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A GUIDE TO CONSIDERING AND EVALUATING REGULATORY PROGRAMS FOR GROUP HOMES

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INTRODUCTION

This article outlines the legal background and major policy issues that must be considered in order to begin creation of a defensible ordinance or resolution to guide development review and approval of "group homes." From a zoning and development approval standpoint, the regulation of group homes presents a difficult subject matter for several reasons.

A common attitude of the public is to generally support the integration of homes for the handicapped, elderly, and other similar persons into residential communities. However, once a particular group home is proposed to be located within a certain neighborhood, this attitude of the public may sometimes change. There are often poorly articulated fears expressed during the development review process that a group home will result in a degradation of the residential neighborhood, pose a risk of harm to neighbors, and reduce property values. In some instances, the group home will provide residential accommodations for recovering drug addicts or another classification of federally-protected persons perceived by surrounding landowners as a significant detriment to the neighborhood. Another common complaint raised by citizens is that a proliferation in the number of group homes within a neighborhood can change the quiet residential character of the neighborhood into a more institutional or commercial character.

The law governing group homes is somewhat complex and, at times, conflicting. For example, some federal courts have held that laws imposing minimum spacing requirements between certain types of group homes violates federal law, but the Colorado statutes for group homes expressly permits such spacing. In addition, Colorado statutory provisions predate federal requirements and are poorly “fitted” with federal provisions thereby causing more confusion. Lastly, federal and state law protects certain types of group homes from discrimination or dissimilar treatment during the development review process and effectively restricts the ability of local governments to address the public’s concerns related to the location and operation of group homes.

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GENERAL LEGAL BACKGROUND

There are two major levels of laws governing Colorado group homes: federal law (both statutory and case law) and Colorado state law (largely statutory). These laws effectively reduce the local government's ability to regulate certain types of group homes.

1. Federal Laws

- The federal Fair Housing Act, a part of the Civil Rights Act of 1968, was originally enacted to prohibit discrimination on the basis of race, color, religion, or national origin. In 1974, the Act was amended to add protection on the basis of gender and, in 1988, the Act was further amended to prohibit discrimination on the basis of "handicap" or "familial" status (families with children).

- "Handicap" is defined broadly by 42 U.S.C. § 3602(h) as:

  (A) a physical or mental impairment which substantially limits one or more of such person's major life activities;

  (B) a record of having such an impairment; or

  (C) being regarded as having such an impairment.

  Persons who qualify as handicapped range from physical disabilities, mentally disabled and mentally ill persons, recovering alcoholics and drug addicts (non-users), many elderly persons with physical or mental impairments, and persons infected with Human Immuno-deficiency Virus (HIV) and other life limiting medical impairments. See, e.g., United States v. Southern Management Corp., 955 F.2d 914 (4th Cir.1992).

- "Discrimination" includes a local government's failure to make "reasonable accommodations" in rules, policies, practices, or services necessary to afford a handicapped person equal opportunity to the use and enjoyment of a residential dwelling. Such a failure can arise from a government's neglect in removing barriers to housing for handicapped persons that are contained in the government's zoning ordinance. Importantly, the federal law's provision concerning the making of "reasonable accommodation" may provide the local government an ability to alter its application of discriminatory ordinances once confronted with a development application for a group home or when the local government is called upon to enforce a policy or regulation which would be discriminatory in effect against the group home. Much of the relevant case law illustrates that the failure of the local government to make a reasonable accommodation during the enforcement of its policies or regulations resulted in legal action by the group home.

- Unlawful discrimination can be proven through a showing of "intentional discrimination" or by demonstrating that a regulation or policy has a "discriminatory effect." Intentional discrimination need only involve a showing that one of the reasons for the action by the government was based on the handicap character of a protected class of individuals. For example, a regulation that is enacted, in part, to limit the number of handicapped persons in the community may evidence intentional discrimination. Moreover, if an action is taken by a governing body to appease the viewpoint of persons opposed to the

residence of handicapped persons within a neighborhood, the governing body's decision may be "tainted" by the discriminatory intent of the group home's opponents. See, e.g., Horizon House Dev. Services, Inc. v. Village of Waterford, 808 F. Supp. 120 (N.D.N.Y. 1992) (prejudice of public influenced decision makers); United States v. Borough of Audubon, 797 F. Supp. 353 (D.N.J. 1991) (city council's denial grounded in discriminatory opposition on the community).

- To prove a discriminatory effect, a showing that a rule, regulation, or policy has the mere effect of discriminating against handicapped persons will be sufficient to prove unlawful discrimination. The fact that the government had no actual intent to discriminate is irrelevant.

- Where discrimination by a local government exists, there are several potential avenues for an aggrieved party to pursue. The Department of Housing and Urban Development (HUD) can request that the state attorney general prosecute a complaint in civil court which can result in an injunction against the municipality, a fine of $50,000 for a first offense ($100,000 for subsequent violations), and attorneys' fees and costs. The federal Attorney General can file a federal civil claim with similar penalties against the local government. In addition, a private enforcement action can be brought by the aggrieved party which could include a 42 U.S.C. § 1983 civil rights claim potentially resulting in significant monetary penalties.

- Certain types of governmental actions have been found by various courts to constitute “discrimination” within the meaning of the Fair Housing Amendments Act. The more important actions addressed by the courts include:

  (1) Spacing Requirements. Some communities require group homes to be spaced a certain distance from one another. Although some judicial decisions have approved spacing limitations for federally-protected group homes, some recent federal courts have found spacing requirements to be a discriminatory practice and violative of the Fair Housing Amendments Act because similar requirements are not imposed on other residential uses and users. See, e.g., Familystyle of St. Paul v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991)(supporting spacing requirement as advancing integration into communities); but see Horizon House Dev. Services Inc. v. Township of Upper Southampton, 804 F. Supp. 683 (E.D. Pa. 1992), aff'd, 995 F.2d 217 (3d Cir. 1993) (finding spacing requirement facially invalid as discriminatory); Association for Advancement of Mentally Handicapped v. Elizabeth N.J., 876 F. Supp. 614 (D.N.J. 1994) (spacing facially invalid).

  (2) Limitations on Numbers of Unrelated Residents. Some communities limit the number of persons that may reside in a group home. These limitations usually indirectly arise from the definition of "family" or "household" contained in local ordinances. For example, a local ordinance may define “family” as any number of related persons or not more than four unrelated persons. Because residential zoning ordinances typically limit a residential dwelling unit to occupancy by one “family,” a residential group home would be limited to housing four unrelated persons. Where the unrelated residents are federally-protected handicapped persons, there is a real concern that such limitations would unlawfully discriminate against handicapped persons and violate the Fair Housing Amendments Act. This potential violation stems from the fact that the community does not usually limit the number of *related* persons who may occupy a

residential dwelling unit and the limitation on handicapped persons is therefore discriminatory. See, e.g., City of Edmonds v. Oxford House, Inc., 131 L. Ed. 2d 801 (U.S. Supreme Court 1995).

(3) Special or Conditional Use Review. Some communities require group homes to undergo special or conditional use review as a condition to obtaining approval to locate within a residential zone district. Some (but not all) courts have concluded that this practice is discriminatory and violates the Fair Housing Amendments Act because the local government does not require other types of single family residential users to undergo special or conditional use review. See, e.g., Cherry Hills Township v. Oxford House, 621 A.2d 952 (N.J. Sup. Ct. 1993) (variance procedure unlawful under FHAA); United States v. Schuylkill Township, 1990 WL 180980 (E.D. Pa. 1990). At least one federal court found that a neighborhood notice and special or conditional use review requirement constituted a violation of the Fair Housing Amendments Act because such meetings are not required for other residential uses and they tend to polarize neighborhoods against federally-protected persons and their group homes. See Potomac Group Corp. v. Montgomery County, 823 F. Supp. 1285 (D. Md. 1993)(notice and meeting requirement served "no legitimate governmental interest" and notice actually caused "great harm by galvanizing neighborhood opposition" to the group home and its residents).[2]

The federal Fair Housing Amendments Act does not preclude all regulation of group homes. A local government may impose restrictions on the number of persons residing in a group home where the restriction is the result of a uniform attempt to limit the number of residents to prevent overcrowding. See 42 U.S.C. § 3607(b)(1). This type of regulation would customarily require limitations applicable to all residential units regardless of the make-up of the residents and might be accomplished through a regulation which limits occupancy numbers based on the total floor area of a residential structure.

2. Colorado Statutory Law

- Colorado statutes governing municipalities (C.R.S. § 31-23-303) and counties (C.R.S. § 30-28-115) recognize the location of certain types of group homes are a matter of statewide concern, thereby limiting the ability of municipalities and counties to regulate these state-protected group homes. The state statutes establish that the following types of group homes which contain eight (8) or fewer persons must be recognized as a residential land use for local zoning purposes and cannot be excluded from residential zone districts including single family districts:

  (1) State-licensed group homes for developmentally disabled persons together with appropriate staff persons. "Developmentally disabled" means persons having "cerebral palsy, multiple sclerosis, mental retardation, autism, and epilepsy."

[2] In addition, the U.S. Supreme Court in City of Cleburne v. Cleburne Living Center, 472 U.S. 432 (1985) concluded that a special use review process for group homes for the mentally ill was invalid under the equal protection clause of the United States Constitution because there was no rational basis for believing that such a home would pose any threat to a legitimate governmental interest. The government simply had no reasonable basis upon which to regulate such homes (other than unsubstantiated fears and perceptions).

(2) A state-licensed group home for mentally ill persons as defined by C.R.S. § 27-10-102. Such persons must be pre-screened be a mental health professional and such persons cannot have been previously convicted of a felony involving a violent crime, or have found guilty by reason of insanity.

(3) An owner-occupied or nonprofit group home for the exclusive use of not more than eight (8) persons who are sixty (60) years of age and older.

- Group homes for not more than eight developmentally disabled, mentally ill, an elderly persons (all as defined by the state statute) cannot be excluded from single family or any other residential zone district. However, the state statutes do permit other forms of regulations by the local government designed to address compatibility of the group homes with the residential character of neighborhoods. See, e.g., Adams County Assoc. for Retarded Citizens v. City of Westminster, 580 P.2d 1246 (Colo. 1978)(decided under state law and not FHAA).

- State law also expressly *requires* the spacing of elderly group homes and mentally ill group homes at a distance of 750 feet form another group home of the same type unless the municipality or county establishes a different spacing requirement. Group homes for developmentally disabled are not required to be spaced or separated by the state law. The stated and evident intent of this statute is to assist group homes for the elderly and the disabled in finding locations in residential communities and to increase the opportunities for integration of these homes in residential communities. See Double D Manor v. Evergreen Meadows, 773 P.2d 1046 (Colo. 1989). Because the explicit intent of the statutory program is to encourage the establishment of group homes within residential communities, the proper interpretation of this spacing requirement is to permit local governments to place such homes *closer* to each other than 750 feet. It is not the intent of the statute to permit local governments to set larger spacing restrictions upon group homes.[3] Although state law permits spacing of group homes, this spacing requirement may potentially conflict with the federal court decisions cited above which hold that spacing requirements are discriminatory and violates the Fair Housing Amendments Act.

Basic Interplay Between State and Federal Law

Virtually all persons living within a state-defined group home (developmentally disabled, mentally ill, and most elderly persons) will fall within the federal definition of "handicapped person." Such persons possess a physical or mental impairment that "substantially limits one or more of such person's major life activities." As a result, the state laws governing group homes may be preempted or at least somewhat superfluous where the state laws conflict or violate the federal act. See 42 U.S.C. § 3615; Bangerter v. Orem City Corporation, 46 F.3d 1491 (10th Cir. 1995).

[3] A number of Colorado communities maintain spacing requirements exceeding 750 feet. It is difficult to identify a uniform or standard reason for such spacing requirements. In some cases, the local spacing requirement may have predated the statutory provision; in other cases, the community may be relying upon constitutional home rule powers and/or a greater political willingness to defend such spacing requirements.

Components of Common Group Home Regulations

Most local government regulatory programs attempt to address three elements of residential group homes: (1) limitations on total number of group home residents; (2) conditional or special use review for the siting or approval of group homes; and (3) spacing between one or more group homes. These elements of regulatory programs comprise the most commonly litigated issues when local governments deny or reject the establishment of a new group home in the community.

In devising a regulatory program for group homes, the local government should consider the following broad policy issues and basis for regulations:

A. Whether a Limitation Should be Imposed on the Total Number of Group Home Residents

Considerations include:

1. State law requires that local governments provide housing opportunities in residential zone districts for group homes of not more than eight (8) developmentally disabled, elderly, and mentally ill persons.

2. A limitation upon the total number of persons that may reside in a group home may be found to be a discriminatory practice when the persons seeking to live in a group home are federally-protected handicapped persons. This discrimination arises from the fact that related and non-related persons are not equally limited in the total number that may reside in a residential structure.

3. Local governments may impose uniform regulations limiting the number of persons on a per square foot, per bedroom, or other objective standard or basis provided that the standard is applied to all residential uses regardless of the relationship of the residents. However, this type of regulation is difficult to administer and to enforce. Most local governments are unwilling to apply limitations against traditional families of related persons.

4. Although limitations in the number of federally-protected persons may risk violating the federal law, there is simply some point at which a group home is of a sufficient size to present a significant impact on the neighborhood. Based on the case law to date, group homes with greater than 15 persons are not commonplace. When a single family home is occupied by 15 or more persons, there is a reasonable argument that the home requires special use review and mitigation measures to protect the character of the neighborhood. The local government should understand that the purpose for the review is not to exclude federally-protected homes, but to determine the need to make, and to permit the government to make, reasonable accommodations for these protected homes.

5. If a limitation on the number of residents of a group home is desired, the local government should assess the degree of risk acceptable to the government concerning legal challenges. If a federally protected group home seeks to locate within the community and the regulatory program would create a claim of

discrimination, the government should be prepared to defend the claim or provide a reasonable accommodation to the group home.

6. Group homes for persons not protected by federal or state law may be regulated. Such regulations need only have a reasonable or rational basis. These group homes may include homes for violent offenders, half-way houses, homeless shelters, etc.

B. Whether a Special or Conditional Use Permit Should be Required

Considerations include:

1. Some federal courts have found conditional or special use review and other permitting procedures to be discriminatory under the Fair Housing Amendments Act.

2. Special or conditional use review and the public hearing process oftentimes provides a fertile ground for ad hoc, discretionary decisions that are influenced by the unsubstantiated fears and perceptions of neighboring residents. It is sometimes difficult to educate the public concerning the federal and state law protections afforded handicapped and other persons in finding residential accommodations, especially where the federally-protected persons are recovering drug users and recovering alcoholics. Political pressure may give rise to a discriminatory decision.

3. Special use review can be undertaken in an administrative fashion without a public hearing or meeting where sufficiently detailed regulations are available to guide the administrative decision.

4. A registration program can likely be instituted which is merely designed to obtain information from the group home to determine that the home qualifies as a handicapped group home protected by the Fair Housing Amendments Act. The form for such registration would be simple and the required information could include: (1) the name and address of the home, (2) name of operator and contact persons, (3) maximum number of persons to be housed, (4) description of disabilities or handicaps of the residents, (5) number of resident staff and hours staffed, (6) physical changes to the premises necessary to serve the residents, etc. This registration system would permit the local government to assist the group home in obtaining any necessary variances or to address, in an administrative forum, any concerns for impacts on the neighborhood.

5. A permitting system can provide for reasonable restrictions designed not to exclude group homes for handicapped persons but to ensure their safety and enjoyment of the residential neighborhood. See, e.g., Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995). Examples might include: (1) appropriate staff where the residents are immobile or otherwise require day-to-day assistance; (2) smoke detectors and other safety systems designed to protect the residents especially where the residents will need assistance in exiting the building. Many of these types of protections are afforded as part of the state program for licensed mentally and developmentally disabled homes.

6. A permitting system can provide for architectural design guidelines imposed to screen or buffer certain features which are often attached to some group homes such as handicap ramps or enlarged entry doors. If applied to all residential structures, these types of restrictions would likely be enforceable. If applied only to group homes of FHAA protected persons, these types of restrictions would be subject to a request for "reasonable accommodation" by the group home operators and cited as discriminatory against group homes.

B. Whether Spacing Requirements Should be Imposed.

Considerations include:

1. State statute permits spacing requirements of 750 feet for a state licensed group home for developmentally disabled, mentally ill, and elderly persons. However, these persons may likely qualify as "handicapped" under the Fair Housing Amendment Act. If so, then the body of federal case law striking down spacing requirements as discriminatory may provide these group homes protection from spacing requirements.

2. If the local government desires to maintain a spacing requirement, the spacing requirement should either be brought into conformance with the spacing requirements of the state statute (750 feet) or reduced to less than 750 feet. Maintaining a spacing requirement that mimics of conforms with the state statute may aid in defending the local government from a potential claim that spacing requirements are discriminatory (as found by several federal trial courts). If the local regulation mimics the requirements of the state statute, the burden of the defense of a claim of discrimination could also fall upon the state of Colorado.