



ZONING COMMITTEE OF THE PLAN COMMISSION

Wednesday, March 27, 2019
7:00 P.M.

Lorraine H. Morton Civic Center, 2100 Ridge Avenue, Room 2403

AGENDA

1. CALL TO ORDER / DECLARATION OF QUORUM

2. MINUTES: Approval of the November 15, 2017 Meeting Minutes

3. NEW BUSINESS

A. TEXT AMENDMENT

Residential Care Homes

18PLND-0094

A Zoning Ordinance Text Amendment pursuant to City Code Title 6, Zoning to modify regulations regarding Residential Care Home uses (Section 6-4-4) including potential related amendments within the Residential, Business, Commercial, Downtown, Transitional Manufacturing, Special Purpose and Overlay Zoning Districts (Sections 6-8 through 6-15).

4. ADJOURNMENT

Order of agenda items is subject to change. Information about the Plan Commission is available online at: <http://www.cityofevanston.org/plancommission>. Questions can be directed to Meagan Jones, Neighborhood and Land Use Planner, at 847-448-8170 or via e-mail at mmjones@cityofevanston.org.

The City of Evanston is committed to making all public meetings accessible to persons with disabilities. Any citizen needing mobility or communications access assistance should contact the Community Development Department 48 hours in advance of the scheduled meeting so that accommodations can be made at 847-448-8683 (Voice) or 847-448-8064 (TTY).

La ciudad de Evanston está obligada a hacer accesibles todas las reuniones públicas a las personas minusválidas o las quines no hablan inglés. Si usted necesita ayuda, favor de ponerse en contacto con la Oficina de Administración del Centro a 847/866-2916 (voz) o 847/448-8052 (TDD).



DRAFT

MEETING MINUTES

ZONING COMMITTEE OF THE PLAN COMMISSION

Wednesday, November 15, 2017

7:00 P.M.

Evanston Civic Center, 2100 Ridge Avenue, Room 4802

Members Present: Carol Goddard, Colby Lewis, Terri Dubin

Members Absent: Simon Belisle, Peter Isaac

Other Plan Commission Members Present: none

Staff Present: Meagan Jones, Neighborhood and Land Use Planner
Scott Mangum, Planning and Zoning Administrator

Presiding Member: Colby Lewis, Chairman

1. CALL TO ORDER / DECLARATION OF QUORUM

With a quorum present, Chairman Lewis called the meeting to order at 7:00 pm.

2. MINUTES

Approval of October 11, 2017 Zoning Committee of the Plan Commission Meeting Minutes:

Chair Lewis requested a minor edit to the minutes. Commissioner Dubin then made a motion to approve the minutes as amended.

Commissioner Goddard seconded the motion. A voice vote was taken and the minutes were approved as amended with a voice vote 3-0.

3. OLD BUSINESS

A. DISCUSSION

C1a Regulations

Plan Commission referral to the Zoning Committee to discuss possible retirement of or revisions to the C1a Commercial Mixed-Use Zoning District, per Aldermanic referral.

Ms. Meagan Jones gave a brief overview of what was discussed at the October Zoning Committee meeting, revisions made to the recent development data in the C1a chart, and provided a brief overview of what staff proposed as possible text amendment

including: Increase in the minimum lot size per dwelling unit from 350 square feet to 400 square feet; reduction of the maximum planned development site development allowance for dwelling units from 40% to 30%; reduction of the the height allowed by right from 67 feet to 55 feet with a height incentive possible should an increase in front yard building setback be provided at a rate of 5 feet in height per additional foot of front yard setback provided or establishing a required front setback from the curb to the face of the building to allow for adequate pedestrian walkway using both public right-of-way and private property.

Discussion followed regarding the intent of the suggested amendments. The proposed reduction of the site development allowance for the number of dwelling units in planned developments and the increase in minimum lot size for the district was intended to encourage larger units. It was emphasized that this is not a guaranteed result due to the ability for Council to grant site development allowances above code requirements with a supermajority vote.

Chair Lewis inquired about how existing and proposed regulations compare to neighboring zoning districts. The zoning district comparison chart indicated the existing and proposed revisions would be in line with nearby zoning districts.

A brief discussion followed regarding sidewalks. Commissioner Goddard inquired about who provides sidewalk widths for larger developments. Staff responded that it can be either the City or the developer who push to provide sidewalks above the minimum requirement. Examples were given where the City pressed for wider sidewalks as well as instances where pedestrian area requirements have been written into the code such as with the Central Street Overlay District. Commissioner Lewis pointed out that a developer ultimately has no control of where a curb is should the City decide to widen a street or alternately, widen a sidewalk.

Commissioner Goddard expressed that she is still uncertain that the proposed amendments are needed. Dubin inquired how much the proposed amendments might reduce density and what consequences may be. A brief discussion followed regarding the optimal location of the district with regards to transit and fairly wide streets. Chair Lewis asked about the establishment of the C1a and if the establishment of the district and changes adopted in 2000 have been optimal. Commissioner Goddard responded that she believes they are but would not support increasing those standards.

Commissioner Lewis stated that he has concerns regarding the sidewalk widths, comparing sidewalks of the AMLI development to those of the townhomes near South Boulevard as an example. He stated that providing an incentive to get wider sidewalks could lead to taller buildings than preferred as well as inconsistent sidewalk widths throughout the district. Additionally, sidewalk furniture and landscaping would need to be taken into consideration.

Clarification was provided on the proposed recommended text amendments and a discussion followed regarding appropriate sidewalk widths, market demand for smaller

units and studios and possible development sites within the district. It was also stated that a reduction in building heights likely is not needed if the proposed incentive is not adopted.

Commissioner Goddard made a motion to recommend to the Plan Commission to increase the minimum lot size per dwelling unit from 350 square feet to 400 square feet and to require a sidewalk width of 12 feet within the C1a Commercial Mixed Use District. Commissioner Dubin seconded the motion.

The motion was approved by a voice vote, 2-1.

Ayes: Dubin, Goddard

Nays: Lewis

4. ADJOURNMENT

Commissioner Dubin made a motion for adjournment and Commissioner Goddard seconded the motion. With all commissioners in favor, the meeting was adjourned at 8:01 p.m.

Respectfully Submitted,
Meagan Jones
Neighborhood and Land Use Planner
Community Development Department

Zoning Committee of the
Plan Commission

Text Amendment

Residential Care Homes
18PLND-0094



Memorandum

To: Chair and Members of the Zoning Committee

From: Johanna Leonard, Director of Community Development
Scott Mangum, Planning and Zoning Manager
Meagan Jones, Neighborhood and Land Use Planner

Subject: Zoning Ordinance Text Amendment -
Residential Care Homes as a Special Use
18PLND-0094

Date: March 22, 2019

Request

Staff recommends consideration of a text amendment to the Zoning Ordinance to make Residential Care Homes a Special Use in zoning districts in which they are currently permitted.

Notice

The Application has been filed in conformance with applicable procedural and public notice requirements.

Analysis

Background

At the October 1, 2018 Rules Committee meeting, Ald. Fiske made a referral to the Plan Commission for a possible text amendment to the Zoning Ordinance to make Residential Care Homes a Special Use.

At the November 14, 2018 Plan Commission meeting, discussion on the proposed amendment began. Clarification was provided regarding the reasoning behind the proposal, both the possibility of making Residential Care Homes a Special Use and strengthening the existing distance requirement between this use. Concerns were raised that making Residential Care Homes a Special Use would be creating barriers to fair and affordable housing, however, there was support expressed in solidifying the distance requirement. The proposed amendment was subsequently sent to the Zoning Committee for further discussion.

Residential Care Homes are currently permitted in a variety of zoning districts. There are two categories of Residential Care Homes which are based on the number of residents (excluding staff): Category I permit 4-8 residents; and Category II allows between 9 and 15 residents. Similarly, Child Residential Care Homes are permitted as a

Special Use in residential zoning districts and permit between 4-8 residents under the age of 21.

Existing Regulations for Residential Care Homes

The Zoning Ordinance currently defines Residential Care Homes - Category I as:

Residential Care Home - Category I: A dwelling unit shared by four (4) to eight (8) unrelated persons, exclusive of staff, who require assistance and/or supervision and who reside together in a family type environment as a single housekeeping unit. "Residential Care Home - Category I" shall not include a home for persons who are currently addicted to alcohol or narcotic drugs or are criminal offenders serving on work release or probationary programs.

This use is currently permitted by right in all residential, business and downtown zoning districts as well as the C1a, MU, MXE, T1 and T2 districts, and allowed as a special use in the MUE district. A Residential Care Home – Category II has a similar definition but allows between 9 and 15 unrelated people and is allowed by right only in the R4, R5, R6, D1, MU and MXE zoning districts. Category II homes are currently allowed as a special use in the R1 R2, R3, B1, B2, B3, C1a, D2, D3, D4 and MUE Districts.

The Zoning Ordinance defines Child Residential Care Homes as:

Child Residential Care Home: A dwelling unit shared by four (4) to eight (8) unrelated persons, under the age of twenty-one (21) years, exclusive of staff, who require assistance and/or supervision while pursuing a primary or secondary education curriculum, and who reside together in a family-type environment as a single housekeeping unit. "Child residential care home" shall not include a home for persons who are currently addicted to alcohol or narcotic drugs or who are criminal or juvenile offenders serving on work release, probationary or court-ordered supervisory programs for offenders; nor a dormitory, fraternity/sorority dwelling, boarding house, rooming house or nursing home.

Both Residential Care Homes and Child Residential Care Homes are required to be licensed by the State of Illinois Department of Human Services and the City of Evanston through the Department of Health and Human Services. Additionally, regardless of whether the use is permitted or a special use, it must be a minimum of 900 feet from another Residential Care Home, Child Residential Care Home or Transitional Treatment Facility. The attached use description provides more detail on the latter of these uses. This use is considered a Community Integrated Living Arrangement (CILA) by the State of Illinois. Per Rule 115.310 of the Illinois Joint Committee on Administrative Rules' Administrative Code, "CILAs owned or leased by an agency and funded by the Department of Human Services shall not be located within a distance of 800 feet, measured via the most direct driving route, from any other setting licensed or funded to provide residential services for persons with a developmental disability or mental illness."

Proposal Overview

The originally proposed text amendment would make Residential Care Homes - Category 1 and Category II a Special Use in a number of zoning districts. A Chart outlining the change is below:

	Current Regulations		Proposed Regulations
Residential Care Home - Category I	Permitted Use in R1, R2, R3, R4, R4a, R5, R6, B1, B1a, B2, B3, D1, D2, D3, D4, MU, MXE, T1, T2	Special Use in MUE	Special Use in R1, R2, R3, R4, R4a, R5, R6, B1, B1a, B2, B3, D1, D2, D3, D4, MU, MUE, MXE, T1, T2
Residential Care Home - Category II	Permitted Use in R4, R5, R6, D1, MU, MXE	Special Use in R1, R2, R3, B1, B2, B3, C1a, D2, D3, D4 and MUE	Special Use in R1, R2, R3, R4, R5, R6, B1, B2, B3, C1a, D1, D2, D3, D4, MU, MUE, MXE

Changes to the R1 Single Family Residential District, Sections 6-8-2-3. - Permitted Uses and 6-8-2-4. – Special Uses, are shown below as an example of the changes:

- **6-8-2-3. - PERMITTED USES.**

The following uses are permitted in the R1 district:

~~Residential care home—Category I (subject to the general requirements of [Section 6-4-4](#), "Residential Care Homes and Residential Care Homes," of this Title).~~

- **6-8-2-4. - SPECIAL USES.**

The following uses may be allowed in the R1 district, subject to the provisions set forth in [Section 6-3-5](#), "Special Uses," of this Title:

Residential care home—Category I (subject to the general requirements of [Section 6-4-4](#), "Residential Care Homes and Residential Care Homes," of this Title).

Residential care home—Category II (subject to the general requirements of [Section 6-4-4](#), "Residential Care Homes and Residential Care Homes," of this Title).

Transitional treatment facility—Category I (subject to the general requirements of [Section 6-4-5](#), "Transitional Treatment Facilities," of this Title).

The Comprehensive General Plan calls for maintaining the appealing character of Evanston's neighborhoods while guiding their change as well as ensuring that Evanston, with neighboring communities, will share in the responsibility of providing for its special needs populations. The Comprehensive Plan also references the HUD Consolidated Plan which provides a more detailed analysis of the housing market, especially as it relates to these populations and low and moderate-income income households. It points to a need for additional supportive housing for persons with mental illness, developmental disabilities and other disabling conditions.

Analysis

Staff reviewed regulations from bordering municipalities, comparable national communities and consulted the American Planning Association's (APA) Planning Advisory Service for research on example ordinances and broader national trends. The attached chart provides a brief overview. Group Homes of similar size are largely permitted within residential districts by right and have distance requirements ranging from 600 feet to 1320 feet. As mentioned above, the State of Illinois has an 800 feet distance requirement for this type of use when funded by the State. A recent legal case in Springfield, IL *Valencia v. City of Springfield*, challenged that City's 600 foot distance requirement for family care residences which allow up to 6 unrelated residents. The court in that case issued a preliminary injunction against Springfield in August 2017. That ruling was upheld by the U.S. Court of Appeals for the Seventh Circuit in March of 2018. As of the date of this memo, the City of Springfield has not appealed that decision. The Justice Department also filed a suit against Springfield for discrimination against persons with disabilities in November 2017. Springfield has not yet revised their regulations regarding this use but will likely do so upon final determination from the courts.

The Fair Housing Amendments Act (FHAA) of 1988 requires communities to make reasonable accommodations to give people with disabilities an equal right to housing and prohibits communities from imposing additional barriers to community residences for people with disabilities. In July 2015 new regulations were issued, *Affirmatively Furthering Fair Housing; Final Rule* (Link included below) 24 CFR Parts 5, 91, 92 et al. This requires recipients of federal entitlement funds, including Community Development Block Grant funds, to affirmatively further fair housing by taking meaningful actions to overcome the legacy of segregation, unequal treatment and historic lack of access to opportunity in housing by members of protected classes, which includes persons with mental and physical disabilities. This Rule was further adjusted in early 2018, delaying compliance deadlines. Making approval of housing for persons with disabilities that is currently by right a special use could be viewed as adding an impediment to fair housing choice for persons with disabilities.

Standards of Approval

The proposed Zoning Ordinance Text Amendment to make Residential Care Homes - Category I and Category II Special Uses in the districts it is currently permitted by right may meet some of the standards for approval of amendments per Section 6-3-4-5 of the City Code. An objective of the Comprehensive General Plan is to maintain the appealing character of Evanston's neighborhoods while guiding their change, however, it is unclear whether residential care homes, with the existing distancing requirements,

are affecting this objective. Additionally, the proposal appears to be in contrast with the objective of ensuring that Evanston, along with neighboring communities, will share in the responsibility of providing for its special needs populations.

As regulations for Residential Care Homes direct the homes to fit within the context of the neighborhood they are located in as well as not create additional traffic within that area, there are no adverse effects to public utilities that would be expected from this type of use nor does staff believe that a well operated facility would have adverse effects on the values of adjacent properties. As detailed in the attached comparison chart, almost all communities permit the operation of similar facilities by-right while implementing distance requirements similar to Evanston to prevent any one area from having an over-concentration of residential care homes.

Adding the special use process may be seen as a hindrance to entities who meet existing use standards. There is also a concern that this proposed action would not align with the Fair Housing Amendments Act. With the existing 900-foot distance requirement between homes and existing regulations at the local and state levels, the intensity and impact of this use appears to have been largely mitigated within the residential districts.

Recommendation

Staff recommends the Zoning Committee discuss the facts presented and make a recommendation to the Plan Commission regarding the proposed text amendment.

Attachments

- List and Map of current Residential Care Homes
- Facility descriptions (Residential Care Homes and Transitional Facilities)
- Comparable City Regulations
- American Planning Association- Zoning Practice, Issue Number 6: *Practice Group Housing*
- American Planning Association – Zoning Practice, Issue Number 12: *Fair Housing*
- Link to *Affirmatively Furthering Fair Housing; Final Rule*: <https://www.gpo.gov/fdsys/pkg/FR-2015-07-16/pdf/2015-17032.pdf>
- Plan Commission Minutes from November 14, 2018 Meeting

Licensed Residential Care Homes as of 07/19/16

Address	Type	Operator	Zoning District
115-117 Custer Avenue	Category 1	Rimland Services	R5
219 Hartrey Avenue	Category 1	Rimland Services	R2
1423 Hartrey Avenue	Category 1	Rimland Services	R2
1537 Fowler Avenue	Category 1	Rimland Services	R2
1746 Dodge Avenue	Category 1	Rimland Services	R3
1826 Foster Street	Category 1	Rimland Services	R3
2124 Dewey Avenue	Category 1	Rimland Services	R4
2308 Emerson Street	Category 1	Rimland Services	R2
608 Sheridan Road	Category 2	Yellowbrick	R5
823 Gaffield Place	Child	Boys Hope	R4a
827 Gaffield Place	Child	Boys Hope	R4a
1127 Hinman Avenue	Child	Girls Hope	R1
1818 Simpson Street	Residence	Rimland Services	R3
3334 Colfax Street	Residence	Rimland Services	R2
1934 Brown Avenue	Residence	Rimland Services	R3

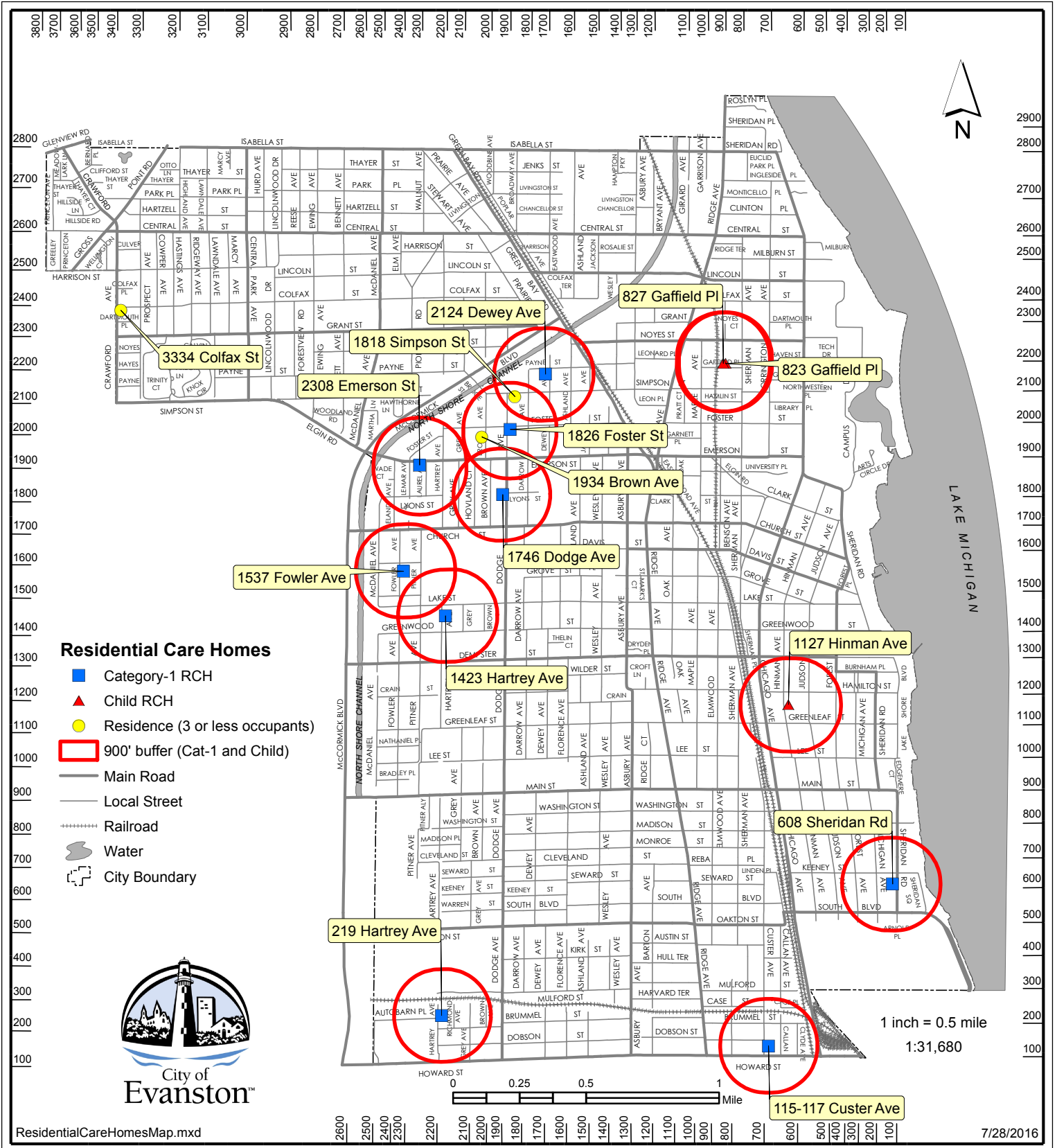
Category 1 = 4 to 8 occupants; 900' distance requirement

Category 2 = 9 to 15 occupants; 900' distance requirement

Child = child residential care home = 4 to 8 occupants; 900' distance requirement

Residence = 3 or less occupants; no distance requirement

Residential Care Homes



This map is provided "as is" without warranties of any kind. See www.cityofevanston.org/mapdisclaimers.html for more information.

Residential Care Homes and Transitional Treatment Facilities

Residential Care Homes

*License required from City department of Health and Human Services

Residential Care Home - Category I: A dwelling unit shared by four (4) to eight (8) unrelated persons, exclusive of staff, who require assistance and/or supervision and who reside together in a family type environment as a single housekeeping unit. "Residential care home - category I" shall not include a home for persons who are currently addicted to alcohol or narcotic drugs or are criminal offenders serving on work release or probationary programs.

- Allowed as a permitted use, as of right, in R1, R2, R3, R4, R5, R6, B1, B2, B3, C1a, D1, D2, D3, D4, MU, MXE, T1 and T2. (In B1, B2, B3, C1a, D2, D3 and D4 must be above ground floor)
- Allowed as special use in MUE
- Must be minimum of 900' of another child residential care home, residential care home or transitional treatment facility.

Residential Care Home - Category II: A dwelling unit shared by nine (9) to fifteen (15) unrelated persons, exclusive of staff, who require assistance and/or supervision and who reside together in a family type environment as a single housekeeping unit. "Residential care home — category II" shall not include a home for persons who are currently addicted to alcohol or narcotic drugs or are criminal offenders serving on work release or probationary programs. (Ord. 43-0-93).

- Allowed as a permitted use, as of right, in R4, R5, R6, D1, MU and MXE
- Allowed as special use in R1, R2, R3, B1, B2, B3, C1a, D2, D3, D4, MUE, T1 and T2 (In D2, D3 and D4 must be above ground floor)
- Must be minimum of 900' from another child residential care home, residential care home or transitional treatment facility.

Child Residential Care Home : A dwelling unit shared by four (4) to eight (8) unrelated persons, under the age of twenty-one (21) years, exclusive of staff, who require assistance and/or supervision while pursuing a primary or secondary education curriculum, and who reside together in a family-type environment as a single housekeeping unit. "Child residential care home" shall not include a home for persons who are currently addicted to alcohol or narcotic drugs or who are criminal or juvenile offenders serving on work release, probationary or court-ordered supervisory programs

for offenders; nor a dormitory, fraternity/sorority dwelling, boarding house, rooming house or nursing home. (Ord. 40-0-95)

- Allowed as Special Use in R1, R2, R3, R4, R5 and R6.
- Must be minimum of 900' from another child residential care home, residential care home, transitional treatment facility or an existing childcare institution.

Transitional Treatment Facility

*License required from City Department of Health and Human Services

Transitional Treatment Facility: A facility licensed by the state of Illinois that provides supervision, counseling and therapy through a temporary living arrangement for individuals recovering from addiction to alcohol or narcotic drugs in order to facilitate their transition to independent living. Residents of this facility have been previously screened in another treatment setting and are determined to be sober/drug free but require twenty-four (24) hour staff supervision and a peer support structure in order to strengthen their recovery/sobriety. Transitional treatment facility shall not include any facility for persons awaiting adjudication by any court of competent jurisdiction or any facility for persons on parole from correctional institutions.

Transitional Treatment Facility (Category I – 4-8 Residents)

- Allowed as special use in R1, R2, R3, R4, R5, R6, MU, MUE, MXE, T1 and T2
- Must be minimum of 900' from another child residential care home, residential care home or transitional treatment facility

Transitional Treatment Facility (Category II – 9-15 Residents)

- Allowed as special use in R4, R5, R6, MU, MUE, MXE, T1 and T2
- Must be minimum of 900' from another child residential care home, residential care home or transitional treatment facility

Transitional Treatment Facility (Category III – 16 or more Residents)

- Allowed as special use in B2 and B3
- Must be minimum of 900' from another child residential care home, residential care home or transitional treatment facility

ZONING PRACTICE

JUNE 2016



AMERICAN PLANNING ASSOCIATION

➔ ISSUE NUMBER 6

PRACTICE GROUP HOUSING



6

Become a Group Home Guru

By Dwight H. Merriam, FAICP

Group homes are *sui generis*, truly a class unto themselves in terms of planning and regulation.

They present nearly intractable challenges for planners, regulators, neighbors, advocates, developers, and many other stakeholders, chief among them the residents. Largely because of misperceptions by many people and a lack of understanding, group homes are among the most disfavored land uses. One study in 1998 found that people felt that group homes were wanted even less in their communities than industrial uses, landfills, and waste disposal sites (Takahashi and Gaber).

One of the problems exacerbating the resistance to the orderly siting of group homes is the lack of proper planning and regulation. This brief treatment of the issues is a basic primer in planning and regulating group homes.

Unquestionably, and facilitated by good planning and regulation, the appropriate siting of group homes will help a community become a richer and more diverse place, and facilitate

the ends of social justice. Social justice is the watchword here. People with disabilities, particularly those with developmental disabilities and suffering from mental health issues, have been treated despicably and only in recent times have come, in large measure though not universally, to be protected and respected.

Historically, those most fortunate were cared for at home (Hogan 1987). When government fails to provide adequate housing for people with disabilities, they are usually rendered homeless and left on the streets, where they are often victims of crime and prone to drug addiction (Apfel 1995). That homelessness among those with disabilities is a continuing problem is evidence that adequate housing is still not always available.

'GROUP HOME' DEFINED

The term "group home" generally refers to any

congregate housing arrangement for a group of unrelated people. Typically the residents share a condition, characteristic, or status not typical of the general population. These congregate living arrangements include community residential facilities, group living facilities, community care homes, nursing homes, assisted living facilities, and many others. They may be permanent or transitional, for-profit or nonprofit, professionally managed or self-managed.

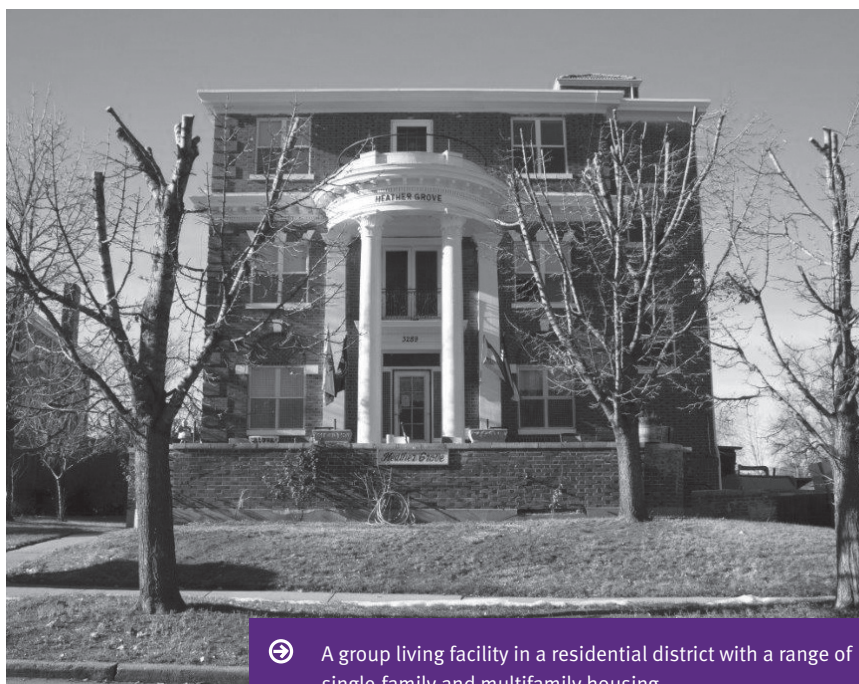
How a group home is defined ultimately delimits the reach of planning and regulation, and guides public policy making. The U.S. Department of Justice has defined the term (2015). Many state and local governments have their own definitions as well. It is worthwhile to consider the broadest range of definitions from many sources and pare that down to those types of living arrangements needing local attention.

But before we go further, consider how local planning and regulation is sometimes inextricably linked with federal laws requiring that local regulations conform to federal mandates.

FEDERAL ZONING

Of course, the U.S. government does not zone land, but there are many federal laws that have such an impact on local land-use regulations that we might call those laws "ersatz federal zoning." The National Flood Insurance Program is one example. It requires that local governments prohibit certain activities in floodways and floodplains. To preserve the right of property owners to get federal flood insurance, local governments must plan and regulate consistently with the national program.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) gives religious organizations and institutionalized persons the right to seek redress in state or federal court when they believe the government is infringing on their legal rights. RLUIPA can be, and very often is, used to force zoning changes to allow



➡ A group living facility in a residential district with a range of single-family and multifamily housing.

religious activities involving the use of land to go forward, overriding local plans and local regulations as necessary.

The Telecommunications Act of 1996 requires that local governments not regulate in a manner that prohibits or has the effect of prohibiting antennas and towers providing personal wireless services. The Act also directs that communities act on applications within a reasonable time and that any denial of an application must be made in writing and supported by substantial evidence. The Act is unusual in that it expressly preempts local regulation under certain circumstances. It does so if the local decision denying an application is based directly or indirectly on the environmental effects of radiofrequency emissions (47 U.S.C. §332(c)(7)).

One of the most direct initiatives from our federal government is the Air Installations Compatible Use Zones (32 CFR §256.5). The program mandates that the secretaries of military departments coordinate with local governments around military air installations “to work toward compatible planning and development in the vicinity of military airfields. . . .”

Federal law similarly influences local planning and regulation for group homes for people with disabilities. That law is the Fair Housing Amendments Act (FHAA), enacted in 1988 to extend the protections of the 1968 Fair Housing Act to people with disabilities. The FHAA prohibits a party from discriminating “in the sale or rental [of], or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap” (42 U.S.C. §3604(f)(1)). A “handicap” is defined with three alternatives: “‘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 21 U.S.C. §802)” (42 U.S.C. §3602(h)). This is essentially the same definition of the term as has been incorporated in the Americans with Disabilities Act (42 U.S.C. §12102).

Note that federal law, and many state and local laws, use the now-outmoded term “handicapped.” The more accurate, appropriate, and respectful description is to use the phrase “a person with a disability” and not a “handicapped person” or a “disabled person.” There is by no means universal agreement on



Brian J. Connolly



A facility for persons with cognitive disabilities in Denver.

this terminology and grammatical structure. Some argue that the generally preferred phrasing “a person with a disability” suggests a medical, rather than the social model (e.g., see Eagan 2012).

While the FHAA does not explicitly address group homes, the U.S. Department of Justice makes it clear (in a joint statement with the U.S. Department of Housing and Urban Development) that the FHAA does prohibit local governments from discriminating against residents on the basis of “race, color, national origin, religion, sex, handicap [disability] or familial status [families with minor children]” through land-use regulation (2015). The upshot is that group homes occupied by unrelated individuals with disabilities have special protection from exclusionary zoning under the FHAA.

Not included within the reach of the federal law, except to the extent that the residents also are disabled, are group homes that are alternatives to incarceration, temporary housing for workers, halfway houses for ex-offenders, homeless shelters, places of sanctuary and prayer, homes for those who are victims of domestic violence, college dormitories . . . you can readily add to this list. Providing for these other types of group homes is important and can be done at the same time as the community addresses its required compliance with the FHAA, but (now take a deep breath) there is one important and dramatic distinction for those types of group homes falling under the protection of the FHAA.

SHOW ME THE MONEY

That distinction has to do with the endgame of an FHAA action. In a typical zoning appeal, for example when a homeless shelter developer is denied a conditional use permit and appeals

and wins, the developer still has to pay for all of its own legal costs. However, consider what happens if the developer of a group home within the reach of the FHAA—one for adults with developmental disabilities, for example—is denied a conditional use permit. If the developer appeals and also brings an action under the FHAA—and wins—that developer is a prevailing party in a fair housing suit, and is allowed, in the court’s discretion, reasonable attorney fees (42 U.S.C. §3613(c)).

If the action is brought under the Civil Rights Acts of 1871, a so-called Section 1983 action for a violation of federal constitutional or statutory law, the prevailing party may recover attorney fees under the 1976 Civil Rights Attorney’s Fees Act (42 U.S.C. §1988). Unless there are special circumstances, a prevailing plaintiff should be awarded attorney fees, but a prevailing defendant, for example the local planning board, is entitled to attorney fees only if the suit was “frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so” (*Hensley v. Eckerhart*, 461 U.S. 424 (1983)). The attorney fees provision, enacted to encourage lawyers to take on these cases, brings a heavy thumb down on the scales of justice.

How bad can that be? Last year, Newport Beach, California, settled some long-running litigation against the city brought by providers of group homes who claimed the city violated the FHAA in effectively prohibiting group homes with seven or more residents in most of the residential areas, as well as requiring that existing group homes go through the same permit process as is required for new homes, including a public review process (Fry 2015). The city of Newport Beach spent more than \$4 million of its own money defending its position



A small drug and alcohol recovery facility in a low-density residential setting.

Brian J. Connolly

and agreed to pay the group homes \$5.25 million. In short and in sum, the fight cost the city \$10 million. Even at the cost of building a new, high-end group home specially adapted for people for physical disabilities, this \$10 million “wasted” in the litigation could have provided more than 80 new beds in Newport Beach, based roughly on the \$600,000 recently spent elsewhere to build a five-bed facility (Salasky 2012).

THE ‘SEVEN-NUN CONUNDRUM’

To illustrate the dramatic effect of the FHAA, consider this real controversy. It is guaranteed to make you smile, shake your head in wonderment, and provide you with a conversation starter with other people who share your interest in planning and zoning.

We need to start with the typical zoning definition of “family.” Nearly every local government defines “family” consistent in most respects with the definition upheld by the U. S. Supreme Court in 1974:

With this definition an unlimited number of people can live together so long as they are related by blood, adoption, or marriage, or in the alternative, no more than two unrelated people can live together. Some local regulations allow an unlimited number of related persons to live together and along with them some limited number, say two or three, unrelated persons.

Is your definition similar? Almost certainly it is. Remember, however, that we actually have 51 constitutions in this country, one federal and 50 state, and what may be constitutional under

federal law may not be constitutional under state law. A half-dozen or so states interpreting their state constitutions have ruled this kind of definition of family unconstitutional under their state constitutions, holding that the definition is not reasonably related to promoting the public’s health, safety, and general welfare.

Obviously a typical group home of six or eight or more unrelated individuals, with or without one or two resident managers, cannot be located in the residential districts of nearly all of the municipalities in this country, unless those local governments happen to have some type of group home zoning.

This brings us to Joliet, Illinois, in the mid-1990s when three nuns, Franciscan Sisters of the Sacred Heart, proposed to live together in a single-family zoning district, bringing in a fourth sister and wanting to have at any time up to three additional guests, women considering becoming members of the order (Merriam and Sitkowski 1998). The regulations allowed only three unrelated people to live together. The nuns sought zoning approval to allow four nuns to live in the home and to convert the basement into the three additional bedrooms for their guests.

More than 100 home owners signed a petition against the application, claiming that the convent would damage the single-family character of the neighborhood, depress property values, and result in increased taxes when the home was removed from the tax rolls. One neighbor said: “We have no objection to three nuns living there but we do object to four or more. If this variation is allowed to go through, the city council, in effect, will be allowing a mini-hotel to be established in our neighbor-

hood. The nuns will come and go, novices will come and go, visitors will come and go. The result will be that our property values would decrease” (Ziemba 1998).

The city council did vote to give the zoning approval, and the mayor, who lived nearby, noted that a family of seven—a couple with five children—could move into the same house without any zoning approval: “It would be legal, even though the impact would be more intense” (Ziemba 1998). Now, here is the punchline and the question you ask your planner friends at the next social event after you have described this background: Under what condition could these seven nuns live together in virtually any single-family dwelling unit in any neighborhood in any city, town, or county anywhere all across this great country regardless of the local definition family and regardless of the federal constitutional right of local government to restrict the definition of family?

Answer: These seven nuns could live together as a household unit as a matter of federal law, the FHAA to be specific, if they were recovering alcoholics or substance abusers, or otherwise disabled. The “Seven-Nun Conundrum” teaches us two things: the traditional definition of family needs to be reconsidered, as it is a complete bar to group homes, and local governments need to get out ahead of the group homes issue by affirmatively planning and regulating for them so that they are sited in the best locations and no one will ever have reason to go to court and claim that they are excluded from living in the community.

IT ALL STARTS WITH PLANNING

Planning for and regulating group homes

requires some careful thought about the community's needs and the demand for such uses. Regardless of the special attention the attorney fees provisions may demand, it is best to plan for all types of group living arrangements at the same time and under the same terms, except as is necessary to recognize that there are differences between them. It should not be the threat of the FHAA that drives a local government to plan and regulate for just those types of group living arrangements that are within the reach of the federal law.

The first step is to identify all types of group living arrangements that are needed now and in the future in your community. Survey social service agencies locally and regionally; interview state-level departments with responsibilities for those who might live in such homes. The agencies will have a list of existing group homes. Some of the homes will likely predate local regulation or may have become established by variances. It is useful to understand what is in place now in order to be able to determine current and future needs.

The operators serving the residents of area group homes can provide insight into gaps in coverage and challenges, particularly opposition, that may lie ahead. As you get further the planning process, you will likely find that access to public transportation is important for many types of facilities. Also, it is important to note that in some states, group homes operated by, contracting with, or funded by a state agency may be immune from local zoning ordinances (Kelly 2016).

The U.S. Census Bureau collects data on the disability status of respondents to the American Community Survey (ACS), and that data is helpful in developing a needs-driven comprehensive planning element. The census data categorizes disabilities as visual, hearing, ambulatory, cognitive, health care, and independent living. The data is also disaggregated by gender, age, race, education level, employment, and health insurance coverage. The ACS also has data on "Group Quarters" generally, of all types (2016).

What is often lacking in the available data and in the surveys conducted is the ability of families to care for those who are disabled and who may be prospective residents of a group home. There are many advocacy groups for people with all types of disabilities that may prove helpful in identifying the hidden demand—families who are caring for their own, often struggling and anxious about the future

care of their family members. Among these organizations are the American Association of People with Disabilities, the National Disabilities Rights Network, the National Information Center for Children and Youth with Disabilities, the National Organization on Disability, and the National Supportive Housing Network.

After the need for various types of group homes, the number of beds for each, and the time frame within which they must be developed, the planning process involves identifying appropriate locations and reaching out to the neighborhoods to attempt to mitigate community opposition through meetings and workshops.

One essential decision is whether to concentrate group homes in one area, particularly where they have access to services, or to disperse them throughout the community to avoid clustering and to facilitate mainstreaming the residents. The courts are not settled on which is the preferred approach. Spacing requirements establishing minimum separating distances between group homes have met with mixed results in the courts. Ultimately, a hybrid approach may be best, locating group homes in a somewhat more clustered way with ready access to services and transportation, while the same time dispersing group homes throughout moderately low-density residential neighborhoods so that they blend seamlessly with the rest of the population.

THE REGULATIONS

Good regulations start with good definitions. Spend plenty of time talking about the types of group homes and how you will define them. See the many types listed in the ACS. You must define "family" and "disability." And to reiterate, providing for group housing is not just about persons with disabilities. There remains a critical need to accommodate all manner of group living arrangements, most of which have no protection under federal law, although they may under state law. For example, local regulations may address the many other types of group homes noted at the outset, chief among them shelters for victims of domestic violence, homes for juveniles, halfway houses for those released from incarceration or as alternatives to incarceration, homeless shelters, congregate housing, job corps shelters, workers' group living quarters (pejoratively labeled "man camps" by some), religious homes such as convent and clergy houses, retirement homes, and even fraternity and sorority houses.

They are all deserving of careful review and attention to whether current and future needs are being met, where such uses might be best located, how many beds are needed during the planning period, what design and siting considerations may be established in advance as criteria for approval, and what processes might be followed—all of which may vary from one type of group living arrangement to another.

Regulation may range from highly discretionary to as-of-right. The most discretionary would be to use a "floating zone" for group homes, where approval requires rezoning the subject parcel. That application typically includes a conceptual site plan so the regulators know what they will get if they vote to allow the floating zone to descend and apply. It is the best of both worlds for planners because the local officials are making a legislative decision in rezoning the land. Courts give the greatest deference to legislative decisions, as distinguished from quasi-judicial decisions such as variances, and administrative decisions, which include subdivision and site plan approvals.

At the same time, the locality gets to see what it is going to get by having a conceptual site plan as part of the rezoning application. The applicants for group homes also may prefer this approach because the conceptual site plan is inexpensive to produce, and once they have the zoning they will have a vested right to develop it consistent with the conceptual site plan. At that point they can finance the detailed architectural and engineering work to get to the final site plan approval stage.

At the other end of the continuum is the as-of-right approach, with zoning districts allowing group homes subject only to compliance with the code and issuance of a certificate of zoning compliance and building permits.

In between these end points is the quasi-discretionary conditional use permit, sometimes called a special permit, special use permit, or special exception. In these cases, the group home use is permitted, but an application and public hearing are required to determine if it is appropriate for a particular site.

Take care not to stigmatize the potential residents. Federal appellate courts covering about half of the country have found that a formal, discretionary approval, such a conditional use permit, is not acceptable when used in making a decision regarding persons with disabilities or those otherwise protected under the FHAA, because they stigmatize the resi-



Brian J. Connolly

➡ An assisted living facility outside of Denver.

dents by requiring them to come “hat in hand” for permission to live like any other household. The floating zoning approach has the same problem. At the same time, local officials have a real need to make sure that the group home meets the needs of its residents, fits in with its neighbors, and blends in such that it is indistinguishable from others. Questions that arise include access to transportation, appearance and scale, parking, and density of occupancy. Locational criteria such as these and others must be assessed either through a public review or by staff.

Which approach to take along the continuum of discretion is a difficult, even intractable, ethical, legal, and public policy decision. Ultimately, it may be politically necessary to have some discretion in the process.

Given that residents may have cognitive or physical disabilities affecting mobility, it is especially essential to give special care to housing, building, and fire codes in the administration of any group homes program. One common issue is determining the “right” number of residents permitted. Some of the federal courts have used a “rule of eight” allowing up to eight essentially as-of-right—but beyond that, supporting greater discretion by the local government. (*Oxford House-C v. City of St. Louis*, 77 F.3d, 249, 253). Smaller group homes tend to be better integrated in single-family detached neighborhoods, while the larger group homes provide economies of scale, the opportunity for a higher level of service, and often peer support that is essential to some populations, such as those in drug and alcohol abuse recovery. Again, a hybrid approach allowing a range of levels of occupancy depending upon the setting may prove to be the most advantageous strategy. For example, a group home in a single-family residence of not more than eight people including caregivers and

managers might be as-of-right. Any home with greater occupancy could be required to have some type of formal review, perhaps site plan review at a public meeting, or a conditional use permit, or even a rezoning with a floating zone or overlay district. But it also may depend upon the context. Would it be necessary, for example, to require a public hearing for the conversion of an existing 10-apartment building to a group residence for 40 people recovering from addiction?

ONE REALLY GOOD EXAMPLE

Almost three decades ago, the city of Ames, Iowa, the home of Iowa State University, found itself in a perfect storm of neighborhood invasions by college students, challenges to the traditional definition of family, the need to accommodate a variety of household types, and a state statutory mandate regarding group homes. Somehow, under the leadership of elected and appointed officials, including the then planning director Brian O’Connell, the community developed a comprehensive approach mitigating all of the impacts of the storm. I was along for the ride as a consultant to the city in developing the regulations.

By developing definitions of “family” (§29.201) and “functional family” (§29.1503(4)(d)), Ames was able to prevent groups of undergraduates from taking over single-family houses and at the same time accommodate any seven Franciscan nuns who might choose to live in the city and any other groups of people that were truly functioning as a type of family, including extended gay and lesbian families with unrelated individuals and foster children (long before the right to same-sex marriage).

Group homes (“Group Living”), defined in part as being “larger than the average household size,” were addressed consistent with the state statutes, while distinguishing them from

“Household Living,” considered to be “[r]esidential occupancy of a dwelling by a family,” and the definition of family was made less restrictive. The regulations today have evolved in some respects from the initial ones first adopted in the early 1990s, and they are better for it. One especially salutary aspect of this definitional scheme is that a group home for persons with disabilities with eight or fewer residents is considered a “Family Home” as defined in Section 29.201 of the Ordinance and in Iowa Code Section 414.22, and is treated like any single-family use. What is also interesting is how Ames conformed its local regulation with state definitions and requirements.

The regulations are not perfect—and they should not be considered a model for adoption elsewhere without careful consideration. However, the city did a good job of reconciling competing needs and the regulations are worthy of consideration.

THE ULTIMATE ESCAPE HATCH: ‘REASONABLE ACCOMMODATION’

If a community does not have good planning and regulations, such that group homes are not readily approved and developed without discrimination, the FHAA requires that local governments provide a “reasonable accommodation” for group homes with disabled persons (42 U.S.C. §604(f)(3)(B)). In the words of a federal appellate court: “reasonable accommodation provision prohibits the enforcement of zoning ordinances and local housing policies in a manner that denies people with disabilities access to housing on par with that of those who are not disabled” (*Hobson’s, Inc. v. Township of Brick*, 89 Fed.3d 1096, 1104 (3rd Cir. 1996)). A reasonable accommodation

can be anything, including use or dimensional variances, amending the regulations, issuing a building permit even though it is illegal under the regulations, and allowing a group home to be considered similar enough to some other use permitted under the regulations, such as a bed and breakfast. Being forced to make a reasonable accommodation is a poor substitute for good planning and regulation, but sometimes it may be all you have.

MEET THE NEED, MEET THE LAW

Becoming a group homes guru requires recognizing the need for them, and planning for and regulating them with a fine-grained approach to make sure that they are fully integrated with the rest of the community while protecting the interests of all stakeholders. It is the right thing to do, and it is the law. Community opposition to group homes can often be traced back to lack of information or misinformation, fear of negative community impacts, shortcomings in local procedures that preclude full public participation in the decision-making process, outright prejudice and bias, and conflicting interests and development goals (Iglesias 2002).

The federal Fair Housing Amendments Act, the principal federal law dealing with mat-

ters of housing discrimination against people with disabilities, and other federal and state antidiscrimination laws (including the Americans With Disabilities Act, the Rehabilitation Act, and state-law equivalents), require local governments to plan for and enable group homes through reasonable regulation for those expressly protected under the law. In addition, it is the responsibility of all of us to provide safe, clean, decent housing for all citizens, many of whom can only be accommodated in group homes.

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HAS YOUR COMMUNITY MADE
SPACE FOR GROUP HOUSING?

6

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PRACTICE FAIR HOUSING



Fair Housing Is More Important Than Ever

By Don Elliott, FAICP

Fair housing seems like a quintessentially American goal. Of course we're against housing discrimination. Who would be in favor of it? But our nation's path toward that goal has been long and slow. In April 2018, *Planning* magazine devoted its cover and lead article to the many unfulfilled promises of the Fair Housing Amendments Act of 1988 (the Fair Housing Act), and support for the Fair Housing Act has been less than robust in Washington. But there is more to the story than that. Fair housing remains a priority for many local governments and has become increasingly intertwined with efforts to address America's affordable housing crisis. This article will review the basics of fair housing law, two recent developments in fair housing, and best practices to help close the gap between the current reality and the ideal of fair housing.

BACKGROUND

To review, the Fair Housing Amendments Act of 1988 is a part of the Civil Rights Act. It prohibits "making unavailable" housing on the basis of race, color, national origin, religion, sex, family status, or handicap (42 U.S.C. §§3601-3619 and §3631). While we don't use the word "handicap" much anymore, it is used in the Fair Housing Act and in many court decisions interpreting it, so it will be used occasionally in this article. The Fair Housing Act advises the courts to interpret its requirements broadly in order to achieve its purposes. While originally and primarily intended to prevent redlining by real estate brokers and mortgage lenders, it also applies to local governments. In that context, some courts have held that the "making unavailable" prohibition may be violated when local government programs, policies, and rules result in protected people not being able to access housing options on the same basis as the population at large (42 U.S.C. §§3604(a)). While some commentators insist that the act protects everyone, not just those in the listed categories, this article

uses the phrase "persons protected by the act" to mean persons in those categories explicitly listed in the Fair Housing Act.

A separate provision requires that if an applicant for a development approval asks the local governments to make a "reasonable accommodation" for persons protected by the act by bending its rules, or to make a "reasonable modification" to its programs and policies to carry out the intent of the act, the local government must be willing to accommodate the request if it is reasonable and does not undermine the effectiveness of the rule or policy. A surprising number of local governments seem to be unfamiliar with this part of the Fair Housing Act, and most zoning ordinances do not reflect its requirements.

TWO LEVELS OF COMPLIANCE REQUIRED

Since it is included in the very broad reach of the Civil Rights Act of 1964, the Fair Housing Act applies to everyone. There are no exemptions from its basic requirements. While there are some defenses available to communities whose rules or policies are challenged under the act, those defenses generally apply when full compliance would threaten another federal constitutional right or obligation. Federal constitutional rights have to be balanced against other federal constitutional rights, but they are not balanced against the convenience, political desires, or financial resources of the local government. Importantly, the basic requirements of the Fair Housing Act cannot be used to force state and local governments to spend money to build housing for those protected by the act. Its reach is limited to preventing discrimination in rulemaking, program management, and the impacts of spending decisions made by local governments.

There is a second tier of obligations under the Fair Housing Act, however. State and local governments that accept local government funds agree in writing to "Affirmatively Further Fair Housing," which goes by the acronym AFFH. Since the vast majority

of state and local governments do accept money from the federal government (in this context, most notably through Community Development Block Grants or the HOME program), this second tier also applies to most state and local governments. This additional contractual obligation reflects the U.S. Department of Housing and Urban Development (HUD)'s attempt to put some teeth behind the act's language on AFFH. For many years, however, many local governments checked the box acknowledging their AFFH obligations but did little or nothing differently than they would have done otherwise. That changed after a Westchester County, New York, case (*U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 495 F.Supp.2d 375. (S.D.N.Y. 2007)).

While the antidiscrimination center that filed the lawsuit against Westchester County did not allege a violation of the Fair Housing Act, the case raised important questions about what local governments that accept federal funds need to do to satisfy their duty to AFFH.

To make a very long and complex story short, the outcome of the case was a settlement in which Westchester County acknowledged that its practice of focusing housing resources to upgrade the poorest quality housing (which was located in predominantly minority neighborhoods) could have the unintended effect of perpetuating those concentrated pockets of minorities because it did not create housing opportunities in other (predominantly white) neighborhoods in the county.

As part of its settlement, Westchester County agreed to take numerous expensive and politically unpopular actions to increase the supply of affordable housing in areas of the county with predominantly white populations. That result made many state and local governments question whether they too might be challenged for failure to meet their AFFH obligations.

TWO RECENT DEVELOPMENTS

While the meaning of the Westchester County case and settlement was working its way into state and local government thinking, two other changes in the Fair Housing Act landscape occurred. The first was the Inclusive Communities case (*Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, 576 U.S. ____ (2015)), and the second was the finalization of a HUD rule as to what the AFFH duty requires.

Inclusive Communities, Inc. sued the state of Texas alleging that the way the Texas Department of Housing and Community Affairs allocated low-income tax credits for affordable housing violated the Fair Housing Act because it had a “disparate impact” on persons protected by it. That case became a legal vehicle to resolve a long-standing difference of opinion as to whether the act required a showing of “disparate treatment” (i.e., a rule, policy, or program that deliberately treats persons protected by the act differently) or just a showing of “disparate impact” (i.e., a rule, policy, or program that is neutral on its face but in fact makes it more difficult for persons protected by the act to obtain housing on an equal basis). The uncertainty arose because of the wording of the act itself and how federal courts had interpreted that wording in other decisions. Although a majority of the U.S. Court of Appeals circuits had recognized “disparate impact,” many Supreme Court watchers assumed that the Court would hold that a showing of “disparate treatment” was needed. To the surprise of many, the U.S. Supreme Court held that showing of “disparate impact” could be a violation of the Fair Housing Act. It also reinforced the requirement that claims under the act must be based on a rule, policy, or program affecting multiple decisions—and that “disparate impact” claims cannot be based on a single decision or incident.

But that was not the end of the decision. The Supreme Court went on to clarify that claims of “disparate impact” had to meet a “robust causality” requirement. More specifically, plaintiffs must show that the rule, policy, or program actually caused the unfair housing outcomes that violate the

Fair Housing Act. The Court added that the causality requirement could not be satisfied just by presenting evidence showing a statistical correlation between the government implementation of the rule or program and the existence or increase in the segregation or isolation of those groups protected by the Fair Housing Act. Upon remand, the U.S. District Court held that Inclusive Communities’ evidence did not show the “robust” causality required by the Supreme Court (*Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, C.A. No. 3-08-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016)). In other words, it had not shown that Texas’s implementation of its program to award tax credits caused the segregation of racial minorities or other groups, so there was no violation of the act. Since that decision, most of the federal courts considering “disparate impact” claims have likewise found that plaintiffs cannot show the causality required to support their challenges.

The second change after the Westchester County case was the finalization of a HUD regulation on what the duty to AFFH means in practice (24 CFR Parts 5, 91, 92, et al., July 16, 2015). This new rule had been under development during six of the eight years of the Obama administration, and reflected a dramatic strengthening of the AFFH requirement beyond what many assumed it meant. Again, to make a long and complex story short, HUD’s AFFH rule provided that, in the future, HUD would provide local governments with a series of maps generated from U.S. Census data, the American Housing Survey, and other sources showing where those groups of persons protected by the act lived, plus many indicators of how those locations related to jobs, transportation, public facilities, good schools, and other proxies for quality of life and opportunity. HUD also stated that it would be paying attention to whether certain types of regulations—including zoning regulations—were inconsistent with AFFH obligations.

Given the current demographics and settlement patterns in the U.S., it was clear that many of the HUD maps would show that minorities, the handicapped, persons

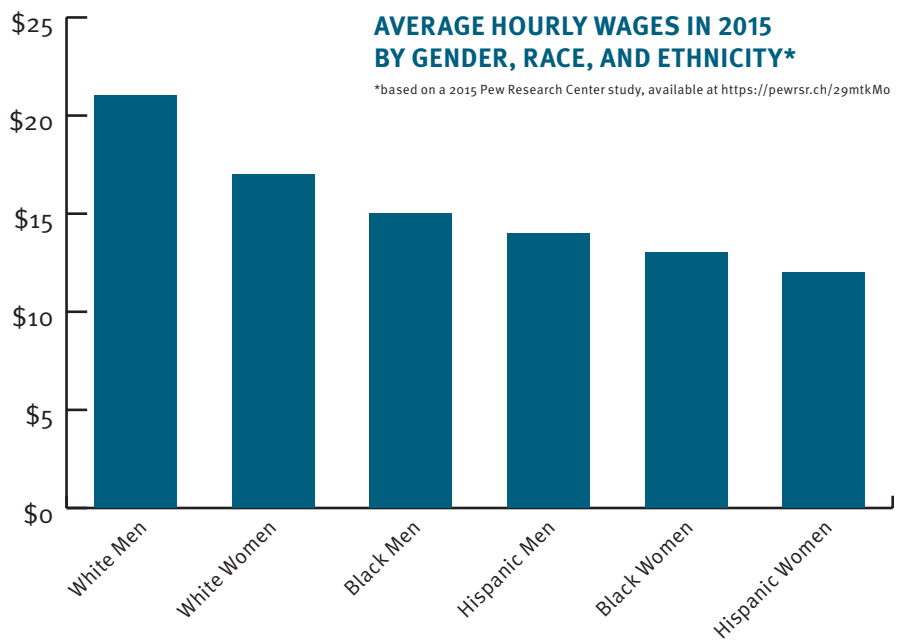
born in other countries, female-headed households, and other groups protected by the Fair Housing Act were concentrated in specific locations. Going forward, state and local governments would need to respond to those maps, or at least understand that HUD would be considering the patterns shown in those maps, as part of the evaluation of whether they were affirmatively furthering fair housing.” State and local recipients of federal funds would now have to complete a more stringent Assessment of Fair Housing (AFH) instead of the more general Analysis of Impediments to Fair Housing that had previously been required.

No specific response to the maps was required. For example, one possible city response might be that the concentrations were due solely to personal preferences and that their regulations had nothing to do with the outcome. However, HUD assumed (probably correctly) that the public review of those maps and the AFH would provoke discussions among elected officials, planners, and citizens as to whether any of their regulations were in fact contributing to the concentrations of persons protected by the Fair Housing Act, and that some communities might conclude that their own rules and programs were partly responsible. The HUD AFFH rule was widely criticized as being very burdensome to state and local governments (as well as HUD), but it was finalized on July 16, 2015.

Not surprisingly, the Trump administration took a different view as to how it wanted to address the enforcement of the duties in the Fair Housing Act. Shortly after taking office, HUD Secretary Ben Carson stated that the department was not in support of the AFFH rule. More tactically, in May 2018 HUD withdrew the computer assessment tool that was used to generate and evaluate the maps showing where those groups protected by the Fair Housing Act lived and their access to opportunities from those locations. In support of its action, HUD stated that the assessment tools contained errors and that administration of the tool was overly burdensome. Without the computerized assessment tool, many observers concluded that it

would be difficult for local governments or HUD to respond to or evaluate concentrations of minorities, female-headed households, immigrants, persons with disabilities, and others. Although the HUD action was promptly challenged in federal court, by August 2018 the suit had been dismissed on the grounds that withdrawal of the assessment tool did not amount to repeal of the AFFH rule (which could only be done through a new federal rulemaking process), and that many aspects of the AFFH rule remained in place. In the meantime, HUD had issued an Advance Notice of Proposed Rulemaking for “Streamlining and Enhancements” to the AFFH rule. As a first step, public comments on how the rule should be revised are being accepted, but no draft of a proposed revised or replacement rule has been published. At present, the AFFH rule remains in place because no alternative rule has been approved, but the data needed to comply with that rule is not readily available.

The saga of the AFFH rule leaves state and local governments in an interesting (but somehow familiar) spot. In light of uncertain or conflicting federal government requirements, plus the common desire of local elected officials to continue receiving federal CDBG and HOME funds, what kind of AFFH showing is needed? The answer will probably also seem familiar. In the face of uncertainty, local government responses tend to reflect the political will of the elected officials. Some local governments that may not be fully supportive of the Fair Housing Act’s constraints on their local authority may decide to make the fairly general showings of efforts toward AFFH that they made before the Obama-era rule, and expect that HUD will not be particularly strict in reviewing their applications. Other communities with strong support for fair housing may continue to prepare the stricter Assessments of Fair Housing (using their own analyses of U.S. Census and housing data, if necessary) and then try to address the patterns of concentration shown in those documents in hopes that their showings still meet the requirements of the not-yet-replaced AFFH rule.



ANNUAL EARNINGS DIFFERENCES BETWEEN THOSE WITH AND WITHOUT DISABILITIES IN 2011*

Educational Attainment	Without a Disability	With a Disability	Difference
High school or equivalent	\$29,471	\$22,966	(\$6,505)
Some college	\$31,104	\$26,489	(\$4,615)
Associate degree	\$39,968	\$32,768	(\$7,199)
Bachelor’s degree	\$58,822	\$46,103	(\$12,719)
Master’s degree or higher	\$87,771	\$66,899	(\$20,871)

*based on a 2014 report issued by the American Institutes for Research, available at <https://bit.ly/2JJJEeNG>

THE FAIR HOUSING ACT/LOW-INCOME NEXUS

These housing challenges are further compounded by the nexus between the Fair Housing Act and lower income populations. To repeat—the FHA prohibits “making unavailable” housing based on race, color, national origin, religion, sex, family status, or handicap. It does not prohibit “making unavailable” housing because of low income. Under the constitution and federal laws of the United States, there is no legal duty for local governments to make housing available to everyone regardless of their ability to pay for it.

Some would consider it a moral duty, and others would consider it good planning practice to create inclusive cities. The AICP Code of Ethics and Professional Conduct

recognizes “a special responsibility to plan for the needs of the disadvantaged and to promote racial and economic integration”—but there is no federal legal duty to do so.

At the same time, a disproportionate number of households headed by minorities, women, the disabled, immigrants, and refugees have lower-than-average incomes. The income and wealth gaps between male- and female-headed households are well documented, and the same is true for majority- and minority-headed households in most communities. That is the Fair Housing Act/low-income nexus. One group (named in the Fair Housing Act) has federal legal protection aimed at equal treatment, while the other group (lower income households) does not, but the two

groups overlap significantly. That raises two interesting questions.

The first question is: “Do housing policies that tend to restrict the supply of affordable housing (defined broadly here as housing for those that are currently priced out of the housing market) create a ‘disparate impact’ on groups protected by the Fair Housing Act?” Or, to put it another way, “Do local regulations that restrict the supply of low-income housing fall more heavily on minority-, women-, disabled-, and immigrant-headed households to a point that violates the Fair Housing Act?” To date, no court has said so, and it would be difficult to prove because of the “robust causality” requirement of the *Inclusive Communities* decision. In other words, it would be difficult to prove that regulations restricting affordable housing cause concentrations of Fair Housing Act-protected persons that deny them equal access to housing opportunities, because there are so many other possible causes for those concentrations. Other possible causes include traditional ties to the neighborhood, personal preference, proximity to the resident’s job or school, or the obvious one—lack of income to afford higher rents elsewhere. While that showing may someday be made, the bar to proving a violation of the Fair Housing Act based on “disparate impact” has been set very high.

The second question is: “Do state and local government actions that increase the supply of affordable housing tend to promote the goals of the Fair Housing Act?” The answer is almost certainly “yes.” Because of the Fair Housing Act/low-income nexus, the benefits of increasing the supply of affordable housing almost certainly have a disproportionately positive impact on those groups protected by the act. Put simply, since some of the populations protected by the Fair Housing Act have lower-than-average incomes, the probability that a new affordable housing unit will be occupied by a household led by or including a person in a protected group is higher than average. There is no guarantee, of course. Theoretically, most of the additional affordable housing units made available through increased spending or regulatory reform



Joe DeAngelis



Local officials can help to increase the availability of housing for people with disabilities by treating small group homes just like any other type of single-family housing.

could be occupied by white males without disabilities who were born in the United States, but it seems unlikely. Increasing the supply of affordable housing almost certainly provides a disproportionately positive increase in housing opportunities for at least one, and probably several, of the groups listed in the Fair Housing Act.

THE INITIATIVE SHIFTS TO LOCAL GOVERNMENT

As always, when the federal government reduces its regulatory involvement, the range of opportunities open to state and local government expands. As documented in *Planning* magazine’s April cover story, the nation’s success in implementing the Fair Housing Act has been spotty, and the challenges of implementing it remain daunting. Many of the housing challenges faced by minorities, persons with disabilities, female-headed households, and legal immigrants, refugees, and other persons born outside the United States still exist.

Fortunately, many of the barriers to fair

housing are well within—and have always been within—the control of local government. Most importantly, zoning regulations have a substantial direct impact on both the availability of housing for those with physical disabilities and a substantial indirect impact on the supply of affordable housing. The paragraphs below list several steps that city and county governments can take to promote the goals of the Fair Housing Act.

Treat small group homes for persons with disabilities like single-family homes. While few Americans would object to fair housing in principle, that support sometimes turns to opposition when a small group home for the disabled is proposed close to that person’s home. Since up to half of the land area in many U.S. cities is occupied by single-family homes, regulations that make it harder for small group homes to locate in those neighborhoods can substantially limit the availability of housing for persons with disabilities. Because of localized opposition to group homes, many cities and counties

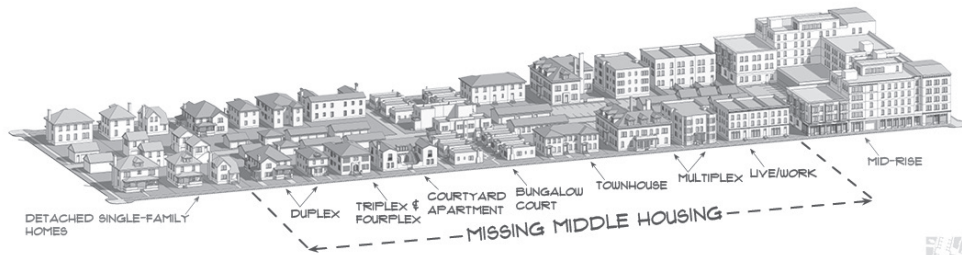
impose additional barriers to their entry into single-family neighborhoods. The two most common barriers are special permit requirements and minimum required distances between group homes. Less common barriers include requirements to provide more off-street parking, more vegetated buffering, additional fences, or that the facility enter into an operating agreement or “good neighbor” agreement.

Those and other regulatory hurdles are frequently challenged in federal court as violations of the Fair Housing Act, because they do not make a single-family dwelling available for persons with disabilities on the same basis the dwelling unit is available to persons without disabilities. The results of those lawsuits have been uneven. Sometimes the local regulation is upheld; sometimes it is overturned. (See, for example, *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir., 1995) and *Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.*, 923 F.2d 91 (8th Cir. 1991).)

In general, federal courts considering these challenges have suggested that group home providing housing for six to eight residents should be able to locate in existing single-family dwellings without facing significant regulatory barriers (e.g., *Bryant Woods Inn. v. Howard County*, 911 F.Supp. 918 (D.Md. 1996)), but they disagree as to what types of additional regulations are so significant that they constitute a violation of the Fair Housing Act.

The better practice is to treat occupancy of single-family detached homes by group homes containing no more than six or eight persons with physical or mental disabilities the same as occupancy of that structure by other persons, and without applying limits on the number of unrelated persons that can occupy that dwelling unit. Oregon has required this result by state law, saying:

(1) Residential homes [defined as housing for up to five persons receiving care plus their caregivers] shall be a permitted use in (a) any



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⊕ Allowing a wider variety of housing types, typified by the spectrum of “missing middle housing,” can help to increase access to affordable housing for those protected by the Fair Housing Act.

residential zone, including a residential zone which allows a single-family dwelling, and (b) any commercial zone that allows a single-family dwelling, and a city or county may not impose any zoning requirement on the establishment and maintenance of a residential home in a zone described in subsection (1) of this section that is more restrictive than a zoning requirement imposed on a single-family dwelling in the same zone.

(2) A city or county may not impose any zoning requirement on the establishment and maintenance of a residential home in a zone described in section (1) of this section that is more restrictive than a zoning requirement imposed on a single-family dwelling in the same zone. (ORS §197.665)

The same type of equal treatment ordinance could be adopted at the local level, and many cities and counties follow this approach.

Treat larger group homes for persons with disabilities like other multifamily housing.

The same logic outlined above applies to multifamily housing. If the intent of the Fair Housing Act is that protected persons not face barriers to housing choice that are not faced by persons without disabilities, then larger group homes (i.e., those with more than six or eight residents) should be treated the same as apartment or condominium buildings with the same number of residents. Again, Oregon law requires that result (ORS §197.667), and some governments have embodied the same result in ordinances.

Create an administrative process to address requests for “reasonable accommodation.”

Almost all local zoning ordinances have a formal process to grant variances if applicants show (generally at a public hearing) that a legal hardship will occur without the variance. In contrast, relatively few ordinances have a written procedure for responding to requests for “reasonable accommodation” or “reasonable modification” under the Fair Housing Act. As a practical matter, when those requests are received, most local governments find a way to respond—sometimes through a decision by the zoning administrator or the city manager, and sometimes by sending the request through a formal variance process. However, using a formal variance process is generally inconsistent with the goals of the Fair Housing Act, since it creates a public event, in a public forum, that draws attention to the special needs of the person with disabilities who is requesting the reasonable accommodation. Worse, a public hearing opens an opportunity for neighbors or other citizens to request that the city deny or condition the application in ways that a reviewing court will later find to be unreasonable under the Fair Housing Act.

The better practice is to create an administrative process for the city or county to respond to requests for reasonable accommodation or reasonable accommodation without the need for a public hearing. The Fair Housing Act does not require that there be a written procedure, or specify what that procedure needs to be, just that the local government act reasonably in responding

to the request. However, it is almost always preferable to have a written procedure in place so the public understands how those requests will be reviewed, and so succeeding zoning administrators and city managers do not need to reinvent a (potentially inconsistent) way to respond each time such a request is made. A written procedure, and criteria to guide the decision, also reduces the chance of a legal challenge claiming that the local government's charter and ordinances did not authorize it to respond to the request the way it did. Failure to respond reasonably creates liability under the Fair Housing Act; responding to the request in a way that is not authorized by law could create liability under state or local law, so the answer is to create a written procedure and use it.

Review the zoning regulations for actual barriers to fair housing. Regardless of how the HUD AFFH rule is modified in the future, zoning regulations can create significant barriers to fair housing. In addition to the barriers to location of small and large group homes discussed above, the regulations sometimes categorize group homes as commercial uses, which can subject them to higher utility rates. They can also establish very large minimum residential lot sizes that make it difficult for operators of congregate care facilities to locate in those areas. Zoning ordinances can make it difficult or impossible to create accessory dwelling units, which reduces that ability of persons with disabilities to live close to, or within the same dwelling unit as, persons who could provide prompt assistance in case of a health emergency. Many zoning ordinances limit the number of unrelated persons who can live together, which limits the ability of persons with disabilities who can live independently from living with others who could provide mutual support for daily living activities and help in an emergency. Finally, zoning regulations that establish narrow definitions for each type of group-living facility can make it hard for facilities with mixed populations, or those providing an innovative mix of services, from being approved. Zoning rules have often been used to protect residential neighborhoods from different and

unexpected uses. It is worth reviewing those rules to see which barriers to fair housing have been created by zoning rules—because those same barriers can be removed by amending the rules.

Promote affordable housing—because it has fair housing impacts. While rights to fair housing are legally protected, and rights to affordable housing are not, the two topics are intricately linked. Zoning regulations, policies, and programs that tend to increase the supply of affordable housing are likely to have a disproportionately positive impact on those protected by the Fair Housing Act. While many communities across the United States are facing an affordable housing crisis, and most are working to address that crisis, the fact that those protected by the Fair Housing Act are disproportionately impacted by the shortage of affordable housing provides another reason for bold action. There are a variety of ways for zoning changes to promote affordable housing, including:

- reducing minimum residential lot sizes
- allowing a wider variety of housing—including “missing middle” housing
- reducing the barriers to creating accessory dwelling units
- providing height or residential density incentives for affordable housing
- allowing increased occupancy of existing housing stock by unrelated individuals

CONCLUSION

Implementation and enforcement of the federal Fair Housing Act has always been imperfect, but the current uncertainty about how the HUD AFFH rule may be modified should not lead to a wait-and-see attitude. Instead, it puts much of the challenge of implementation back at the local level, and many cities and counties have accepted that challenge. When it comes to zoning, many of the barriers to fair housing were created at the local level, and they can be removed at the local level. Because of the Fair Housing Act/low-income nexus, planners should also realize that reducing barriers to affordable housing tends to open up housing choices for those

protected by Fair Housing Act. Much of the unfulfilled promise of the Fair Housing Act is—and has always been—in the hands of local government planners.

ABOUT THE AUTHOR

Donald L. Elliott, FAICP, is a director with Clarion Associates, LLC, a national land-use consulting firm. His practice focuses on land planning and zoning and international land and urban development issues. He is the author of *A Better Way to Zone* (Island Press 2008), coauthor of *The Rules that Shape Urban Form* (APA Planners Press 2012) and *The Citizen's Guide to Planning* (APA Planners Press 2009) and has served as the editor of *Colorado Land Planning and Development Law* for more than 25 years. Elliott has a bachelor's degree in Urban Planning and Policy Analysis from Yale University, a law degree from Harvard Law School, and a master's degree in City and Regional Planning from the John F. Kennedy School of Government at Harvard.

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DOES YOUR COMMUNITY
MAKE FAIR HOUSING A
PRIORITY?

12



MEETING MINUTES

PLAN COMMISSION

Wednesday, November 14, 2018

7:00 P.M.

Evanston Civic Center, 2100 Ridge Avenue, James C. Lytle Council Chambers

Members Present: Colby Lewis (Chair), Terri Dubin, Carol Goddard, Andrew Pigozzi, Peter Isaac

Members Absent: Jennifer Draper, George Halik

Staff Present: Meagan Jones, Neighborhood and Land Use Planner
Scott Mangum, Planning and Zoning Administrator

Presiding Member: Colby Lewis, Chairman

1. CALL TO ORDER / DECLARATION OF QUORUM

Chairman Lewis called the meeting to order at 7:00 P.M.

2. APPROVAL OF MEETING MINUTES: October 10, 2018

Commissioner Goddard made a motion to approve the minutes, seconded by Commissioner Isaac. The Commission voted unanimously, 5-0, to approve the minutes of October 10, 2018.

3. NEW BUSINESS

A. Text Amendment

18PLND-0094

Residential Care Homes

A Zoning Ordinance Text Amendment pursuant to City Code Title 6, Zoning to modify regulations regarding Residential Care Home uses (Section 6-4-4) including potential related amendments within the Residential, Business, Commercial, Downtown, Transitional Manufacturing, Special Purpose and Overlay Zoning Districts (Sections 6-8 through 6-15).

Ms. Jones provided a brief presentation of the proposed text amendment which was an aldermanic referral.

Chair Lewis opened up the hearing to questions from the public and invited Alderman Fiske to speak.

Alderman Fiske explained that the reason for her referral was concern that Springfield had not adequately defined why they had a distance requirement in place and she wanted Evanston to more clearly define its reasoning before there are any issues. She also wished to extend regulation to include residential care homes with fewer than 4 residents.

Sue Loellbach stated she has no issues looking at the distance requirements but she does have concerns about exacerbating issues by making a Special Use where they currently are not. It would discourage affordable housing options.

Chair Lewis then opened up the hearing to questions from the Commission. There were several, including:

- Commissioner Pigozzi asked for further clarification on the goal of the text amendment. The goal is to more successfully defend distance requirement justification for group home uses as well as extend regulations to include residential care homes with fewer than 4 people.
- Commissioner Goddard asked if what is discussed is a different text amendment. Ms. Jones responded that with clarification, the text amendment could be decided upon as is or altered to include more details for distance requirements and extending regulations.
- Commissioner Isaac inquired about the reference to Transitional Treatment Facilities. Ms. Jones responded that those are not within the purview of the proposed text amendment. Commissioner Isaac then asked if the use of residential care homes is a newer phenomenon and if there was an update to the Springfield case. Alderman Fiske stated that the use is not new and many exist within the 5th Ward with some newer ones within the 1st Ward. She believes care homes with fewer than 4 residents should be included within the text amendment. She added that the City of Springfield did not appeal the Circuit Court's ruling.

Jackie Eddy stated that rules for how close the residential care home use can be are made at the state level if state funding is accepted.

Chair Lewis reviewed the different options the Commission could take for the proposed text amendment. Commissioner Isaac stated that the Commission has not fully gone over the appropriateness of the text amendment and that it should go to committee.

Keralyn Keele of Rimland Services explained that Rimland Services has 13 homes used for adults with autism and she came to the meeting to hear more about what is proposed. She was hoping that there are no hurdles to the work being done. She clarified that the state has a 800 foot distance requirement. She added that their smallest homes consist of only 2 residents and the largest consist of 8 residents.

Commissioner Pigozzi stated that he does not like the idea of making all Residential Care Homes a special use but he would like clarity within the zoning ordinance. He

inquired if the goal could be to redefine the ordinance to not get hung up on the distance requirement.

Chair Lewis expressed that he does not believe this to be an issue and that the proposed amendment seems exclusionary.

Commissioner Goddard made a motion to recommend that the item be brought before the Zoning Committee for further research and discussion. Commissioner Goddard seconded the motion. A roll call vote was taken and the motion was approved, 5-0.

Ayes: Dubin, Goddard, Isaac, Pigozzi, Lewis.

Nays:

4. Discussion

A. Text Amendment

Public Benefits for Planned Developments

Discussion of existing public benefits required of Planned Developments and direction for a possible text amendment to update those requirements.

Mr. Mangum provided an overview of the discussion item which is a referral from City Council. He explained current regulations and reviewed public benefits from more recently approved planned developments.

Chair Lewis asked if there are issues with the current regulations and if the preference would be to redraft an incentives section on a whole or just the sections addressing public benefits. Mr. Mangum responded that there are questions that have been raised regarding what is appropriate for different projects and that there is a disconnect between the code and past practices. He then provided details on the City Council's discussions and stated that both revising certain sections and the whole incentives section are options.

Commissioner Isaac asked if staff had reached out to other municipalities. Mr. Mangum responded that this has not happened but is a good suggestion. Commissioner Dubin stated that Evanston is a unique area for development. Oak Park and Arlington Heights were suggested as possible comparable cities to review.

Chair Lewis stated that this is an opportunity to provide regulations that will be better able to be enforced. Commissioner Isaac stated that he would like to see broadness and specificity at the same time. This would enable flexibility for any changes that occur with regards to community or site needs.

Commissioner Pigozzi stated that the list within the staff report is good and

suggested that streetlight replacement be added as a possible benefit to be more inline with new lighting standards. Chair Lewis responded that lighting could be added to a broader list of improvements or possible benefits so as not to get too specific with regards to a public benefit list. Ms. Goddard suggested that staff do some research and return with a list that generalizes the list included in the report.

Ms. Jones confirmed what the Commission would like staff to do. Chair Lewis replied that clumping the detailed list together into different categories would be a start. He stated that it would be good to list overall goals then provide examples on how to reach them through specific public benefits. Commissioner Pigozzi added that it will be good for developers to have a list that shows what Evanston values.

The Commission requested that staff draft possible amendments based on the points brought up during the discussion. The amendment will be brought back to the Plan Commission at a date to be determined.

5. PUBLIC COMMENT

There was one comment to make sure that public benefits of a planned development benefit the public and not just the development's tenants.

6. ADJOURNMENT

Commissioner Goddard made a motion to adjourn the meeting. Commissioner Pigozzi seconded the motion.

**A voice vote was taken and the motion was approved by voice call 5-0.
The meeting was adjourned at 8:14 pm.**

Respectfully Submitted,
Meagan Jones
Neighborhood and Land Use Planner
Community Development Department