



TROUBLESHOOTING YOUR ZONING ORDINANCES: GROUP HOMES

by
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INTRODUCTION

The history of group home regulation is an interesting mixture of clever lobbying, federal enactments and overreaction by our state legislature. Under current law, cities must be prepared to accept and accommodate group homes in their single-family residential neighborhoods.

OXFORD HOUSE

In 1988 Congress passed the Fair Housing Act Amendments. These Amendments brought the protections of the federal Fair Housing Act to handicapped individuals. The definition of “handicap” under the federal statute includes recovering drug addicts and alcoholics.¹ Oxford House’s founder, Paul Molloy, was a Congressional Aide who was instrumental in establishing the first Oxford House facility in Silver Spring, Maryland. Using Mr. Molloy’s congressional experience, Oxford House included in the federal record many references to self-governing facilities for recovering drug addicts. Without any significant debate or publicity, a legislative record was established that facilities’ recovering drug addicts and alcoholics were intended to be protected by the Act. The Fair Housing Act Amendments do include an exemption for “reasonable occupancy limits.”² Like virtually every city, planners in the City of Edmonds were caught by surprise when told that an Oxford House facility for recovering addicts and alcoholics was protected by federal law and that the City was required to accommodate the use in its single-family neighborhoods.

Edmonds, like most communities at that time, had in its code a definition of “family” based upon established federal constitutional precedent. One line of cases arose out of the civil rights movement, recognizing that within the in the black community, the definition of “family” required a definition that recognized that “any number of persons related by blood or marriage” could form a family. This line of cases recognize that definitions of family which exclude

¹ Current substance abusers are not protected by the Act.

² 42 USCA, Section 3607(b)(1).

extended families could discriminate against ethnic and cultural groups. A separate line of case law developed in the 1960's upholding a City's ability to limit the number of unrelated persons occupying a structure. This line of cases arose out of cities' concerns about the impacts of "communes" on single-family neighborhoods.

Edmonds brought a declaratory judgment action against the Washington State Building Code Council in an effort to clarify whether or not the exemption in the Fair Housing Act Amendments for reasonable density restrictions included the definition of "family."³ The suit was structured in this format in order to avoid incurring the punitive damages that would have arisen had the City brought enforcement action against the Oxford House facility. One common theme in Fair Housing Act Amendments is the risk cities run in the public hearing process. Ill-considered "Not In My Back Yard (NIMBY)" remarks can create a negative record which could result in the imposition of hundreds of thousands of dollars of fines and damages.

The City prevailed in District Court and lost at the Ninth Circuit. The U.S. Supreme Court ruled against the City although not on the basis frequently cited by the disability lobby. The U.S. Supreme Court in a narrow ruling held that the exempt category of "reasonable density restrictions" did not include family definitions designed to protect the stability and tranquility of residential neighborhoods. The Court did not reach the other significant issue -- whether a city can accommodate recovering drug addicts and alcoholics in specific areas of the city, such as the multi-family residential zone, or must accommodate the use in each and every zone of the city. The case was remanded to District Court for trial.

After having incurred hundreds of thousands of dollars in costs and legal fees, the City chose not to go forward and entered into a settlement with the Justice Department. As part of that settlement agreement, Edmonds adopted an administrative process for the accommodation of its zoning requirements for disabled individuals.

STATE LEGISLATURE - REACTION AND OVER-REACTION

The Washington State Legislature, like a number of other state legislatures, over-reacted to the Oxford House decision. State statutes were amended to provide that adult family homes and similar group homes were required to be recognized as primary uses in residential neighborhoods. While the statutes have gone through several iterations, RCW 70.128.140(2), as amended in 2011, now states that adult family homes are required to be an outright ". . . permitted use in all areas zoned for residential or commercial purposes, including areas zoned for single-family dwellings." As we will see, the requirement that adult family homes be recognized and that cities make accommodations for the disabled, opens the door through the federal and state discrimination statutes for all facilities treating the disabled, including facilities for recovering drug abusers and alcoholics.

In 1993 the legislature adopted the Washington Housing Policy Act (WHPA). The Act codified at RCW 43.185B.005(2)(e), in pertinent part, states:

³ *Edmonds v. Oxford House, Inc.*, 514 US 725, 115 S.Ct. 1776, 131 Led 2d 801 (1995).

No city may enact or maintain an ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure occupied by persons with disabilities different from a residential structure occupied by a family or other unrelated individuals. As used in this section, “handicaps” are as defined in the federal Fair Housing Act Amendments of 1988 (42 U.S.C. 3602).

STATE AND FEDERAL DISCRIMINATION STATUTES

State and federal decisions which followed the *Oxford House* decision underline both the cities’ duty to accommodate group housing for the disabled, including recovering drug addicts and alcoholics,⁴ and facilities for the young.⁵ In *Sunderland*, the City of Pasco denied a special use permit (SUP) to operate a youth-crisis residential center in an R-1 zoning district. The facility sought to serve the “residential needs of seriously and severely disabled minor children.”⁶ The Pasco Planning Commission recommended approval of the SUP with 14 conditions. Despite the recommendation, the City Council held its own hearing and denied approval. Sunderland contended throughout that the City had no authority to require a special use permit.

In its decision, the Washington Court of Appeals noted that the WHPA and FHAA are not co-extensive. Under federal law, three theories are available to a plaintiff: (1) disparate treatment, (2) disparate impact, and (3) failure to make reasonable accommodations. Unlike the FHAA where discriminatory housing practices are prohibited based on handicapped or familial status, the WHPA has no intent requirement and requires only a showing that an ordinance, practice or policy treats residential structures occupied by handicapped persons “differently” than a structure occupied by a family or other unrelated individuals. “Furthermore, the WHPA does not contain language that would require a city to make reasonable accommodations to permit a person with a handicap to occupy a dwelling.”⁷

In its holding, the Court of Appeals found that the SUP requirement was invalid because it imposed requirements not applicable to a traditional family on the occupancy of a residence by a treatment facility for the disabled.

In another holding, the Court noted that the City did not permit a home occupation permit for a group home facility. The City had determined that residential care facilities did not fall within the City’s home occupation definition. The Court found that the needs of the handicapped residents required professional staff, rotating non-resident shift employees, volunteers and other professionals providing services thereby placed the applicant Sunderland in an untenable position. On one hand, the applicant could not satisfy the home use occupation requirements and on the other, the proposed home would not be considered a “family” because of the staff required to care for handicapped children. The Court found that because of the definitions of “family” and “home occupation” and the application of certain environmental standards, “handicapped

⁴ *Sunderland Family Treatment Services v. City of Pasco*, 107 Wn. App. 109, 26 P.3d. 955 (2001).

⁵ *The Children’s Alliance v. City of Bellevue*, 950 F. Supp. 1491 (Western Dist. of WA 1997).

⁶ *Sunderland*, at 958.

⁷ *Sunderland*, at 119.

children who were required specialized care were denied access to single-family home in Pasco based on their handicap and their familial status.”⁸

Using similar reasoning under the FHAA, Judge Zilly of the Western District of Washington found provisions of the City of Bellevue’s zoning ordinance to be in violation of the Fair Housing Act Amendments and the Washington Law Against Discrimination on a theory of facial discrimination against group homes for foster children based on familial and handicap status. The Court found the ordinances imposed additional burdens on staffed group homes that were not justified by the City’s general interests in public safety, stability and tranquility.⁹ The Court held that the categories created by the City were “discriminatory on their face.” Judge Zilly noted that building code provisions that apply to buildings that provide personal care services, rather than buildings that house handicapped persons, are “. . . a distinction without a difference, since individuals who need personal care services are typically handicapped.”¹⁰

Taken together, these cases stand for the proposition that in Washington, either the Fair Housing Act Amendments or the WHPA can form a basis for a claim of discrimination whenever a City attempts to treat a group home or other care facility for the disabled differently than it treats a traditional family occupying single-family residence.

Senior citizens often receive a wide variety of services at home. In the legislative record attendant to the Americans with Disabilities Act, Congress noted that 80% of all Americans will be considered disabled at some point during their lifetime. Senior citizens are frequently disabled. Recovering drug addicts and alcoholics, as long as they remain recovering, are considered disabled persons under both state and federal law. The fact that a disabled person may need personal care services at their residence, generate traffic because of visits from treatment providers, or utilize van or other “access” services are not reasons to discriminate against such residential facilities in single-family neighborhoods.

TROUBLESHOOTING

What follows are a short list of problematic provisions. If your zoning code contains a similar provision, you should consult your city attorney and consider amending your code:

1. Personal Care Services. Ordinances which limit the siting of residential care facilities based upon the provision of personal care services discriminate against the disabled.¹¹ Please note that the fact that not all members of a class are similarly burdened is irrelevant if a high enough percentage of the disabled require a certain accommodation.¹²

⁸ *Sunderland* at 128.

⁹ *The Children’s Alliance v. City of Bellevue*, 950 F. Supp. 1491 (1997).

¹⁰ *The Children’s Alliance*, at p. 496, citing with approval, *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1071 (Northern District of Illinois, 1996).

¹¹ *See Bellevue, supra*, at 496.

¹² *See Bellevue, supra*.

2. Staff. City ordinances which attempt to distinguish families from group facilities based on staff are problematic. In *Children's Alliance v. Bellevue*, Judge Zilly held that such distinctions are “proxy” for discrimination against the under-aged or handicapped.

3. Traffic. Do not attempt to use special use or conditional use permits to control traffic, particularly when such traffic involves trips by staff members or “access” vans providing transportation services to the disabled persons in the group home.

4. Definition of Family. Any definition of family that attempts to limit the number of unrelated persons to fewer than six is both discrimination and clearly illegal in Washington, given the fact that adult family homes are required uses in every residential zone of the city. The holdings in *Oxford House*, *Children's Alliance* and *Sunderland* suggest that any limitation on the number of unrelated individuals occupying a residence that is not based on the building code square footage requirements is suspect. So long as your zoning code permits any number of persons related by blood or marriage, it is hard to argue that a group facility for the disabled will have any greater impact on a neighborhood than a family with five teenagers, all with cars or motorcycles.

5. Limitations on Number of Unrelated Residents. The *Children's Alliance* case calls into question any limitation on the number of members of a “protected class” under the FHAA so long as the city maintains a definition of family which does not attempt to limit the number of persons related by blood or marriage who can occupy a structure.

6. Distancing Requirements. It is a violation of both state and federal law to require a distancing requirement between group home facilities. Washington's Attorney General has opined that RCW 70.128.140 pre-empts the ability of a city to make such a requirement.¹³ Judge Zilly held that such distancing requirements violated the federal Fair Housing Act in the *Children's Alliance* case.¹⁴

7. Conditional or Second Special Use Permits. The requirement of a conditional or second special use permit is prohibited under *Sunderland*.

8. Differential Utility Rates. A city may not maintain higher differential utility rates for water, sewer, electricity or garbage for a group home for the disabled than for a family in a residential setting.¹⁵

9. Noticing Requirements. Requiring a group home to notify neighbors of its establishment is discriminatory.

¹³ Wash. AGO 1992 No. 25.

¹⁴ *Bellevue*, at 1499.

¹⁵ RCW 70.128.140(2) and *Community Services, Inc. v. Wind Gap Municipal Authority*, 421 F.3d 170 (3rd Cir. 2005).

SAFE HARBOR REGULATIONS

1. Reasonable Occupancy Limits. Building code provisions which limit occupancy based on factors such as square footage, exiting requirements and other basic health and safety protections are enforceable. Provisions established for the protection of handicapped individuals, which are the same for all residential structures, are enforceable.

2. Evenly Applied Engineering and Zoning Protections. Engineering requirements such as impervious surface requirements designed to protect all persons and which are evenhandedly applied are enforceable and need not be accommodated.¹⁶ A requirement that a facility for the disabled extend a sewer line to obtain service has also been upheld.¹⁷

3. Prohibition of Active Drug and Alcohol Use. Persons who are actively abusing illegal drugs or alcohol are not subject to the protections of the Fair Housing Act.¹⁸ Please note that criminal statutes provide adequate protections for active illegal drug use and I recommend that you not attempt to incorporate such requirements in your zoning code.

4. Direct Threat to Others or to Property. The Fair Housing Act amendments contain an exemption for tenancies which would “. . . constitute a direct threat to the health and safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.”¹⁹ Facilities to house arsonists or persons with a proven record of violence could fall into this category. Please note that neither children nor the handicapped are “suspect classes” under the Equal Protection clause, and only a “rational basis” is required to support a legislative body’s determination that a threat exists.²⁰ Any such determination should be based upon specific information regarding the individual or individuals who inhabit a structure and not on stereotypical assumptions. Judge Zilly held that a generalized interest in protecting public safety, stability and tranquility is “only sufficient if they are threatened by the individuals” burdened by an ordinance.²¹

CLOSING TIP

Whenever possible, avoid public hearings in a siting or accommodation process. The case law under the Fair Housing Act amendments is replete with cities being hung by the federal courts on the basis of provocative citizen statements made at public hearings. In today’s world of highly charged public dialogue, affording the public its say can result in a record which makes even a thoughtful attempt to assess a threat or impose a restriction suspect. Consider installing a staff or hearing examiner process to grant reasonable accommodations from zoning practices or provisions which burden the disabled. As noted, engineering and zoning requirements which provide protections to the residents of a lot or to the neighborhood are not discriminatory practices, if evenhandedly applied.

¹⁶ *Chiara v. Dozoglio*, 81 F. Supp 2d 242 (D. Mass 2000).

¹⁷ *Good Shepherd Manor Foundation, Inc. v. City of Monroe*, 323, Fed. 3d 557 (C.A.7 2003).

¹⁸ 42 USC § 3602 (K)(3)

¹⁹ 42 USC §3604(t)(9)

²⁰ *Bellevue* at 1497-1498.

²¹ *Bellevue* at 1498.