Navigating NIMBY:
A Public Official's Guide to Neighborhood Living for People with Disabilities

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Tennessee Fair Housing Council

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Introduction

There are few situations more difficult for public officials than “Not in My Back Yard” (or “NIMBY”) disputes that arise when homeowners want to keep housing or facilities for people with disabilities out of their neighborhoods. Officials must weigh the neighbors’ wishes to control their surroundings against the rights of those seeking to provide housing for their most vulnerable constituents. The conflicts that often ensue force public officials to ask themselves difficult political, legal and ethical questions about responsible - and responsive - governance.

This handbook provides public officials with the information they need to make educated decisions that will keep them on the correct side of the law. It is also intended to provide strong, research-based, factual information that can give officials confidence that following the law will not lead to the negative consequences neighborhood residents often fear. This information should also help them educate their constituents about the realities of housing for people with disabilities to perhaps pave the way for smoother and more neighborly coexistence. This handbook also has some suggestions on how public officials can fulfill their roles as administrators or elected officials to plan for, educate about and regulate homes for people with disabilities.

Respecting and upholding the fair housing rights of people with disabilities does not occur at the expense of the quality of life in a neighborhood or a city. It enhances it. We hope you will find this guide helpful as you deal with the competing concerns of fair housing, land-use control and homeowner objections.

CHAPTER 1:
The Law as it Applies to Housing and Other Facilities 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, municipal policy makers 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.[1]

This provision, which is known as a "zoning override," *supersedes any local zoning regulations to the contrary*[2] 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

[1] TENN. CODE ANN. § 13-24-102.

[2] TENN. CODE ANN. § 13-24-103.

government can show a genuine need) to which other single-family homes do not have to submit.

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."[3] In 1982, the Tennessee Court of Appeals discussed the boundaries of commercial operation in Nichols v. Tullahoma Open Door, Inc.:[4]

[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.[5]

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,[6] did not usurp local governments' zoning powers[7] and did not violate equal protection by granting rights to people with disabilities that were not granted to others.[8]

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[3] TENN. CODE ANN. § 13-24-104.

[4] 640 S.W.2d 13 (Tenn. App. 1982)

[5] *Id.* At 17.

[6] *Id.*

[7] *Id.* at 18.

[8] *Id.*

This state zoning provision has been held not only to supersede local 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.*,[9] 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.[10]

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.[11]

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 licensed medical practitioners), and may include three additional persons acting as houseparents or guardians, also

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[9] 2002 Tenn. App. LEXIS 767.

[10] Metro Nashville Code of Laws § **17.04.060**

[11] Murfreesboro City Code, Appendix A (Zoning Ordinance), § 2.

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.[12]

For providers of housing for people with disabilities, then, local zoning ordinances 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

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.[13] 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,[14] which amended the federal Fair Housing Act[15] to add protection

[12] Memphis Code, Title 15, § 12.3.1.

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

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

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."[16] 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.[17]

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 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

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[15] 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.

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

[17] 42 U.S.C. § 3602(h).

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.[18] Courts then weigh the discriminatory impact of the policy against

[18]*See, 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).

the city's justification for its policies.[19]

"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."[20] 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.[21]

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.[22] 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.

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-family" zoning that prevents a group home from locating where only groups of related people had been permitted;[23] spacing requirements prohibiting housing for people with disabilities within a certain distance of existing

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[19] *Id.*

[20] 42 U.S.C. § 3604 (f)(3)(B)

[21] ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION p. 11D-36 (2007)

[22] *Id.*

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

housing;[24] special safety and health rules that apply only to homes for people with disabilities;[25] burdensome procedural requirements for such homes;[26] state enforcement of private restrictive covenants,[27] 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.*[28] The group home[29] 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 "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

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

[25] *Id.*

[26] *Id.*

[27] *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)

[28] 514 U.S. 725 (1995)

[29] 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.

dwelling overcrowding."[30] 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."[31]

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*,[32] 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*,[33] 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."[34]

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"[35] as evidenced

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[30] 514 U.S. at 733.

[31] *Id.* at 736.

[32] 819 F. Supp.1179 (E.D. N.Y. 1993)

[33] 37 F.3d 1230 (7th Cir. 1994)

[34] *Id.* at 1234.

[35] *Id.*

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.[36]

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

In *Bangerter v. Orem City, Utah*,[37] 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

[36] Hovsons, Inc., v. Township of Brick, 89 F.3d 1096 (3d Cir. 1996)

[37] 46 F.3d 1491 (10th Cir. 1995)

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."[38]

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,"[39] 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*,[40] 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.[41]

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 population in the housing. In *Marbrunak, Inc., v. City of Stow, Ohio*,[42] 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."[43] The result, the court said, was "an onerous burden which has the effect of limiting the ability of these handicapped individuals to

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[38] *Id.* at 1503

[39] 42 U.S.C. 3604(f)(9).

[40] 8 F. Supp. 2d 408 (D.NJ 1998).

[41] 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)

[42] 974 F.2d 43 (6th Cir. 1992)

[43] *Id.* at 46-48.

live in the residence of their choice."[44] 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."[45] "Personal care" is defined as "the care of residents who do not require chronic or convalescent medical or nursing care."[46]

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, it is unclear whether the statute would require municipalities to treat such 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 state[47], so most cities simply adopt the same version of the NFPA 101 Life Safety Code that's in place at the state level.

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[44] *Id.* at 48.

[45] NFPA 101 Life Safety Code 3.3.168.12

[46] NFPA 101 Life Safety Code 3.3.181

[47] Tenn Code Ann. § 68-120-101(a).

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).[48]

Until the State of Tennessee or local municipalities adopt such language, there will continue to be conflict. One approach might be for local fire marshals to be open to reasonable accommodations in the form of a waiver of all or part of the fire code 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

[48] Fire Prevention Code of Baltimore County 101:33.1.1.5 (2010).

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.[49]

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."[50]

Indeed, "(a)s a society, we have rejected spacing and density restrictions applied to families on the basis of race, religion and national origin,"[51] and 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

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[49] *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.

[50] Larkin, 89 F.3d at 291.

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

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*[52], 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*,[53] 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 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."[54]

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

[53] 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)

[54] 24 C.F.R. 100.80 (b)(3).

And recall from earlier in this chapter that in *Pioneer Subdivision Homeowners Ass'n v. Prof'l Counseling Servs., Inc.*[55], 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.[56]

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.[57]

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.

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[55] 2002 Tenn. App. LEXIS 767

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

[57] 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 though the lawsuit would be groundless.)

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.[58]

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 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

[58] 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)

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.

Other relevant federal statutes

Title II of the Americans with Disabilities Act[59] ("ADA") and Section 504 of the Rehabilitation Act of 1973[60] ("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.[61]

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:

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. ...[62]

The zoning function of a state or local government is a "service," a "program" or an "activity" covered by the ADA and Section 504.[63] Thus,

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[59] 42 U.S.C. §§ 12131-12165 (1994).

[60] 29 U.S.C. § 794 (1994).

[61] 42 U.S.C. § 12132 (1994).

[62] 29 U.S.C. § 794(a) (1994)

[63] *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).

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.

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."[64] 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.

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.

[64] 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.

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.[65] Similarly, a 1990 review of 25 studies conducted throughout the United States found none that showed a decrease in property values or increased turnover.[66]

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."[67]

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

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[65] 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.

[66] COMMUNITY RESIDENCES INFORMATION SERVICES PROGRAM (CRISP). THERE GOES THE NEIGHBORHOOD (1990).

[67] See Robert L. Schonfeld, *"Five-Hundred-Year Flood Plains" and Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Retarded*, 1 XVI FORDHAM URBAN LAW JOURNAL (1988).

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.[68]

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."[69]

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.[70]

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 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."[71]

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

[69] 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.

[70] Colwell, Dehring, Lash *, supra* note 66, at footnote 3, 619.

[71] 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

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."[72]

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, 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

[72] DEAR AND WILTON, *supra* note 64, 4

crime does not increase with the introduction of group homes for people with mental illness.[73] CRISP's 1990 summary of 58 studies of group homes and treatment facilities found the same thing.[74] Lauber's 1986 Illinois study found, however, "the crime rate for residents of these homes was *lower* than that of the general population."[75]

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."[76]

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.[77] "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 strangers and to commit assaults in public places."[78]

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.

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[73] Schonfeld, *supra* note 67.

[74] Crisp, *supra* note 66.

[75] Lauber, *supra* note 65.

[76] 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).

[77] 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

[78] *Id.* at 151.

In a rural middle Tennessee town, a recent controversy arose over the siting of a group home 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.[79]

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.”[80]

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.

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.”[81]

Otto Wahl found similar results, noting that one-quarter of the residents of the neighborhood he studied were unaware there was a group home

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[79] 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

[80] 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

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

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.[82]

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 advocates[83] 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.

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

[83] 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 51.

CHAPTER 3:
The Role of Public Officials

The sometimes conflicting needs of people with disabilities and homeowners can make public officials feel as though their role is merely that of referee. While refereeing such disputes can be an important part of a public official's job, he or she has other important and positive leadership roles to play in the larger scheme of making more affordable housing available in their communities.

Those roles can be roughly categorized as planning; education and policing for health, safety and quality of life. Public officials regularly carry out all three of these roles in a variety of contexts already. We will examine each of these roles and the way they might work in the context of housing for people with disabilities in more detail.

Planning

One of the most important functions public officials at all levels perform is planning. Public officials have a responsibility to analyze the housing needs of their communities. There are few communities that, after a thorough needs assessment, would conclude that there is enough affordable housing, especially for people with disabilities.

And such an assessment would make clear that merely "to be focused first on how to allocate among communities the meager amount of housing available misses the critical issue entirely."[84] Instead, local governments should concentrate on increasing the overall pool of housing options for people with disabilities in all parts of the city.

For most cities, this planning process is already in place. Cities and other local governmental entities that receive federal Community Development Block Grant ("CDBG") funds must file periodically a Consolidated Plan and an Analysis of Impediments to Fair Housing Choice ("AI"). The AI is part of a community's obligation to "affirmatively further fair housing."

Though this obligation has never been defined in law, HUD requires CDBG grantees to:

[84] WHITMAN & PARNAS, supra note 51, at 29.

1. Conduct an analysis to identify impediments to fair housing choice within the jurisdiction
2. Take appropriate actions to overcome the effects of any impediments identified through the analysis
3. Maintain records reflecting the analysis and actions taken in this regard.[85]

Looking carefully at barriers to housing for people with disabilities and then addressing those barriers certainly affirms fair housing, and such an examination may in fact be necessary to meet HUD's requirements for CDBG recipients.

HUD identifies NIMBY-type resistance to housing for people with disabilities as a potential impediment to fair housing choice,[86] making it imperative that entitlement jurisdictions identify such tensions and take steps to remedy them. Those steps might include examining the jurisdiction's own ordinances, policies and procedures, both formal and informal, for siting housing for people with disabilities and for addressing community objections.

Jurisdictions should also discuss in their plans "the extent to which a broad variety of accessible housing for persons with disabilities are distributed throughout the jurisdiction, demonstrating efforts made to provide such housing in an integrated setting."[87]

With respect to this requirement, cities should examine whether some neighborhoods have a higher proportion of housing for people with disabilities than others. While it is a mistake to think of such housing as a burden on those neighborhoods, homeowners in those neighborhoods may claim to be shouldering more than their "fair share." If there are economic, political or other factors that prevent a diverse distribution of housing for people with disabilities throughout the jurisdiction, city officials should take steps to address them.

Education

Public education is really a continuation of the planning process. It involves getting the message out to the public that the community needs housing for people with disabilities in integrated settings.

When people with disabilities move into a group home arrangement in a

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[85] U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, FAIR HOUSING PLANNING GUIDE 1-2
[86] *Id.* at 2-17.
[87] *Id.* at 2-28.

residential neighborhood, one of the most prevalent complaints from homeowners nearby is that they weren't told it was going to happen.

As discussed above, in many cases there is no obligation on the part of the providers of such housing to tell anyone they are moving in, because the home should be treated like any other single-family home. In other cases, where a house has required a special-use permit or other zoning relief to locate in a single-family zone, there may be no public hearings as a reasonable accommodation to the prospective residents.

However, there are ample opportunities - and good reasons - for public officials to discuss homes for people with disabilities and people with disabilities in general with their constituents. Such public discussion can dispel the fears and myths about such housing and educate the public about the acute need for it throughout the community.

Further, "it's much easier to educate people and secure their support for housing and services when they are not fighting to keep them out of their own back yards."[88]

In some cases, housing providers will voluntarily hold community meetings, either to answer questions before a site for housing becomes an issue or to address concerns homeowners raise after they learn a site in their neighborhood has been chosen. Public officials can participate constructively in these meetings by making clear their support for development of housing for people with disabilities and their commitment to obeying federal and state law.

In some cases, housing providers will voluntarily hold community meetings, either to answer questions before a site for housing becomes an issue or to address concerns homeowners raise after they learn a site in their neighborhood has been chosen. Public officials can participate constructively in these meetings by making clear their support for development of housing for people with disabilities and their commitment to obeying federal and state law.

It is important to consider, however, whether repeated meetings about the same home are constructive. Repetitive meetings to rehash issues that have been discussed already can sometimes serve only to delay an important project and harm the chances that homeowners and the home in question can eventually develop a neighborly relationship.

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[88] Michael Allen, *Why Not in Our Back Yard?*, 45 PLANNING COMMISSIONERS JOURNAL, Winter 2002, at 5.

Health, safety and quality of life issues

The Fair Housing Act and other federal statutes do not leave public officials powerless to make sure that homes for people with disabilities do not become a nuisance, or that homes that will be a nuisance do not locate in a residential neighborhood inappropriately. They can also regulate the health and safety standards of homes for people with disabilities to the extent that such regulation does not single out the homes for extra attention based on the disabilities of the people living there.

Public officials can and should take appropriate steps to address legitimate complaints that the residents of any home, including people with disabilities, are engaging in conduct which is dangerous, a nuisance or otherwise not in keeping with community standards. People with disabilities do not have free reign to disregard the law.

Therefore, disturbances of the peace, violent behavior, trespassing and other infractions of the law should be dealt with the same way they would be if committed by a non-disabled person. In some cases, it might be appropriate at that point for a behavior-modification plan to be worked out in lieu of eviction or some other action, if the behavior is related to a disability.

It is important to ensure that complaints are legitimate and not frivolous, especially in neighborhoods where there has been opposition to a home for people with disabilities. And those complaints should be addressed on the basis of individual behavior, not the disability status of all the residents in a given home. That means that neighbor complaints should not result in the closing and subsequent ban on homes for people with disabilities in the neighborhood (which may be what the neighbors want) but rather a measured, appropriate response to the problematic behavior of the individual causing problems.

Of course, local officials are responsible for addressing harassment, trespass or other criminal behavior directed at the residents in a home.

Municipalities also have the authority to deal with homes whose condition becomes a health hazard. Many cities have ordinances dealing with lawn and weed abatement and hazardous materials, for example, in residential zones, and there is nothing that prevents public officials from enforcing those ordinances against a group home.

However, it may be necessary for public officials to grant a reasonable accommodation, as discussed above, for certain kinds of infractions. For example, if a city ordinance puts a limit on the number of cars that can be

parked on the street in front of a house, a reasonable accommodation may be necessary if a home has staff members who need to park at the home. (And such complaints from neighbors who are already aware that the home has a staff should be viewed as potentially frivolous and part of an ongoing campaign to get the home out of the neighborhood.)

Public officials should encourage neighborhood residents to channel their complaints appropriately. Though the First Amendment guarantees every citizen's right to convey his grievances to any elected official - including members of Congress - neighbors should understand that the most effective way to deal with complaints about individuals' behavior is to call appropriate local authorities, including the police. After all, neighbors wouldn't call their Congressional representative to complain about a loud party in the college students' house across the street, so there's very little good reason for them to call him or her about tall grass at the group home next door. For them to do so indicates a potential bias on their part based on the disabilities of the home's residents.

Your city might also consider implementing a mediation process to help citizens 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.[89] 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.

Conclusion

No public official wants to be caught in the middle of a NIMBY dispute. However, such disputes are typical of what public officials deal with every day - competing concerns that demand a solution that will not please everyone (at least not at first) but that recognizes the legal rights of all parties involved. But as this handbook has shown, public officials need not - and probably should not - sit passively by and wait for disputes to erupt. And when they do, there are many ways public officials can help to solve them.

Good zoning policy, solid community education, sound planning and evenhanded policing can help your community evolve in a way that addresses many of the wants and needs of your constituents - all of them.

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[89] Portland Office of Neighborhood Involvement, http://www.portlandonline.com/oni/index.cfm?c=32417

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