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**OVERVIEW OF FAIR HOUSING ACT AMENDMENTS
AND RECENT DECISIONS
AFFECTING CONGREGATE LIVING FACILITIES**

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I. Basic Assumptions

The following principles should apply in any review of restrictive ordinances or building codes:

1. Individuals with disabilities must be treated in the same manner as individuals who have not been diagnosed with disabilities unless the city can demonstrate that there is a compelling reason to make accommodations or other adjustments to policy based on actual facts and the specific needs of the individual. If three unrelated individuals can live together as a family without additional restrictions, then the existence of a disability should not automatically require disparate treatment.
2. FHAA, ADA and 504 requirements must be met. This memo focuses on the FHAA requirements because, in general, they address the issues raised in the ordinance. We follow interpretations of various cases which have considered applicable law.
3. A diagnosis of a disability should not be the basis of compromising an individual's rights, including the right to privacy and confidentiality.
4. Concerns for safety should be addressed with the same assumptions as apply to the general public.

In assessing the justification for requirements which apply to persons with disabilities under the FHAA, courts, including the Sixth, Ninth, and Tenth Circuits, have explicitly rejected the rational basis test and have concluded that heightened scrutiny is required for claims of intentional discrimination against disabled individuals under the FHA. The FHA "specifically makes the handicapped a protected class for the purposes of a statutory claim--they are the direct object of the statutory protection-even if they are not a protected class for constitutional purposes." Human Res. Research & Mgmt. Group v. County of Suffolk, 687 F. Supp. 2d 237, 256 (E.D.N.Y. 2010) (citations omitted); Larkin v. Michigan Department of Social Services 89 F.3d 285 (6th Cir. 1996).

II. The Fair Housing Amendments Act of 1988.

A. General

The Fair Housing Amendments Act of 1988 (the "FHAA"), 42 U.S.C. § 3601 *et seq.*, extended the protection of the federal fair housing law to persons with disabilities. The FHAA prohibits discrimination on the basis of a physical or mental handicap. 42 U.S.C. § 3604(f)(1).

Section 3604(f)(1) makes it unlawful:

to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of –

(A) that buyer or renter;

(B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or

(C) any person associated with that buyer or renter.

42 U.S.C. § 3604(f)(1)(A)-(C).

The FHAA's definition of "disability" is the same broad definition used by the Rehabilitation Act of 1973. 42 U.S.C. § 701(a)(3). *See also* H.R. Rep. No. 711, 100th Cong., 2d Sess. 311 (1988), reprinted in 1988 U.S.C.C.A.N. 2173. The FHAA defines "handicap" as:

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment, . . . but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).

42 U.S.C.A. § 3602(h). This definition covers people with developmental disabilities, mental illness, physical disabilities, contagious diseases like tuberculosis or HIV and drug or alcohol addictions as long as the individuals are not currently using any illegal substance.

Under the FHAA it is unlawful to discriminate against any person in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap of that person." 42 U.S.C. § 3604(f)(2). The FHAA states that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. § 3615.

B. Applicability of FHA to zoning/housing/building codes

The FHAA's legislative history indicates that Section 3604(f) was intended to reach a wide array of discriminatory housing practices, including zoning or licensing laws which purport to advance the health and safety of the community. The legislative history states:

[§ 3604(f)] would also apply to state or local land use and health and safety laws, regulations, practices and decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related

persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.

The Committee intends that the prohibitions against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice.

H.R. Rep. No. 711, 100th Cong., 2d Sess. 24, reprinted in 1988 U.S.Code Cong. & Admin. News at 2173, 2185.

Despite the broad reach of the FHAA, however, not all zoning ordinances which impact on the handicapped are per se invalid. For instance, a city or municipality “may impose standards which are different from those to which it subjects the general population, so long as that protection is demonstrated to be warranted by the unique and specific needs and abilities of those handicapped persons.” *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43 (6th Cir. 1992). Furthermore, the paragraph that follows the above legislative history in the House Committee Report suggests that municipalities can impose rationally-based zoning regulations on community residences:

Another method of making housing unavailable has been the application or enforcement of otherwise neutral rules and regulations on health, safety, and land-use in a manner which discriminates against people with disabilities. Such discrimination often results from false or over-protective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited.

H.R. Rep. No. 711, 100th Cong., 2d Sess. 311, reprinted in 1988 U.S.Code Cong. & Admin. News at 2173.

III. Recent Key Decisions

A. General

FHAA applies to the regulation of group homes. See *Smith & Lee Assoc. v. City of Taylor, Mich.*, 13 F.3d 920, 924 (6th Cir. 1993); *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 45 (6th Cir. 1992) *Inc. v. City of Stow, Ohio*, 974 F.2d 43, 45 (6th Cir. 1992). Congress explicitly intended for the FHAA to apply to zoning ordinances and other laws which would restrict the placement of group homes. See H. Rep. No. 711, 100th Cong., 2d Sess. 24, reprinted in 1988 U.S.C.C.A.N. 2173, 2185.

A zoning ordinance is facially discriminatory when it applies only to the disabled or handicapped and not to other living arrangements. Larkin v. State of Mich. Dept. of Social Services, 89 F.3d 285 (6th Cir. 1996).

A. Restriction on location within City

Although Gulf Coast may operate halfway houses in other areas of Treasure Island, the essential question in reasonable accommodation cases is whether the handicapped have an equal opportunity to live in the dwellings of their choice, not simply an opportunity to live somewhere in the City. ... We therefore conclude that the availability of another dwelling somewhere within the City's boundaries is irrelevant to whether local officials must accommodate recovering substance abusers in the halfway houses of their choice. Schwarz v. City of Treasure Island, 544 F.3d 1201, 1225-1226 (11th Cir. Fla. 2008).

B. Restriction based on number of residents

The US Supreme Court in *City of Edmonds, Petitioner, v. Oxford House, Inc., et al.* 514 U.S. 725 (1995), struck down a family composition rule which defined "family" as one or more persons occupying a single dwelling unit, who, if unrelated by blood, marriage or adoption, could contain no more than four persons. The FHAA allows reasonable floor space requirements at 42 USC §3607(b)(1). This section of the law states that "Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." In *City of Edmonds*, the City tried to justify the contested rule by arguing that it was a limitation on the maximum number of occupants within the meaning of the FHAA exemption. The Supreme Court rejected this argument, holding that the City's definition of family was a "family composition rule" which did not qualify as a restriction regarding the maximum number of occupants permitted to occupy a dwelling. It held that the FHAA exemption applied only to maximum occupancy restrictions which "cap the number of occupants per dwelling, typically in relation to available floor space or the number and type of rooms." Id. at 732.

C. Restrictions based on proximity to similar group homes

Minimum separation requirement of 1,500 feet violates FHAA. State's justification based on avoiding concentration of facilities in small area is not supported by any evidence. Larkin v. State of Mich. Dept. of Social Services, 89 F.3d 285 (6th Cir. 1996).

D. Restrictive Building Codes

The city "may impose standards which are different from those to which it subjects the general population, so long as that protection is demonstrated to be warranted by the unique and specific needs and abilities of those handicapped persons." Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43 (6th Cir. 1992).

E. Restrictions based on concerns for danger to others or property

The FHAA expressly allows discrimination rooted in public safety concerns: "nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. 3604(f)(9).

The 10th Circuit Court has read section 3604(f)(9) as permitting reasonable restrictions on the terms or conditions of housing when justified by public safety concerns, given that housing can be denied altogether for those same reasons. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. Utah 1995). However, the Court held that the exceptions to the FHAA's prohibitions against discrimination should be narrowly construed. *Elliott v. City of Athens, Ga.*, 960 F.2d 975, 978-79 (11th Cir.), cert. denied, 121 L. Ed. 2d 287, 113 S. Ct. 376 (1992). Restrictions predicated on public safety cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir.1995).

“Restrictions predicated on public safety cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents ... restrictions that are narrowly tailored to the particular individuals affected could be acceptable under the FHAA if the benefit to the handicapped in their housing opportunities clearly outweigh whatever burden may result to them.” *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir. 1995).

A New Jersey Zoning Ordinance was struck down as violating the FHAA because it prohibited placement into community residence individuals acquitted by reason of insanity, without a *particularized factual consideration of whether that person is currently dangerous*. *Matter of Commitment of J.W.*, 288 N.J. Super. 197, 207-208 (App.Div. 1996) (emphasis added). In *J.W.*, the New Jersey court held that 42 U.S.C.A. § 3604(f)(1) forbids excluding a mentally ill person from an appropriate community residence merely because he or she falls within the category of persons acquitted by reason of insanity. That class undoubtedly includes persons who are potentially dangerous. *Id.* But to warrant the exclusion, there must be particularized proof that an identified person would be potentially dangerous in a specific placement. *Id.*

Numerous decisions have allowed groups to be admitted into communities despite the perceived risk based on their conditions. See e.g., *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614 (D.N.J.1994) (community residence for the emotionally disturbed children); *United States v. City of Philadelphia, Pa.*, 838 F. Supp. 223 (E.D.Pa.1993) (group home for chronically homeless people who were mentally ill or recovering substance abusers), *aff'd*, 30 F.3d 1488 (3d Cir.1994); *Support Ministries for Persons with Aids, Inc. v. Village of Waterford, N.Y.*, 808 F. Supp. 120 (N.D.N.Y.1992) (residence for HIV infected homeless persons); *Easter Seals Soc'y of New Jersey, Inc. v. Township of North Bergen*, 798 F. Supp. 228 (D.N.J.1992) (group home for eight mentally ill recovering substance abusers); *United States v. Borough of Audubon*, 797 F. Supp. 353 (D.N.J.1991) (community residence for recovering alcohol and drug abusers), *aff'd*, 968 F.2d 14 (3d Cir.1992); *Baxter v. City of*

Belleville, 720 F. Supp. 720, 729 (*S.D. Ill. 1989*) (holding that the city must issue the required special use permit for a hospice for people with HIV).

F. Requirement to Disclose Protected Information

The FHAA rule at 24 CFR 100.202(c) states that “It shall be unlawful to make an inquiry to determine whether an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available, or any person associated with that person, has a handicap or to make inquiry as to the nature or severity of a handicap of such a person.

In Cason v. Rochester Housing Authority, 748 F. Supp. 1002 (W.D.N.Y. 1990) the court held that housing authority’s eligibility standard requiring proof of disabled applicant’s ability to live independently and requiring disclosure of confidential medical information violated FHAA and 24 C.F.R. 100.202.

G. Requirements on Level of Supervision

Marbrunak requires that safety restrictions be tailored to the individual needs of the residents with disabilities. The requirement for uniform level of supervision for all congregate living facilities does not take into account the need of specific supervision requirements.

A similar blanket supervision requirement was rejected by the court in Human Res. Research & Mgmt. Group v. County of Suffolk, 687 F. Supp. 2d 237, 261-263 (E.D.N.Y. 2010), noting that not all persons in recovery had the same staffing needs.

In Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995) the court held that zoning approval condition requiring 24-hour supervision of mentally disabled group home residents violated FHAA and constituted intentional discrimination but remanded to determine whether restriction was sufficiently narrowly tailored to individual requirements of group home residents.

H. Exclusion based on prior finding of NGRI or Incompetent/non-restorable

New Jersey Zoning Ordinance was struck down as violating the FHAA because it prohibited placement into community residence individuals acquitted by reason of insanity, without a *particularized factual consideration of whether that person is currently dangerous*. *Matter of Commitment of J.W.*, 288 N.J. Super. 197, 207-208 (App.Div. 1996) (emphasis added). In *J.W.*, the New Jersey court held that 42 U.S.C.A. § 3604(f)(1) forbids excluding a mentally ill person from an appropriate community residence merely because he or she falls within the category of persons acquitted by reason of insanity. That class undoubtedly includes persons who are potentially dangerous. *Id.* But to warrant the exclusion, there must be particularized proof that an identified person would be potentially dangerous in a specific placement. *Id.*

KEY ZONING DEVELOPMENTS in OHIO

Yr.	Case/Law	Cite	Summary
1974	Driscoll v. Goldberg	<i>1974 Ohio App. LEXIS 3916</i>	A home maintained for mentally retarded children living as a single family unit with a foster parents is permissible in a R-12 zone and such use is not contrary to the Zoning Ordinance of the City of Youngstown.
1977	RC 5123.18		State law added sections requiring family homes (6-8) to be permitted uses in single family districts. Group homes (9-16) are permitted use in multi-family districts.
1980	Carroll v. Washington Twp.	63 Ohio St. 2d 249	Foster home did not qualify as "one family residential dwelling unit" which the Township zoning resolution required. a comprehensive township zoning plan which excluded a foster home from an area zoned for residential use was not per se unconstitutional, and that such a zoning plan was not unreasonable.
1980	Garcia v. Siffrin	63 Ohio St. 2d 259	A "family home," as defined in R. C. 5123.18(A)(3), is not a "family" use, as defined in the Canton city zoning ordinance, and is not a permitted use in the R-2 zoned district under such ordinance. State statute (RC 5123.18) which required cities to allow family homes in residential areas was unconstitutional.
1980	Brownfield v. State	63 Ohio St. 2d 282	State could not use eminent domain to establish group home.
1981	Saunders v. Clark County Zoning Dept.	66 Ohio St. 2d 259	Foster care facility in owner's home fit definition of family (two or more persons living together in single housekeeping unit).
1982	Beres v. Hope Homes	Ohio App. 3d 71	Summit County Appeals Court found that city properly granted conditional use permit because group home was functioning as a family.
1985	City of Cleburne v. Cleburne Living Ctr., Inc.	473 U.S. 432, 105 S. Ct. 3249	City denied a special use permit for group home in an area that allowed boarding houses. Supreme Court held that people with mental retardation were not a quasi-suspect class. The Court held that to withstand equal protection review, legislation that distinguished between people who are mentally retarded and others must be rationally related to a legitimate

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governmental purpose. As no rational purpose was present, the Court held that the ordinance was invalid.

1988	Fair Housing Act Amendments	42 U.S.C. § 3601 <i>et seq.</i>	Extended the protection of the federal fair housing law to persons with disabilities. Applies to zoning and housing codes.
1992	Marbrunak, Inc. v. City of Stow, Ohio	974 F.2d 43 (6 th Cir.)	The city “may impose standards which are different from those to which it subjects the general population, so long as that protection is demonstrated to be warranted by the unique and specific needs and abilities of those handicapped persons.”