

of fair housing laws.

6. A local government that uses community resistance as a basis for its decision to deny a conditional use permit (CUP) to a residential program for persons with disabilities is in violation of those laws.

Repeatedly, the courts have ruled that local governments denying CUPs based on stereotypical negative projections are discriminatory in that their effect is to restrict where persons with disabilities can live. Furthermore, courts have stated that such negative projections have no validity as they are not supported by data and in fact, are contradicted by data.⁵ Making a determination as to whether a group home or residential treatment program is a threat to neighborhood health and safety must be made on an individualized basis using specific criteria applied only to the residence under consideration and not be made on stereotypical assumptions.

Q 3. If it has been a violation of fair housing laws since 1988 for a local government to base denial of a CUP for a residential alcohol and drug treatment program on community resistance to such programs, why does it remain today the most effective means communities have to prevent their local governments from issuing CUPs to these programs?

A. It is commonly known in local governments that fair housing laws make it illegal to discriminate in housing sales, rentals or lending practices on the basis of race, national origin, religion or gender. What is not as commonly known is how fair housing laws also apply to zoning and land use decisions regarding residential treatment programs that house persons with disabilities such as substance abusers. However, lack of knowledge by local governments is not an excuse for discrimination. The FHAA has been in existence since 1988 and has been widely publicized by the U.S. Department of Housing and Urban Development and by national and local disability and fair housing advocacy organizations.

One reason for this lack of attention is because residential programs for substance abusers and the mentally ill comprise a small percentage of the housing and building concerns that come before local governments. For instance, in San Diego County, compare the number of houses, apartment complexes and commercial buildings to that of only 77 licensed residential alcohol and drug treatment programs. In fact, some local governments have never had occasion to consider a CUP for such a program. Of the 19 local governments in San Diego County, only nine have a state licensed residential substance abuse program.

Q 4. Since zoning and land use issues depend upon local conditions, do local regulations automatically pre-empt fair housing laws?

A. No. Fair housing laws prohibit local governments from using zoning and other land use requirements to discriminate against the housing needs of persons with disabilities. Courts have further strengthened the intention of federal fair housing laws in a series of decisions that apply any one of three tests to local regulations: (1) discriminatory intent, (2) discriminatory impact, or (3) failure to provide reasonable accommodation.⁶ An accommodation is considered reasonable as long as it does not place an undue administrative or financial burden on the local government. Former California Attorney General Bill Lockyer, put it this way:

“Thus, municipalities relying upon these alternative procedures have found themselves in the position of having refused to approve a project as a result of consideration which, while sufficient to justify the refusal under the criteria applicable to grant of a variance or conditional use permit, were insufficient to justify the denial when judged in light of the fair housing laws’ reasonable accommodation mandate.”⁷

Not all denials of CUPs are discriminatory against persons with disabilities. Sometimes it may be both legitimate and appropriate for a local government to turn down a residential alcohol and drug treatment provider for a use permit. That is why the application of reasonable accommodation criteria is critical. Reasonable accommodation is not a one way street. Providers are also obliged to be flexible in their responses to legitimate land use concerns that their facility might cause, such as increased parking, traffic, building size or design, or outdoor lighting.

There is good litmus test to apply as to whether or not a zoning or land use regulation or practice is discriminatory. It can be considered discriminatory if it focuses on persons with disabilities—in other words focuses on “WHO” is being served by the residence, not “WHAT” type of residence it is.

Q 5. How can residential alcohol and drug treatment providers ensure that they can get a CUP?

A. There are no guarantees that treatment providers will be granted a CUP, but fair housing laws definitely improve the odds for providers over what they have been in the past. When a residential provider submits a CUP application it is important to include a request for reasonable accommodation. Specifically it should include:

- ◆ Identifying the category of persons with disabili-

ties per fair housing law (substance abusers) that the proposed residential program will be serving.

- ◆ Specifying the accommodations in zoning land use that will be necessary to make this residential facility available to those with disabilities.
- ◆ Identifying the ways in which the requested accommodation will not impose an undue financial or administrative burden on the local government to which the provider is applying.

However, a provider proposing a treatment program in a facility no larger than other residences in the neighborhood, or a treatment program with six beds or fewer seeking a small increase its number of beds, may not need to apply for a CUP, but instead can apply for reasonable accommodation. There are many reasons to pursue this course of action. Any provider seeking to do this may want to consult with a fair housing professional who is knowledgeable in this area of land use. For more information on this subject see: <http://www.mhas-la.org/DeveloperGuide3-9-05.pdf>.

Q 6. Can local governments put special restrictions on sober living residences?

A. No. Sober living residences are housing where people abstinent from alcohol and drugs seek a clean and sober living environment. There are no treatment or counseling services given, although they may hire a house manager. They are considered the same as any other residential rental. Local governments cannot require restrictions or permits for one residence without requiring the same for all. They exist by right, just as any single family dwelling unit, whether it is a single family home, a unit in a duplex, a large apartment complex, or other types of dwelling units.

Single family dwellings are regulated under one of two different categories: “Occupancy limits” and “definition of family.” “Occupancy” regulations limit the number of people allowed per square footage and is considered non-discriminatory because the standards apply equally to everyone and are, therefore, generally exempt from the application of fair housing laws. However, few local governments use this type of density limitation as it can impact large families.



The most commonly used regulation is how a local jurisdiction defines “family.” In California no local government may limit the number of adults who choose to live together. This is due to a 1980 case, *City of Santa Barbara v. Adamson*, in which the California Supreme Court, based on California privacy laws, ruled that people that want to live together have the right to do so. Therefore, no California local government can restrict the number of unrelated adults choosing to live together. Many local governments still have a restrictive definition of family that limits the number of unrelated people that can live together, but such regulations are not in compliance with the law.

Q 7. If my state’s fair housing laws are not equivalent to the protections specified in federal fair housing law, which one prevails?

A. Federal fair housing law will always be considered the “floor.”⁸ If state law provides

fewer protections than federal law, then federal law prevails. Some states may have more protections in their fair housing laws than federal law, such as California. In that case, the law that provides the most protection prevails. (See California Fair Employment and Housing Act: <http://www.dfeh.ca.gov/Statutes/feha.asp>)

Q 8. What are the consequences for local governments that do not follow fair housing laws in zoning and land use decisions for residential alcohol and drug treatment programs?

A local government can be sued by a provider or potential residents of a residential facility if it is perceived that local government decision makers intentionally discriminated against them, or the effect of their acts was discriminatory, or they failed to provide reasonable accommodation. Similarly, the United States Department of Justice has authority to step in and enforce federal law when there is an allegation violation of the FHAA in a local government’s zoning or land use decisions. If the courts find in favor of the residential provider or its potential residents, a local government would have to pay attorney fees. Additionally both federal and state fair housing laws provide for the added potential consequences of having to pay damages and be assessed penalties.

It should be noted that an actionable act by a local government in zoning and land use decisions against persons with disabilities can only be committed at the final step of the decision making process by elected officials who are the ones legally responsible for those decisions. For more information on this and other related subjects please see the Tool Kit and other publications at <http://futuresassociates.org/step.html>. To learn how to become involved locally in removing zoning and land use barriers for residential treatment providers and other housing for persons with disabilities, please see the STEP issue briefing on how to use Housing Element Plan updates which will be posted at this site in September, 2008.



References

¹ Federal Fair Housing Act, 42 U.S.C. Section 3602 (h)
² Federal Fair Housing Act, 42 U.S.C. Section 3602 (h) (3)
³ Federal Fair Housing Act, 42 U.S.C. Section 3604 (f) (3) (B)
⁴ Federal Fair Housing Act, 42 U.S.C. Section 3613 (c)
⁵ Daniel Lauber, "Impacts on the Surrounding Neighborhood of Group Homes for Persons with Developmental Disabilities." Governor's Planning Council on Development Disabilities, Springfield, Illinois, Sept. 1986.
Council of Planning Librarians, "There Goes the Neighborhood. . . A Summary of Studies Addressing the Most Often Expressed Fears about the Effects of Group Homes on Neighborhoods in which They Are Placed," April 1990.
⁶ Ted H. Gathe, City of Vancouver, WA, "Group Homes: Local Control and Regulation Versus Federal and State Fair Housing Laws," Municipal Research and Services Center of Washington.
⁷ Bill Lockyer, California Attorney General, Letter to All California Mayors, "Adoption of a Reasonable Accommodation Procedures," page 3, paragraph 2, May 15, 2001.
⁸ Federal Fair Housing Act, 42 U.S.C. Section 3615

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KEY PROVISIONS OF THE FEDERAL FAIR HOUSING AMENDMENTS ACT OF 1988

Sec. 802. [42 U.S.C. 3602] Definitions

- (h) "Handicap" means, with respect to a person--
- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
 - (2) a record of having such an impairment, or
 - (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

Sec. 804. [42 U.S.C. 3604] Discrimination in sale or rental of housing and other prohibited practices

As made applicable by section 803 of this title and except as exempted by sections 803(b) and 807 of this title, it shall be unlawful--

- (f) (2) To discriminate against any person in the conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of--
- (A) that person; or
 - (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
 - (C) any person associated with that person.
- (3) For purposes of this subsection, discrimination includes
- (B) 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;