

MUNICIPAL REGULATION OF GROUP HOMES

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Introduction and Setting of the Stage

Perhaps like many city attorneys in Texas, we've rarely encountered a need to look into the subject of group homes. Most cities our firm represents have a provision in their zoning ordinances defining a group home, listing them in use charts for particular districts, and sometimes referring to Chapter 123, Human Resources Code and/or Chapter 247, Health & Safety Code. It wasn't until 2011 that one of the cities we represent received an application for a group home, to be located in a residential area in the city, which subsequently became controversial and required that we look closely into the subject.

That led to a phone call to TML to request any papers or opinions that were available, being told that there were few or none, to which one of us commented that the topic would be a good one for some future TCAA session. Our punishment for doing that now lies before you.

Despite what we may have believed in the heady days of 2010 and before, there is no single definition of "group home" under either state or federal law. To make matters worse, under Texas law there are at least 24 types of homes, houses, centers, and other facilities, probably more, that *may* qualify as a group home, viz:

- "Agency foster group home," Sec. 42.002, Human Resources Code
- "Assisted living facility," Ch. 247, Health & Safety Code
- "Boarding home facility," Sec. 254.001, Health & Safety Code
- "Child-care facility," Sec. 42.002, Human Resources Code
- "Community corrections facility," Ch. 509, Government Code, including:
 - (A) a restitution center;
 - (B) a court residential treatment facility;
 - (C) a substance abuse treatment facility;
 - (D) a custody facility or boot camp;
 - (E) a facility for an offender with a mental impairment, as defined by Section 614.001, Health and Safety Code;
 - (F) an intermediate sanction facility, and
 - (G) a "State jail felony facility" under Chapter 507, Subchapter A, Government Code
- "Community Homes," Ch. 123, Health & Safety Code
- "Community Residential Facility," Sec. 508.119, Government Code
- "Day-care center," Sec. 42.002, Human Resources Code
- "Family home," Sec. 42.002, Human Resources Code
- "Foster group home," Sec. 42.002, Human Resources Code
- "Foster home," Sec. 42.002, Human Resources Code
- "Group day-care home," Sec. 42.002, Human Resources Code
- "Halfway houses," Sec. 508.118, Government Code & 61.038, Human Resources

Code, whether operated by the state, local governments, religious organizations, non-profits, or private companies, including those for former prisoners, mentally handicapped, physically disabled, mental patients, post-addiction recovery, sex offenders, parolees, juvenile/troubled youth, and drug rehabilitation
“Hospice,” Health & Safety Code, 142.001, et seq.
“Personal Care Facilities,” Health & Safety Code, Chapter 247
“Special Care Facilities,” Health & Safety Code, Chapter 248
“Residential AIDS Hospices,” Health & Safety Code, 248.029

Obviously, some types of group homes, such as day care centers, are not likely to create concern from neighbors or a city council, while others, such as a state jail felony facility, are not likely to be proposed for location in a residential area of a city. Other facilities, however, such as assisted living facilities, substance abuse treatment centers, or any of the myriad of halfway houses are very likely to encounter local opposition.

What may happen—the manner in which the stage may be set—is that a group home will come to a residential part of the city, probably with minimal fanfare, probably to occupy an existing residence. Perhaps the owner/operator will come to the City to make certain the home is allowed, or perhaps the City’s ordinance will require a Special Use Permit or the home will need a building permit, with the result that soon the staff is asking the city attorney if it should recommend approval or not. They may ask, or contend, that the home is a commercial or residential use or that it is a home occupation that is not allowed under the City’s zoning ordinance in a residential district.

The city’s ordinance may define a group home (or community home, or assisted living facility, or residential treatment facility) in a manner similar to one of these definitions:

Group Home: To qualify as a group home, an entity must provide the following services to persons with disabilities who reside in the home: 1) food and shelter, 2) personal guidance, 3) care, 4) habitation services, 5) supervision.

A group home must be a community based residential home operated by the Texas Department of Mental Health and Mental Retardation. The home must have not more than six (6) persons with disabilities and two supervisors residing in the home at the same time. The limitation on the number of persons with disabilities applies regardless of the legal relationship of those persons to one another. The home may not be established within one-half (1/2) mile of an existing group home.

For purpose of this definition, “person with a disability” means a person whose ability to care for himself, perform manual tasks, learn, work, walk, see, hear, speak, or breathe is substantially limited because the persons has: an orthopedic, visual, speech, or hearing impairment; Alzheimer’s disease; presenile dementia; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; cancer; heart

disease; diabetes; mental retardation; autism; or emotional illness.--City of Cedar Park

Group home: An interim or permanent residential facility shared by six or fewer people who do not meet the definition of “family” including any resident staff who share a single housekeeping unit. This use does not include facilities that permit sleeping arrangements on a daily basis.--City of Giddings

Group Home for the Disabled or Disadvantaged. A dwelling shared by four or more disabled persons, including resident staff, who live together as a single housekeeping unit and in a long-term, family-like environment in which staff persons provide care, education, and participation in community activities for the residents with the primary goal of enabling the resident to live as independently as possible in order to reach their maximum potential.

As used herein, the term “disabled” shall mean having (1) a physical or mental impairment that substantially limits one or more of the person’s major life activities so that such person is incapable of living independently; (2) a record of having such an impairment; or (3) being regarded as having such an impairment. However, “disabled” shall not include current illegal use of or addiction to controlled substance, nor shall it include any person whose residency in the home would constitute a direct threat to the health and safety of other individuals. The term “group home for the disabled” shall not include alcoholism or drug treatment center, work release facilities for convicts or ex-convicts, or other housing facilities serving as an alternative to incarceration. --City of Hondo

Group Home (6 or fewer persons): A home-based facility providing 24-hour care in a protected living arrangement for not more than 6 residents. This classification includes foster homes, homes for the physically and mentally impaired, homes for the developmentally disabled, congregate living facilities for seniors and maternity homes. Requires licensing by the State of Texas. Does not include post-incarceration facilities or facilities for those who are a danger to themselves or others. --City of Hutto

Group home. A dwelling for no more than six (6) legally unrelated, developmentally disabled persons and no more than two (2) supervisory personnel. Said persons and personnel must live as a single housekeeping unit, for the primary purpose of providing shelter in a family-like atmosphere as part of the residential community, with on-site medical treatment or therapy a secondary purpose. A group home must qualify as a family home under chapter 123 of the Texas Human Resources Code, Community Homes for Disabled Persons Locations Act. --City of Leon Valley

As the city attorney you will compare the ordinance definition with the group home and advise staff on whether it meets the criteria, which will lead to a conclusion about whether the home is allowed by operation of law, allowed under the terms of the ordinance, allowed if it meets certain other conditions, or not allowed under any theory. Whichever conclusion you come to, you may

have a nagging concern that there are other issues besides the ordinance language you should consider. More than likely, you will have certain council members, P&Z commissioners, staff members, advocates for the disadvantaged, and/or residents who will have a very firm opinion about whether the home should or should not be allowed in their city, their neighborhood, their backyard. In all likelihood, you will, or should, realize that whichever way you advise, you need to be absolutely certain you are correct.

The purpose of this paper is not to provide you with the silver bullet/magic wand/holy grail answer about your particular group home. Instead, it is intended to provide city attorneys with the tools and practical guidance to assist them in analyzing a particular application for a group home and/or determine if a city group home ordinance is enforceable, and/or identify other doctrines or bodies of law to consider or apply in addition to the ordinance.

Applicable Law

Discrimination in Housing

The overarching law in regard to regulation of group homes is the prohibition against discrimination in housing. Housing discrimination might be challenged under the Civil Rights Act of 1866, Title VI of the Civil Rights Act of 1964, the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, or the Texas Fair Housing Act, Texas Property Code, Chapter 301, but the clearest and best-known prohibitions are contained in the Fair Housing Amendments of 1988 (the "FHAA"), 42 USCA Sec. 3601, et seq, which prohibit discrimination based upon handicap or familial status, and which provide that no city or county 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 handicaps differently than a similar residential structure occupied by a family or other unrelated individuals.

"Handicap" is defined in the FHHA 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

--42 USC Sec. 3602

The Supreme Court had already confirmed that discrimination against the handicapped was prohibited prior to passage of the FHHA, and in a case coming out of Texas, no less. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985), the Court held that a requirement for a special use permit for group homes for the mentally retarded, but not for any other type of commercial living arrangement such as nursing homes and boarding houses, violated equal protection because there was no rational basis for the separate requirement.

Apparently, Congress's intent in passing the FHHA three years later was to provide broader legal protection to handicapped individuals in addition to prohibiting intentional discrimination. The legislative history of the FHAA indicates that Congress intended that both municipal land use

and health and safety regulations comply with its provisions, saying "[t]he 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 in the community." *H.R. Rep. No. 711*, 100th Cong., 2d Sess., reprinted in *U.S.C. C.A.N.* 2173, 2185 (1988).

The Requirement to Make "Reasonable Accommodation"

The FHAA requires that governments provide a "reasonable accommodation" for the handicapped if necessary to afford an equal opportunity with regard to housing. More specifically, the Act says that discrimination includes: "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. Sec. 3604 (f)(3)(B).

Accordingly, when a court considers a suit alleging violations of the FHAA, it must first determine if the litigant is "handicapped" within the meaning of the Act, which is not merely persons who are physically or mentally disabled, but also recovering addicts not currently using drugs or alcohol. If a litigant is not handicapped, he or she has no FHAA protection, but if handicapped, the court must then determine whether the government regulation or activity is discriminatory. It is at this point that the "reasonable accommodations" test comes into play. A zoning regulation may be discriminatory, but it may still be upheld if, on balance, it serves a legitimate government interests and is rationally related to the goals of health, safety and community welfare.

This means that cities must be flexible when applying zoning restrictions to handicapped persons living in group homes. City officials are required to tailor zoning provisions to the needs of the handicapped and the establishment of group homes when doing so will not impose an undue burden on the city. A group home owner or a handicapped individual may even request a "reasonable accommodation" in a local ordinance, based on the FHAA requirement, and a city's refusal to make "reasonable accommodations" may lead to a finding of illegal discrimination under the FHAA.

The implication of the reasonable accommodation requirement is that a jurisdiction must sufficiently broaden its zoning rules and regulations to allow the establishment of sufficient community residences to accommodate handicapped citizens who want to live in a "homestyle" setting, rather than in an institutional environment. A city can reasonably accommodate group homes by not enforcing an exclusionary definition of "family" or other such illegitimate zoning restrictions, or by changing its Code. A reasonable accommodation, according to a majority of courts, is one which would not impose an undue hardship or burden upon the entity making the accommodation and would not undermine the basic purpose which the requirement seeks to achieve. *United States v. Village of Marshall*, 787 F. Supp. 872, 878 (W.D. Wis. 1991).

It is important to note that the courts have upheld legitimate government zoning regulations where they intentionally promote public health and safety, and are narrowly designed to reach specific ends. While the "reasonable accommodations" requirement in the FHAA takes away

some municipal zoning power, it does so only to the extent that government regulations conflict with the policy behind the FHAA: to protect the handicapped from baseless stereotyping, and assist in their ability to achieve normalization and community integration.

Religious Freedom

In addition, cities must consider and apply the Religious Freedom Restoration Act of 1993 (RFRA), the Religious Exercise in Land Use and by Institutionalized Persons Act of 2000 (RLUIPA), and the Texas Religious Freedom Restoration Act (TRFRA). The background of these laws and their application to group homes is as follows.

In 1963, in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), the U.S. Supreme Court established a balancing test for the validity of laws affecting religious practices, holding that governments may not substantially burden religious exercise without compelling justification. Specifically the court held that that under the Free Exercise Clause, a member of the Seventh-day Adventist Church who refused to work on Saturday, the Sabbath Day of her faith, could not be denied unemployment benefits because she was not “available for work” as required by generally applicable state law. This was followed by *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), in which the Court invalidated Wisconsin's mandatory school-attendance law as applied to Amish parents who refused on religious grounds to send their children to school.

However, in 1990 the U.S. Supreme Court ruled in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), that under the Free Exercise Clause of the First Amendment, “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.” Specifically, the Court held that a generally applicable Oregon statute criminalizing the use of peyote did not violate the Free Exercise rights of members of the Native American Church who ingested the drug for sacramental purposes.

Four Members of the Court in *Smith* contended that the majority's decision “dramatically departs from well-settled First Amendment jurisprudence, and is incompatible with our Nation's fundamental commitment to individual religious liberty.” A lot of others agreed, and criticism of the Court's reasoning in *Smith* resulted in the passage of RFRA” -*the Religious Freedom Restoration Act of 1993*, under which Congress provided that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise”, and that “governments should not substantially burden religious exercise without compelling justification.” The purpose of RFRA, Congress declared, was “to restore the compelling interest test as set forth in [*Sherbert and Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.” In other words, under RFRA, “[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless it] demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.”

In 1997, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court explained that in *Smith*, the Court had “declined to apply the balancing test set forth in *Sherbert* and *Yoder*, but that in extending that in extending RFRA to the States, Congress exceeded its enforcement authority under Section 5 of the Fourteenth Amendment. In response, Congress first amended RFRA to limit its application to the governments of the United States, its territories and possessions, and the District of Columbia and Puerto Rico, and then enacted the Religious Exercise in Land Use and by Institutionalized Persons Act of 2000 (RLUIPA), which applied the RFRA standard to land use regulation. RLUIPA applies not only to the federal government but to state and local governments when the activity is federally funded or affects interstate commerce.

The Texas Legislature joined the fun in 1999 and enacted the Texas Religious Freedom Restoration Act, which, like RFRA, provides in part, that government “may not substantially burden a person’s free exercise of religion [unless it] demonstrates that the application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that interest.”

That led, in 2009, to *Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009).

Therein, a pastor named Richard Barr began a religious halfway house for recently released convicts, in 1998, in Sinton, which is the county seat of San Patricio County, population 5,676, located near Corpus Christi. The halfway house consisted of two separate homes located within a block of Barr’s church, and could hold up to sixteen men at a time. The residents were unsupervised but the City did not receive any complaint or disturbances.

A few months after operations commenced, Barr met with the city manager, mayor, and police chief, apparently to make certain that he was in compliance with state law. The City had no zoning or other restrictions that applied, but once Barr went before the City Council to describe his ministry, the Council called a public hearing and a large number of people came forward, both to oppose and support the halfway house. In response, the Council passed an ordinance prohibiting the location of a “correctional or rehabilitation facility” within 1000 feet of a residential area, a school, a public park, a church, synagogue, or other place of worship.

Nevertheless, Barr continued to conduct his ministry, and was cited. Then in October 2000, the Sinton police chief complained to the Texas Board of Pardons and Paroles that Barr and Philemon were housing parolees in violation of a city ordinance. For awhile parole officials refused to approve the arrangement, and residents of the halfway house moved in with members of the Church.

In June 2001, Barr’s attorney notified the City by letter that the ordinance violated TRFRA, and in August, Barr and Philemon sued seeking injunctive relief, a declaratory judgment, monetary damages, and attorney fees. The trial court ruled that the City’s ordinance did not violate TRFRA and the Court of Appeals affirmed, but the Texas Supreme Court reversed and ruled in favor of Barr.

The Court held that (1) zoning ordinances are covered by TRFRA, (2) the impact of zoning on the free exercise of religion is subject to strict scrutiny, (3) the City’s ordinance burdened Barr’s

“free exercise of religion” as defined by TRFRA, (4) the burden was “substantial,” (5) that the City failed to demonstrate that its ordinance furthered a compelling governmental interest; (6), even if there was a compelling interest, the City made no effort to show that ordinance was not the least restrictive means of furthering that interest. Instead, the court observed that locations in the City of Sinton more than 1,000 feet from a residential area, school, park, recreational area, or church are “pretty close to nonexistent”, so that the ordinance effectively prohibited any residential facility from being operated for the purpose of Barr’s facility. “Read literally,” the Court held, “the ordinance would prohibit a Sinton resident from leasing a room to someone within a year of his having been jailed for twice driving with an invalid license. Such restrictions are certainly not the least restrictive means of insuring that religiously operated halfway houses do not jeopardize children's safety and residents' wellbeing.”

Specific Texas Statutes

State law provides the greatest amount of guidance and specificity for cities in regard to “community homes” under Ch. 123, Texas Human Resources Code.

A community home is a home for “persons with a disability” or, more precisely, persons with:

- (1) an orthopedic, visual, speech, or hearing impairment;
- (2) Alzheimer's disease;
- (3) pre-senile dementia;
- (4) cerebral palsy;
- (5) epilepsy;
- (6) muscular dystrophy;
- (7) multiple sclerosis;
- (8) cancer;
- (9) heart disease;
- (10) diabetes;
- (11) mental retardation;
- (12) autism; or
- (13) emotional illness.

To qualify as a community home, an entity be a community-based residential home operated by either TDMHMR, a community center that provides services to persons with disabilities; a non-profit corporation, an entity certified by the TDHR as serving persons with mental retardation in intermediate care facilities, or must be an assisted living facility licensed under Chapter 247, Health and Safety Code (with an exterior structure compatible with surrounding residential dwellings). A community home must provide food, shelter, personal guidance, care, habilitation, and supervision to persons with disabilities who reside in the home, must be licensed by the State and must not house more than six persons with disabilities and two supervisors at the same time, regardless of the legal relationship of those persons to one another.

If a community home meets the qualifications of Chapter 123, it is “a use by right that is authorized in any district zoned as residential.” Not only will city ordinances be preempted, but so will any “restriction, reservation, exception, or other provision in an instrument created or amended on or after September 1, 1985, that relates to the transfer, sale, lease, or use of property

may not prohibit the use of the property as a community home.” *Tex. Human Res. Code*, Sec. 123.003. Note, however, that a community home may not be established within one-half mile of an existing community home, and the number of vehicles that may be kept at the home may not exceed the number of bedrooms in the home. *Id.* at 123.008 & .009.

An “assisted living facility licensed under Chapter 247, Health and Safety Code,” is an establishment that furnishes food and shelter, personal care services, administration of or assistance with administration of medication to four or more persons who are unrelated to the facility’s proprietor. It does not include certain religious organization establishments such as those of the Church of Christ, Scientist, for the care or treatment of the sick exclusively by prayer or spiritual means without the use of any drug, a tax exempt retirement home for ministers, and does not include a facility funded in whole or in part by the department of Aging and Disability Services. *Tex. Health & Safety Code*, Sec. 247.004

What a City May Do, May Try to Do, and May Not Do

State law provides some guidance on regulations a Texas city may employ in connection with particular types of group homes. For “assisted living facilities” under Ch. 247, Health & Safety Code, for example:

[t]he governing body of a municipality by ordinance may:

(1) prohibit a person who does not hold a license issued under this chapter from establishing or operating an assisted living facility within the municipality; and

(2) establish a procedure for emergency closure of a facility in circumstances in which:

(A) the facility is established or operating in violation of Section 247.021 [i.e. operating without a state license]; and

(B) the continued operation of the facility creates an immediate threat to the health and safety of a resident of the facility.

The fact that a particular facility is a group home or is operated by a religious organization does not, of course, exempt it from compliance with various city codes, such as building, plumbing, fire, electrical, health, and other codes designed to protect the health, safety of the public and which are applied to all homes. The city may require a Certificate of Occupancy, inspect for code compliance, require proof of state licensing, enforce traffic and parking regulations, and enforce other applicable zoning requirements or city ordinance provisions. Where cities and city attorneys are asked to get creative, however, is when a desire exists on the part of citizens or city officials to regulate the location, size, number, or use of particular group homes. A few of the approaches that have been tried are discussed hereafter.

Beyond that, various other types of regulation have been attempted or considered, such as requiring a city license or registration, imposing density limitations (i.e. how many people may live together in a home), and imposing spacing, or distance, requirements between homes.

A. Licensing and Registration by the city

There are a number of valid reasons to require the owner or operator of a group home to obtain a license or at least register the home with the city: 1) the need to protect its residents from persons who may take advantage of them; 2) maintaining adequate health and safety standards for protection of the residents; 3) ensuring that adequate fire, police or emergency response vehicles or patrols are available; and 4) identifying and facilitating appropriate responses for residents who may require special assistance during an emergency.

Some states, such as Washington, have licensing requirements for such homes that preempt local regulation. (See Washington State law, Ch. 70.128 RCW). In other cases registration requirements for submission of basic information about a group home have been successfully challenged. In *Oxford House, Inc. v. Township of Cherry Hill*, 799 F.Supp. 450, 462 (D. N. J. 1992), a federal district court found application procedures for obtaining a use permit to be discriminatory, and in *United States v. Village of Palatine*, 37 F.3d 1230, 1234 (7th Cir. 1994), the Circuit Court upheld a group home owner's argument that an application and permitting process violated their right to "reasonable accommodation" in zoning practices. In *Oxford House, Inc. v. City of St. Louis*, 843 F.Supp. 1556, 1581 (E.D. Mo. 1994), advocates for the handicapped argued that health and safety concerns of a local government perpetuated public misconceptions about the handicapped that the FHAA intended to eliminate.

While there is currently no comparable Texas or 5th Circuit case, a registration requirement would need to be clearly health and safety-related and applied equally to all types of group living arrangements in order to withstand challenge.

B. Density Limitations

Prior to passage of the FHAA, the U.S. Supreme Court upheld certain city practices that limited the number of persons who were allowed to live together in a single-family dwelling. In *Village of Belle Terre v. Borass*, 94 S.Ct. 1536 (1974), the Court upheld a zoning ordinance that allowed no more than two unrelated students to live in the same house. Six unrelated students who lived in a single family house brought suit but the Court found that the ordinance was not an unconstitutional violation of either equal protection, the right of association, the right to travel, or expectations of privacy, and ruled that the ordinance was reasonable. Three years later, however, in *Moore v. City of East Cleveland*, 97 S.Ct. 1932 (1977), the Court considered a municipal ordinance that defined "family" to include only a narrow category of individuals directly related to one another and held that the ordinance interfered with the freedom of personal choice in family living arrangements in violation of the Due Process Clause of the Fourteenth Amendment.

Since passage of the FHAA, a series of cases worked their way through the circuits and produced conflicting opinions rendered by the Circuit Courts in the 9th and 11th Circuits, *Elliot v. City of Athens*, 960 F.2d 975 (11th Cir. 1992); *City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994). The conflict was resolved when the Supreme Court accepted writ in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995), and held that the FHHA prevents a city from enforcing a zoning ordinance limiting the number of unrelated persons who may live in a dwelling located in an area zoned for single family use, if no similar restrictions are imposed on all residents of all dwellings. The Court also held that the FHHA's exemption for local

maximum occupancy restrictions, which limit the number of occupants per dwelling, typically in regard to floor space or the number and type of rooms, do not apply to a city's single family zoning restrictions.

There is a good deal more that can be said about this topic, particularly if a city decides to define "family" and particularly if it does so for the purpose of masking land use restrictions as occupancy limits for health and safety purposes (e.g. to prevent overcrowding) but such a discussion is beyond the scope of this paper.

C. Spacing Requirements

Somewhat surprisingly, requiring a mandatory minimum distance between group homes is not clearly a violation of the FHAA. In fact, some group home advocates support spacing requirement under the theory that by requiring group homes to be distributed throughout the community, the residents are able to live in mainstream residential neighborhoods rather than in a cluster of group homes segregated from the rest of the community. Some states have even included a spacing limitation by statute, as has Texas for community homes in Chapter 123, Human Resources Code.

Two non-Texas cases that considered spacing requirements came to opposite conclusions.

In *Familystyle of St .Paul, Inc. v. City of St. Paul* 728 F. Supp. 1396 (1991) a federal district court in Minnesota upheld a St. Paul ordinance requiring a minimum of 1,320 foot spacing between existing group homes for the mentally ill. The home operator argued that the spacing requirement had the effect of reducing the number of residents it could house, limiting a handicapped person's choice of where to live, and thus was invalid as a discriminatory housing practice under section 3615 of the FHAA.

The City denied the charge and asserted that federal, state, and city laws all had the same purpose, i.e. increasing the housing options available to all handicapped people by integrating them into the mainstream of the community, through a policy of deinstitutionalization. The City also argued that the spacing requirements were valid because, even if they were discriminatory against the handicapped, handicapped people are not a "suspect class" under *Cleburne v. Cleburne Living Center*; 473 U.S. 432 (1985). and second, that even under strict scrutiny, the policy of deinstitutionalization and prevention of "ghettoization" is a compelling government interest which is narrowly tailored to achieve its ends through zoning dispersal.

The court agreed with the City. In its holding, the court explained that, "[t]here is a significant difference between laws which directly regulate individuals and laws which regulate institutions," and [s]urely the Congress intended states to maintain some control over such facilities Because the handicapped are not directly prohibited from residing at these residences, and because states must maintain some authority over such institutions, the state and local laws are not preempted by section 3615." *Id .* at 1401.

The court also found the spacing requirement to not have a discriminatory effect under Title VIII and the equal protection clause because, under a rational basis standard of scrutiny, the Attorney General, the Legislature, the courts, Congress and the state of Minnesota had all promoted the

policy of integration of the handicapped into the mainstream of the community. In other words, requiring new residential facilities to locate at a distance from similar facilities prevents a clustering of homes that might lead the mentally ill to cloister themselves and not interact with the mainstream community. By prohibiting this clustering effect, state and local laws furthered the goal of integrating the handicapped into the community. *Id.* at 1404. Finally, the court refused to find that a distance requirement of less than 1,320 feet would be a less drastic means of attaining the policy of deinstitutionalization, thereby finding the city zoning law narrowly drawn to promote a compelling government interest.

On appeal, the Eighth Circuit affirmed the district courts findings that the challenged state laws and local ordinances were not preempted by the FHAA. It noted that, "Congress did not intend to abrogate a state's power to determine how facilities for the mentally ill must meet licensing standards," and that, "the challenged state laws and city ordinance do not affect or prohibit a retarded or mentally ill person from purchasing, renting, or occupying a private residence or dwelling." 923 F.2d 94.

However, in *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F.Supp. 683 (E.D. Pa. 1992), the court found that a distance requirement of 1000 feet between group homes required under a Pennsylvania ordinance was a violation of the Fair Housing Act and the equal protection clause of the Constitution. The court did not accept the Township's rationale that the group homes ordinance was a well-intentioned effort to, "avoid potential clustering of homes for people with mental retardation and to promote their integration into the neighborhood." *Id.* at 690. The City provided no evidence about how the ordinance would promote integration to support the reasonableness and legitimacy of their motives, and the court ruled that "the City was prohibited by the Fair Housing Act from using its concern for the safety and health of its disabled citizens as a pretext for actions that are actually based on outdated and unfounded prejudices and stereotypes about the abilities and limitations of handicapped persons." *Id.* at 699

Practical Guidelines

Following are our suggestions for consideration and questions to ask for city attorneys of cities which receive an application for a new group home or who simply want to fine tune their cities' ordinance in anticipation of such applications.

1. Does the City include group homes in its zoning or other ordinance? If not, we recommend they be added.
2. If so, how are they defined and are they allowed in residential districts? While the location of a group home in a commercial district can still be controversial, it is in residential districts where the greatest concern and opposition usually arises.
3. How is "group home" (or "community home" or other term) defined? Is the definition, like some of the examples quoted above, based on Chapter 123, Human Resources Code? If so, and if the home under consideration is clearly allowed as "a use by right that is authorized in any district zoned as residential," under Sec. 123.004, that may be the happiest outcome available, or at least it may be the most legally defensible.

4. If the home is not allowed in a residential district “by right” under Sec. 123.004, may it nevertheless be protected under the FHHA? That is, in particular, does the City’s ordinance impose “special requirements through land use regulations . . . [or]. . . conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community?” If the City requires an SUP for a group home but does not require one for a residence containing an equal number of family members, or students, or other residences, the ordinance may not be enforceable.
5. Does the ordinance impose particular requirements, such as licensing by the City, density limitations, spacing restrictions, or other conditions that are not imposed on other types of residences? If so, what is the City’s interest in imposing the condition? Can the City demonstrate that the conditions have a rational, non-discriminatory basis? Will the ordinance withstand a rational basis level of scrutiny?
6. Does the City’s ordinance or proposed action provide for “reasonable accommodations?” That is, might the ordinance or the City’s action amount to a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling?
7. Is the home to be owned or operated by a religious institution? If it is a mainstream religious institution and the home furthers the “ministry” of the institution, it is probably protected under TRFRA. If the institution is not “mainstream,” is it nevertheless founded on religious convictions? Is the home going to be operated as part of a “ministry,” as the Supreme Court found to be the case in *Barr v. Sinton*, wherein the residents received religious instruction in addition to a place to live? Can the City demonstrate that a refusal to allow such home does not burden the free exercise of religion? If there is burden, is the burden substantial? Can the City demonstrate that its ordinance furthers a compelling governmental interest? Is the ordinance the least restrictive means of furthering that interest? Will the ordinance withstand strict scrutiny?

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