

## **Group Homes and Zoning Under the Fair Housing Act**

Michael Mirra

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### **Introduction**

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Michael Mirra

COLUMBIA LEGAL SERVICES

Suite 430

625 Commerce Street

Tacoma, WA 98402

(253) 572-4343

FAX (253) 572-4348 [michael.mirra@columbialegal.org](mailto:michael.mirra@columbialegal.org)

*This outline is only a cursory review of the topics it covers. It cannot substitute for legal advice. Persons with a particular legal problem may wish to consult an attorney. Attorneys should supplement this outline with their own legal research.*

This outline reviews what the Fair Housing Act (FHA) has to say about governmental regulation or restriction of group homes, both their siting and operation. In general, the FHA provides group homes, their residents and developers with important protection. This protection results from the application to group homes of basic and longstanding principles of FHA adjudication. For that reason, this outline will begin by reviewing those basics.

### **I. SOME BACKGROUND**

Much of the nation's housing segregation resulted from overt policies and practices of the public and private entities that controlled or influenced the housing market, *e.g.* realtors, housing lenders, federally assisted housing programs, local and state laws governing residential use or public enforcement of private restrictive covenants. These institutionalized efforts created or fortified a pervasive white racism in the housing market against African-Americans and other persons identified by race, ethnicity or religion. <sup>(1)</sup> By 1968, the nation's housing was thoroughly segregated by race.

In this century, the effort to promote fair housing began in the courts. The Supreme Court began using the Civil Rights Act of 1866 and the 14th amendment's guarantee of equal protection to restrict racial discrimination by local governments. In 1917, it issued its first ruling against racial zoning ordinances. <sup>(2)</sup> In 1948, the Court prohibited judicial enforcement of racially restrictive covenants governing the use of land. <sup>(3)</sup> Soon afterward, the Federal Housing Administration and the Veteran's Administration stopped insuring mortgages on property encumbered with racially restrictive covenants. Racial zoning and covenants continued in place, however, until the passage of effective affirmative legislation.

State and federal anti-discrimination laws generally followed a pattern. First, the laws outlawed discrimination in public accommodations and publicly financed activities. Employment laws then followed. Laws then outlawed discrimination in public housing. The last laws to be enacted restricted discrimination in the private housing market. By 1968, about half the states, including Washington, had some form of fair housing law.

In 1968, Congress enacted Title VIII of the Civil Rights Act of 1968 -- the Fair Housing Act. The turbulent events of the time spurred its passage. The urban riots of 1967 and the subsequent Kerner Commission report caused some to attribute many social afflictions to residential segregation. <sup>(4)</sup> On April 4, 1968, Martin Luther King, Jr. was assassinated. The Fair Housing Act became law on April 11, 1968.

In many respects, however, the 1968 Fair Housing Law has not been a success. As a source of legal enforcement it fell far short of its counterpart laws governing public accommodations or employment. The number of private and public prosecutions was comparably few. More importantly, its effect on patterns of residential use disappointed its proponents. Discriminatory barriers became more sophisticated if less overt. Most communities remained segregated for reasons that appeared directly related to discriminatory conduct.<sup>(5)</sup>

One of the Act's shortcomings was its lack of effective enforcement. Efforts soon began in Congress to strengthen it. After nearly twenty years of debate, the Congress passed the Federal Fair Housing Amendments Act of 1988. Among its major provisions:

- it greatly strengthened the administrative enforcement of the Act, making its remedies available to people without lawyers; it eliminated the \$ 1,000 cap on punitive damages
- available in private lawsuits; it provided for civil penalties and damages in lawsuits brought by the United States.

Despite these enhancements, the racial segregation America's housing markets continues.<sup>(6)</sup>

The 1988 amendments also added handicap and "familial status" to the list of protected characteristics under the Fair Housing Act (FHA). These additions are meant to protect disabled persons and households with minor children from pervasive discriminatory practices that excluded them from large segments of the residential housing markets. Disabled persons have traditionally faced widespread public and private discrimination based on erroneous and destructive stereotypes. The Act was "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." *Helen L. v. DiDario*, 46 F.3rd 325, 333 n. 14 (3d Cir.) (quoting H.R.Rep. No. 711, 100th Cong., 2d Sess. 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2179).

At the same time, Congress recognized that large portions of the private rental market excluded households with minor children. These practices, combined with increasingly unaffordable housing prices, have contributed to a housing emergency for large segments of the American public for whom affordable, decent or secure housing remains unavailable.

## **II. PROMINENT PROVISIONS OF THE FAIR HOUSING ACT GENERALLY**

### **A. Protected Characteristics**

The FHA outlaws or restricts housing discrimination because of:

- race;
- color;
- religion;
- sex;
- "familial status;"<sup>(7)</sup>
- national origin;
- handicap.

### **B. The Act's Scope is Broad**

With few exceptions, the FHA governs nearly every type of housing, including mobile homes, shelters, vacant land intended for housing, and group homes.<sup>(8)</sup> This is clear from its definition of "dwelling:"

'Dwelling' means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

42 USC § 3602(b). (The exceptions are narrow and refer to owner-occupied apartment complexes of 4 or less units, religious organizations, and private clubs. See 42 USC § 3603.)

The FHA also governs nearly every aspect of a housing transaction, including financing, brokering, appraising, and marketing. It also applies to land-use and zoning practices of government. The FHA applies to a broad range of discriminatory behavior, including:

- (1) refusing to sell, rent, negotiate for "or otherwise make unavailable or deny" a dwelling;
- (2) discriminating in the "term, conditions, or privileges of a sale or rental" of a dwelling or in the "provision of services or facilities in connection therewith";

- (3) making or publishing any discriminatory statement in regard to a sale or rental;
- (4) misrepresenting the availability of a dwelling;
- (5) inducing a person to sell or rent any dwelling by representations about the presence of members of a protected class in the neighborhood;
- (6) discriminating in the access to real estate services;
- (7) discrimination in the residential real estate related transactions and in the terms or conditions of such transactions, including the making of loans for the purchase of a dwelling, the making of loans secured by residential units and the "selling, brokering, or appraising of residential real property."

42 U.S.C. § 3604. There are limits, however, to the scope of the FHA's coverage. [\(9\)](#)

The FHA protects not only racial minorities or other protected classes of people. It gives a cause of action to any person or entity who is harmed by an act of illegal discrimination. [\(10\)](#) Zoning laws that unlawfully discriminate against handicapped persons seeking group home living, for example, would give rise to claims not only by the prospective residents who are handicapped but also by the developers or financiers of the group home.

### **C. The Definition of Disability is Broad**

The definition of "handicap" is very broad:

(h) 'Handicap' means, with respect to a person --

- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
- (2) a record of having such an impairment, or
- (3) being regarded as having such an impairment,

but such term does not include current, illegal use or addiction to a controlled substance as defined in section 802 of Title 21.

42 USC § 3602. This definition includes mental illness, developmental disabilities, physical impairments, persons who test positive for HIV, persons who have AIDS, wet or dry alcoholics and persons recovering from addiction to an illegal drug as long as they are not currently using illegal drugs. [\(11\)](#)

The need to live in a group home, by itself, may denote a disability to the extent it results from an inability to live independently. [\(12\)](#)

Note: The definition of "disability" under Washington's Law Against Discrimination may be somewhat broader than the definition under the FHA. [\(13\)](#)

### **D. Protections for Handicapped Persons and Children are Equivalent to Those Provided Against Racial Discrimination.**

The terms "handicap" and "familial status" appear in the FHA alongside those of "race" and the other protected characteristics. Thus, the law treats discrimination on the basis of "handicap" and "familial status" as it treats racial discrimination. "[F]amilies with children [and handicapped persons] must be provided the same protections as other [protected] classes of persons." 24 C.F.R. Ch. 1, Subch. A. App. I at 931 (1995).

### **E. Violations and Requirements of the FHA**

Violations of the FHA include not only acts of intentional discrimination but other acts or policies that have a discriminatory effect even without any intent to discriminate.

#### *1. Intentional Discrimination*

A person or entity violates the FHA when it denies or conditions or impairs a housing opportunity intentionally because of race, color, religion, sex, familial status, national origin or handicap. Intentional discrimination can violate the law even if the defendant also had other legal reasons for his or her conduct. In relation to discrimination on the basis of handicap, the Act is intended to repudiate the use of stereotypes and requires that persons with handicaps be considered as individuals. [\(14\)](#)

## 2. Unintended but Disparate Discriminatory Effects

The FHA also outlaws or restricts practices that have an unintended but disproportionate effect on protected persons. In these cases, the defendant must show a legitimate reason that is important enough to justify the practice despite its disproportionate effect. Courts have allowed such claims because of a practical view of fair housing enforcement:

Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because ...'[w]hatever our law was once,...we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as a perversity of a willful scheme.

*United States v. City of Black Jack, Missouri*, 508 F.2d 1179 (8th Cir 1974):Id. at 1185 (8th Cir. 1974), cert. den. 422 U.S. 1042 (1975). The legislative history of the 1988 Amendments strongly endorses this analysis as applied to handicapped persons. [\(15\)](#)

Some common examples of practices or policies found to violate the FHA because of their unintended but disproportionate exclusion of protected persons include: exclusion of families with children found to constitute racial discrimination; exclusion of subsidized housing found to constitute race discrimination; occupancy maximums and siting restrictions on group homes found to constitute familial status discrimination. [\(16\)](#)

## 3. Denial of Reasonable Accommodation of Handicaps

In addition to prohibiting discriminatory practices on the basis of handicap, the FHA goes further and limits the application of neutral rules that have no discriminatory intent or effect. The FHA requires owners to make "reasonable accommodation" in such rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B). The FHA imposes an "affirmative duty upon landlords reasonably to accommodate the needs of handicapped persons." *U.S. v. California Mobile Home Park Management Co.*, 29 F.3rd 1413, 1416 (9th Cir. 1994), appeal after remand 107 F.3rd 1374 (9th Cir. 1997). This duty receives a "'generous construction' in order to carry out a 'policy that Congress considered to be of the highest priority.'" The generous spirit with which we are to interpret the FHA guides our [reasonable accommodation] analysis here." 29 F.3rd at 1416. See Also, *Shapiro v. Cadman Towers, Inc.*, 51 F.3rd 328, 335 (2d. Cir. 1995).

In general, a requested accommodation is reasonable and therefore required, if (i) it is necessary for the handicapped persons' equal opportunity to use and enjoy a dwelling and (ii) it does not impose undue administrative or financial burdens or require a fundamental alteration in the nature of the housing program. *E.g.*, *U.S. v. California Mobile Home Park Management Co.*, 29 F.3rd 1413, 1416 (9th Cir. 1994), appeal after remand 107 F.3rd 1374 (9th Cir. 1997); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3rd Cir. 1996).

As a reasonable accommodation for handicapped persons, courts have required waivers in leases, contracts, rules, ordinances, restrictive covenants, zoning codes and otherwise reasonable rules of many types when necessary to accommodate a disability. Examples of lease rules that courts have waived include: first come, first serve rule for assignment of parking spaces; [\(17\)](#) rule against pets; [\(18\)](#) rule against threatening behavior; [\(19\)](#) lease provision for charges and penalties. [\(20\)](#) In requiring a waiver of rules, the FHA can also oblige a landlord to spend or forego money. [\(21\)](#) Reasonable accommodation concerning group homes can include the waiver of otherwise applicable zoning restrictions. [\(22\)](#)

The FHA also requires owners to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modification may be necessary to afford such person full enjoyment of the premises. A landlord may, where it is reasonable to do so, condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted. 42 USC § 3604(f)(3)(A). (The FHA also requires that most multi-family buildings that are first occupied after March 15, 1991 meet certain adaptability and accessibility requirements. State law has imposed similar requirements for several years already.)

## 4. The "Dangerousness" Exception

The FHA makes an exception for the protections offered to "handicapped" persons to account for dangerous persons:

Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

42 U.S.C. § 3604(f)(9). Dangerous persons or persons with criminal histories are not, by virtue of that history, protected from discrimination. This remains the case even if they are handi-capped. However, the criteria and process by which people are screened or excluded for dangerousness cannot itself be discriminatory. Several concepts are likely to govern a court's review of such procedures. First, the FHA requires that the "direct threat" restrictions be based on individual assessments. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995).<sup>(23)</sup> Generalized conclusions about groups based upon their handicap are not permissible. See Also 54 FR 3245 (January 23, 1989).

Second, a process to screen out dangerous people cannot be applied only to handicapped people. See House Report at 30; 53 FR 45001(November 7, 1988)

Third, a criteria or process that excludes people because of a dangerous history may be amenable to waiver as a reasonable accommodation to a person's disability. A reasonable accommodation, for example, may include treatment or controls that provide adequate assurance that threatening behavior will not recur.<sup>(24)</sup>

## **F. Enforcement**

Victims of FHA violations have several enforcement options:

### *1. Private Litigation*

A victim can sue in state or federal court. 42 U.S.C. § 3613. The court can order the defendant to stop the illegal activity and to take affirmative measures to insure against repeated violations. The court can also require the defendant to pay money to compensate the victim for harm, including psychological and emotional injury. The court will also normally order the defendant to pay the attorney's fees of the prevailing victim. The court can also punish the defendant by requiring further payment of punitive damages. The FHA imposes a two year statute of limitations for filing such a lawsuit.

### *2. Administrative Enforcement*

A victim can file an administrative complaint with an enforcement agency responsible for the jurisdiction. 42 U.S.C. § 3612. He or she must file within one year of the alleged violation. Under the Act, HUD can delegate this enforcement authority to a local agency whose laws are "substantially equivalent" to the FHA. In that case, the local enforcement agency contracts with HUD to handle complaints. Presently, HUD has contracts with four jurisdictions in Washington State: King County; Seattle; Tacoma; Washington State. As a result, HUD refers most administrative complaints arising from within Washington State either to the Washington State Human Rights Commission or to the fair housing enforcement agencies for King County, Seattle or Tacoma.

An agency, if it finds a violation, can order the defendant to stop the illegal activity. It can order the defendant to pay the victim's attorney's fees. In order "to vindicate the public interest," the agency can also impose a civil penalty of up to \$ 50,000 depending on the number of the defendant's prior violations.

### *3. United States as Plaintiff*

The United States Government can also sue to remedy violations of the Act that result from a "pattern or practice" of illegal activity or from conduct that otherwise "raises an issue of general public importance." 42 U.S.C. § 3614. The court may impose penalties of up to \$ 100, 000.

## **G. Courts Will Interpret the FHA Expansively**

The court will give the FHA a generous and expansive construction "in order to carry out a `policy that Congress considered to be of the highest priority.'" *U.S. v. California Mobile Home Park Management Co.*, 29 F.3d 1413 (9th Cir. 1994)(referring to the FHA, quoting from *Trafficante v.*

*Metropolitan Life Ins.*, 409 U.S. 205, 212, 93 S.Ct. 364, 368, 34 L.Ed.2d 415 (1972).<sup>(25)</sup>

## **III. FHA'S APPLICATION TO GROUP HOMES**

### **A. The FHA Governs Local Zoning Regulation**

Courts have long applied the FHA to local zoning codes.<sup>(26)</sup> It governs not only behavior specified in the law but actions, like zoning, that "otherwise make unavailable or deny" a dwelling. §§42 U.S.C. § 3604(a),(f)(1). The FHA has been "construed to reach `every practice which has the effect of making housing more difficult to obtain on prohibited grounds.'" *United States v. Yonkers Board of Education*, 624 F.Supp. 1276, 1291, n. 9. (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486

U.S. 1055 (1988). Additional sections of the FHA particularly govern local laws. <sup>(27)</sup> The 1988 amendments adding "handicap" protections targeted zoning laws especially:

These new subsections [protecting handicapped persons] would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps.

House Report at 24. <sup>(28)</sup>

Note: Other laws prohibiting discrimination on the basis of handicap also apply to zoning codes. *E.g.* Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a)(Section 504 applies to zoning codes of cities that receive federal money); <sup>(29)</sup> American with Disabilities Act, 42 U.S.C. § 12132 (The ADA applies to "public entities," defined to include cities. §42 U.S.C. § 12131(1)(A)). <sup>(30)</sup>

### **B. The FHA Protects Group Homes**

Courts have further applied the FHA to protect group homes. <sup>(31)</sup> Group homes fit the FHA's definition of dwelling. §42 U.S.C. § 3602. The FHA's protection for group homes became particularly clear with the 1988 amendments for handicapped persons:

This provision [protecting handicap persons] is intended to prohibit special restrictive covenants or other terms of conditions, or denials of services because of an individual's handicap and which have the effect of excluding, for example, congregate living arrangements for persons with handicaps. . . . While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. . . .

House Report at 23-24. (emphasis added.)

Group homes are generally covered because their residents are handicapped. In one case, the court also applied the FHA to group homes for children under the Act's "familial status" provision. <sup>(32)</sup>

### **C. Some Particular Issues Arising from Municipal Regulation of Group Homes**

#### *1. Occupancy Maximums:*

Municipalities have commonly restricted the number of residents allowed in group homes. These restrictions appear in various forms. Some apply particularly to group homes, raising questions of direct and intentional discrimination. Other restrictions apply to all households of unrelated persons, raising questions of their discriminatory effect that results because handicapped people, more than others, require group home living.

The FHA expressly allows "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). However, this exemption applies only if the maximums apply to everyone in a dwelling, generally for the purpose of avoiding overcrowding. *City of Edmonds v. Oxford House, Inc.*, U.S. , 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995)(generally applicable occupancy limits like the Uniform Housing Code designed to prevent overcrowding fall within exemption from FHA). The FHA does not exempt limits "designed to preserve the family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants living quarters can contain, do not." *Id.* at 1782. Such limits that purport to define "families" have been found to discriminate against residents of group homes.

Some courts have struck down these limits relying either on their discriminatory intent or discriminatory effect. <sup>(33)</sup> Other courts have reviewed requests to waive neutral occupancy maximums as a reasonable accommodation for the disability of residents of group homes. <sup>(34)</sup>

#### *2. Size and Bulk Limitations*

In general, the FHA does not require a city to waive nondiscriminatory limitations on the size or bulk of buildings or their nonresidential use. *E.g. Gamble v. City of Escondido*, 104 F.3d 300 (9th Cir. 1997)(City could reject proposal for a large complex for disabled adults, including non-housing services, in a single family residence.)

### 3. Dispersal Requirements

With some notable exceptions, courts have generally struck down requirements that group homes maintain minimum distances from other group homes. *E.g.*, *The Children's Alliance et al v. City of Bellevue*, 950 F.Supp. 1491 (W.D. Wash. 1997)(striking down 1,000 foot dispersal requirement for group homes); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F.Supp. 683, 693, aff'd 995 F.2d 217 (3rd Cir. 1993) (same); *But see, Familystyle of St. Paul v. City of St. Paul, Minn.*, 923 F.2d 91 (8th Cir. 1991)(The court permitted application of a dispersal requirement to prevent cluster of 21 group homes within one and one-half block area.)

### 4. Notice and Permit Requirement

Courts have also struck down requirements that group homes register with municipal authorities or notify their neighbors. *E.g.* *Stewart B. McKinney v. Town Plan and Zoning Com'n*, 790 F.Supp. 1197 (D.Conn. 1992) (neighbor notification); *Potomac Group Home Corp. v. Montgomery County, Maryland*, 823 F.Supp. 1285 (D. Md. 1993)(hearing and notification requirement); *Larkin v. State of Michigan*, 89 F.3d 285 (6th Cir. 1996) (notification of neighbors requirements); *The Children's Alliance et al v. City of Bellevue*, 950 F.Supp. 1491 (W.D. Wash. 1997)(requirement for city permit and community hearing process).

Some courts, however, have allowed procedural requirements by which group home developers can be made to seek waivers of exclusionary rules as a reasonable accommodation to the disability of their prospective residents. *E.g.*, *Elderhaven, Inc. v. City of Lubbock*, 98 F.3rd 175 (5th Cir. 1996).

Most courts have ruled that a city cannot justify a discriminatory rule merely by providing a process by which a group home may seek its waiver. Reasonable accommodation procedures are applicable only to consider a waiver of a nondiscriminatory rule. [\(35\)](#)

### 5. Requirement for Permanent Residency

Courts have also rejected requirements that residents of group homes remain as occupants for minimum periods of time. The court in *The court in North Shore-Chicago Rehab. v. Village of Skokie*, 827 F.Supp. 497 (N.D. Ill. 1993) struck down a requirement that group home residents be "permanent." Similarly, the court in *Oxford House, Inc. v. Township of Cherry Hill*, 799 F.Supp. 450 (D.N.J. 1992) barred enforcement of a requirement that all households of unrelated persons meet a standard of "permanency and stability."; *Oxford House, Inc. v. Town of Babylon*, 819 F.Supp. 1179, 1183 (E.D.N.Y. 1993)(barred town's eviction of the group home "due to the size or transient nature of plaintiffs' group living arrangement"); *The Children's Alliance et al v. City of Bellevue*, 950 F.Supp. 1491 (W.D. Wash. 1997)(court voided exclusion of group homes for children who stayed less than 30 days.)

### 6. Benign Intentions Do Not Excuse Adverse Discriminatory Regulation

Municipalities commonly justify adverse discriminatory regulation of group homes by claiming a benign motive to assist or protect the residents from harm. Several points are pertinent to such discussions. First, plaintiffs in a FHA claim do not have to prove malice or animus to show a violation:

Specifically with regard to housing discrimination, a plaintiff need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination where the defendant expressly treats someone protected by the FHAA in a different manner than others.

*Bangerter v. Orem City Corp.*, 46 F.3rd 1491, 1500 (10th Cir. 1995). [\(36\)](#) Second, good intentions do not cure discrimination. [\(37\)](#) Third, discriminatory intentions are illegal even if the city also had non-discriminatory intentions. [\(38\)](#)

### 7. Some Possible Grounds for Different Treatment of Handicapped Persons

Some courts, upon finding intentional discrimination, then consider possible reasons that could justify the discrimination. *Bangerter v. Orem City Corp.*, 46 F.3rd 1491, 1502-1504 (10th Cir. 1995); *Marbrunak, Inc v. City of Stow*, 974 F.2d 43 (6th Cir. 1992). The courts stated that the FHA may not prohibit overt discrimination beneficial to handicapped persons or to fair housing goals in the same way that racial categories designed to insure integration are sometimes permissible. *Id.* at 1504 - 1505. In *Alliance for the Mentally Ill v. City of Naperville*, 923 F.Supp. 1057, 1073 (N.D. Ill 1996), the court stated that any intentionally discriminatory rule must fulfill the "FHAA, which mandates that any such [facially discriminatory] requirements correspond to the `unique and specific needs and abilities of [the] handicapped persons' affected." Any differential treatment must be based on a scrutiny of individual needs. *The Children's Alliance et al v. City of Bellevue*, 950 F.Supp. 1491, 1499 (W.D. Wash. 1977). Even under these decisions, the possible justifications for overt discrimination are very narrow and provoke great judicial skepticism.

"We should be chary about accepting the justification that a particular restriction upon the handicapped really advances their housing opportunities rather than discriminates against them in housing. Restrictions that are based upon unsupported stereotypes or upon prejudice and fear stemming from ignorance or generalizations, for example, would not pass muster.

*Bangerter*, 46 F.3d at 1504. Under the standard analysis and in the normal case, there is no reason that can justify overt intentional and adverse discrimination. Instead, discrimination must benefit the disabled residents and must be tailored to their needs.

One court, however, has expanded the grounds for permissible discrimination to include discrimination reasonably necessary to serve a city's legitimate interests. *Family-Style of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991). In that case, the court permitted a city to prevent the addition of more group homes to a one and one-half block area that already had 21 such homes. The court ruled that dispersal benefited handicapped persons and FHA goals of integration. The court's use of a "rational basis" standard to review the city's overtly discriminatory ordinance is anomalous among the reported decisions. It has been rejected by courts in other Circuits. *E.g., Larkin v. State of Michigan*, 89 F.3d 285 (6th Cir. 1996); *The Children's Alliance et al v. City of Bellevue*, 950 F.Supp. 1491, 1498 (W.D. Wash. 1997).

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## NOTES

**1.** See, Robert G. Schwemm, *Housing Discrimination: Law and Litigation*, pages 2-1 - 2-9. (1994).

**2.** *Buchanan v. Warley*, 245 U.S. 60 (1917).

**3. *Shelley v. Kraemer*, 334 U.S. 1 (1948).**

**4.** National Advisory Commission on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 1 (1968)(The Report concluded that America was "moving toward two societies, one black, one white -- separate and unequal.")

**5.** In 1979, for example, HUD's survey of 40 metropolitan areas concluded that an African-American will encounter discriminatory barriers 49 percent of the time in the purchase market and 72% of the time in the rental market. See, R. Wienk, C. Reid, J. Simonson & F. Eggers, *Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey* (U.S. Department of Housing and Urban Development 1979). This report found discrimination most pervasive cities in the North Central and Western states.

In 1989, HUD commissioned another study. It reported "no solid basis for concluding that the incidence of unfavorable treatment experienced by black homeseekers had either risen or declined since the late 1970s." M. Turner, R. Struyk & J. Yinger, *Housing Discrimination Study: Synthesis vii* (U.S. Department of Housing and Urban Development 1991).

**6.** See MASSEY & DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

**7.** "Familial Status means one or more individuals (who has not attained the age of 18 years) being domiciled with -- (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person." 42 U.S.C. § 3602(k). The FHA expressly exempts "housing for older persons" from its "familial status" provision. If a housing complex qualified for this exemption it may discriminate against children. This exemption, which Congress recently enlarged, is defined to include either housing that is occupied solely by persons 62 years of age or older or housing intended for persons over 55 years and in which over 80% of the units are occupied by at least one person 55 years of age or older.

**8.** *E.g. Hernandez v. EverFresh Co.*, 923 F.Supp. 1305 (D. Or. 1996)( farm labor camps); *Woods v. Foster*, 884 F.Supp. 1169 (N.D. Ill. 1995)( homeless shelter); *United States v. Columbus Country Club*, 915 F.2d 877, 881 (3rd Cir.), cert. den. 501 U.S. 1205 (1991)(defining FHA "residence" as a "temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit.); *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996)(emergency homeless shelters.); *Baxter v. City of Belleville*, Ill., 720 F.Supp. 720 (S.D. Ill. 1989)(hospice for short-term and long-term occupancy by sufferers of AIDS); *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir.1990)(summer bungalows); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3rd Cir. 1996)(nursing homes). HUD's definition of

" dwelling unit" for purposes of the "handicap" discrimination provision includes congregate facilities, as well as "dormitory rooms and sleeping accommodations in shelters intended for occupancy as a residence for homeless persons." 24 CFR 100.201. See Also Section IIIB below.

**9. E.g. Michigan Protection & Advocacy Service v. Babin, 18 F.3rd 337 (6th Cir. 1994) (neighbors are not liable for financing the purchase of a home to prevent its use by group home operator.)**

**10.** E.g. *Keith v. Volpe*, 858 F.2d 467, 477 (9th Cir. 1988)(nonprofit housing providers and homeowners have a claim against persons who prevented them from concluding a deal with black seekers.); *Crumble v. Blumthal*, 549 F.2d 462 (7th Cir. 1977)(white brokers have a claim if they lose a commission because of discrimination against their minority clients); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)("Congress intended standing . . . to extend to the full limits of Art. III and . . . the courts accordingly lack the authority to create prudential barriers to standing in suits brought under the [FHA].") Standing extends to organizations whose advocacy purposes are frustrated by defendant's actions. *Id.* Standing extends to people who were not discriminated against. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 208 212, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972)(white persons can challenge discrimination against racial minorities).

**11.** The United States Supreme Court has ruled that the definition of disability under the American with Disabilities Act (ADA) includes a person who is HIV-positive but who is otherwise without symptoms of illness. *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998). The definition of disability under the ADA is the same as the definition of handicap under the FHA.

**12.** E.g., *United States v. City of Audubon*, 797 F.Supp. 353, 358 - 359 (D.N.J. 1991)(recovering alcoholics and drug addicts who could walk, hear, speak, learn work, etc are handicapped by their need for group care)("We do not think that the list of major life activities set forth in the regulation was meant to be all-inclusive. Even if it were, the residents would still satisfy the definition because their inability to live independently constitutes a substantial limitation on their ability to `care for themselves".) The court in *U.S. v. Massachusetts Indus. Finance Agency*, 910 F. Supp. 21, 26 (D. Mass 1996) expressed a similar view about residents in a home for emotionally disturbed children. ("Indeed, given [the home's] purpose, mere placement in one of its residential schools is strong evidence of an inability to function in a regular environment.")

**13.** Unlike the FHA, Washington's Law does not require that the disability be an "impairment which substantially limits one or more of a person's major life activities." Instead, it refers to the "presence of any sensory, mental, or physical disability or the use of a trained guide dog or service dog by a disabled person." RCW 49.60.030(1). The Washington State Human Rights Commission, in a recent definition, stated that it "includes, but is not limited to an abnormal condition that (a) is medically cognizable or diagnosable; (b) exists as a record or history; or (c) is perceived to exist, whether or not it exists in fact." WAC 162-38-050. The Commission declined to adopt the federal definition explaining that to do so would be a "substantial narrowing" of state law. WSR 96-13-045 (Part 3).

**14.** Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusions.

H.R. Rep. No. 100-711, 100th Cong., 2d. Sess. at 18, reprinted in 1988 U.S. Code Cong. & Admin. News. at 2173. (emphasis added.)(hereafter cited as House Report).

In assessing information, the landlord may not infer that a recent history of a physical or mental illness or disability, or treatment for such illnesses or disabilities, constitutes proof that an applicant will be unable to fulfill her or her tenancy obligations.*Id.* at 30.

**15.** The legislative history of the 1988 amendments to the FHA strongly endorses the application of the effect's test:

The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land use regulations, restrictive covenants and conditional or special use permits that have the **effect** of limiting the ability of such individuals to live in the residence of their choice in the community . . .

Another method of making housing unavailable to people with disabilities has been the application of enforcement of otherwise **neutral rules and regulations** on health, safety and land-use in a manner which discriminates against people with disabilities. Such discrimination often results from false or over-protective assumptions about the needs of handicapped people, as well as unfounded fears about the problems that their tenancies may pose. These and similar practices would be prohibited.

House Report at 24 ( emphasis added.)

**16.** *E.g., Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988)(action had "twice the adverse impact on minorities as it had on whites" because two-thirds of the group eligible for blocked low-income housing project were minorities.) In *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir.) *aff'd per curiam*, 488 U.S. 15 (1988) the affected low-income housing project was 28 percent minorities and 11 per cent white. The court called this a "substantial adverse impact." The court overruled the trial court's reliance on absolute numbers which showed that a greater number of whites would be affected. *See also, Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert denied*, 434 U.S. 1025 (1978)("a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for the [housing that the defendant city refused to allow]." *Southeast Neighborhood Imp. v. County of St. Clair*, 743 F.2d 1207, 1209 (7th Cir. 1984) (disparity was "significant"); In *Betsey v. Turtle Creek Associates*, 736 F.2d 989, 988 (4th Cir.) the court reviewed a landlord's policy that excluded children from one building on the premises. The court found that the policy's effect was "substantially greater" on racial minorities since 54.3% of their households in the building had children while 14.1% of white households had children. Reversing the trial court, the Court found a disparate impact despite the fact that racial minorities would continue to comprise a larger percentage of the building than they do of the community and despite the fact that the policy would have an insignificant impact on racial minorities in the community.); *Fair Housing Council of Orange County, Inc. v. Ayres*, 855 F.Supp. 315, 316 (C.D. Calif. 1994)("The court holds that a showing of discriminatory intent is not necessary for plaintiffs to state a prima facie case of housing discrimination based on familial status." The court struck down a neutral occupancy maximum because of its effect on families with children); *Martin v. Constance*, 843 F.Supp. 1321 (E.D. Mo. 1994)(finding restrictive covenants limiting use to a private residence to constitute intentional discrimination and to impose a discriminatory effect on handicapped persons); *Stewart B. McKinney Found, Inc. v. Town Plan & Zoning Com'n*, 790 F.Supp. 1197, 1216-19 (D. Conn. 1992)(The plaintiff "need prove no more than that the conduct of the defendant[s] actually or predictably results in . . . discrimination; in other words, that it has a discriminatory effect. The plaintiff need make no showing whatsoever that the action resulting in . . . discrimination in housing was . . . motivated [by a desire to discriminate against the handi-capped]; *North Shore-Chicago Rehab. v. Village of Skokie*, 827 F.Supp. 497 (N.D.Ill. 1993) (ordinance requiring group home to be occupied on a permanent basis and to be licensed had an unlawful discriminatory effect).

**17.** *Shapiro*, 51 F.3rd at 333-336.

**18.** *HUD v. Dutra*, Fair Housing-Fair Lending Rptr. ¶ 25,124 (HUD ALJ 1996).

**19.** ***Roe v. Sugar Mill Associates*, 820 F.Supp. 636, 639-640 (D.N.H. 1993)(The landlord could not evict a mentally ill tenant based on threatening behavior until "after defendants have made reasonable efforts to accommodate his handicap . . . [T]he Act requires defendants to demonstrate that no `reasonable accommodation' will eliminate or acceptably minimize the risk he poses to other residents at [the apartment], before they may lawfully evict him." *Accord, Roe v. Boulder Housing Authority*, 909 F.Supp. 814 (D.Col. 1996).**

**20.** *Samuelson v. Mid-Atlantic Realty Co. Inc.*, 947 F.Supp. 756, 759-62 (D. Del. 1996).

**21.** "We find the effort to distinguish accommodations that have a financial cost from other accommodations unconvincing. Besides the fact that § 3604's reasonable accommodations requirement contains no exemption for financial costs to the landlord, the history of the FHAA clearly establishes that Congress anticipated that landlords would have to shoulder certain costs involved, so long as they are not unduly burdensome."

*U.S. v. California Mobile Home Park Management Co.*, 29 F.3rd at 1416 (9th Cir. 1994) In this case, this Court reversed a trial court dismissal of a reasonable accommodation request that a landlord waive a parking fee for a home health care aide. After remand, the Court affirmed the trial court's subsequent finding that the waiver was not necessary in the particular facts of the case. 107 F.3rd 1374 (9th Cir. 1997).

**22.** *Moorestown, L.L.C. v. Moorestown Township*, F. Supp. , 1998 WL 129956 (D.N.J. 1998).

**23.** "As the FHAA's legislative history declares, the FHAA `repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals.'" Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusions.'" *Bangerter*, 46 F.3rd at 1503 (quoting from House Report at 18.)

**24.** House Report, *supra*, at 29; 53 Fed. Reg. 45002 (November 7, 1989); *E.g.*, *Roe v. Sugar River Mills Associate*, 820 F.Supp. 636, 640 (D.N.H. 1993)(The court would not permit the eviction of a tenant convicted of disorderly conduct arising from threats to neighbors unless the landlord can "demonstrate that no 'reasonable accommodation' will eliminate or acceptably minimize the risk he poses to other residents.")

**25.** See also, *City of Edmonds v. Oxford House*, U.S. , 115 S.Ct. 1776, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995); *United States v. Gilbert*, 813 F.2d 1523, 1526 - 1527 (9th Cir.) *cert. denied*, 484 U.S. 860 (1987)(The court ruled that the FHA's dwelling rights covered the actions of an child adoption agency. "The Fair Housing Act is intended 'to provide within constitutional limitations, for fair housing throughout the United States.' The Supreme Court has observed that this expansive approach is carried throughout the Act, and that the Act as a whole is 'broad and inclusive' and should be given 'generous construction.'")

**26.** *E.g.*, *City of Edmonds v. Oxford House, Inc.*, U.S. , 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995) (occupancy maximums contained in land-use code are subject to the FHA); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 558 F.2d 1283 (7th Cir. 1977), *cert. den.* 434 U.S. 1025 (1978)(striking down zoning restriction on low-income housing because of discriminatory effect on African-Americans); *U.S. v. City of Hayward*, 36 F.3rd 832 (9th Cir. 1994), *cert. den.* 116 S.Ct. 65 (1995)(striking down city rent control ordinance requirement of lower rents upon landlord's admission of children); *Smith & Lee Assocs. Inc. v. Taylor*, 13 F.3rd 920, 930 (6th Cir. 1993); *Oxford House, Inc. v. Cherry Hill*, 799 F.Supp. 450 (D.N.J. 1992); *United States v. City of Black Jack*, 508 F.2d 1179, 1188 (8th Cir. 1974) *cert denied*, 422 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed. 2d 694 (1975); *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43 (6th Cir. 1992); *United States v. Village of Marshall, Wis.*, 787 F.Supp. 872, 878 (W.D. Wis. 1991); *Potomac Group Home v. Montgomery County, MD*, 823 F.Supp. 1285 (D.Md. 1993)(striking down ordinance that required public notice and hearing for group homes and excluded "exceptional persons" who cannot exit without assistance).

**27.** Section 3615 expressly invalidates "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under [the FHA]." 42 U.S.C. § 3615. Since the ordinances threatened violators with civil and criminal consequences, they also violate 42 U.S.C. § 3617 outlawing coercion and threats:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

42 U.S.C. § 3617. This section applies to zoning ordinances. *E.g.*, *U.S. v. City of Hayward*, 36 F.3rd 832 (9th Cir. 1994); *Stewart B. McKinney Foundation v. Town Plan and Zoning Com'n.* 790 F.Supp. 1197, 1221 (D. Conn. 1992) (zoning requirement of neighborhood notification found to constitute handicap discrimination).

**28.** *Potomac Group Home Corp. v. Montgomery County, Maryland*, 823 F.Supp. 1285, 1294 (D.Md. 1993) ("Recognizing the purpose and breadth of provisions of the [FHA], courts have consistently invalidated a wide range of municipal licensing, zoning and other regulatory practices affecting persons with disabilities.")(striking down a zoning requirement that a group home notify its neighbors and that excludes non-ambulatory residents)(cites omitted.)

**29.** Section 504 applies to "any program or activity receiving Federal financial assistance". §§ 29 U.S.C. § 794(a). "Program or activity" is defined to include cities like Bellevue. §§29 U.S.C. § 794.

Courts have applied Section 504 to strike down zoning code provisions found to discriminate on the basis of handicap. *E.g Sullivan v. City of Pittsburgh, Pa.*, 811 F.2d 171 (3rd Cir. 1987) *cert den.* 484 U.S. 849 (1987)(affirming preliminary injunction granted against city refusal to grant zoning permits for alcoholic treatment centers.) The 9th Circuit emphasized the scope of Section 504 in *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988) by noting that it applies to "any program or activity receiving financial assistance.")(emphasis original). In that case, the court applied Section 504 to prison administration.

**30.** "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, **programs, or activities of a public entity, or be subjected to discrimination by any such entity.**" §42 U.S.C. § 12132 (emphasis added). The implementing regulations apply to "all services, programs, and activities provided or made available by public entities." §§28 C.F.R. § 35.102(a). The preamble to the implementing regulations stated expressly that Title II of the ADA "applies to anything a public entity does. [It] is not limited to "Executive agencies, but includes activities of the legislative and judicial branches of State and local governments." 28 C.F.R. Part 35 - Appendix A, page 449 (July 26, 1991). *E.g.*, *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3rd 37 (2d. Cir. 1997); *Oak Ridge Care Center, Inc. v. Racine County*,

*Wisconsin*, 896 F.Supp. 867, 872 (E.D.Wis. 1995)(court refused to dismiss ADA claims arising from county's denial of a zoning permit to a residence for drug and alcohol addicts). *But see United States v. City of Charlotte*, 904 F.Supp. 482, 484 (W.D.N.C. 1995)(zoning practices are not a "program or activity" under the ADA.)

**31.** *City of Edmonds v. Washington State Bldg. Code Council*, U.S. , 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995)(Oxford House for recovering drug addicts); *The Children's Alliance et al v. City of Bellevue*, 950 F.Supp. 1491 (W.D. Wash. 1997)(court struck down a city ordinance that discriminated against children in group homes); *Potomac Group Home v. Montgomery County, MD*, 823 F.Supp. 1285 (D.Md. 1993)( group home for disabled persons); *United States v. Hughes Memorial Home*, 396 F.Supp. 544, 548-549 (W.D. Va. 1975)(FHA's prohibition on race discrimination applied to a children's group home). *See Also*, ADA: *Oak Ridge Care Center, Inc. v. Racine County, Wisconsin*, 896 F.Supp. 867 (E.D.Wis. 1995); Section 504: *Sullivan v. City of Pittsburgh, Pa.*, 811 F.2d 171 (3rd Cir. 1987); *Samaritan Inns v. District of Columbia*, 114 F.3rd 1227 (D.C. Cir. 1997)(damage award against City and its officials for their interference with the siting of a group home for persons recovering from drug or alcohol addiction.)

**32.** *The Children's Alliance et al v. City of Bellevue*, 950 F.Supp. 1491 (W.D. Wash. 1997).

**33.** *Support Ministries v. Village of Waterford*, 808 F.Supp. 121 (N.D.N.Y. 1992)(voiding an occupancy maximum of 6 unrelated persons); *Oxford House-Evergreen v. City of Plainfield*, 769 F.Supp. 1329 (D.N.J. 1991)(same); *Oxford House, Inc. v. Town of Babylon*, 819 F.Supp. 1179 (E.D.N.Y. 1993)(same); *The Children's Alliance et al v. City of Bellevue*, 950 F.Supp. 1491 (W.D. Wash. 1997).

**34.** *E.g., Bryant Woods Inc, Inc. v. Howard County*, 124 F.3rd 597 (4th Cir. 1997)(requested increase of occupancy of a group home from 8 to 15 was not a reasonable accommodation that the county was required to grant.); *Elderhaven, Inc. v. City of Lubbock*, 98 F.3rd 175 (5th Cir. 1996)(city, which granted a waiver of its occupancy maximum to allow 10 residents, was not required to allow 12); *Smith & Lee Associates, Inc. v. City of Taylor*, 102 F.3d 781 (6th Cir. 1996)(court ordered requested increase of occupancy maximum from 6 to 9 persons.)

**35.** "Here, defendant's suggestion that making the process of applying for a [Certificate of Occupancy] more onerous for plaintiffs than it is for the majority of applicants, somehow constitutes 'reasonable accommodation', stands the concept on its head. It is analogous to arguing that a rule requiring only handicapped people to pay a special fee before entering a building constitutes a reasonable accommodation."

*Oxford House, Inc. v. Cherry Hill*, 799 F.Supp. 450, 462, n. 25 (D.N.J. 1992). "Courts have consistently held that discriminatory procedural requirements are themselves violative of the FHAA." *Potomac Group Homes Corp. v. Montgomery County, Md.*, 823 F.Supp. 1285, 1297 (D. Md. 1993). *See also Stewart B. McKinney v. Town Plan and Zoning Com'n*, 790 F.Supp. 1197, 1218 - 20 (D.Conn. 1992) (special permit requirement for group home was itself discriminatory); *The Children's Alliance et al v. City of Bellevue*, 950 F.Supp. 1491, 1500 (W.D. Wash. 1997).

**36.** The intent of which the court speaks is the legal concept of intent, to be distinguished from motive. [citations omitted] To prevail on its claim of discriminatory treatment, therefore, the plaintiff is not required to show the defendants were motivated by some purposeful, malicious desire to discriminate against HIV-infected persons. Nor must it prove the defendants were motivated solely, primarily, or even predominantly by the HIV-infected status of the Foundation's future tenants.

*Stewart B. McKinney v. Town Plan and Zoning Com'n*, 790 F.Supp. 1197, 1211 (D.Conn 1992). The court in *City of Edmonds v. Washington State Bldg. Code Council* considered the City's alleged violations of the FHA noting that "[t]here are no allegations that Edmonds acted out of any animus against the occupants of Oxford House because of their handicap." 18 F.3rd 802, 803 (9th Cir.), *affirmed sub. nom* *City of Edmonds v. Oxford House, Inc.*, U.S. , 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995). *See also, Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1530-31 (7th Cir. 1990)(treating potential customers differently because of their race is unlawful even if the defendant does so for non-racist reasons.); *Potomac Group Home Corp. v. Montgomery County, Maryland*, 823 F.Supp. 1285, 1295 (D.Md. 1993)("To prove discriminatory intent, a plaintiff need only show that the handicap of the potential residents [of a group home] . . . was in some part the basis for the policy being challenged."); *Alliance for the Mentally Ill v. City of Naperville*, 923 F.Supp. 1057, 1069 (N.D. Ill. 1996)(facial discrimination against handicapped persons resulting from codes designed to protect them from hazards).

**37.** *E.g., Williams v. Mathews Company*, 499 F.2d 819, 827, (8th Cir.) *cert denied* 419 US 1021 (1974) (subjective good intentions do not overcome intentional discrimination.); *Potomac Group Homes. Corp. v. Montgomery County, Maryland*, 823 F.Supp. 1285, 1295 (D.Md. 1993) ("An ostensibly benign justification for a challenged rule or regulation is irrelevant under a disparate

treatment analysis. Thus, a plaintiff need not prove that a defendant was motivated by malice or prejudice in order to prevail on a claim of intentional discrimination."(Citations omitted.) The Supreme Court has made the same point in employment discrimination cases when it struck down an employer's exclusion of women of child bearing age from jobs that posed possible fetal risk to lead:

[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether [a] a practice involves disparate treatment through explicit facial discrimination does not depend on why [defendant] discriminates but rather on the explicit terms of the discrimination.

*Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

**38.** The courts recognize that mixed motives or intentions are common, especially with legislative decisions. They nevertheless hold them responsible for discriminatory intent. *United States v. City of Parma, Ohio*, 494 F.Supp. 1049, 1054 (N.D. Ohio 1980), *aff. as modified*, 661 F.2d 562 (6th Cir.) *cert. denied* 456 US 926 (city's political decision "inevitably involve the consideration and balancing of numerous competing interests."). The FHA prohibits actions taken "because of a handicap." 42 U.S.C. § 3604(f)(1). It is enough if "handicap" was one of several reasons. *E.g., Support Ministries v. Village of Waterford*, 808 F.Supp. 120, 134, n. 5 (N.D.N.Y. 1992)("The plaintiff's evidence of discriminatory intent, however, must demonstrate only that the HIV-infected status of the plaintiff's future [residents] was one factor, not the sole factor . . .", quoting from *Stewart B. McKinney Found., Inc. v. Town Plan & Zoning Com'n*, 790 F.Supp. at 1210-1211(D.Conn. 1992).