹⁵ which amended the federal Fair Housing Act¹⁶ 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 was intended to address zoning decisions, restrictive covenants, and conditional or special-use permits “that have the effect of limiting the ability of [people with disabilities] to live in the residence of their choice in the community.”¹⁷ Thus, Congress explicitly made zoning an issue in the 1988 amendments, though the Act also applies to discrimination in a variety of other housing transactions.

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.¹⁸

For purposes of this discussion, there are three major legal theories under the Fair Housing Act 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 because of their disabilities. This is often called **discriminatory** or

¹⁵ Pub. L. 100-430, 102 Stat. 1619 (1988). The legislative history of the Act makes extensive reference to the City of Cleburne case.

¹⁶ 42 U.S.C. §§ 3601 *et seq.* The act now prohibits discrimination on the basis of race, color, national origin, religion, sex, disability and familial status.

¹⁷H.R. REP. NO. 711, 100th Cong., 2d Sess. 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185.

¹⁸ 42 U.S.C. § 3602(h).

disparate treatment.

Second, the Act prohibits enforcement of facially neutral rules or policies that have the effect of discriminating against members of a protected class. This is usually called **discriminatory** or **disparate impact**.

Third, the Act creates an affirmative obligation on local governments to provide a “**reasonable accommodation**” for housing for people with disabilities, usually in the form of a zoning change or waiver of other local policy or rule where necessary.

We will examine these three broad categories in more detail.

Prohibitions against discriminatory treatment

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 landlords, for example, to treat people unfairly 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 traditionally has taken the form of private restrictive covenants or zoning regulations that specifically prohibit housing for people with disabilities. It can also take the form of discriminatory application or enforcement of a rule or policy, especially when accompanied by pressure from constituents based on the disabilities of the residents. We will examine further examples of these kinds of discrimination below.

Discriminatory impact

A “discriminatory impact” (also variously known as “disparate impact,” “adverse impact” or “discriminatory effect”) occurs when an apparently neutral policy or procedure results in discrimination based on disability.

A plaintiff in a fair housing case can lay the groundwork for a claim of discrimination simply by showing the more burdensome effect such a policy has on him because of his disability, or on people with disabilities generally. It is helpful, but not necessary, to the plaintiff’s case to show evidence of intent to discriminate. However, a city can answer that claim

by showing that its actions furthered a legitimate governmental interest and that there was no alternative that would serve that interest with a less discriminatory effect.¹⁹ Courts then weigh the discriminatory impact of the policy against the city's justification for its policies.²⁰

“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.”²¹ Under this theory, people with disabilities are entitled to a favored status, because they must reasonably be accommodated in ways that people without disabilities need not be.²²

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 require local governments to grant the zoning relief necessary to allow 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.²³ Application of the reasonable accommodation provisions has also resulted in waivers of specific kinds of zoning requirements, such as density, spacing, signage and public hearing requirements.

B. Case law under the federal Fair Housing Act

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-

¹⁹See, e.g., *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp.1179, 1183 (E.D. NY 1993), *Tsombanidis v. City of West Haven*, 352 F.3d 565 (2d Cir. 2003).

²⁰*Id.*

²¹ 42 U.S.C. § 3604 (f)(3)(B)

²² ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* p. 11D-36 (2007)

²³ *Id.*

family” zoning that prevents a group home from locating where only groups of related people had been permitted;²⁴ spacing requirements prohibiting housing for people with disabilities within a certain distance of existing housing;²⁵ special safety and health rules that apply only to homes for people with disabilities;²⁶ burdensome procedural requirements for such homes;²⁷ state enforcement of private restrictive covenants,²⁸ 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 significant success in court. One of the most significant cases is *City of Edmonds v. Oxford House, Inc.*²⁹ The group home³⁰ 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 despite its having more than five unrelated residents.

The city argued that language in the Fair Housing Act that exempted

²⁴ See especially *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995). This case will be discussed in more detail below.

²⁵ See, e.g., *N.J. Rooming & Boarding House Owners v. Asbury Park*, 152 F.3d 217 (3d Cir. 1998)

²⁶ *Id.*

²⁷ *Id.*

²⁸ See, e.g., *Hill v. The Community of Damien of Molokai*, 911 P.2d 861 (N.M. 1996); *Martin v. Constance*, 843 F.Supp. 1321 (E.D. Mo. 1994)

²⁹ 514 U.S. 725 (1995)

³⁰ In its promotional materials, Oxford House describes itself as “a concept in recovery from drug and alcohol addiction. In its simplest form, an Oxford House describes a democratically run, self-supporting and drug-free group home.” Published on the Internet at <http://www.oxfordhouse.org>. People recovering from addictions to controlled substances are considered “handicapped” under the Fair Housing Act. 24 C.F.R. § 100.201.

“reasonable occupancy restrictions” from scrutiny protected the city from a Fair Housing Act challenge. However, 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.”³¹ 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.”³²

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*,³³ 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.

Ordinarily, 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, it is not necessarily illegal for a city to require all housing providers to seek a special-use permit, variance or some other zoning relief before locating. In *United States v. Village of Palatine*,³⁴ 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.”³⁵

³¹ 514 U.S. at 733.

³² *Id.* at 736.

³³ 819 F. Supp.1179 (E.D. N.Y. 1993)

³⁴ 37 F.3d 1230 (7th Cir. 1994)

³⁵ *Id.* at 1234.

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”³⁶ as evidenced by the fact that a city appears to be in the habit of rejecting requests for zoning relief because of community opposition or other considerations.

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 needed because of the disabilities of the actual or prospective residents and that without the accommodation people with disabilities would be denied the opportunity to enjoy equal housing in the community of their 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.³⁷

Municipalities must prove that these kinds of legitimate zoning considerations are demonstrable and not hypothetical and that they are not motivated by an intent to discriminate.

Special safety and procedural rules for housing for people with disabilities

Because of unsupported fears about community safety and concerns about resident safety, municipalities have often either barred housing for people with disabilities altogether or grudgingly allowed homes for people with disabilities and other arrangements on the condition that they comply with onerous safety and other procedures not required of other congregate living arrangements. Courts that have dealt with this issue have generally struck such requirements down as discriminatory. Some of the most important litigation in this area has taken place in the Sixth Circuit, the judicial circuit in which Tennessee is located.

1. Measures for the safety of the community

³⁶ *Id.*

³⁷ *Hovsons, Inc., v. Township of Brick*, 89 F.3d 1096 (3d Cir. 1996)

In *Bangerter v. Orem City, Utah*,³⁸ the city had imposed two conditions on a group home for mentally retarded adults. First, the city told the home it must give assurances that the home would be supervised 24 hours a day. Second, the city ordered the home to establish a community advisory panel to deal with complaints from neighbors. The city imposed no such requirements on any other communal living arrangement, and the court held that these requirements amounted to intentional discrimination under the Fair Housing Act that must be “justified by public safety concerns.”³⁹

However, public safety concerns must be reasonable and not predicated on stereotypes about people with disabilities. Though the Fair Housing Act does not protect individuals “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,”⁴⁰ municipalities may not base decisions about housing for people with disabilities simply because of an assumption that people with disabilities are dangerous. In *Township of West Orange v. Whitman*,⁴¹ a court rejected the township’s and local homeowners’ claims that they should be consulted before housing for people with mental illness is allowed to locate in their neighborhoods and their request to receive information on the histories of people placed in this housing.⁴²

2. Measures to protect the residents

Municipalities may not prescribe burdensome safety requirements for housing for people with disabilities unless they are tailored to the specific

³⁸ 46 F.3d 1491 (10th Cir. 1995)

³⁹ *Id.* at 1503

⁴⁰ 42 U.S.C. 3604(f)(9).

⁴¹ 8 F. Supp. 2d 408 (D.NJ 1998).

⁴² Closer to home, the Court of Appeals of Tennessee at Jackson struck down a trial court’s order that the committee that selects residents for a group home include two members of a neighborhood association that opposed the group home’s presence in the neighborhood. However, the holding was not because the requirement would violate the Fair Housing Act but because the neighborhood association did not request such relief. *Pioneer Subdivision Homeowners Ass’n v. Prof’l Counseling Servs.*, 2002 Tenn. App. LEXIS 767 (Tenn. Ct. App. 2002)

population in the housing. In *Marbrunak, Inc., v. City of Stow, Ohio*,⁴³ the city's zoning code included "nearly every safety requirement that one might think of as desirable to protect persons handicapped by any disability - mental or physical."⁴⁴ The result, the court said, was "an onerous burden which has the effect of limiting the ability of these handicapped individuals to live in the residence of their choice."⁴⁵ Therefore, the ordinance was held to be discriminatory on its face.

Marbrunak-type fact situations are extremely common in Tennessee and may be one of the leading obstacles to development of housing for people with disabilities in residential neighborhoods. The Tennessee Department of Commerce and Insurance has adopted the 2006 National Fire Protection Association Life Safety Code, which contains a "Residential Board and Care Occupancy" classification that was in past versions of the Code as well. "Residential Board and Care Occupancy" is defined as "a building or portion thereof that is used for lodging and boarding of four or more residents, not related by blood or marriage to the owners or operators, for the purpose of providing personal care services."⁴⁶ "Personal care" is defined as "the care of residents who do not require chronic or convalescent medical or nursing care."⁴⁷

Many group homes with staff, even if staff are not providing the kind of services that would require the home to be licensed by the state, are routinely categorized by local fire safety officials as "residential board and care occupancy" and thus are subject to the requirements of Chapter 32 of the NFPA code, "New Residential Board and Care Occupancies." That chapter has special provisions relating to means of escape, automatic sprinkler systems, special fire-resistant walls and doors, provisions that go far beyond the requirements for a typical single-family home.

Recall from Chapter 1 that a state statute and some local ordinances provide that certain group homes with eight or fewer people with disabilities should be treated as single-family homes for zoning purposes. However, most municipalities take the position that the statute does **not**

⁴³ 974 F.2d 43 (6th Cir. 1992)

⁴⁴ *Id.* at 46-48.

⁴⁵ *Id.* at 48.

⁴⁶ NFPA 101 Life Safety Code 3.3.168.12

⁴⁷ NFPA 101 Life Safety Code 3.3.181

require them to treat group homes as single-family homes **for fire and building code purposes.**

Municipalities in Tennessee are required by state law to adopt fire codes that are at least as stringent as that adopted by the state⁴⁸, so most cities simply adopt the same version of the NFPA 101 Life Safety Code that's in place at the state level.

The central difficulty of this wholesale adoption of the NFPA code is that the code doesn't provide the kind of flexibility required by the *Marbrunak* court. There is no provision in the NFPA whereby a group home operator could demonstrate to a local fire official that the population he is serving is just as capable of evacuating a burning building as the traditional family next door. The NFPA code treats all people requiring "residential board and care" exactly the same, but in reality, people at all levels of ability are in family-style residential settings.

The City of Baltimore is one municipality that has addressed this issue by adopting the following language in its fire code:

A permanent living unit for four to eight individuals with disabilities, in addition to live-in staff, that was legally occupied as a residential board and care facility before January 1, 2007 is only required to comply with the requirements for a one and two family dwelling if specific information is presented at least annually to the fire chief or designee that the residents of the permanent living unit have no unique and specific needs which warrant imposition of the fire safety standards required by either Chapter 26, 32, or 33. A permanent living unit is one in which an individual intends to reside for more than 30 days. Individuals with disabilities means those persons who have a handicap as defined in the federal Fair Housing Acts Amendment Act of 1988, 42 U.S.C. Section 3601 et seq. Fire Prevention Code of Baltimore County 101:33.1.1.5 (2010).⁴⁹

Until the State of Tennessee or local municipalities adopt such language, it is difficult to know the best approach to this problem. One approach might be to request from the local fire marshal a reasonable accommodation in the form of a waiver of all or part of the fire code

⁴⁸ Tenn Code Ann. § 68-120-101(a).

⁴⁹ Fire Prevention Code of Baltimore County 101:33.1.1.5 (2010).

requirements if the residents of the home do not need extensive life safety equipment and if the home will not be able to open without a waiver because of the expense of installing such equipment. If the fire marshal denies the reasonable accommodation, that may, depending on the facts and circumstances, give rise to a Fair Housing Act complaint.

Dispersion requirements

One of the bedrock principles behind the Fair Housing Act's protections for housing for people with disabilities is that the residents should be able to live in an integrated residential setting of their choice. However, this principle often has been defeated by municipal rules that require a certain amount of space between facilities (otherwise known as dispersion requirements). Most courts, among them the federal circuit that includes Tennessee, have held that cities may not impose dispersion requirements on housing for people with disabilities.⁵⁰

Though the stated purpose of dispersion requirements is often to aid the integration of people with disabilities into communities and to prevent "ghettoization" of housing for people with disabilities, "integration is not a sufficient justification for maintaining permanent quotas under the FHA or the FHAA, especially where, as here, the burden of the quota falls on the disadvantaged minority. ... The FHAA protects the right of individuals to live in the residence of their choice in the community...If the state were allowed to impose quotas on the number of minorities who could move into a neighborhood in the name of integration, this right would be vitiated."⁵¹

Indeed, "(a)s a society, we have rejected spacing and density restrictions applied to families on the basis of race, religion and national origin,"⁵² and

⁵⁰ See, e.g., *Larkin v. State of Michigan*, 89 F.3d 285 (6th Cir. 1996). *But see* *Familystyle of St. Paul v. City of St. Paul, Minnesota*, 923 F.2d 91 (8th Cir. 1991), holding that St. Paul's dispersion requirements were permissible because they promoted community integration instead of segregation and clustering. This is clearly the minority view. See also *Oconomowoc Residential Programs, Inc., v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002), holding that the city erred in not granting a waiver from a spacing requirement but explicitly not dealing with the legality of the requirement since it was not at issue in the litigation.

⁵¹ *Larkin*, 89 F.3d at 291.

⁵² CAMERON WHITMAN AND SUSAN PARNAS. FAIR HOUSING: THE SITING OF GROUP HOMES FOR THE DISABLED AND CHILDREN 17 (1999). This guide for local officials was a joint publication of the National League of Cities and the Coalition to Preserve the Fair Housing Act; their points of agreement and disagreement are clearly defined throughout the document. Available at

thus similar restrictions on the basis of disability should be rejected as well. The Fair Housing Act protects people with disabilities to at least the same extent it does the other six protected classes.

Interference with funding

Actions taken by public officials or others to interfere with the ability of a housing provider or other agency to obtain funding for housing for people with disabilities can violate the Fair Housing Act. Such actions can take the form of simply withholding certifications or other documentation the agency needs for its application, if the reason for doing so is discriminatory (for example, because of the objections of neighbors).

There have not been many reported cases on this issue. In *Fu v. City of Clyde Hill*⁵³, an operator of adult family homes for people disabilities lost a bank loan because the city would not provide a letter certifying that her home would not be in violation of a local zoning ordinance. The court held that the town's failure to provide the letter affirmatively recognizing the group home as a permitted use could constitute a failure to provide a reasonable accommodation.

Restrictive covenants

Covenants that restrict neighborhoods to residential uses only are vulnerable to attack under the Fair Housing Act where they are used as a barrier to housing for people with disabilities. In at least one case, *Martin v. Constance*,⁵⁴ the court held that neighbors violated the Fair Housing Act when they sued the state to bar a group home, claiming the home would be in violation of a neighborhood covenant restricting homes to single-family occupancy. The court held the neighborhood had discriminatory intent when it sued to stop the home; that the covenant had a discriminatory effect on housing for people with disabilities; and that the neighborhood failed to reasonably accommodate the group home

http://books.google.com/books/about/Fair_Housing.html?id=45p9AAAACAAJ

⁵³ FH-FL Rptr. 16,195 (W.D.Wash. March 7, 1997)

⁵⁴ 843 F. Supp. 1321 (E.D. Mo. 1994). See also, e.g., *Advocacy Center for Persons with Disabilities, Inc., v. Woodlands Estates Ass'n, Inc.*, 192 F. Supp. 2d 1344 (M.D. Fla. 2002); *Hill v. The Community of Damien of Molokai*, 911 P.2d 861 (N.M. 1996); *Broadmoor San Clemente Homeowners Ass'n v. Nelson*, 30 Cal. Rptr.2d 316 (Cal. App. 1994); *Deep East Regional Mental Health and Mental Retardation Services v. Kinnear*, 877 S.W.2d 550; *U.S. v. Wagner*, 940 F. Supp. 972 (N.D. Texas 1996)

when it filed suit to enforce its covenants. (The First Amendment implications of homeowner lawsuits to block housing for people with disabilities will be discussed further below.)

The court's decision relied heavily on legislative history and the regulations promulgated by the U.S. Department of Housing and Urban Development, which prohibit "(e)nforcing covenants or other deed, trust, or lease provisions which preclude the sale or rental of a dwelling to any person because of race, color, religion, sex, handicap, familial status, or national origin."⁵⁵

And recall from earlier in this chapter that in *Pioneer Subdivision Homeowners Ass'n v. Prof'l Counseling Servs., Inc.*⁵⁶, the Court of Appeals of Tennessee at Jackson held that Tenn. Code Ann. § 13-24-102 overrides not only local zoning but also private restrictive covenants.

Free speech issues

Homeowners and other community members have a First Amendment right to speak out against the development of housing for people with disabilities or other housing to which they object. Such protected activity includes petitioning elected officials to stop the development of such housing.⁵⁷

It also includes filing lawsuits to block development, unless the suits are filed for an illegal objective; without a reasonable basis in law or fact; and with an improper motive. Lawsuits such as these are not only unprotected by the First Amendment, they can themselves be violations of the Fair Housing Act.⁵⁸

⁵⁵ 24 C.F.R. 100.80 (b)(3).

⁵⁶ 2002 Tenn. App. LEXIS 767

⁵⁷ See, e.g., *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000)

⁵⁸ *U.S. v. Wagner*, 940 F. Supp 972 (N.D. Texas 1996). See also *White*, 227 F.3d at 1232 (a lawsuit "can amount to a discriminatory housing practice only in the event that (1) no reasonable litigant could have realistically expected success on the merits, and (2) the plaintiffs filed the suit for the purpose of coercing, intimidating, threatening, or interfering with a person's exercise of rights protected by the FHA."); *Schroeder v. De Bertoloe*, 879 F. Supp. 173, 178 (D. P.R. 1995) ("plaintiffs' allegations that defendants ... brought groundless civil claims against decedent, and threatened to bring groundless criminal charges against her ... are sufficient to state a claim under the FHAA."); *South Middlesex Opportunity Council, Inc. v. Town of Framingham*, 752 F. Supp. 2d 85 (D. Mass. 2010) (plaintiff decides to close a shelter because of the threat of a lawsuit, even

Neighbors *do not* have the right to engage in direct harassment of residents or other activity not protected by the First Amendment. They may not physically obstruct construction or trespass in an attempt to slow or halt development.

And though citizens have the right to urge their public officials to block housing for people with disabilities, those officials do not have a right to act on those requests by making a decision that discriminates or otherwise violates state or federal law.

C. Enforcement of the Fair Housing Act and the Tennessee Human Rights Act

Violations of the Fair Housing Act (and the parallel Tennessee Human Rights Act) can be addressed in a number of ways.

The U.S. Department of Housing and Urban Development has the authority, under the Fair Housing Act, to enforce the Fair Housing Act. HUD, under a partnership agreement with the State of Tennessee, usually refers any administrative complaints it receives to the Tennessee Human Rights Commission for investigation and enforcement. The statute of limitations to bring a complaint to HUD is one year after the occurrence of the last discriminatory action; a complaint to the Tennessee Human Rights Commission must be brought within 180 days.

In matters involving zoning and land use (i.e., the majority of NIMBY cases), HUD does not issue a charge of discrimination. Instead, HUD refers matters it believes may be meritorious to the Department of Justice, which may decide to bring suit. The Department of Justice may also bring suit in a case that has not been the subject of a HUD complaint by exercising its power to initiate litigation alleging a “pattern or practice” of discrimination or a denial of rights to a group of persons which raises an issue of general public importance.⁵⁹

Victims of NIMBY-style discrimination also have the right to go straight to state or federal court without first pursuing an administrative remedy. The Fair Housing Act provides a two-year statute of limitations for private

though the lawsuit would be groundless.)

⁵⁹ Joint Statement of the Department of Justice and the Department of Housing and Urban Development: Group Homes, Local Land Use, and the Fair Housing Act, Aug. 1999 (available at http://www.justice.gov/crt/about/hce/final8_1.php)

enforcement of the Fair Housing Act in federal court. The Tennessee Human Rights Act provides a statute of limitations of one year to file a case in state court.

Because NIMBY-style discrimination has many victims, many parties may have the right to sue. The current or prospective residents of a home for people with disabilities would be proper plaintiffs, as would the owners and operators of the home. Mental health agencies or other organizations that assist people with disabilities in finding permanent housing would also be proper plaintiffs, because this sort of discrimination frustrates the mission of these organizations and diverts resources they would more properly use to serve more clients. The same is true of fair housing organizations that assist operators and residents of group homes to pursue their rights under applicable fair housing laws.

Similarly, it can be argued that governmental entities, such as state mental health agencies, that provide grant or other funds to operators of homes for people with disabilities may have an injury that would make them proper plaintiffs.

D. Other relevant federal statutes

Title II of the Americans with Disabilities Act⁶⁰ (“ADA”) and Section 504 of the Rehabilitation Act of 1973⁶¹ (“Section 504”) can also come into play in issues of zoning for housing (or other facilities) for people with disabilities.

The ADA provides, in relevant part:

No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.⁶²

Likewise, Section 504 applies to recipients of federal funds, which includes almost all cities by virtue of their receipt of federal grants and entitlement programs, such as Community Development Block Grant funds. It provides:

⁶⁰ 42 U.S.C. §§ 12131-12165 (1994).

⁶¹ 29 U.S.C. § 794 (1994).

⁶² 42 U.S.C. § 12132 (1994).

No otherwise qualified individual with a disability ... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. ...⁶³

The zoning function of a state or local government is a “service,” a “program” or an “activity” covered by the ADA and Section 504.⁶⁴ Thus, discriminatory application of zoning rules and discriminatory zoning decisions can be challenged under either of these statutes.

While the Fair Housing Act covers only disputes over “dwellings,” the ADA and Section 504 cover a broad range of services for people with disabilities, such as treatment or drop-in centers, that need zoning relief in order to be in an appropriate location.

⁶³ 29 U.S.C. § 794(a) (1994)

⁶⁴ See, e.g., *Innovative Health Systems, Inc., v. City of White Plains*, 117 F.3d 37 (2nd Cir. 1997); *MX Group Inc., v. City of Covington*, 2002 U.S. App. LEXIS 11249 (6th Cir. 1998).



CHAPTER 2: The Myths and Truths about Housing for People with Disabilities

NIMBY disputes can appear anywhere – the inner city; new suburban subdivisions; older, established areas; integrated and homogenous communities – but there are a few core concerns that appear regardless of the character of the neighborhood. The most commonly cited issues are the effect of homes for people with disabilities on property values, crime and “fair share.”

Most residents’ concerns are based on misinformation, largely built on myths about mental illness and other disabilities. Concern about falling property values can only occur if people with disabilities are seen as a “problem,” a threat, as a group that will cause upheaval if “allowed into” a community. Researcher Michael Dear laments that beliefs about, for example, mental illness haven’t changed significantly in the past twenty years, believing that the attitudes described in a 1972 study still hold true: most people still see “strange or disturbed behavior, particularly when it is socially visible, . . . as a threat to public safety.”⁶⁵ Media images, particularly the news, can reinforce these beliefs by sensationalizing isolated incidents such as recent shooting tragedies in Aurora, Colo. and Newtown, Conn.

Starting from the inaccurate premise that people with disabilities are a burden on a community, most neighborhoods will fight homes for people with disabilities with a set of beliefs unsupported by evidence. In reality, homes for people with disabilities have little to no negative impact on a neighborhood’s property values or on its crime rates. “Fair share” arguments rest on the assumption that people with disabilities are a burden; local governments should be sensitive to any perception that housing providers are targeting communities without political power and counter that perception with factual information about homes for people with disabilities.

⁶⁵ Rabkin, J. *Opinions about Mental Illness: A Review of the Literature* 77
PSYCHOLOGICAL BULLETIN 153-171 (1972) cited in MICHAEL DEAR AND ROBERT
WILTON, CRIME & SAFETY: FACT & FICTION 3.

Property values

The most commonly stated concern of residents near a proposed group home is that property values will decline. For most people, their home is their biggest investment – for many, the only significant one. Homeownership provides not only a place to live but is seen as a guarantee of future financial stability. It's not surprising that neighborhood residents will take action if they believe there is a threat to their investment.

However, the fear that homes for people with disabilities and other social services cause a decline in property values is not supported by the experience of neighborhoods throughout North America. Studies on the effects of homes for people with disabilities on property values have consistently shown that property values not only do not decline but in some cases increase.

Daniel Lauber's influential 1986 study of Illinois found no negative effect on property values. He examined 2,261 properties in Illinois for two years before and after group homes were introduced. Lauber's findings: property values rose 79% in neighborhoods with group homes, but only 71% in the control group.⁶⁶ Similarly, a 1990 review of 25 studies conducted throughout the United States found none that showed a decrease in property values or increased turnover.⁶⁷

Studies throughout the United States and Canada show the same effect – property values in neighborhoods with group homes increased or decreased at the same rates as those without group homes. Wolpert's study of 42 neighborhoods found, "without exception, the location of a group home or community residential facility for mentally disabled people does not adversely affect property values or destabilize a neighborhood."⁶⁸

⁶⁶ DANIEL LAUBER, IMPACTS ON THE SURROUNDING NEIGHBORHOOD OF GROUP HOMES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES. Report prepared for the Governor's Planning Council on Developmental Disabilities. (1986) cited in Peter F. Colwell, Carolyn A. Dehring, and Nicholas A. Lash, *The Effect of Group Homes on Neighborhood Property Values*. LAND ECONOMICS 617 (November 2000). A summary of the Colwell/Dehring/Lash study appears online at <http://pbadupws.nrc.gov/docs/ML1208/ML12088A314.pdf>.

⁶⁷ COMMUNITY RESIDENCES INFORMATION SERVICES PROGRAM (CRISP). THERE GOES THE NEIGHBORHOOD (1990).

⁶⁸ See Robert L. Schonfeld, "Five-Hundred-Year Flood Plains" and Other Unconstitutional Challenges to the Establishment of Community Residences for

A 2002 study by Arthur Anderson LLP focused on housing developed in Connecticut starting in mid-1992 by the Corporation for Supportive Housing, a national non-profit organization whose mission is to increase the supply permanent housing for people with special needs. The program produced 281 units of “service-enriched” permanent housing for homeless people and people at risk of becoming homeless.

The study found that “[t]he data collected to assess the impact of the projects on neighboring property values implied that the markets surrounding all but one of the projects improved from the date of our first evaluation” in mid-1999 through March 2002.⁶⁹

Similarly, a study published in 2004 of the impact of 11 small-scale supportive housing facilities found “no evidence that the announcement and development of these supportive housing sites was associated with any *negative* impact on proximate house prices.”⁷⁰

In contrast to the hundreds of studies that found no negative effect, the number of studies that have found decreases are in the single digits. However, even these studies often show that homes for people with disabilities can’t be singled out as the predominant factor in valuation. For example, one study speculated that the reason for the drop was “an initial overreaction to the group homes establishment” – in other words, panic selling – and that these initial decreases are eventually corrected. Intriguingly, the same study found that those neighborhoods protesting a group home found their property values dropping an additional 7% compared to those without protests.⁷¹

Another study that found a mix of increasing and decreasing values concluded that homes for people with disabilities weren’t “a certain predictor or cause” of value changes, citing instead that the issue is far more complex, with property values determined by “prevailing

the Mentally Retarded, 1 XVI FORDHAM URBAN LAW JOURNAL (1988).

⁶⁹ Arthur Andersen LLP, *Connecticut Supportive Housing Demonstration Program Final Program Evaluation Report* (May 2002)

⁷⁰ George Galster et al., *Supportive Housing and Neighborhood Property Value Externalities*, LAND ECONOMICS Vol. 80 No. 1, PP 33-54, at 49-50, available at <http://www.jstor.org/discover/10.2307/3147143>.

⁷¹ Colwell, Dehring, Lash, *supra* note 66, at footnote 3, 619.

neighborhood real estate valuation trends, economic recessionary forces, the location of industrial sites or major transportation highways, public school closing/opening, nearby positive or negative occurrences, felt increases/decreases in crime, increases/decreases in vacancies, etc.”⁷² The presence of homes for people with disabilities is only one of a wide variety of factors that can determine the value of any particular property, and should not be given particular importance.

Though neighborhood residents’ concerns about property values are sincere, there is little support for those fears. The consensus among researchers, as well as the experience of communities across the country, shows that homes for people with disabilities do not lower property values.

Disabilities and crime

The second most commonly stated concern is that homes for people with disabilities, especially those whose residents have mental illnesses, increase crime in nearby areas. This idea rests largely on the popular yet baseless belief that all people with mental illness are dangerous. While research indicates there is an association between some forms of mental illness and violence, several studies have shown that the public grossly overestimates the danger, with the Surgeon General reporting the public overestimating violence by a factor of 2.5.

Part of this misconception comes from not understanding how people with mental illness find themselves in the criminal justice system.

People with mental illness are often arrested and imprisoned not because they are dangerous, but because of a lack of treatment options. According to Michael Dear, communities “blocking facility developments . . . may actually perpetuate the conditions that they themselves find so disconcerting.”⁷³

Dear’s conclusion is further supported by a consensus among researchers that people with mental illness who are receiving treatment are “no more violent than others in the community.” In addition,

⁷² Greater Baltimore Community Housing Resource Board, Inc., “*The Impact of Group Homes on Residential Property Values in Baltimore County, Maryland.*” (December 1993) <http://www.gbchrb.org/grphomes.htm>

⁷³ DEAR AND WILTON, *supra* note 65, 4

residential homes for people with disabilities have rigorous standards for clients, keeping those with violent tendencies out of residential treatment facilities for the safety not only of the neighborhood, but also of other clients.

These conclusions are supported by many studies over the past few decades which consistently demonstrate that homes for people with disabilities do not increase crime in their neighborhoods.

Schonfeld found in a wide-ranging examination of 363 group homes that crime does not increase with the introduction of group homes for people with mental illness.⁷⁴ CRISP's 1990 summary of 58 studies of group homes and treatment facilities found the same thing.⁷⁵ Lauber's 1986 Illinois study found, however, "the crime rate for residents of these homes was *lower* than that of the general population."⁷⁶

A 2002 study in Denver similarly showed "no statistically significant evidence that the levels of reported crime rates of any category increased within any distance of a supportive housing facility after it began operating."⁷⁷

A 2008 article re-examining the MacArthur Violence Risk Assessment Study from the mid-1990s also concluded that individuals who move into a community after being discharged from a mental health treatment facility are likely to be good neighbors if they are being carefully monitored and are not abusing alcohol or drugs.⁷⁸ "Indeed, for people who do not abuse alcohol and drugs, there is no reason to anticipate that they present greater risk than their neighbors ... People with mental disorders are less likely than people without such disorders to assault

⁷⁴ Schonfeld, *supra* note 68.

⁷⁵ Crisp, *supra* note 67.

⁷⁶ Lauber, *supra* note 66.

⁷⁷ George Galster, Kathryn Pettit, Anna Santiago and Peter Titian, *The Impact of Supportive Housing on Neighborhood Crime Rates*. 24 JOURNAL OF URBAN AFFAIRS (Fall 2002).

⁷⁸ E. Fuller Torry M.D. et al , *The MacArthur Violence Risk Assessment Study Revisited: Two Views Ten Years After Its Initial Publication*, PSYCHIATRIC SERVICES, Feb. 2008, Vol. 59, No. 2, at 147-152. Available at <http://ps.psychiatryonline.org/data/Journals/PSS/3837/08ps147.pdf>

strangers and to commit assaults in public places.”⁷⁹

The argument that homes for people with disabilities introduce people with mental illness into a community is flawed – they are already there. Within any community live individuals with depression, substance abuse, personality disorders, developmental delays, schizophrenia, and these, because they are hidden or unacknowledged, often go untreated. Homes for people with disabilities provide a continuum of care and a stable environment that leads to a greater chance of recovery from mental illness than those who remain behind closed doors, suffering silently along with their families.

In a rural middle Tennessee town, a recent controversy arose over the siting of a group home for adults with mental illness within a few miles of a school. Neighbors and some city officials cited the December 14, 2012 shooting of children at Sandy Hook Elementary School in Newtown, Conn., as their main concern about the proximity of the home to the school.⁸⁰

In response to concerns like this one, the American Psychiatric Association wrote to Congressional leaders, urging them not to overreact to the tragedy and to support increased funding for mental health. “The vast majority of violence in our society is not perpetrated by persons with serious mental disorders,” the APA wrote. “Research suggests that individuals with mental illness engaged in regular treatment are considerably less likely to commit violent acts than those in need of, but not engaged in, appropriate mental health treatment.”⁸¹

The belief that homes for people with mental illness bring crime into a neighborhood is not only unsupported by the evidence, but it is a flawed conclusion given the prevalence of mental illness and other disorders already existing in our communities.

Fair Share

⁷⁹ *Id.* at 151.

⁸⁰ Julia Bruck, *Group home worries neighbors near Sumner school*, WSMV-TV, Jan. 21, 2013, <http://www.wsmv.com/story/20523513/group-home-worries-neighbors-near-sumner-school>

⁸¹ American Psychiatric Association, *Letter to Reid, McConnel, Boehner and Pelosi*, Dec. 20, 2012, <http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/APA%20on%20the%20Issues/APA-Letter-Regarding-CT-Shooting.pdf>

As a result of well-organized neighborhood opposition, group home operators have often looked for less risky locations, often in inner-city neighborhoods without political organization and with less strict zoning laws. Further, the affordability of real estate plays a large role in siting decisions, and poor, predominantly minority neighborhoods often offer the most affordable siting opportunities in a city. This, of course, leads to concentration, which some believe work against the central tenet of community-based care. It has also led to accusations against group home operators that they were engaging in race-based “targeting” of inner city communities, which may already have several mental health treatment facilities. In one neighborhood meeting in Nashville, residents of a predominantly African-American neighborhood angrily proclaimed that their neighborhood had become a “dumping ground” for unwanted group homes and even questioned whether their neighborhood, with its crime and other social ills, would be a safe place for people with disabilities.

The response in some cities has been the development of spacing requirements and “fair share” guidelines, which continue to be legally contested territory. “Fair share” statutes in the form of dispersal requirements are a clear violation of the Fair Housing Act. To deny a group home entry into a particular neighborhood simply because there are others there already is discriminatory on its face.

However, many advocates encourage a “fair share” approach that doesn’t legally limit the siting of group homes but instead encourages scattered siting. They maintain that community-based care should be in a residential community, providing clients a setting that helps them to re-enter everyday life, and that a high concentration of social service centers can work against this. For example, in St. Paul, Minnesota, an operator tried to create 21 group homes within a block and a half;⁸² advocates for scattered siting countered by supporting spacing requirements to help maintain a neighborhood setting for the benefit of clients and the surrounding area.

“Fair share” advocates believe such guidelines also help in increasing the number of communities available for siting. Fair share can provide a tool to open doors into communities that might otherwise be closed off to group homes and other social service facilities.

However, other advocates believe the assumptions behind “fair share”

⁸² WHITMAN AND PARNAS, *supra* note 52, at 16.

are destructive because the term itself implies that social service facilities are a burden, an undesirable addition to a neighborhood – a perception based on the myths of mental illness.

With this premise at work, they claim fair share guidelines could also be used to discriminate against people with mental illness by limiting possible siting locations. Spacing requirements limit the ability of group home operators to locate facilities freely, especially in the case of non-profit entities in search of affordable housing stock, interfering not only with the creation and development of group homes but actively discriminating against people with mental illness.

The authors of this guide believe that a far better solution to perceived overconcentration of housing for people with disabilities in low-income neighborhoods is a system of financial supports that enable developers of such housing to buy properties in all kinds of neighborhoods. When real estate prices are less of a factor in site selection, dispersal can occur naturally without possibly illegal government restrictions on the further development of group homes in certain areas.

Happy endings

The experience of other communities with homes for people with disabilities has shown that the effects most often cited by opponents clearly do not occur. Diana Antos Arens interviewed 75 people who lived in a Long Island neighborhood that fought the introduction of a group home. The results: after two years, the “overwhelming majority agreed that the residents are good neighbors; they have had no problems; and the residences had no adverse effects on property values.”⁸³

Otto Wahl found similar results, noting that one-quarter of the residents of the neighborhood he studied were unaware there was a group home nearby. Those who were aware saw no negative impact on property values, crime, or safety. Most were satisfied with the home in their neighborhood, and found that the results were far better than they had anticipated.⁸⁴

⁸³ Diana Antos Arens. *What do the neighbors think now? Community residences on Long Island, New York*. 29 COMMUNITY MENTAL HEALTH JOURNAL. (June 1993).

⁸⁴ Otto Wahl, *Community impact of group homes for mentally ill adults*. 29 COMMUNITY MENTAL HEALTH JOURNAL. (June 1993).

The experience of a variety of communities has shown that the issues most commonly raised in opposition to the siting of a group home have no factual basis. The community's fears may certainly be sincere – and should be treated as such – but some advocates⁸⁵ believe part of the task of siting is to educate people in the surrounding area about the realities of mental illness and the ethical and practical implications of deinstitutionalization.

⁸⁵ For example, the National League of Cities and the Coalition to Preserve the Fair Housing Act “agree on the importance of [local government officials and advocates] working together to educate existing neighbors and other stakeholders about the housing needs of people with disabilities, and the extent to which group homes fill a portion of this need.” WHITMAN AND PARNAS, *supra* note 52.



CHAPTER 3: Approaches to Siting Group Homes and Other Housing Options

While the evidence dispelling the myths surrounding of group homes is clear, approaches to siting are as varied as neighborhoods. While some advocates believe a low-profile, matter-of-fact approach is best, others argue for community involvement from the earliest stages.

Even within these camps, however, there is disagreement. Recently, two housing advocacy groups found their disagreements so strong that a jointly published fair housing guide listed their differing positions side by side on the same page, with the rationale for each.⁸⁶

It is beyond the scope of this guide to solve these disagreements. Instead, it will outline issues to be considered in developing a specific plan for a specific siting.

The varying approaches grow out of thirty years of siting history, concisely outlined by Michael Dear.⁸⁷ Early advocates usually worked with one of two strategies: a low-profile approach, in which a group home was secretly sited, with the hope that it would be accepted once its presence became known. The risks of this approach are obvious. Others were more public in siting, using a high-profile strategy of notifying and involving the neighborhood to gain acceptance. The risk: giving opponents enough information to mount a campaign to keep the facility out of the neighborhood.

Approaches to Siting

Housing advocates and providers disagree about many of these issues, but there are at least four things they do agree on:

- Group homes are free to locate in neighborhoods of their choosing, just as other citizens are.

⁸⁶ WHITMAN AND PARNAS, *supra* note 52.

⁸⁷ Michael Dear, Understanding and overcoming the NIMBY syndrome, 58 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION (Summer 1992).

- Know the neighborhood.
- Be prepared for opposition.
- Not every approach will work in every neighborhood.

Researchers have noted that NIMBY disputes are becoming more frequent and more organized.⁸⁸ The following sections suggest considerations to make in developing a plan to deal with the possibility of neighborhood opposition.

Low-Profile Approach

A low-profile siting keeps community contact at a minimum. In attempting to strike a balance between the wishes of a community to be involved in decision-making and the rights of an individual to be free of housing discrimination, this approach gives more emphasis to individual freedom. Assuming no zoning relief is necessary, low-profile, autonomous approaches rest on the belief that a housing provider may locate a facility “by right,” because people with mental illness, like any other residents, should not have to seek the neighborhood’s approval to move in. It is also built on the experience of other neighborhood-based group homes, where the fears of residents were replaced with an acceptance that comes from familiarity.

This approach requires working with local officials in adhering to the law – building codes, variances, and other requirements – but only as far as any other homeowner might.

Keeping a low profile does not, however, mean ignoring a community. Advocates strongly advise that a plan be developed to deal with potential opposition, guidelines for which are found in the following section on high-profile sitings.

Matter-of-fact entry into a neighborhood still requires that the operator not resort to subterfuge and that honest replies are given to honest questions. A group home requires a long-term, open relationship with its host community. However, this approach is built upon the simple legal fact that a home’s residents cannot be excluded from a neighborhood, and that they can legally exercise the same rights and expectations as

⁸⁸ Dear, *supra* note 87.

their neighbors.

A low-profile siting also spares group home residents from public scrutiny and public criticism, which few people would tolerate in their own lives. People with mental illness are guaranteed the same rights to privacy and confidentiality that are to be expected in a free society.

There are sound reasons for pursuing a low-profile siting approach. It can help in avoiding extensive frivolous NIMBY legal battles, especially if the operator works closely with local officials to ensure that laws are carefully followed. And even if NIMBY disputes arise, some researchers have noted that they often dissipate rapidly after a public hearing on the proposal.

However, there are risks. A community can see this as “sneaking” into a neighborhood, with the implication that the group home is doing something that it couldn’t get away with openly. This can create an atmosphere of distrust and suspicion that will require effort to dispel.

High-Profile Approach

The high-profile approach is based on collaboration with the host neighborhood, often starting before the property is purchased.

The premise is that neighborhoods fear what they don’t understand; therefore, a campaign of education and community participation is the best way to defuse opposition and build long-term acceptance, providing the greatest opportunity for clients to integrate into the daily life of the neighborhood.

The greatest risk with a high-profile approach is that it provides a flash point for the opposition to begin organizing to prevent the siting of the group home. It can also expose group home residents to public scrutiny, loss of confidentiality, and other negative effects, and because of this, the work of gaining community acceptance should begin long before residents move in.

There are, however, ways to minimize many of these risks, though they cannot be eliminated completely.

Research, Research, Research

Many who have been involved in successful sitings have emphasized the need to know the community. Utilizing neighborhood organizations, local

public officials and newspaper searches, learn about the neighborhood's history and power structures. Who are the neighborhood leaders? Who are the elected representatives? Who might benefit directly from the facility, such as builders and future employees? Are there already group homes in the neighborhood? What was the community's reaction when the group home was announced? What is its current relationship?

There are two main objectives in this research: First, to identify potential supporters.⁸⁹ Neighborhood-based support can be invaluable in educating and defusing local opposition. Second, to identify what form the opposition might take.⁹⁰ Is the opposition widespread or limited to a few vocal opponents? What responses have they used in the past? Notifying the media? Pressuring local officials? Harassment? Identifying supporters and avoiding the mistakes of the past can help in strengthening ties to the community and avoiding miscommunication.

According to developer Arthur Collins, "Changing negative public perception is one of the more expensive and laborious feats of communications." It is "[b]etter to anticipate community and government issues before arguments become emotional and it becomes impossible to retreat from a difficult position. The more you know about a community's goals and concerns, the greater the opportunity to avoid confrontation altogether."⁹¹

It is also important to research the concerns important to the community. Be prepared with practical, credible information to dispel the myths about property values, crime, and mental illness; have a response to the neighborhood's assertions that it has its "fair share" of group homes and that it is being unfairly singled out, for example, for its racial makeup.

One ABA publication suggests that one person within the organization be designated as contact person for the community, government, and media. This ensures consistent communication and avoids dissipating the

⁸⁹ Arthur Collins II, *Mixing NIMBY and ensuring development approval*, 46 REAL ESTATE WEEKLY (November 3, 1999); AMERICAN BAR ASSOCIATION STEERING COMMITTEE ON UNMET LEGAL NEEDS OF CHILDREN AND COMMISSION ON HOMELESSNESS AND POVERTY, *NIMBY: A PRIMER FOR LAWYERS AND ADVOCATES* (1999).

⁹⁰ *Id.*

⁹¹ Collins, *supra* note 89.

energies of the organization.⁹²

Reaching Out

Community: Successful outreach depends on open, honest, straightforward communication with the neighborhood. This will not only defuse tensions but will build the reputation of the group home. Communication that is confused, contradictory and erratic will give opponents little reason to believe that the home will be a well-managed asset to the community.

Though outreach can strengthen the ties between the group home and the surrounding neighborhood, it can also arouse NIMBY responses. Simply notifying the community will provide an opportunity for opponents to begin organizing ways to prevent its siting. According to one housing advocacy group, “public notification without public education only inflames public opposition.”⁹³

An important tool in informing and educating is the community meeting. The more successful sitings have kept meetings small and not site-specific and have made certain to include local supporters.⁹⁴ This is not to say that large meetings should be avoided as a way of silencing the community – rather, that such meetings can reduce the possibility of rational discussion by encouraging misinformation and emotional, biased responses. Neither the community nor the clients are served well by decisions made in such an atmosphere. In the experience of many advocates, and mentioned in at least one court case, large public meetings often become “platforms for ‘stereotypical views,’ not educated comments. . . . They can allow a vocal faction to derail the siting process, thereby entrenching fears about group home residents and undermining rational discourse and public education.”⁹⁵ This lays the groundwork for future distrust and can make it more difficult for local authorities to make decisions, leaving them open to legal liability.⁹⁶ A recent study on community outreach noted that many group home administrators were

⁹² AMERICAN BAR ASSOCIATION, *supra* note 89, at 17.

⁹³ WHITMAN AND PARNAS, *supra* note 52, at 12.

⁹⁴ AMERICAN BAR ASSOCIATION, *supra* note 89, at 26; GCA Strategies at <http://www.gcastrategies.com>; WHITMAN AND PARNAS, *supra* note 52.

⁹⁵ WHITMAN AND PARNAS, *supra* note 52, at 35, footnote 63.

⁹⁶ *Id.*

relying on small meetings, finding that the larger the meetings, the greater the opposition.⁹⁷

Instead of large meetings, then, small, face-to-face communication is more effective in allowing in-depth discussion that can address the neighborhood's concerns about group homes. A neutral location and facilitator are also recommended to allow information to flow in both directions.⁹⁸ While local residents need opportunities to get accurate information about the facility, operators can also benefit from community suggestions to ease integration into the surrounding area.⁹⁹

Government Officials: Local government officials play a vital role in siting a group home. These are the decision makers, who spend their days trying to balance competing interests – and it is important that they be made aware of the issues. Local representatives are often members of the community without a background in the wide range of often specialized issues involved in fair housing, and, along with the neighborhood, will often need to be the focus of education efforts.¹⁰⁰ Keep in close touch with local representatives, through mail or personal visits, making them aware of the need for a facility and the benefits it brings to the community. When meeting with them, it may prove useful to bring along supporters from the neighborhood, which can help representatives avoid seeing a NIMBY response as “group home vs. neighborhood.” Discussing the operator's response to neighborhood concerns can also be useful in showing a good-faith effort in working with the community, and a tour of the facility – or one like it – can also enlist local decision-makers in community education efforts.

Media: The media can be a powerful tool for getting information out about the group home, and in responding to neighbor's concerns. Maintaining a good relationship with the media will make it possible to respond to misinformation and rumors. Reporters work against deadlines, so make it easy for them to keep in touch with the organization by designating one person to be on call for providing statements and other information whenever it is needed.

⁹⁷ Allison Zippay, *Establishing group housing: Community outreach methods*, 23 *Administration in Social Work* (Summer 1999).

⁹⁸ AMERICAN BAR ASSOCIATION, *supra* note 89.

⁹⁹ Dear, *supra* note 87.

¹⁰⁰ AMERICAN BAR ASSOCIATION, *supra* note 89.

A guide from HomeBase makes several pragmatic, useful recommendations:

Create a press kit that describes the organization and group home, specific community supporters, and examples of successes.

Don't wait for the media to make the first contact. This will help in ensuring accurate information is available to the public, as well as avoiding a battlefield mentality. The project may suffer if the organization is never seen except in reaction to criticism. Get to know reporters. Ask about the angle of the story, find out with whom they've spoken and deal with reporters openly and honestly.¹⁰¹

After the siting, now what?

The group home has been established, the residents are settled in, and the program is up and running. Research shows that even in resistant neighborhoods, time will breed acceptance.¹⁰²

However, this doesn't mean the neighborhood can now be taken for granted. There is always a possibility that incidents will occur that may arouse neighborhood concerns, especially if they happen when opposition is beginning to ease. Continuing to build a strong relationship with the community will make sure that small, isolated incidents are seen for what they are, and as accepted as the occasional quirks that invariably happen throughout the neighborhood.

Strong relationships are built on familiarity, openness, and trust – the foundations of overcoming NIMBY opposition and factors vital to maintaining good standing in the community. Some advocates believe that outreach should continue beyond the siting stage, encouraging the neighborhood to participate through open houses and other community activities, as well as keeping neighbors updated on the progress of residents and the beneficial impact of the home on the area.¹⁰³

¹⁰¹ HomeBase / The Center for Common Concerns. BUILDING INCLUSIVE COMMUNITY: TOOLS TO CREATE SUPPORT FOR AFFORDABLE HOUSING (1996), cited in AMERICAN BAR ASSOCIATION, *supra* note 89.

¹⁰² Arens, *supra* note 83; Wahl, *supra* note 84; Dear, *supra* note 87.

¹⁰³ AMERICAN BAR ASSOCIATION, *supra* note 89, at 32.

Some housing advocates also recommend that local community members be part of an advisory board, further strengthening the ties between the home and the neighborhood.¹⁰⁴ You might also take the lead in encouraging your local government to develop a mediation process to help homeowners and housing providers work through neighborhood disputes. Portland, Ore., once established a “Community Residential Siting Program,” whose services included technical assistance, community outreach and mediation. Unfortunately, the program was discontinued because of lack of funding.¹⁰⁵ While participation by community residences for people with disabilities would be only voluntary, many would welcome the opportunity to mediate disputes with the help of a neutral third party rather than through the intervention of police, members of Congress or city council members.

What not to do

In a survey of 33 group home sitings, Michael Dear briefly summarizes several mistakes housing providers have made.¹⁰⁶

- Failing to respond to rumors and misinformation. Bad information can spread quickly when the neighborhood is already fearful of group homes, and the difficulty of dispelling rumors is well established.¹⁰⁷
- Failing to take into account local politics.¹⁰⁸ Misreading long-standing alliances and disagreements, as well as misunderstanding the difference between formal and informal power structures, can derail a project. Arthur Collins alludes to this: “community leaders – or those who perceive themselves as such will be offended, if not insulted, if they are not included in the planning process to some degree.”¹⁰⁹ Formal power structures

¹⁰⁴ *Id.*

¹⁰⁵ Portland Office of Neighborhood Involvement, <http://www.portlandonline.com/oni/index.cfm?c=32417>

¹⁰⁶ MICHAEL DEAR, CASE STUDIES OF SUCCESSFUL AND UNSUCCESSFUL SITING STRATEGIES (undated).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Collins, *supra* note 89.

– elected representatives, local councils – are only part of the picture. Consider also private citizens who have clout within a neighborhood, whether through long-term residency, networking, church organizations, political involvement, or other methods of influencing other members of the community.¹¹⁰

- Refusing to compromise, or compromising when it isn't appropriate.¹¹¹ The goal is to get the home sited and to have a good relationship with the community – compromises that can achieve these goals may be necessary. Agreeing to landscaping changes or parking arrangements are small prices to pay for a long-term successful siting. However, compromising to the extent that the home cannot operate effectively – for example, interference with the privacy of residents – is not appropriate. Such missteps can also be read as signs of weakness by those opposed to the home, and because of this will often result in escalating NIMBY responses.
- Relying on “religious and political rhetoric.”¹¹² Arguments such as these assume a shared set of values – religious doctrine, political assumptions – which, if not shared by the audience, can alienate them and increase hostility.
- Falling victim to “ingrained intransigence,” which creates distrust and suspicion built on a history of hostility. Lines are drawn in the sand, and neither side trusts the other enough to negotiate appropriate compromises.¹¹³
- Failing to prepare responses to accusations of improperly “targeting” a neighborhood based on its racial makeup, perceived lack of political clout or other characteristics. Group home operators should take care to make sure they carefully document that they are choosing sites based on such objective factors as housing costs and proximity to transportation and other social services.

¹¹⁰ AMERICAN BAR ASSOCIATION, *supra* note 89.

¹¹¹ Dear, *supra* note 87.

¹¹² *Id.*

¹¹³ *Id.*

There is no one siting approach that will work for every group home in every neighborhood. An agency needs to take into account its resources – financial, legal, and political – and those of the surrounding community so it can pursue the most effective approach in creating a long-term, positive relationship with the people nearby. Understanding the history and feel of the area will provide the most useful background for developing plans to allay fears and build trust among local residents, leading to a successful siting.

There are many ways to achieve a successful siting, and many ways to fail. Whether the siting is low- or high-profile, more needs to be taken into account than simply gaining a zoning variance or purchasing a property. A strategy based on open communication, community education, honesty in dealing with homeowners' concerns, and working toward a strong, long-term relationship with the neighborhood can often result in benefits for the group home and the surrounding area.

And if all else fails, it is critical to remember that the law strongly supports providers of housing for people with mental illness. Providers should not hesitate to seek legal assistance to aggressively combat illegal acts on the part of local and state governments and neighbors. A sound legal approach can pave the way not only for the project at hand but for future projects as well.

Frequently Asked Questions

Q. The neighbors claim my housing will drive down property values, but I know this isn't true. Has there been any research on this issue?

A. Yes. Most research shows no negative impact on the value of properties in the vicinity of housing for people with disabilities.

Q. The neighbors say the residents in my housing will commit crimes and create a safety hazard in the neighborhood. I know this is not true, but has there been any research on this issue?

A. Yes. Most research shows that appropriately placed and supervised residents of housing for people with disabilities are actually less likely to commit crimes than the general population.

Q. Can I sue the neighbors for going to the City Council or some other governmental officials to try to block the housing I am trying to develop?

A. Neighbors have a First Amendment right to petition elected officials to act on your project in a certain way. They may not, however, engage in non-protected conduct to block your development.

Q. Can the city impose extra requirements on my housing just because people with mental illness or intellectual disabilities will be living there?

A. Not without a good reason. If the city is imposing special requirements for your home based on "public safety" concerns, those concerns must be reasonable and not predicated on stereotypes about people with disabilities.

Q. What are the benefits and risks of a low-profile approach to siting?

A. See Chapter 3.

Q. What are the benefits and risks of a high-profile approach to siting?

A. See Chapter 3.

Q. What does Tennessee law say about zoning for my group home?

A. "For the purposes of any zoning law in Tennessee, the classification 'single family residence' includes any home in which eight (8) or fewer unrelated mentally retarded, mentally handicapped or physically handicapped persons reside, and may include three (3) additional persons acting as houseparents or guardians, who need not be related to each other or to any of the mentally retarded, mentally handicapped or physically handicapped persons residing in the home."

Q. Who can I call for help if I have a problem?

A. In Middle Tennessee, call the Tennessee Fair Housing Council at (615) 874-2344. In the rest of the state, call West Tennessee Legal Services at (731) 423-0616.

Resources

Tennessee Department of Mental Health and Developmental Disabilities.
Creating Homes Initiative Strategic Plan.

The American Bar Association Steering Committee on the Unmet Legal Needs of Children and Commission on Homelessness and Poverty.
NIMBY: A Primer for Lawyers and Advocates.

Schwemm, Robert G. **Housing Discrimination: Law and Litigation.**

Resource Document Series from The Campaign for New Community.
Handbooks:

Seeing People Differently: Changing Constructs of Disability and Difference.

Accepting and Rejecting Communities.

Case Studies of Successful and Unsuccessful Siting Strategies.

Community Relations: A Resource Guide.

Research Reports:

Hierarchies of Acceptance.

Building Supportive Communities.

Factors Influencing Community Acceptance: Summary of the Evidence.

The Question of Property Values.

Crime and Safety: Fact and Fiction.

Whitman, Cameron, and Susan Parnas. **Fair Housing: The Siting of Group Homes for the Disabled and Children.** A joint publication of the National League of Cities and the Coalition to Preserve the Fair Housing Act. Available at
http://books.google.com/books/about/Fair_Housing.html?id=45p9AAAACAAJ

Stein & Schonfield, Bazelon Center for Mental Health Law. **Digest of Cases and Other Resources on Fair Housing for People with Disabilities.**

The Fair Housing Act

<http://www.fairhousing.com/index.cfm?method=page.display&pageid=656>

The National League of Cities

<http://www.nlc.org/>

National Fair Housing Advocate Online

<http://www.fairhousing.com>

GCA Strategies
<http://www.gcastrategies.com>

Bazelon Center for Mental Health Law
<http://www.bazelon.org>

