North Carolina Communities' Reaction to the 1988 Federal Fair Housing Amendments

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Congress overwhelmingly passed the Fair Housing Amendments Act of 1988 (FHAA or the “Act”) and President Bush signed it into law. The Act has been called by a noted scholar “the most significant civil rights enactment in a generation ...” but its impact has been appreciated only slowly by communities in North Carolina and other states.

What the Act Does.

The FHAA brings persons with disabilities under the protection of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, and extends to these persons the promise of equal housing opportunity. The path-breaking original Fair Housing Act determined that many long-standing government and private practices that reduced the housing options of blacks and other minorities were unlawful. The FHAA is equally path-breaking in extending these same rights to persons with disabilities as well as to families with children. Race and disability are now on equal standing under the law; discrimination in housing against either group is unlawful.

As Congress explained, the Act:

is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

In passing the Act, Congress recognized that people who have disabilities are full members of the community; as with any other group of people, some are good neighbors and some are not. What the FHAA in essence says is that, just as with race, no one may determine where persons with disabilities may live based merely on their label or status. Rather, as with every other citizen, housing decisions that others make for a person with disabilities may be based only on how that individual acts.

The Reach of the Act Is Wide

In sweeping language, the Act makes it unlawful for any individual or government “[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap ....” The Act further makes it unlawful for any individual or government “[t]o 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 dwelling, because of a handicap....”

The reach of the FHAA is so great because it does not simply prohibit actions taken with the intent to discriminate against persons with disabilities, it also prohibits apparently neutral practices that, whether intended or not, have the effect of restricting the housing options of persons with disabilities. In addition, the FHAA provides even greater protection on the basis of handicaps than on the basis of race by affirmatively requiring...
individuals and municipalities to make "reasonable accommodations" in appropriate circumstances. The Act
does so by defining discrimination to include:

a refusal to make reasonable accommodations in
rules, policies, practices, or services, when such ac-
ccommodations may be necessary to afford such per-
som equal opportunity to use and enjoy a dwelling.7

Thus, as a whole, the Act prohibits practices that deny
people with disabilities the right to choose where they
wish to live by prohibiting discriminatory practices against
individuals with any "handicap." The Act defines the
term "handicap" broadly to mean "(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 ...."8

The FHAA does not protect people who currently
engage in unlawful use of controlled substances, but it
does protect individuals who are in a treatment program
for drug or alcohol abuse.9 The Act does not protect
persons "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."10 The House Report makes
clear, however, that direct threat can only be demon-
strated through "a history of overt acts or current con-
duct" of a particular individual, not a generalized fear
of the person's disability.11

The Act Encourages Enforcement

The FHAA makes the entire Fair Housing Act more
effective by attracting competent attorneys to bring fair
housing cases through allowing generous damages
(including punitive damages) awards and allowing the
award of attorney's fees. The FHAA also extends the
statute of limitations. In addition, the Act liberalizes
"standing" rules by extending the definition of persons
who are considered "aggrieved" and therefore able to
sue. The Act includes among those who are entitled to
relief (1) any person who claims to have been injured by
a discriminatory housing practice, or (2) any person who
believes that such a person will be injured by a discrimi-
natory housing practice that is about to occur.12 As a
result, advocacy organizations and housing providers
are included among those who may sue under the Act.13

The FHAA's Largest Impact on
Municipalities: Zoning Practices

The Fair Housing Act, of which the FHAA is now a
part, explicitly trumps local and state laws that conflict
with it.14 As mentioned, Section 3604(f) of the FHAA
makes it unlawful for any individual or government "[t]o
discriminate in the sale or rental, or to otherwise make
unavailable or deny, a dwelling" because of handicap. By
its terms, this language covers discriminatory land-use
decisions by municipalities.15 Decisions by courts de-
scribing the same language of the original Fair Housing
Act make clear that this section does cover land-use and
zoning actions.16 As the House Report to the FHAA
stated in explaining both disability provisions:

These new subsections would also apply to state or
local land use and health and safety laws, regulations,
practices or decisions which discriminate against in-
dividuals with handicaps. While state and local gov-
ernments have authority to protect safety and health,
and to regulate use of land, that authority has some-
times been used to restrict the ability of individuals
with handicaps to live in communities....The Commit-
tee 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.17

Since the amendments went into effect in 1989, a
number of courts have found that municipalities’ zoning
regulations and decisions that denied zoning approval
to facilities for the handicapped violated the Act.18

Dispersal Statutes

Many municipalities have passed statutes that re-
quire that homes intended for persons with disabilities
be located a certain distance from other such homes.
Dispersal requirements impose a quota of one home
intended for persons with disabilities within a certain
area. It was legally well-established under the Fair Housing
Act of 1968 that quotas intended to prevent a protected
class of people from becoming overconcentrated in one
area violate the Act.19 Dispersal statutes also squarely
violate the FHAA since a flat ban against permitting a
home occupied by individuals with handicaps to be
placed within a certain area does "make unavailable or
deny a dwelling to [a] buyer or renter because of a
handicap."20 In fact, that is the exact purpose of disper-
sal zoning provisions: to deny use of that dwelling to
persons with disabilities.

In a decision affirmed by the Third Circuit Court of
Appeals, a Pennsylvania federal district court concluded
that dispersal requirements indeed violate the FHAA.21
The Maryland legislature repealed a 1,000-foot distance
requirement for facilities housing people with disabili-
ties based on an opinion issued by the Maryland Attor-
ney General advising the legislature that such a rule was
illegal under the FHAA.22 The City of Portland, Ore-
gon did the same.

Congress could not have been more clear that rules
such as distance limits that have the effect of denying individuals with disabilities the choice of where to live can no longer be maintained.23 There is an isolated court case to the contrary,24 which is poorly reasoned and unlikely to be adopted elsewhere because it bases its decision on a U.S. Supreme Court case decided before passage of the FHAA. In fact, the U.S. Department of Justice continues to bring litigation based on the position that dispersal statutes are unlawful under the FHAA.

**Occupancy Restrictions**

The second major zoning rule that affects persons with disabilities prescribes the maximum number of persons who are allowed to live in a house. While municipalities generally do not limit the number of related persons who can live in a house, many do limit the number of unrelated persons who may live together to between three and five. This rule presents a problem for persons with disabilities because, as courts have found, they must often live in greater numbers because of their special needs.25 For some individuals with disabilities a group setting may be necessary for therapeutic reasons; for others, their incomes are so low as a result of their disabilities that resources must be pooled to allow a program to succeed financially. Some courts have suggested and the Department of Justice believes that allowing sufficient densities for housing persons with disabilities is required by the "reasonable accommodations in rules, policies, practices, or services," provision of the Act.26 Also, the Act's legislative history suggests that the prohibition against discriminating "in the terms, conditions, or privileges of sale or rental of a dwelling,"27 would prohibit zoning practices "which have the effect of excluding...congregate living arrangements for persons with handicaps."28 Thus, municipalities must allow occupancy limits that are responsive to the special needs of persons with disabilities.

**Special Use Permit Requirements**

Many municipalities also require those developing housing for persons with disabilities to obtain a special-use type permit in a public proceeding. For a municipality to require individuals with disabilities to obtain a permit that is not required of others in order to live in a certain neighborhood discriminates in the "terms and conditions" of housing.29 Additionally, the Act would bar municipalities from legislating procedural requirements that "otherwise make unavailable or deny" housing to people with disabilities. As the House Report concludes, the FHAA prohibits "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."30 The public approval process often tends to mobilize neighborhoods unfairly against such houses based on stereotypes rather than conduct or experience.31 Under the FHAA, Courts have not hesitated to strike down procedures such as these that are not required of everyone, uniformly.32

**Enforcement of the FHAA**

The potential options to enforce the FHAA if someone determines that their federal fair housing rights have been violated are dizzying. There are a number of avenues by which aggrieved parties can seek legal remedies.

**Sue Privately under FHAA**

An individual or group's first option is to bring suit privately in either state or federal court under the FHAA. There is no need to exhaust administrative remedies before bringing suit under the federal law. Should the party who sues win, the losing party will have to pay the winner's attorney's fees through the cost-shifting provision of the Act.

**File a Complaint with HUD**

Alternatively, the party can file a complaint with the agency charged with enforcing the Act, the U.S. Department of Housing and Urban Development (HUD). HUD, in turn, refers the complaint either to the U.S. Department of Justice or to the North Carolina Human Relations Commission (HRC).

**U.S. Department of Justice**

If the case concerns zoning, HUD will likely refer it to the U.S. Department of Justice (DOJ) for prosecution, as specifically directed in the Act to ensure effective enforcement of zoning and land-use matters.33 DOJ can bring suit itself in federal court or intervene in an existing suit brought by a private party or the HRC.34 In addition, an aggrieved party can bring concerns directly to DOJ initially.

**N.C. Human Relations Commission**

When HUD receives a complaint that is not appropriate for referral to the Department of Justice, HUD likely will refer it to the HRC. HUD makes this referral because it has determined the HRC to be a "substantially equivalent" agency to HUD with respect to fair housing enforcement. HUD made this determination because the HRC's enabling legislation--the State Fair Housing Act--in large part tracks the federal Act. A private party also can file a complaint with the HRC directly under the state law as an alternative to using the federal law. Before suing privately under the state law, an individual must exhaust administrative remedies by filing first with the HRC.

The HRC investigates all cases referred to it, which provides free discovery to plaintiffs, and determines whether there are "reasonable grounds" to bring suit. If
it determines that reasonable grounds exist, the HRC is then required to enforce the state law (even if the original complaint was to HUD under the federal law). If either party or the HRC desires to sue in court, the HRC itself will bring suit in state court under the state law. This occurs about half the time.35 Otherwise, the HRC will bring the case to the Office of Administrative Hearings, where it is heard by an administrative law judge, who recommends a decision to a panel of three HRC commissioners. On the other hand, if the HRC does not find reasonable grounds to sue, it issues the complaining individual a right to sue letter. At this time, the party may bring suit privately under the state law or still may choose to sue under the federal law.

In general, particularly in zoning cases, aggrieved parties will probably find their rights better protected by using the federal rather than the state law because rights under the federal FHAA are clearer and the case law is better developed.

North Carolina Communities and the FHAA

North Carolina, even before adoption of the FHAA, recognized the special occupancy requirements of persons with disabilities and the problems inherent in special use permits in such cases.

In 1981 the General Assembly enacted a statute that authorized family care homes of up to six handicapped residents plus staff to be located in any residential zoning district in the state and prohibited the requirement of any special approval procedure.36 The statute states North Carolina's purpose "to provide handicapped persons with the opportunity to live in a normal residential environment." The statute does, however, allow municipalities to impose a half-mile dispersal rule.

Many municipalities still retain dispersal and special use requirements and have unduly restrictive occupancy standards for persons with disabilities. Now that the FHAA is law, state and local governments may face costly legal actions if they fail to eliminate statutes that in effect make a dwelling unavailable to any buyer or renter because of a handicap.

While North Carolina communities have not reacted swiftly to change local statutes following passage of the Fair Housing Amendments Act, a number of questions have been raised about the legality of existing laws, and during the past two years many local practices have been challenged.

Durham Sets a Good Example

Shortly after passage of the Fair Housing Amendments Act, a use permit to build a house on a nonconforming lot of record was requested in the City of Durham. Such permits are routinely granted by the City's Board of Adjustment if the proposed house is physically compatible with surrounding houses. This particular house was being built for persons with mental illness, and when neighbors learned of the proposed use, they made a number of calls to the City opposing the home.

Before holding the hearing on the permit request, the Durham Assistant City Attorney and the chair of the Durham Board of Adjustment conferred and reviewed existing law, including North Carolina General Statute 168-9, which generally protects the handicapped from discrimination in housing, and the FHAA. They agreed that comments about the disabled status of the residents were irrelevant to the issuance of the permit and that allowing such comments would prejudice the proceedings by introducing evidence that could lead to impermissible discrimination.

A number of neighbors attended the hearing to oppose the permit. The first speaker was an advocate for persons with mental disabilities, who was aware of community opposition and planned to talk to the Board about the need in Durham for the proposed home. The Board chair interrupted at the first mention of mental illness and stated that the status of the proposed resi-
Residents of the house was irrelevant and that the Board therefore would not allow discussion about them. No further discussion about the proposed residents or use of the house was allowed from either the proponents or the opponents. Evidence was limited to size, location, and parking. The Board, properly treating the request as it would any similar request for a single family home, approved the permit.

**The City of Hendersonville Is Ordered To Comply**

In 1992, a North Carolina court ordered the City of Hendersonville to approve a special use permit for a housing development for persons with mental illness following several months of heated community controversy. In August 1991, after months of searching for a suitable building site, the Mental Health Association in North Carolina (MHA/NC) had signed an option to purchase land in Hendersonville, where it planned to construct eleven one-bedroom apartments for ten persons with mental illness and a resident manager. The individuals who would be able to move into the new apartments were clients of the community mental health program; their illnesses were stabilized with medication, and they received a number of other services that enabled them to live independently in the community. Generally, their housing at the time was neither decent nor affordable, with most paying more than half of their income for housing costs.

In response to an application for funding submitted by MHA/NC, HUD had approved the site and committed to the project $494,100 for land acquisition and construction and an additional $1,000,000 to be used over a 20-year period as rental assistance to make the apartments affordable. The HUD fund reservation would expire if construction did not begin by March 31, 1992.

As the developer of the proposed housing, the MHA/NC hired an architect, who conferred with the Hendersonville City planner. Following the planner's guidance about zoning requirements, the architect prepared and submitted plans to the City along with an application for a Planned Use Development (PUD) special use permit, which the City routinely requires for all apartment developments of more than four units.

The City planner reviewed the plans and the application, saw that they met all city requirements for a PUD permit, including all architectural, engineering, and environmental requirements. He informed the MHA/NC's architect that he would recommend approval and that he anticipated that the Hendersonville Planning and Zoning Board's approval at its January 1992 meeting would be routine. At that meeting, however, one member of the Board moved that the matter be tabled, despite the City planner's recommendation. Neighbors of the proposed project had learned that the apartments were to be occupied by persons with mental illness and had submitted a petition to the Board opposing the project. During subsequent court action, it was alleged that the Board member who moved to table the request for a special use permit is the son of two individuals who had signed the petition.

This action by the Board alerted the MHA/NC to the fact that community opposition had fallen on fertile ground, and the organization contacted Carolina Legal Assistance, which works with attorneys of local legal services offices and pro bono attorneys to protect the legal rights of individuals with mental disabilities. As a result of this early contact, during each step of the ensuing process, the statements and actions of both the opponents and the Board members were closely monitored and documented.

Once the development of these apartments was taken off of the track that similar housing developments routinely follow, opposition by neighbors and others in the community increased. At the Planning and Zoning Board's February 1992 meeting, considerable discussion occurred including, according to court documents, vociferous opposition to the development. Among the concerns expressed were drainage problems, flooding, valuation of property, and the "institutional effect" the development might have on the neighborhood. One resident declared that she did not want this "mental institution" near her.

The City offered no technical or scientific evidence in support of the drainage and flooding concerns. Nonetheless, the Board voted to once again table the request and to send it to a subcommittee for further study. The subcommittee was chaired by the individual who had initially moved to table the request.

At the March 1992 meeting of the Planning and Zoning Board, the City planner stated that the plan met all technical requirements and, again, recommended approval. The subcommittee gave a report expressing its belief that the apartment plan was "not in harmony with the existing immediate residential neighborhood." To address concerns about flooding, the project's architect presented engineering data showing that the effect of water runoff would be minimal—less than two inches in a fifty-year storm. The MHA/NC addressed concerns about property values by presenting studies showing that values do not decline as a result of such developments. The Planning and Zoning Board, however, adopted the subcommittee's recommendation to deny the request for a special use permit.

Faced with certain further delay, the MHA/NC requested HUD to extend the fund reservation for the apartments to September 30, 1992, and HUD granted the extension, stating that further extensions would not be granted.

According to the Zoning Ordinance of the City of Hendersonville, Planning Board recommendations with
respect to Planned Unit Developments must be reviewed and approved by the Mayor and the City Council. The proposed development was discussed at the April 1992 meeting of the City Council. Again, neighborhood opposition to the complex was vocal and included concern that the neighborhood was near schools, and that those living in the area wished to keep the neighborhood family-oriented and safe. A member of the City Council stated that the proposed plan was not compatible with the "people" in the neighborhood. The architect for the proposed development testified that it would not adversely affect flooding in the area and that the complex had been redesigned from two-story to one-story units to better conform to the appearance of the surrounding homes. No expert opinion or documentation was presented to support the contention that the development would adversely affect flooding in the area.

The City planner again recommended approval of the special use permit. The City Council voted unanimously to deny approval. The stated reasons were that the development would have an adverse impact on flooding in the neighborhood, that the complex would have an adverse impact on the single-family character of the neighborhood, and that it was not "in harmony" with the neighborhood. In later court action, the plaintiffs pointed out to the court that the site was zoned for apartments, that apartment complexes in single-family neighborhoods are common in Hendersonville, and that there are, in fact, a privately owned triplex within 50 yards of the site and eight units of public housing in duplex format within 200 yards of it.

In May 1992, Carolina Legal Assistance and Pisgah Legal Services, representing plaintiff Jeffrey Blackwell, an individual who planned to move into the apartment development, and an attorney for plaintiff MHA/NC sued in state court to allow the project to go forward before HUD funding would be withdrawn.

The attorneys stated that the City's denial of the special use permit constituted a discriminatory housing practice under three separate provisions of the Fair Housing Amendments Act discussed earlier in this article. First, plaintiffs alleged that the City unlawfully made the proposed residence unavailable to plaintiff Blackwell because of his handicap in violation of Section 3604(f)(1) of the Act. Second, plaintiffs accused the City of violating Section 1(f)(3)(b) by refusing to make reasonable accommodations in rules, policies, and practices so as to afford persons with handicaps equal opportunity to choose, use, and enjoy a residence. Third, plaintiffs alleged that the City had treated plaintiffs differently from persons without handicaps in the terms, conditions, and/or privileges for residences in Hendersonville in violation of Section 3604(f)(2) of the Act.

In papers filed with the court, plaintiffs stated that while proof of discriminatory intent is not required under the Act, such intent could be inferred in the present case for the following reasons: (1) the City's decision to withhold the special use permit had a discriminatory impact, since the only class of persons affected by the decision would be persons with mental disabilities; (2) the City departed from normal zoning procedures in repeatedly tabling the request and then referring it to a special subcommittee chaired by a man with a known conflict of interest; (3) members of the decision-making body made contemporary statements that indicated that they acted for the purpose of effectuating the desires of private citizens and that a motivating factor behind those desires included the fact that the proposed residents of the housing were mentally ill; (4) the concerns expressed by the City about the lay of the land and drainage were clearly pretextual; and (5) the contentions that the plaintiffs' development was "not in harmony" or "not compatible" with the neighborhood were a thinly veiled camouflage for public opposition based on fears and stereotypes about the potential residents.

Following a hearing on the matter, Judge Julia Jones, Superior Court Judge Presiding, issued an order based on her finding that the defendant had no valid basis for denying the special use permit and had violated the Fair Housing Act, as amended, in denying the permit. The judge also found that plaintiffs "would incur immediate, irreparable injury if an injunction is not issued because they have no other adequate remedy at law to preserve their rights to substantial HUD funding to build the needed housing for mentally handicapped people."46

The Judge's order was clear and, in its broad scope, ensured that the housing project could be developed without further interference:

It is ordered that the defendant and all other persons, boards and bodies who are its officers, officials, agents, servants, employees, and attorneys are hereby permanently enjoined from failing to grant plaintiff Mental Health Association in North Carolina, Inc. a Planned Use Development permit for the site ... Defendant and all other persons, boards and bodies who are its officers, officials, agents, servants, employees, and attorneys are also enjoined permanently from failing to make all reasonable accommodations in rules, policies, practices, or services as may be necessary to afford mentally handicapped individuals the opportunity to reside in the development planned by MHA ... Any violation of this Judgment is in contempt of court and punishable by both civil and criminal contempt powers of this court upon proper showing.

The City of Albenarle Avoids a Legal Challenge

In 1993, the MHA/NC submitted an application to HUD for funding to develop apartments for individuals
with mental illness in Albemarle. When local citizens learned of the pending application, they contacted the Center Director of the Stanly County Mental Health Program and City Council members and voiced their opposition. The City Council requested the Center Director to canvas the people living in the area to find out how the neighbors would feel about such a project. The Center Director declined to do so, informing the City Council that, in his opinion, this would violate the Fair Housing Amendments Act.

When local citizens continued calling the mental health center about the proposed housing, the Director contacted the consultant for the MHA/NC to obtain a copy of the Fair Housing Amendments Act. He also obtained information about the court order against Hendersonville and contacted staff in that city to learn more about their experience with community opposition. The impression he gained from a Hendersonville staff person was that the judge “had ordered them to issue the permit or they could all go to jail.”

The Center Director then hosted a meeting to inform the community about the need for the housing and about the rights guaranteed to individuals with disabilities by the Fair Housing Amendments Act. Subsequently, HUD approved the application, and the developer anticipates receiving full cooperation from the City of Albemarle during construction of the project.

*Raleigh Exhibits Enlightened Self-Interest*

The City of Raleigh Zoning Code classifies facilities that provide housing for persons with disabilities (and other designated special population groups) according to whether they are a group care facility, family care home, or family group home. Different facilities allow different occupancies, may be located in different zoning districts, and must be located a half mile away from another facility in that category and 100 yards from a facility in another category. The classification system was developed in an ad hoc manner and is cumbersome. The Raleigh Code also requires the issuance of a special use permit for group care facilities through a quasi-judicial evidentiary hearing.

The Raleigh Code’s legality after passage of the FHAA has recently been challenged by two parties. The first individual was denied zoning permission to open a family care home because it would be located (just) within a half-mile of an existing family care home. She filed a complaint with the N.C. Human Relations Commission, which investigated and referred the case to the U.S. Department of Justice.

In the second case, Raleigh has threatened five Oxford House, Inc. houses with closure because they don’t meet the family care home requirements that (1) there be no more than six persons with disabilities in a house and (2) there be on-site staff supervision. Oxford House sponsors houses in which up to ten persons recovering from substance addiction live on their own. Oxford House believes that people stop abusing substances by assuming the responsibility of maintaining a job and a household and by peer pressure--a resident is kicked out if he or she uses substances again. The effectiveness of peer pressure, according to Oxford House, would be undermined by the presence of staff on site. Oxford House filed a complaint against Raleigh with HUD and retained a local attorney. HUD also referred the case to the Department of Justice.

As a result of the referral of these cases, lawyers from the Department of Justice met with the staff of the Raleigh City Attorney’s office. Following this meeting, the Raleigh City Attorney reported to the Law and Finance Committee of the Raleigh City Council that the Justice Department was prepared to bring suit against the City if it enforced the current zoning laws regarding dispersal, occupancy and supervision in the two cases at hand.

Two lawyers from the Department of Justice met with the staff of the Raleigh City Attorney’s office and communicated the Department’s firm position that Raleigh’s dispersal statute is unlawful under the FHAA, that
Raleigh must make a reasonable accommodation to Oxford House by allowing larger numbers of individuals to occupy one residence, and that Raleigh cannot insist that an Oxford House residence must have on-site staff supervision since this runs counter to the needs of residents. The DOJ lawyers indicated that they would bring suit against the City if it enforced the zoning laws as written.

Partly as a consequence of this meeting, the Law and Finance Committee of the Raleigh City Council has re-examined its treatment of special population housing. The City Attorney recommended that the City eliminate dispersal requirements entirely and accommodate greater occupancies to satisfy the Justice Department’s interpretation of the FHAA. The Committee, over a five month period, heard from numerous groups representing persons with disabilities and other special needs as well as many neighborhood representatives. It has now developed a recommendation that has been scheduled for public hearing before the full Council and the Planning Commission that does not fully satisfy any group but is a constructive effort to meet the requirements of the FHAA, special population housing needs, and neighborhood interests.

The Law and Finance proposal has three significant aspects. First, it continues not to limit where housing for persons with disabilities may be located if it meets existing occupancy requirements—that is, the housing allows no more than four unrelated persons in a dwelling unit. Second, the proposal allows a larger number of occupants with disabilities to reside in a dwelling that is “supervised” by on-site staff. It permits up to two adults to live in a bedroom, with no upper limit on the number who can live in the house. Up to four children (related to the adults) may share the bedroom with one or two adults. Groups who choose this option, however, will have to abide by an “incentive” dispersal requirement of 300 yards from another such high occupancy dwelling. Groups appearing before the Committee generally accepted this reduced spacing requirement in exchange for the other provisions of the proposal. This housing, different from current law, could be placed in any zoning district in the city and there would be no special parking requirements to avoid making the house appear institutional. Also, there would be no requirement to comply with a special process to gain permission for this use; instead, groups would register their locations and occupancies with the City to ensure that they abide by the 300-yard spacing requirement.

Finally, the proposal provides a reasonable accommodation for persons with mental disabilities in a particularly creative manner. Surveys have shown that the vast majority of persons with mental disabilities desire to live alone or with a chosen roommate in residential neighborhoods scattered throughout the community. In addition, numerous studies have shown that this “supportive housing” model, with services available “off-site” and on demand, not only is generally preferred but also is effective.48

Local groups who attempt to meet this need for persons who are able to live independently have found that it is met most effectively in multi-unit one bedroom housing. This type of housing, however, is only available in the downtown areas that are zoned for higher-density housing. In other parts of the city this type housing either is not allowed (for example, in R-4 zoning) or is too expensive to develop because more land is required where zoning density allowances are lower. These groups argued that the impact of housing for people with disabilities on the neighborhood is reduced if up to four persons have their own apartments than if they are forced to live together in one dwelling unit, with consequent roommate frictions.49 The Law and Finance proposal responds to these concerns by allowing up to four attached units of housing to be treated as a single family dwelling anywhere in the city so long as the total number of persons in the “Multi-Unit Supportive Housing Residence” does not exceed six.
The Law and Finance proposal still is vulnerable to challenge under the FHAA because it includes 300-yard dispersal and "supervision" requirements, and it has yet to be adopted by the full City Council. If adopted, however, it would be a significant improvement over existing law that is worthy of the attention of other North Carolina communities.

The Department of Justice Visits Charlotte

In 1993, residents of a neighborhood in Charlotte voiced strong opposition to the construction that was underway in their area of a group home for individuals with AIDS. Following this opposition, the City of Charlotte canceled the previously approved building permit. The non-profit organization that had received funding from HUD to develop the home filed a complaint with HUD pursuant to 42 U.S.C. Section 3610(g)(2)(C). HUD staff determined that the complaint involved the legality of a zoning ordinance. Since a number of other organizations were complaining that their group homes also had been negatively affected by City actions, it seemed that a pattern or practice of discriminatory treatment of projects for the disabled might be occurring in Charlotte. HUD referred the complaint to the Department of Justice (DOJ).

In late October 1993, staff attorneys of the DOJ visited Charlotte and met with staff of a number of non-profit organizations that provide housing for persons with disabilities and their consultant. The DOJ attorneys were told of a number of actions that had prevented or delayed development of projects and that these actions were not routinely experienced by developers of single family homes in similarly zoned neighborhoods in Charlotte. Actions that were thought to be discriminatory included not allowing parking in the required setback area, requiring space-consuming turn-around areas, and imposing special technical requirements for water lines.50

Following this meeting, the DOJ attorneys met with legal staff of the City of Charlotte. Further action is pending.

Notes

442 U.S.C. Section 3604(f)(1). The section goes on: "of the (A) that buyer or renter; (B) a person residing in or intending to reside in that dwelling after it is sold, rented or made available; or (C) any person associated with that buyer or renter.

6See Smith v. Town of Clarkson, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982).
842 U.S.C. Section 3602(h). This definition also originated in section 504.
1010 U.S.C. 42 Section 3604(a)(9).
1242 U.S.C. Section 3602(i).
13See 24 C.F.R. Section 100.20 (HUD Regulations).
1442 U.S.C. Section 3615.
15Additionally the FHAA makes clear that "State or local zoning or land use law or ordinance is subject to the Act's prohibitions against restricting the housing choices of people with disabilities because the act specifically directs the Secretary of HUD to refer such cases to the U.S. Attorney General for prosecution. 42 U.S.C. Section 3610(g)(2)(C).
19For example, in United States v. Starrett City Assoc., Inc., 840 F.2d 1096 (2d Cir. 1988), cert. denied, Accord, United States v. Charlotte Redevelopment & Housing Authority, 718 F. Supp. 461 (W.D. Va. 1989); Burney v. Housing Authority of the County of Hamilton, 551 F. Supp. 488 U.S. 946 (S.D.N.Y. 1988). For large New York housing developer imposed limitations on the percentage of blacks and Hispanics who could become tenants in order to maintain racial integration in the complex. Starrett City justified the quota system as necessary to prevent "tipping," a process by which white tenants exceed a certain percentage of the total and are considered likely to move out. The Second Circuit Court of Appeals concluded, however, that promoting racial integration does not justify an inflexible rule that has the result of limiting the housing choices of a class protected by the Fair Housing Act. 746 (W.D. Pa. 1989). A dispersal statute for persons with disabilities is analytically indistinguishable from the Starrett City rule, and is similarly unlawful.
2042 U.S.C. 3604(f)(1); see House Report at 24; 24 C.F.R. Section 100.70 (HUD regulations).
22Ibid.
23In addition, imposing the distance rule on individuals with disabilities and not others violates Section 3604(f)(2) of the FHAA because the rule constitutes "terms [and] conditions . . . [in the] sale or rental of a dwelling" that are imposed merely "because of a handicap." 42 U.S.C. Section 3604(f)(2). As the House Report states, "[i]mplementing these requirements are not imposed on families and groups of similar size of other unrelated people; these requirements have the effect of discriminating against people with disabilities." House Report at 24.
24The Eighth Circuit Court of Appeals in Familyly v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991) concluded that the City's quarter-
mile spacing requirements for group homes did not violate the FHAA because there is a more lenient standard of review for victims of handicap discrimination than that afforded to victims of other forms of discrimination. It did so by using the rational basis constitutional test announced by the Supreme Court in City of Cleburne v.Cleburne Living Center, Inc., 473 U.S. 432 (1985), to evaluate handicap discrimination under the act. The Supreme Court adopted the lower test for persons with handicaps under the Equal Protection Clause of the Constitution in 1985, before Congress adopted the FHAA in 1988. The FHAA went beyond the constitutional protection to which the Court referred in Cleburne, however, and made it flatly illegal to "discriminate against any person ... because of handicap." 42 U.S.C. Section 3604(f)(2). Congress was free to, and chose to, provide a greater level of protection for persons with disabilities legislatively through the Fair Housing Amendments Act than the floor that the Supreme Court had indicated the Constitution already provided in Cleburne. There is no support in the Act or its legislative history whatsoever for the proposition that Congress intended to provide a lower level of protection for individuals with disabilities than that afforded to other protected classes. HUD, the federal agency charged with interpreting the Act, concluded that "persons with handicaps ... must be provided the same protections as other classes of persons" under the Fair Housing Act. Preamble, 54 Fed. Reg. 3232, 3236 (Jan. 23, 1989). Courts owe HUD's interpretation great deference. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972).


27 42 U.S.C. Section 3604(f)(2).

28 House Report at 23.

29 42 U.S.C. Section 3604(f)(2).


31 For example, "The Effects of Group Homes on Neighboring Property: An Annotated Bibliography by the Mental Health Law Project" (Washington, D.C. 1988) surveys the literature and annotates over 40 studies that demonstrate property values of neighboring properties do not go down near homes for persons with disabilities.

32 In Marburnak, Inc. v. City of Stow, 974 F.2d 43 (6th Cir. 1992) the Sixth Circuit Court of Appeals concluded that requiring a home for individuals with disabilities to seek a zoning variance from safety requirements that were more extensive than those imposed on others violated the FHAA. The court prevented the municipality from forcing the plaintiff to submit to the public, potentially invasive, expensive, and "arduous and time-consuming process" of applying for and obtaining a conditional use permit soley because the individual's to be housed were members of a class protected under the FHAA. Id. at 47; see also Potomac Group Homes v. Montgomery County, 823 F. Supp. 1285, 1298 (D. Md. 1993) (striking down neighbor notification and public program review board requirements for approval of group homes); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 464 (D.N.J. 1992); Stuart B. McKinney Foundation, Inc. v. Town of Fairfield, F. Supp. 1197 (D. Conn. 1992).

33 42 U.S.C. Section 3610(g)(2)(e).

34 See U.S.C. Section 3614(a) (DOJ can bring suit if it finds "a pattern or practice of resistance to the full enjoyment of" fair housing rights or that the matter raises an issue of "general public importance").

35 Telephone interview by Eric Stein with Daniel D. Addison, Assistant Director and Legal Counsel to the North Carolina Human Relations Commission (October 22, 1995).

36 N.C.G.S. 168-20 et seq.


40 Id. at 9.

41 Citing Smith v. Clarkson, 682 F.2nd 1055 (4th Cir 1982).

42 Id.


47 Telephone interview by Mary Eldridge with Sam Davis, Center Director of the Stanly County Mental Health Program (November 9, 1993).


49 See Parish of Jefferson v. Allied Health Care, Inc. (E.D. La. filed June 10, 1992) at 13 (impact of housing on neighborhood is determined by the number of occupants, not the number of physical