GROUP HOMES

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GROUP HOMES

Introduction

The Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3631 ("FHAA" or the "Act") impact 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 persons claiming disabilities 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.

The FHAA was enacted in 1988 to clearly and expressly extend the protections of the 1968 Fair Housing Act to people with disabilities. Congress stated "the right to be free of housing discrimination is essential to the goal of independent living." H.R. Rep. No. 100-711, at 13 (1988). The purpose of the FHAA extension to cover people with disabilities is to live or that discourage or obstruct the choices of persons with disabilities to "live where they want to live." in a community, neighborhood or development. 24 C.F.R. §§ 100.50(b), 100.70(a). The seminal case of *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995) provides that the Act is broadly construed, as the Fair Housing Act is in my opinion the most remedial of Federal laws now in force. Importantly, constitutional challenges to the application of the FHAA to local zoning laws land use regulations and decisions have been made and resolved in favor of full application of the Act. *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 200 (5th Cir. 2000).

The application of zoning laws and direct land use regulation to group homes that serve as a residential placement for handicapped persons are by far the most commonly challenged local regulations under the FHA, and will serve as the basis for this paper. But note that other forms of local regulation can also raise protections of the Act. *McGary v. City of Portland*, 386 F.3d 1259, 1264 (9th Cir. 2004) (Nuisance ordinance challenge).

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. "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. Obviously, many disabled persons can easily meet this standard, including the mentally retarded, hearing impaired, blind and visually impaired, physical disabilities, AIDS, and similar conditions. Importantly, persons who are recovering from substance abuse are considered to have a handicap under the Act. [**Note** that 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).]

Also, 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. 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).

Protection is also extended to persons who have a history of disabilities, but may not suffer from current impairment. Further, it also extends to persons who are treated by others as having a disability, even though their major life activities are not impaired. An example includes high blood pressure, which can be controlled, but for which some access to activities and employment are limited.

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).
- 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).
- 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).
- 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).

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).

Importantly, the FHAA also makes it unlawful "to coerce, intimidate, threaten, or interfere with" a person's right to enjoy fair housing. This most often comes into play in claims against cities and their exercise of zoning authority and land use regulation. 42 U.S.C. § 3617.

ZONING AND GROUP HOMES

As an exercise of the police power, cities have broad authority to regulate land use and related matters. However, 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).

As a remedial federal law, the Act prohibits intentional discrimination, as well as other forms of discrimination that can result from land use regulation, including discriminatory classification of persons with disabilities. Facially neutral zoning regulations can have a disparate impact on persons with disabilities. Litigation brought under the Act against cities most involve claims that the City failed to grant a request for "reasonable accommodation" by or on behalf of the disabled person or persons.

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

Importantly, 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 may violate the FHAA even though it does not result in an actual denial of a housing opportunity. Generally, in an FHAA case alleging intentional discrimination, there is seldom proof of direct discrimination. The courts then apply the burden-shifting framework for proof established in *McDonnell Douglas Corp. v. Green* 411 U.S. 792 (1973) (which involved employment discrimination). The plaintiff must establish that: (1) membership in a protected class; (2) he applied for and was qualified for the housing opportunity; (3) he was rejected for the housing opportunity; and (4) the housing opportunity remained available. [Note: case law recognizes that the fourth element alternatively may be established by inference of unlawful discrimination.] *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 401 (2d Cir. 1998).

As in age and gender discrimination cases, upon establishment of a *prima facie* case, the burden shifts to the defendant to produce evidence that shows some legitimate, non-discriminatory reason for its action. If the defendant meets the burden, the ultimate burden of proof switches back to the plaintiff to demonstrate that the defendant's reasons were not the true reasons, but are pretextual. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 255-56 (1977).

Intentional discrimination can take many forms, based upon evidence of discriminatory intent including: (1) the discriminatory impact of the action; (2) the historical background of the action; (3) the sequence of events leading up to the action; (4) departures from normal procedures; and (5) departures from normal substantive criteria. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003). Some U.S. District Courts have held that eevidence to support a city's liability can even include effectuating the discriminatory attitudes of the constituents, even though the City officials displayed no such discriminatory animus. This has been held to be of questionable value to courts, however, and recent cases in Texas seem to have relied less on that element than the five primary types of evidence.

Some examples of zoning cases involving intentional discrimination:

- Denial of special use permit for halfway house for recovering alcoholics may have been result of intentional discrimination. Safety concerns could have been pretextual since the city allowed the development of a child-care project on the same property on which the halfway house was to be developed. *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48-52 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002).
- A one-year moratorium on new adult care facilities for persons with disabilities was held to be a "classic case of discriminatory treatment because ... the ordinance was passed with the intent to discriminate against" persons with mental impairments. *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 850-52 (S.D. Ohio 1996).

- A court found evidence of discriminatory intent in enacting a zoning ordinance requiring that group homes be separated by at least 1,000 feet where the evidence established that the officials imposed the requirement in response to community fears and concerns about property values. *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 695-97 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3rd Cir. 1993).
- Requiring a zoning application for a special exception to provide a residence for persons who are HIV-positive was deemed to be the result of intentional discrimination where there was significant community opposition and the zoning officials departed from normal procedures in considering the issue. *Easter Seal Society of New Jersey, Inc. v. Township of North Bergen*, 798 F. Supp. 228, 234 (D.N.J. 1992).
- Statute that placed special burdens on boarding homes (e.g., requiring new certificates of inspection each time a new resident moved in; posting bond to cover relocation costs in case the facility was forced to close; and requiring homes to obtain zoning permission even when they are in properly zoned areas) was "freighted with discriminatory intent" and violated the FHAA. *New Jersey Coalition of Rooming and Boarding House Owners v.Mayor and Council of City of Asbury Park*, 152 F.3d 217, 221 (3d Cir.1998).
- The District of Columbia's treatment of a group home for people with disabilities as a treatment facility rather than a family (even though it met the zoning law's definition of family) constituted intentional discrimination since it was due to widespread and vocal community opposition. *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 225-28 (D.D.C. 2003).

Of course, courts have also held that the evidence was insufficient to establish that zoning decisions affecting individuals with disabilities were motivated by discriminatory intent.

Discriminatory Classifications

Zoning laws 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).

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).

Some discriminatory classifications have included:

- Dispersion requirements mandating that group homes be separated by a particular distance are discriminatory classifications that violate the Act. *Larkin v. Michigan Dep't of Social Services*, 89

F.3d 285, 289-92 (6th Cir. 1996) (holding that 1,500 foot dispersion requirement violated the FHAA). But see *Familystyle of St. Paul v. St. Paul*, 923 F.2d 91, 94-95 (8th Cir. 1991) (holding that statute requiring group homes to be located at least one- quarter mile from each other absent a conditional use or special use permit was not invalid under FHAA).

- Application of fire code which required sprinkler system and fire alarm monitoring system to group home for persons with mental illness was held to be a discriminatory classification in violation of the FHAA. *Ardmore, Inc. v. City of Akron, Ohio*, Case No. 90-CV-1083, slip op. at 10 (N.D. Ohio Aug. 2, 1990).
- Permits for group homes conditioned on 24-hour supervision and establishment of a community advisory committee to hear neighbors' complaints, held to state a valid claim under the Act. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500-01 (10th Cir. 1995).
- A zoning ordinance that imposed certain requirements on "residential social service facilities" (including minimum spacing requirements, health and safety inspections and requirements, and informational requirements) was held to violate the Act. *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 46-48 (6th Cir. 1992).
- Requiring a six-person group home for people with disabilities to secure a certificate of occupancy when a six-person home that did not house people with disabilities did not have to secure such a certificate was a discriminatory classification under the FHAA. *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 221-25 (D.D.C. 2003).

Disparate Impact

Zoning laws that are facially neutral can violate the FHAA if they have a disparate impact or discriminatory effect on people with disabilities. 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.'" 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. *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).

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 cases. Such definitions 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).

The disparate impact analysis also has had the effect of barring nursing facilities, congregate care facilities, or similar types of dwellings from residential areas, and that can have a disparate impact on the disabled community.

Interestingly, disparate impact analysis has been applied to ordinances that are *facially* discriminatory, including:

- 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).
- 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).
- The denial of special use permit for AIDS hospice was held to have a disparate impact on people with disabilities in violation of the Act. *Baxter v. City of Belleville*, 720 F. Supp. 720, 732-33 (S.D. Ill. 1989).

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).

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).

A reasonable accommodation claim does not require proof that the defendant's actions were motivated by animus. There are three elements to a reasonable accommodation claim. The requested accommodation must be (1) reasonable and (2) necessary (3) to provide equal opportunity. 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); *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002).

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. The majority of courts however, have concluded that 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).

Examples:

- A municipality's refusal to permit a nursing home to operate in a mixed residential zone violated the reasonable accommodation mandate. *Akridge v. City of Moultrie*, No. 6:04 CV 31(HL), 2006 Wl 292179 at *9 (M.D. Ga. Feb. 7, 2006).
- A municipality's failure to issue a variance to its zoning laws to allow the operation of a single room occupancy facility for persons with mental illness and recovering substance abusers in a commercial/industrial district was deemed likely to violate the reasonable accommodation provision.
- A court has held that the FHAA's reasonable accommodation provision required a city to take the steps necessary (through amendment of its zoning laws) to allow a 12-person adult care facility to operate, even though ordinances limited occupancy to 6-persons. *Smith & Lee Assoc. v. City of Taylor*, 102 F.3d 781, 794-96 (6th Cir. 1996).
- Refusals to grant exceptions to spacing requirements have been held to violate the FHAA's reasonable accommodation provision. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 785-87 (7th Cir. 2002).
- Refusal to waive zoning laws that restrictively define "family" and/or limit the number of unrelated persons who may live together so as to bar operation of group facilities have been held to violate the FHAA's reasonable accommodation provision. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003)

Not all requests for reasonable accommodation are granted. For example:

- A city's refusal to turn water on for group home when the home refused to extend the water/sewer line to the edge of the property did not violate the reasonable accommodation requirement. *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 562-64 (7th Cir. 2003); *see also Sanghvi v. City of Claremont*, 328 F.3d 532, 538 (9th Cir), *cert. denied*, 540 U.S. 1075 (2003).
- Traffic safety issues and inadequate access for emergency vehicles raised by site plan for 95-bed nursing facility rendered the requested accommodation unreasonable. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442.

- A zoning board's refusal to allow a group home to expand from 8 to 15 persons did not violate the reasonable accommodation requirement. *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 604-06 (4th Cir. 1997).
- Plaintiffs had failed to establish their reasonable accommodation claim to require the town to allow operation of a vacation residence for persons with mental retardation by waiving the law limiting to four the number of unrelated persons who can live together because plaintiffs had failed to prove that the residence would not be economically viable without a larger number of residents than allowed by the zoning law or that there was a need for such a program.
- 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).
- 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).

II. ENFORCEMENT OF THE FHAA

Complainants

The FHAA permits any "aggrieved party" to complain of violations. This includes individuals with disabilities who live in or would live in the housing. It also includes individuals who do not have handicaps but who live with those who do as well as entities that provide services to people with handicaps. In order to assert a claim, a person or entity must show only that (1) there has been an actual or threatened injury; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury can be redressed by the requested relief. *See San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1497 (10th Cir. 1995).

Administrative Process

An "aggrieved party" who has been the victim of housing discrimination may file an administrative complaint with the United States Department of Housing and Urban Development (HUD). An administrative complaint *must* be filed within one year of the discriminatory act. Complaint form is on HUD's website, www.hud.gov, along within instructions for submission.

Within 100 days after filing a complaint with HUD, the agency conducts an investigation and make a determination as to whether reasonable cause exists to believe a discriminatory housing practice has occurred. In addition, HUD may seek to resolve the matter through "conciliation."

If conciliation is unsuccessful and HUD determines that reasonable cause exists to believe that a discriminatory housing practice has occurred, HUD will prosecute the action, either administratively or in court, and pay all litigation expenses that may be incurred.

If, however, the matter involves the legality of local zoning or land use laws or ordinances and conciliation proves unsuccessful, HUD will not make a reasonable cause determination but, instead, will refer the investigative material to the United States Department of Justice.

Litigation

A complaint in state or federal court under the Act must be filed within two years of the date of the discriminatory practice. The FHAA allows, but does not require, the court to appoint a lawyer to represent persons who are unable to afford counsel

Available Remedies

The FHAA allows private individuals who establish that a discriminatory housing practice has occurred to recover actual and punitive damages as well as an injunction to stop the FHAA violation. However, the Supreme Court has held that punitive damages cannot be assessed against municipalities in civil rights suits under 42 U.S.C. § 1983. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). A prevailing party under the FHAA also may recover his attorneys' fees and costs. 42 U.S.C. § 3613(c)(2).

DEFENSES TO FHAA CLAIMS

Commonly asserted defenses include that the prospective residents of a facility do not have disabilities protected by the FHAA and that the substance of the FHAA claims are legally without merit (asserting that the defendant did not intend to discriminate against plaintiffs, that an ordinance does not disparately impact people with disabilities, or that a requested accommodation is unreasonable).

Maximum Occupancy Limit Exemption

The FHAA exempts completely ordinances that restrict "the maximum number of persons permitted to occupy a dwelling." Until 1995, many municipalities defended FHAA challenges to the limited number of unrelated persons who may live together by arguing that such restrictions were exempt from the FHAA because they constituted maximum occupancy limitations. In 1995, the Supreme Court settled the dispute and definitively ruled that such zoning ordinances were not exempt from the FHAA. However, 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).

Direct Threat

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). Similar "direct threat" provisions are also included in the Americans with Disabilities Act. 42 U.S.C. §§ 12113(b); 12183(b)(3). This particular defense carries with it limitations on its use, and is rarely asserted in the common group home lawsuit.

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).

Ripeness and Exhaustion

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).

While exhaustion of administrative remedies is not required, many federal courts have now held that an individual cannot proceed with a FHAA action before receiving a final negative decision from a local official or body that has final authority to apply the challenged zoning law because, absent such a decision, the case would not be "ripe." Undue delay in consideration of an application may be sufficient to make a case ripe. *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 199-200 (5th Cir. 2000).

There are several exceptions to the ripeness doctrine:

- Individuals need not present disparate treatment claims, such as facial challenges to zoning laws, to local decision-makers before pursuing federal FHAA claims.
- Individuals who are challenging the local variance procedures need not pursue such procedures.
- Individuals need not request action by a final decision-maker if such action would be futile.

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).

Abstention and Res Judicata

Once a proceeding pending before a state administrative or judicial body has commenced, they may be unable to pursue zoning remedies beyond any initial request for a variance, permit, or similar permission. 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 the state proceedings are completed. Additionally, the federal court may find that the plaintiff is precluded from raising any FAA claims in federal court that were raised in the state administrative or court proceedings. *See, Assisted Living Assoc. of Moorestown, L.L.C. v Moorestown Township*, 996 F. Supp. 409, 428-30 (D.N.J. 1998)