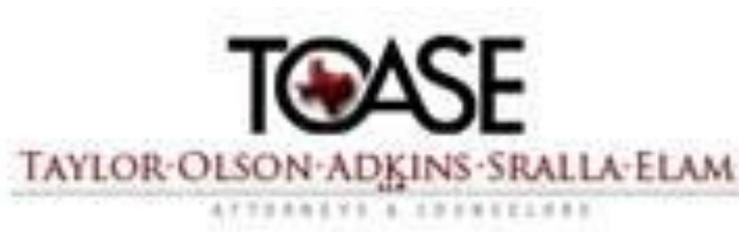


TCAA Summer Conference

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Group Homes



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The Fair Housing Act Amendments

- “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” is prohibited by the Fair Housing Act Amendments.
- 42 U.S.C § 3604 (2006).



The Fair Housing Act Amendments

- The Fair Housing Amendments Act of 1988 impacts all state and local zoning laws and land use regulations. Restrictive zoning laws that limit housing choices for persons with disabilities were targeted by the FHAA. Lawsuits brought by individual claimants and by the Department of Justice have been filed in virtually every jurisdiction, and many have successfully challenged the use of zoning laws to prohibit or limit group homes and other housing arrangements for people with disabilities.
- 42 U.S.C § 3601-3631.

FHAA v. ADA...

- The **Americans with Disabilities Act (ADA)** and Section 504 of the Rehabilitation Act can also be used to challenge discriminatory zoning actions. *Robinson v. City of Friendswood*, 890 F. Supp. 616, 620 (S.D. Tex. 1995). The ADA will be plead in a case brought on behalf of disabled persons as well, but **the broad reach of the Fair Housing Act make it the favored tool** for use by claimants seeking approval for residential uses, such as Group Homes.
- Note that non-residential discrimination against the disabled can only be brought under the ADA. *MX Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002).

Protections of Handicapped Persons

The Act protects people with **handicaps**.

"Handicap" is defined broadly and includes those persons with physical or mental impairments which substantially limit one or more of their major life activities.

42 U.S.C. § 3602(h). 24 C.F.R. § 100.201.

Protections of Handicapped Persons

The Act protects people with handicaps.

"Major life activities" include, but are not limited to, caring for one's self, walking, seeing, hearing, speaking, breathing, learning, and working.

24 C.F.R. § 100.201.

Protections of Handicapped Persons

The Act protects people with handicaps.

- The mentally retarded, hearing impaired, blind and visually impaired, physical disabilities, AIDS, and similar conditions are considered handicapped..
- Importantly, **persons who are recovering from substance abuse are considered to have a handicap under the Act.**

Protections of Handicapped Persons

- The term 'recovering' is critical to the determination of disability, as **current users of illegal or controlled substances are not protected by the Fair Housing Act.**
- 42 U.S.C. § 3602(h).]

Disabled persons



“A person who has a mental or physical disability, an intellectual or developmental disability, a hearing impairment, deafness, a speech impairment, a visual impairment, post-traumatic stress disorder, or any health impairment that requires special ambulatory devices or services.”

Tex. Hum. Res. Code. Ann. § 121.002 (4);

See also 61 TEX. JUR. PUBLIC AID AND WELFARE § 98

Cities and Local Governments Must Comply with the FHAA

The Act prohibits restrictive zoning and land use controls, and other local regulation. Respondents to claims of violation of the Act can include **city management and staff, City Councils and Planning & Zoning Commissions**. And of course, any property owner, landlord, or real estate professional involved with the sale or lease of housing must comply with the Act.

See San Pedro Hotel Co., Inc. v. City of Los Angeles, 159 F.3d 470 (9th Cir. 1998);

Prohibited Actions

Under the Act, it is 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 the buyer or renter, a person residing in or intending to reside in the dwelling after it is bought or rented, or any person associated with that buyer or renter.

42 U.S.C. § 3604(f)(1).

Prohibited Actions

Under the Act, 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 a dwelling, because of a handicap of that person, a person residing in or intending to reside in the dwelling, or a person associated with that person.

42 U.S.C. § 3604(f)(2).

Prohibited Actions

Under the Act, it is unlawful:

To refuse to permit, at the expense of the person with the handicap, reasonable modifications of existing premises occupied or to be occupied by such person if those modifications are necessary to afford the individual full enjoyment of the premises (although, in renting property, a landlord may by agreement restore the property to its original condition).

42 U.S.C. § 3604(f)(3)(A).

Prohibited Actions

Under the Act, it is unlawful:

To refuse 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. § 3604(f)(3)(B).

Proof of Harm ?

A person who demonstrates a violation of any of these provisions establishes liability under the FHAA and need not prove a specific identifiable harm. **The Act makes the discrimination the actionable harm.**

Alexander v. Riga, 208 F.3d 419, 426-27 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001).

Zoning and Group Homes

The legislative history of the Fair Housing Act indicates that Congress intended to restrict the application of state and local zoning and land use laws if they result in limitations on access to housing by people with disabilities:

“The Committee intends that the prohibition 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 in the community.”

- H. Rep. No. 100-711, at 24 (1988).

Intentional Discrimination

If the land use law or zoning decision is the result of an intention to discriminate against people with disabilities, it violates the FHAA.

Intentional Discrimination

Intentional discrimination may be the product of **discriminatory animus**, including the most common -- fears about crime or diminution in property values, prejudice against disabled persons (especially recovering addicts), or malice.

See *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 851 (S.D. Ohio 1996).

Intentional Discrimination

A claimant does not have to prove that intentional discrimination was the sole motivating factor in the alleged wrongful action, but only that it was **a motivating factor**.

Community Services, Inc. v. Wind Gap Municipal Authority, 421 F.3d 170, 177 (3d Cir. 2005);
Regional Economic Community Action Program, Inc. v. City of Middletown, 294 F.3d 35, 49 (2d Cir.), cert. denied, 537 U.S. 813 (2002)..

Intentional Discrimination

Intentional discrimination may violate the FHAA even though it does **not** result in an actual denial of a housing opportunity!

The discrimination itself is the harm.

Disparate Treatment

Ordinances that use **discriminatory classifications** can violate the FHAA, as a form of disparate treatment.

Proof of discriminatory motivation is unnecessary.

Larkin v. Michigan Dep't of Social Services, 89 F.3d 285, 289 (6th Cir.1996).

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Disparate Treatment

If a zoning ordinance is discriminatory on its face, the burden is on the defendant to justify the classification. The **"justification must serve, in theory and in practice, a legitimate, bona fide interest** of the ... defendant, and the defendant must show that **no alternative course of action** could be adopted that would enable that interest to be served **with less discriminatory impact.**"

See United States v. City of Chicago Heights, 161 F. Supp. 2d 819, 843 (N.D. Ill. 2001).

Disparate Impact

Disparate impact can be established by showing "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."

Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 574-75 (2d Cir.2003); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d442, 467 (3d Cir. 2002).

Disparate Impact

If a *prima facie* case is established, the **burden shifts to the defendant** to show that it had a legitimate, non-discriminatory reason for the action and that no less discriminatory alternatives were available.

Disparate Impact

The definition of the term "**family**" that allows any number of related persons to live together but limits the number of unrelated persons who may live together has been the subject of numerous cases.

THIS IS PROBABLY YOUR CASE!

Disparate Impact

Such definitions of “family” may be deemed to have a disparate impact on persons with disabilities because usually such individuals need to live in **group homes with residential character** for recovery and treatment program and financial reasons.

See inter alia, Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1182-85 (E.D.N.Y. 1993).

Disparate Impact

Spacing or dispersion requirements for group homes have been held to create a disparate impact on people with disabilities in violation of the FHAA.

See Larkin v. Michigan Dep't of Social Services, 89 F.3d 285, 290-92 (6th Cir. 1996).

THIS IS PROBABLY YOUR CASE TOO.

Disparate Impact

A requirement that group homes be subject to evaluation by a "program review board" prior to issuance of a group home license was determined to have a disparate impact in violation of the FHAA.

Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1297-99 (D. Md. 1993).

IF YOU HAVE LOCAL LICENSING OR SPECIAL PERMITTING REQUIREMENTS, THIS MAY BE YOUR CASE TOO.

Reasonable Accommodation

The failure to grant a request for reasonable accommodation in their policies to allow persons with disabilities to live in the community serves as the basis of many claims for violation of the FHAA regardless of discriminatory intent, and is an independent form of discrimination under the FHAA.

United States v. City of Philadelphia, 838 F. Supp. 223, 229 (E.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994).

THIS IS YOUR CASE.

Reasonable Accommodation

The reasonable accommodation requirement of the Act **mandates** that officials "change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities."

Bangerter v. Orem City Corp., 46 F.3d 1491, 1501-02 (10th Cir. 1995).

Reasonable Accommodation

There are three elements to a reasonable accommodation claim. The requested accommodation must be

- (1) reasonable and
- (2) necessary
- (3) to provide equal opportunity.

Reasonable Accommodation

An accommodation is necessary if, but for the accommodation, the plaintiff is likely to be denied an equal opportunity to enjoy the housing of his choice. An accommodation is "reasonable" if it *does not impose an undue financial or administrative burden and does not undermine the zoning scheme.*

See Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002); Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442, 459 (3d Cir. 2002);

Reasonable Accommodation

For a claimant to be successful, evidence to support the request must be submitted to local officials with the request for reasonable accommodation. However, this does not mean that the decisions of local zoning officials are entitled to deference.

Reasonable Accommodation

The plaintiff has the burden of showing that the requested accommodation is necessary to provide equal opportunity and is not unreasonable on its face. If the plaintiff satisfies that burden, the **burden shifts to the defendant** to show that the requested accommodation is **unreasonable**. *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996).

Reasonable Accommodation

Not all requests for reasonable accommodation are granted. Example:

The City's application of its zoning ordinance, which required group homes for five or more persons to seek a special exception to operate in the primary residential district, did not violate the FHAA's reasonable accommodation requirement. *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178-79 (5th Cir. 1996).

Reasonable Accommodation

Another example:

A city's refusal to allow more than eight people to live in a group home did not violate the reasonable accommodation requirement since the city's zoning law permitted up to eight unrelated persons with disabilities to live together while it permitted only three unrelated, non-disabled persons to live together.

Oxford House-C v. City of St. Louis, 77 F.3d 249, 251-52 (8th Cir.), *cert. denied*, 519 U.S. 816 (1996).

Defenses

Maximum Occupancy Limit Exemption

The FHAA exempts completely ordinances that restrict "the maximum number of persons permitted to occupy a dwelling." true occupancy limitations that serve health and safety purposes (i.e., those that link the number of persons, regardless of disability, to the size of the dwelling) may be exempt under the FHAA.

City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731-738 (1995).

Defenses

Direct Threat

[Seldom used]

The FHAA provides that a dwelling need not be made available to a person "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).

Defenses

Statute of Limitations

Suits under the FHAA must be filed no later than two years after the occurrence or termination of an alleged discriminatory housing practice. If the individual has filed a HUD complaint, however, the two-year statute of limitations does not run while HUD proceedings are pending.

42 U.S.C. § 3613(a)(1)(B).

Defenses

Ripeness and Exhaustion

Nope.

An individual need not file a federal administrative proceeding with HUD before filing a federal lawsuit under the FHAA, nor must state remedies be exhausted before filing a FHAA action in federal court against a state or municipal government under 42 U.S.C. § 1983.

Patsy v. Florida Board of Regents, 457 U.S. 496, 516 (1982).

Defenses

Ripeness and Exhaustion

Nope.

See MX Group, Inc. v. City of Covington, 293 F.3d 326, 343-44 (6th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 452 n.5 (3d Cir. 2002); *United States v. Village of Palatine*, 37 F.3d 1230, 1233-34 (7th Cir. 1994).

Defenses

Abstention and Res Judicata

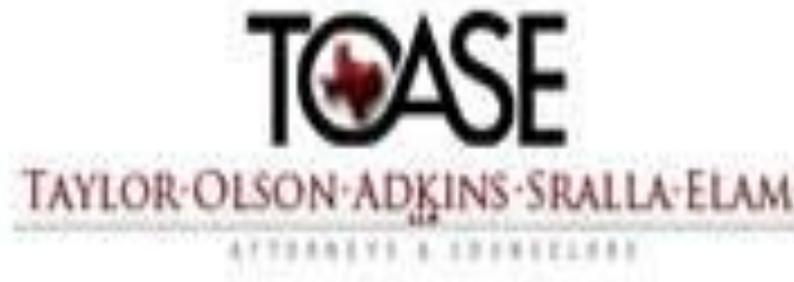
Yep.

Once a proceeding pending before a state administrative or judicial body has commenced:

No zoning remedies beyond the initial request;

If the individual chooses to bring a claim in federal court *while* the zoning procedures are pending before administrative or judicial tribunals, the federal court may be required to abstain until those proceedings are completed.

See, Assisted Living Assoc. of Moorestown, L.L.C. v Moorestown Township, 996 F. Supp. 409, 428-30 (D.N.J. 1998)



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