

residential alcohol and drug treatment programs or sober living residences that are not generally applicable to other comparable housing are also in violation of fair housing laws.

6. A local government that uses NIMBY as a basis for its decision to deny a use permit to a residential program for persons with disabilities as identified by fair housing laws is in violation of those laws.

Repeatedly, the courts have ruled that local governments denying use permits based on stereotypical negative NIMBY projections are discriminatory in that their effect is to restrict where persons with disabilities can live. Furthermore, courts have stated that NIMBY 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 person or even a group home or residential program is a threat to neighborhood health and safety must be demonstrated on an individualized basis using specific criteria, 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 use permit to a residential alcohol and drug treatment program on NIMBY arguments, why does NIMBY remain today the most effective means communities have to prevent their local governments from issuing use permits to these residential programs?

A. It is commonly known in local governments that fair housing laws make it illegal to discriminate in the sale or rental of individual housing units on the basis of race, national origin, religion or gender. What is not as commonly known in local governments is that fair housing laws also apply to land use decisions involving the granting of use permits for residential treatment programs that house persons with disabilities as identified by fair housing laws, 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 such a small percentage of the housing and building concerns that come before local governments. For instance, in San Diego County, compare the presence of hundreds of thousands of houses, apartment complexes and commercial buildings to that of only 77 licensed resi-

dential alcohol and drug treatment programs. In fact, some local governments have never had occasion to consider a use permit 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 land use issues depend upon local conditions, do local zoning laws automatically preempt 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 considering the application. 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 use permits 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, the building size or design, or outdoor lighting issues.

Q 5. How can residential alcohol and drug treatment providers ensure that they can get a conditional use permit (CUP) for their programs?

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 in the application a

request for reasonable accommodation from the local government. Specifically it should include:

- ◆ Identifying the category of persons with disabilities per fair housing law (substance abusers) that the proposed residential program will be serving.
- ◆ Specifying the accommodations in 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 facility of more than six beds in a residential dwelling, or a facility with six beds or fewer seeking to 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>

There are additional actions to take which are specified in the resource guide (How to Site a Residential Alcohol and Drug Treatment Program Using Fair Housing Laws) prepared by the Solutions for Treatment Expansion Project (STEP) at Futures Associates.

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

A. No. Sober living residences are living arrangements where people abstinent from alcohol and drugs seek a clean and sober living environment. There is no staff, except there may be a house manager, and there are no treatment or counseling services given. They are considered the same as any other rental situation. Local governments cannot require restrictions or permits for one residence without requiring the same for all.

The category of land use that sober living residences fall under is that of density requirements. Such regulations are intended to prevent overcrowding in residential settings. In defining density requirements local govern-

ments use one of two criteria: (1) a density limitation tied to general occupancy limitations per single residential dwelling, or (2) a density limitation based on how the local government defines “family.”

Density requirements based on occupancy limitations, limiting the number of people allowed per square footage, are considered non-discriminatory because they apply equally to everyone and are, therefore, 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 common type of density limitation is tied to how a local jurisdiction defines “family.” A typical definition would be that a family consists either of people who are related by blood or adoption (no number cap), or no more than six unrelated people. In such jurisdictions, a sober living residence may need to request reasonable accommodation if that jurisdiction

informs them they are not in compliance with local density requirements. However, in jurisdictions in which there is no cap on the number of unrelated persons living together in a single family residence, sober living residences do not need to request reasonable accommodation as they are within the legal density guidelines.

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 denying use permits to residential alcohol and drug treatment programs?

A. A local government can be sued by a provider or potential residents of the facility denied a use per-



mit if it was perceived that the permit was denied because of NIMBY concerns, or restrictions applicable only to residential alcohol and drug treatment programs, or because of the failure of the local government 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 that a state or local government is discriminating in violation of the FHAA in their 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.



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;

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