

A Legal Guide

to the

Siting of Community-Based Social Service

Programs and Special Needs Schools

Association of Developmental Disabilities Providers
Massachusetts Association of 766 Approved Private Schools
Massachusetts Council of Human Service Providers, Inc.
Mental Health and Substance Abuse Corporations of Massachusetts

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Introduction

The Commonwealth of Massachusetts has a notable history of providing and supporting services and housing for persons with developmental disabilities, mental illness, alcohol and drug addiction, and other special needs, including children who have been the victims of abuse and neglect. It has done so not only by building and funding a comprehensive network of public and private services, but by enacting laws to ensure the elimination of discrimination against such individuals.

These laws make it unlawful to discriminate against a handicapped person¹ in such matters as employment and housing (General Law Chapter 151B), as well as prohibiting cities and towns from discriminating against “disabled persons” through local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions (General Law Chapter 40A, §3, ¶8).

In addition to such protections in state law, Congress has enacted a series of federal laws that provide “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”² Section 504 of the Rehabilitation Act of 1973, the Federal Fair Housing Amendments Act of 1988 and the Americans With Disabilities Act of 1990, as well as the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution all prohibit unlawful discrimination against persons with a disability.

¹ A handicap is defined as “(a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment.” See General Law Chapter 151B, §1, ¶17.

² 42 U.S.C. §12101(b)(1).

The Association of Developmental Disabilities Providers, the Massachusetts Association of 766 Approved Private Schools, the Massachusetts Council of Human Service Providers, Inc., and the Mental Health and Substance Abuse Corporations of Massachusetts have joined together to publish this legal guide to the siting of community-based social services programs and special needs schools. The primary purpose of this guide is to give providers of such programs and schools a comprehensive overview of both the state and federal law relative to the siting of their facilities.

This guide is also intended to serve as a resource to the families of individuals with developmental disabilities, mental illness, alcohol and drug addiction or other special needs that require such services within their own communities. Finally, it is hoped that municipal officials and interested citizens will find this guide helpful.

Summary

The legal protections afforded to community-based social services programs and special needs schools are derived from a combination of both state and federal cases and statutes.

The most important state law in this regard is the so-called Dover Amendment to the Zoning Act (G.L. c. 40A, §3, ¶2). That act makes it illegal for cities and towns in Massachusetts to adopt any zoning ordinance or by-law that prohibits, regulates or restricts the use of land or structures for educational uses on land owned or leased by a nonprofit educational corporation. However, such land or structures may be subject to reasonable dimensional regulations.

Not only does the Dover Amendment effectively exempt traditional educational uses from local zoning, it also encompasses a broad range of activities that are directed to furthering the mental, moral or physical powers and faculties of individuals. Therefore, programs and services that provide support, training and skill building for persons with developmental disabilities, mental illness or alcohol and drug addiction have all been found to be educational in nature.

Note that the Dover Amendment is not, per se, a civil rights act. Rather, it seeks to advance the commonwealth's interest in fostering a broad range of educational opportunities for its citizens by carving out from the home rule authority of municipalities, the ability to restrict or prohibit such uses in its local zoning. Nevertheless, the effect of the Dover Amendment is often to ensure access to rehabilitative and therapeutic services for persons with disabilities.

Section 504 of the Rehabilitation Act of 1973, the Fair Housing Amendments Act of 1988, and the Americans With Disabilities Act of 1990 all seek to eliminate discrimination against individuals with disabilities. These federal laws prohibit cities and towns from discriminating against persons with disabilities through their land-use and zoning decisions and regulations.

Unlike the Dover Amendment which looks to the educational use or purpose of land or structures when considering the validity of local zoning, these federal acts analyze land-use and zoning decisions and regulations to determine whether or not they discriminate against persons with disabilities in their intent, their effect, or their failure to make a “reasonable accommodation” for the needs of such persons by modifying those decisions or regulations.

When confronted by a municipal zoning ordinance or by-law that will impact the siting of a social services program or special needs school, a provider should consider the following:

- Whether the program only provides housing for persons with disabilities. If so, both the Fair Housing Amendments Act and the Americans With Disabilities Act will apply.
- Whether the service, program or activity being provided is educational and serves persons with disabilities. If so, then both the Dover Amendment and the Americans With Disabilities Act will apply.
- Whether the program provides both housing and supportive or rehabilitative services for persons with disabilities. If so, the Dover Amendment, the Fair

Housing Amendments Act and the Americans With Disabilities Act will all provide legal protection.

- Whether the city or town is a recipient of any federal financial assistance. If so, then Section 504 of the Rehabilitation Act of 1973 will be applicable, in addition to any of the other previously cited state or federal laws.

Review of the Law

This section will provide a review of the state and federal laws, as well as relevant court decisions, applicable to the siting of community-based social service programs and special needs schools.

Massachusetts Law

I. Discrimination Against Religious and Educational Uses; the “Dover Amendment” (General Law Chapter 40A, §3, ¶2)

A. History and Language

The so-called “Dover Amendment” to the Massachusetts Zoning Act is one of the most widely recognized and important legal protections afforded nonprofit educational programs under state law.³ It prohibits the adoption of local zoning ordinances and by-laws that discriminate against nonprofit programs that offer training and counseling to persons with disabilities, as well as nonprofit schools for special needs students.

What is the Dover Amendment and what is its origin?

In 1933, the Town of Dover adopted a zoning by-law that prohibited the building or use of any building or premises in a residential district for any purpose except for a detached one-family dwelling, church or education use. Dover amended this portion of its by-law in 1946, to limit “educational use” to only those that were *non-sectarian and not for profit*.

³ The Dover Amendment is inapplicable to the cities of Boston and Cambridge. The authority to regulate zoning in Boston is derived from the Boston Enabling Act (Statute 1956, c. 665) and not the Zoning Act (G.L. C. 40A). Special legislation allows Cambridge to regulate and restrict the use of land or structures for religious or educational purposes within all residentially zoned districts which require a lot area of 1,200 square feet or more per dwelling unit (Statute 1979,c. 565).

In response to the town's action, the Legislature amended the Zoning Enabling Act⁴ to make it illegal for cities and towns to adopt any local zoning ordinance or by-law that "prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational education purpose." (Emphasis added). Subsequently, the Attorney General sued the Town of Dover on the basis that its by-law prohibiting sectarian educational uses was in violation of the Zoning Enabling Act.

The Supreme Judicial Court in *Attorney General v. Dover*, 327 Mass. 601 (1951) concluded that the amendment to the state Zoning Enabling Act could be applied retroactively to Dover. The court invalidated the Dover by-law, ruling that the Legislature intended as "an expression of a general policy to take away from all municipalities all power to limit the use of land for church or other religious purposes or for religious, sectarian, or denominational educational purposes." This zoning protection for religious and educational uses became popularly known as the "Dover Amendment".

Since its original enactment in 1950, the Dover Amendment has been amended and revised by the Legislature. In 1956, the educational use provision was broadened to include "public" educational uses.⁵ With the passage of the Zoning Act in 1975,⁶ the Dover Amendment took its current form:

No zoning ordinance or by-law shall ... prohibit, regulate or restrict the use of land or structures for ... educational purposes on land owned or leased ... by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirement. G.L. c. 40A, § 3, ¶ 2

⁴ Statute 1950, c. 325, §1, An Act Prohibiting Discriminatory Zoning By-laws And Ordinances, adding G.L. c. 40, §25.

⁵ Statute 1956, c. 586

⁶ Statute 1975, c. 808, § 3

The former requirement that the educational use be “public, religious, sectarian, or denominational” was replaced with “nonprofit educational corporation”. More importantly, since 1975, cities and towns may regulate certain dimensional and site aspects of educational buildings and structures.

B. What Is an Educational Use or Purpose?

Although the Legislature did not define the term “educational purpose” in the Zoning Act, a substantial body of case law interpreting that term has developed since the enactment of the original Dover Amendment in 1950. The facts of these cases provide important guidance for providers and municipal officials. Where the cases are not directly on point, a broad definition of “educational purposes” is likely to be the most legally appropriate. Indeed, since 1887, the Supreme Judicial Court has accepted an expansive definition of education:

Education is a broad and comprehensive term. It has been defined as “the process of developing and training the powers and capabilities of human beings.” To educate, according to one of Webster’s definitions, is “to prepare and fit for any calling or business, or for activity and usefulness in life.” Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense, it relates to them all. (Emphasis added) *Mount Hermon Boys’ School v. Gill*, 145 Mass. 139 (1887).

Ninety years after the *Mount Hermon* decision, this definition of education was reaffirmed by the Massachusetts Appeals Court when it said:

The definition seems to us still serviceable despite the new jargon (e.g., “rehabilitation,” “therapeutic”) which has accompanied attempts to create new disciplines. The definition is echoed in Webster’s Third New International Dictionary 723 (1971) which give as one of the definitions of “education”: -- “the act or process of providing with knowledge, skill, competence, or [usually] desirable qualities of behavior or character or of being so provided [especially] by a formal course of study, instruction, or training.” *Harbor Schools, Inc. v. Board of Appeals of Haverhill*, 5 Mass. App. Ct. 600 (1977).

As stated above, Massachusetts courts have specifically and repeatedly ruled on what was or wasn't an educational use or purpose entitled to protection by the Dover Amendment. Examples of an educational use or purpose as found by the courts include:

- A facility for the care and education of emotionally disturbed children was clearly an educational use. *See Harbor Schools, Inc. v. Board of Appeals of Haverhill*, 5 Mass. App. Ct. 600 (1977)
- A community residence for former patients of a state hospital to be trained for independent living was deemed an educational use. The fact that the residents might be taking medication does not necessarily negate the primarily educational purpose of a facility or make its dominant purpose medical. The fact that the residents will be adults does not deprive a use of its educational character. *See Fitchburg Housing Authority v. Board of Appeals of Fitchburg*, 380 Mass. 869 (1980)
- In determining educational purpose, the mere fact that the nature of what is taught is not within traditional areas of academic instruction or that the instructors are not certified by the state is not controlling. *See Cummington School of Arts, Inc. v. Assessors of Cummington*, 373 Mass. 597 (1977)
- A residential care facility for adults with mental disabilities at which they will be taught daily living and vocational skills was an educational corporation. A nonprofit corporation need not have education as its dominant purpose or primary activity to qualify as a “nonprofit educational corporation” to be exempt from local zoning, where

educational activities are among the corporate purposes set forth in its article of organization. *See Gardner-Athol Area Mental Health Association, Inc. v. Zoning Board of Appeals of Gardner*, 401 Mass. 12 (1987)

- Property used as a group residence with supportive services of an educational nature for fifteen elderly, mentally ill individuals would come within the meaning of the term “educational purpose.” *See John Campbell v. City of Lynn*, 32 Mass. App. Ct. 152 (1992)
- The use of a renovated barn, which was an existing nonconforming accessory building, to provide shelter and education for three mentally handicapped individuals and their caretakers, was an educational use. No distinction is made by the Dover Amendment regarding its applicability to “principal” or “accessory” buildings, and it is clear that the over-all intent of the Legislature was to prevent local interference with the use of real property for educational purposes. *See Gary Watros v. Greater Lynn Mental Health and Retardation Association, Inc.*, 421 Mass. 106 (1995)
- Elderly housing developed on an educational institution’s campus with programmatic links to the college was part of an overall educational use. *See Lasell College v. City of Newton*, 1 Land Ct. Rptr. 80 (1993)
- Parking, feeding and housing of college personnel is an educational purpose. *See Radcliffe College v. City of Cambridge*, 350 Mass. 613 (1966)

- A radio station can be part of an educational use. *See Worcester County Christian Communications, Inc. v. Board of Appeals of Spenser*, 22 Mass. App. Ct. 83 (1986)
- Residential facility for interns in professional, business and other fields was part of the overall educational use. *See Commissioner of Code Inspection of Worcester v. Worcester Dynamy, Inc.*, 11 Mass. App. Ct. 97 (1980)
- The installation of lights and snack bar at a sports field on a school campus constitutes educational uses directly related to the functioning of the educational institution. *See The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19 (1979)

Some examples of cases in which the courts did not find an educational purpose entitled to protection under the Dover Amendment include:

- A nursing home facility that offered, according to the court, a mere element of education provided neither by a formal program or trained professionals, was not operated for educational purposes. *See Whitinsville Retirement Society, Inc. v. Town of Northbridge*, 394 Mass. 757 (1985)
- A private for-profit dance school is not an educational use entitled to protection by the Dover Amendment. *See Kurz v. Board of Appeals of North Reading*, 341 Mass. 110 (1960)

C. What “Reasonable Regulations” May Be Imposed on Educational Uses?

Once it is determined that a program or facility qualifies as an educational use, there are limits on the type of regulations a city or town may impose on such use without

violating the Dover Amendment. The Supreme Judicial Court first considered this issue in *Sisters of the Holy Cross of Massachusetts v. Town of Brookline*, 347 Mass. 486 (1964). In that case the court interpreted the original version of the Dover Amendment to find that a zoning by-law that sought to impose height restrictions applicable to single-family homes on a multipurpose college building was invalid.

We think it unlikely that the Legislature would exempt religious and educational institutions from local regulations of use and at the same time permit this exemption to be virtually nullified by a requirement that such institutions construct their buildings on dimensions applicable to single family houses. We think that this by-law, as applied to Holy Cross, “limits the use” of its land and, therefore, we think such application invalid under G.L. c. 40A, § 2.⁷

However, in a footnote to its decision, the court said that it was not confronted in this case with “the issue as to whether dimensional requirements ... which *do not affect the use of the land* would be valid if applied to a religious or educational institution.” The implication of the footnote was that there might be some instances where appropriate dimensional regulations would be valid under the Dover Amendment.

In *Radcliffe College v. City of Cambridge*, 350 Mass. 613 (1966), the Supreme Judicial Court did uphold a dimensional requirement, finding the city’s off-street parking requirement to be reasonable as applied to the construction of a new library. The court held that the parking requirement did not preclude the use of the land for educational purposes.

When the Legislature rewrote the Zoning Act in 1975, it revised the Dover Amendment to explicitly allow municipalities to impose “reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.” This was a

⁷ See *Sisters of the Holy Cross* at 492

significant development in the law that was intended to give cities and towns greater control over certain aspects of a religious or educational use.

The “new” Dover Amendment was extensively analyzed in *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19 (1979) in which a private sectarian school sought to convert one of its buildings from a gymnasium to two classrooms, and to change the use of two other buildings from classrooms and a chapel to small dormitories.

The Town of Lenox had adopted a zoning by-law that required a special permit for all new religious and education uses or changes in such uses. The by-law also required that a site plan be submitted with any application together with an information statement designed “to minimize the probable impact of such uses upon the town in general and upon the character of the specific neighborhood.” It also imposed specific regulations regarding bulk, dimensional and parking restrictions on all non-municipal educational uses and religious uses.

While upholding the dimensional regulations of the Lenox by-law, the Appeals Court found that the special permit regulations and the site plan review requirements went beyond the reasonable bulk and dimensional regulations permitted by the Dover Amendment. In discussing the site plan requirement the court said:

The requirement of a site plan and the type of development prospectus required by the informational statement would be perfectly appropriate for consideration of proposed subdivisions under the Subdivision Control Law or for the evaluation of cluster and planned unit developments under the zoning law. But there is nothing in the language of [the Dover Amendment] which contemplates the requirement of site plans and informational statements as monitoring devices for educational uses. (Citations omitted).

The fact that granting of the special permit was discretionary, and that the school was not entitled to it as a matter of right, was the reason it ran afoul of the Dover Amendment.

In our opinion, the provisions of the by-law taken together invest the board with a considerable measure of discretionary authority over an educational institution's use of its facilities and create a scheme of land use regulation for such institutions which is antithetical to the limitations on the municipal zoning power in this area ... The Legislature did not intend to impose special permit requirements, designed under G.L. c. 40A, § 9, to accommodate uses not permitted as of right in a particular zoning district, on legitimate educational uses which have been expressly authorized to exist as of right in any zone.⁸

The Appeals Court again addressed the issue of special permits in *John Campbell v. City Council of Lynn*, 32 Mass. App. Ct. 152 (1992). In this case, the Lynn City Council granted a special permit to allow a group residence in a business district. The Greater Lynn Senior Services, together with the Department of Mental Health, were to provide support and skill building services and activities of daily living such as money management, health education, cooking and hygiene to fifteen elderly, mentally ill individuals.

The plaintiffs sued the city council for issuing the special permit and argued that the property was subject to the zoning ordinance's dimensional requirements. The Appeals Court held that although the Dover Amendment allows cities and towns to subject religious and educational uses to "reasonable regulation" of bulk and height, yard sizes, lot area, parking, and other dimensional requirements, it does not compel them to do so. The court found no error in the fact that the city council *chose not to impose specific parking and dimensional restrictions on the site.*

A likely factor behind the city council's decision not to impose dimensional restrictions is that, while it is clear that a city or town may impose restrictions on

⁸ *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 33 (1979) (footnote omitted).

certain aspects of property being used for educational or religious purposes, it is equally clear that a municipality may not nullify the use exemption of § 3 by imposing impossible requirements on particular premises.⁹

Requiring an educational institution to seek a variance to obtain permission to complete its project was held to be in violation of the Dover Amendment in *Trustees of Tufts College v. City of Medford*, 415 Mass. 753 (1993). However, if a variance is granted at the request of an educational institution, and not challenged by an aggrieved party within the time period permitted by statute, the variance cannot thereafter be attacked as improper.

The court also concurred with the prior ruling of the Land Court that the site plan review and special permit requirements of Medford's zoning ordinance could not be applied to a library addition and multi-level parking garage Tufts sought to construct on its campus.

Most importantly, the Supreme Judicial Court in this case summarized the issue of the "reasonableness" of dimensional regulations and set forth the following approach for analyzing a legal challenge to them by an educational institution:

1. The question of reasonableness of a local zoning requirement, as applied to a proposed educational use, will depend on the particular facts of each case.
2. Because local zoning laws are intended to be uniformly applied, an educational institution [challenging such laws] will bear the burden of proving that the local requirements are unreasonable as applied to its proposed project.

⁹ *John Campbell v. City Council of Lynn*, 32 Mass. App. Ct. 156 (1992).

3. The educational institution might do so by demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution's campus, without appreciably advancing the municipality's legitimate concerns.
4. Excessive cost of compliance with a requirement imposed on an educational institution, without significant gain in terms of municipal concerns, might also qualify as unreasonable regulation of an educational use.

Finally, the Dover Amendment has been interpreted as not exempting a religious use (and presumably, an educational use also) from a local zoning by-law that regulated wetlands. In *The Southern New England Conference Association of Seventh-Day Adventists v. Town of Burlington*, 21 Mass. App. Ct. 701 ((1986), the Appeals Court reasoned that because all activities inimical to wetlands are prohibited under the wetlands by-law, the town could not exercise preferences as to what kinds of religious uses it would welcome.

II. Discrimination Against Disabled Persons (General Laws Chapter 40A, §3, ¶8)

In 1983, the Zoning Act (G.L. c. 40A, §3) was amended to establish a narrow statutory exemption from any dimensional lot requirements of local zoning for handicapped access ramps on private property.

No dimensional lot requirement of a zoning ordinance or by-law, including but not limited to, set back, front yard, side yard, rear yard and open space shall apply to handicapped access ramps on private property used solely for the purpose of facilitating ingress or egress of a physically handicapped person, as defined in section thirteen A of chapter twenty-two. (G.L. c. 40A, §3, ¶8)

Responding to the increasing awareness and support for the rights of the disabled, the Legislature later added a new provision to the Zoning Act to provide broad protections for disabled persons from discriminatory local practices, and to give specific protections to group homes. In contrast to the Dover Amendment, these protections were expressly made applicable to the cities of Boston and Cambridge.

While similar to the exemption from local zoning for religious and educational uses found in the Dover Amendment, this provision can be used on its own to challenge municipal actions that discriminate against the disabled.

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. (G.L. c. 40A, § 3, ¶ 4)

This provision of the Zoning Act was considered by the Massachusetts courts in *Granada House, Inc. v. City of Boston*, 6 Mass. L. Rep. 466 (1997). The facts of this case are well worth recounting, for they effectively illustrate the problem that is the impetus for this publication. The following is taken from the court's decision:

Granada House is a nonprofit corporation which, for at least fifteen years, has operated a supervised, six-month residential treatment program for men and women recovering from alcohol and drug addiction. It presently operates in an institutional setting in a leased facility on the grounds of the former Brighton Marine Hospital, now known as the Brighton Public Health Center. Ex-alcoholics and ex-drug addicts voluntarily apply to the program and must be sober for at least 30 days prior to being admitted into the program. The residents of Granada House's program participate in planned therapy sessions and group meetings, perform chores, share meals with one another and engage in other social activities in a home-like setting. The Massachusetts Department of Public Health has licensed Granada House to operate its program and has contracted with Granada House for its services.

Granada House later decided to relocate to a permanent home in a residential neighborhood. It sought a permit for a change of use of a two-family residence to a group home for twenty-two recovering substance abusers. The city denied the application for a changed use of the property and Granada House filed suit alleging the city had violated the Massachusetts Zoning Act, as well as, the Fair Housing Act, the Americans With Disabilities Act, and the Rehabilitation Act of 1973.

In considering the complaint by Granada House that the city had violated the Zoning Act (G.L. c. 40A, §3, ¶ 8), the court had to define the terms “disabled person” and “persons with disabilities” since they were not defined in the act. The court held that as a civil rights act, this provision of the Zoning Act must be construed liberally. And, because the state law did not define these terms, the court relied on federal court interpretations of these terms under similar federal statutes.

The court referred to the Fair Housing Amendments Act (42 U.S.C. 3602 (h)) in which the term “handicapped” has been interpreted to include individuals recovering from alcohol and drug addiction who no longer engaged in the illegal use of controlled substances. In doing so, the court held that the Zoning Act must be read to bar the city’s discriminatory treatment of a group home for recovering drug and alcohol users.

The court noted that the Boston Zoning Code prohibited Granada House from operating at a location where it permits groups of mentally handicapped individuals to reside and that in doing so, it had the effect of discriminating against handicapped people.

The City has advanced no legitimate reason, individualized to recovering alcoholics or drug addicts, that would warrant or justify such discrimination. At best, it has offered speculative grounds, such as traffic, parking, and noise problems, or concerns that the residents of Granada House might be prone to criminal behavior, as a basis for its disparate treatment of Granada House ... the City had advanced no substantial reasons for treating the residents of Granada

House differently from those of a permitted group home for mentally ill, mentally retarded, or other persons with disabilities.

Federal Law

I. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 (f)

A. Background

While the Dover Amendment to the Massachusetts Zoning Act *exempts both residential programs and non-residential rehabilitation programs* from local zoning if they are nonprofit educational uses, the Fair Housing Act prohibits discrimination against individuals on the basis of disability *only in regards to housing*. Hence, only residential programs are afforded its protections.

Congress enacted the Fair Housing Act in 1968 (42 U.S.C. § 3601 et seq.) to ensure, within constitutional limitations, fair housing throughout the United States by outlawing discrimination on the basis of race, color, religion and national origin. The law was amended in 1974 to prohibit discrimination in housing on the basis of sex.

Federal courts have repeatedly held that local zoning enactments may be the subject of a legal challenge under the Fair Housing Act.¹⁰

In 1988, the Fair Housing Amendment Act was enacted, to specifically prohibit discrimination in housing on the basis of handicap. This amendment drew heavily on §504 of the Rehabilitation Act of 1973.

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701) prohibits discrimination against persons with disabilities by any recipients of federal financial

¹⁰ *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988).

assistance. The act applies to the actions of state and municipal governments, as well as private organizations.

No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ... the term “program or activity means all of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or of a local government. (29 U.S.C. § 794)

Massachusetts courts have concluded that local zoning decisions are an “activity” of municipal government that are covered by §504 of the Rehabilitation Act. *See Granada House, Inc. v. City of Boston*, 6 Mass. L. Rep. 466 (1997).

Consequently, communities that receive federal funds and discriminate through their local zoning in regards to housing for persons with disabilities (including persons receiving treatment for addiction to alcohol and drugs), may be sued under § 504 of the Rehabilitation Act of 1973.

Because of its broader reach, however, most legal actions by residential programs challenging discriminatory local zoning regulations are brought under the Fair Housing Amendments Act.

B. Statutory Provisions

The Fair Housing Amendments Act (42 U.S.C. §3604 (f)) makes it unlawful:

1. To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of (A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or (C) any person associated with that buyer or renter.

2. To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of (A) that person; or (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that person.

The law defines discrimination to include not only traditional discriminatory practices, but also refusal to make reasonable modifications in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use or enjoy a dwelling.¹¹ This provision makes the act's ban on discrimination against those with a handicap applicable to local zoning decisions and practices. *See H.R. Rep. No. 711*, 100th Congress, 1st Sess. 18, 24 (1988):

The Act is intended to prohibit the application of special requirements through land-use regulation, 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 or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates ... Such discrimination often results from false or overprotective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited.

See also Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775 (2002) where the Fair Housing Amendments Act was applied to a city's zoning ordinance.

The Fair Housing Amendments Act (42 U.S.C. § 3602 (h)) defines "handicap" broadly as:

¹¹ 42 U.S.C. § 3604 (f) (3) (B).

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

The act exempts from this definition of "handicap" (a) the current, illegal use of or addiction to a controlled substance¹²; (b) those persons "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical harm to the property of others"¹³; (c) persons convicted "by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance;¹⁴ and (d) individuals solely because they are transvestites¹⁵.

Individuals recovering from alcohol and drug addiction, who are no longer engaging in the illegal use of drugs, have been determined to be "handicapped" under the Fair Housing Amendments Act. See *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 1182 (E.D.N.Y. 1993), "[I]t is well established that individuals recovering from drug or alcohol addiction are handicapped under the FHA." Citing *United States v. Southern Management Corp.*, 995 F.2d. 914 (4th Cir. 1992); *Elliot v. City of Athens*, 960 F.2d 975 (11th Cir. 1992) cert. denied, 113 S. Ct. 376 (1972); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992); *United States v. Borough of Audubon*, 797 F. Supp. 353 (D.N.J. 1991). See also *H.R. Rep. No. 711*, 100th Congress, 1st Sess. 22 (1988),

¹² 42 U.S.C. § 3602 (h)

¹³ 42 U.S.C. § 3604 (f) (9)

¹⁴ 42 U.S.C. § 3607 (b) (4)

¹⁵ 42 U.S.C. § 3601 note

“Just like any other person with a disability, such as cancer or tuberculosis, former drug-dependent persons do not pose a threat to a dwelling or its inhabitants simply on the basis of status. Depriving such individuals of housing ... would constitute irrational discrimination that may seriously jeopardize their continued recovery.”

In addition, individuals who have contracted communicable diseases, such as AIDS and HIV, have been found to be handicapped under the Fair Housing Amendments Act. *See Support Ministry v. Village of Waterford*, 808 F. Supp. 120 (N.D. N.Y. 1992).

The Fair Housing Amendments Act does not per se grant protection from discrimination in housing to convicted sex offenders. However, such individuals may be considered “handicapped” if they are determined to have a “mental impairment.”

Also, the exemption from the definition of “handicap” for individuals whose tenancy would constitute a “direct threat to the health and safety” of others or whose tenancy would result in “substantial harm to the property of others,” does not permit discrimination in housing based upon mere speculation, stereotypes or generalizations about individuals with disabilities, but must be based upon an actual risk.

As is evident, both state and federal courts have taken an expansive view of the term “handicap” in the Fair Housing Amendments Act.

C. Discrimination

For the purposes of determining whether local zoning regulations discriminate against the rights of persons with disabilities to housing, the courts rely on three theories: discriminatory intent, discriminatory effect, and failure to make “reasonable accommodation” for the needs of such persons.

A violation of the Fair Housing Amendments Act can be established by demonstrating that the challenged statute discriminates against the disabled on its face

and serves no legitimate government interest. In *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683 (1992), the court found that a local ordinance that imposed a distance requirement of 1,000 feet between group homes for mentally retarded persons was facially discriminatory and violated the act because it created an explicit classification based on handicap with no rational basis or legitimate government interest.

In order to prove intentional discrimination it is not necessary to show an evil or hostile motive. It is a violation of the act to discriminate even if the motive is benign or paternalistic. See *International Board of Teamsters v. United States*, 97 S. Ct. 1842 n.15 (1977).

The determination of whether an action is based on “discriminatory intent” requires a “sensitive inquiry into such circumstantial and direct evidence as may be available.” *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683 (1992), citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 97 S. Ct. 555 (1977). As noted in *Dailey v. Lawton*, 425 F. 2d 1037, 1039 (10th Cir. 1970), this type of inquiry is necessary because “it is unusual that a public official will openly reveal that he or she acted on the basis of discriminatory intent.”

In *Baxter v. City of Belleville*, 720 F. Supp. 720,723 (S.D. Ill. 1989) the city denied the plaintiffs a special use permit to open a residence for AIDS patients following two separate hearings at which city officials expressed apprehension over the presence of HIV-infected persons in the community. The court in that case granted a preliminary injunction in favor of the plaintiffs, finding that “irrational fear of AIDS was at least a

motivating factor in the City's refusal to grant [the] special use permit." The court further stated that "due to that fear, the City's actions were both intentional and specifically designed to prevent persons with HIV from residing" at the proposed location.

The fact that the expressions of "irrational fear" were made by community members and not government officials does not, in and of itself, absolve such official acts of discriminatory intent. See *Association of Relatives And Friends Of AIDS Patients (A.F.A.P.S.) v. Administracion De Reglamentos Y Pemisos (A.R.P.E.)*, 740 F. Supp. 95 (1990):

After considering the evidence in the totality, the court cannot avoid the conclusion that A.R.P.E. acted in furtherance of the misguided and discriminatory notions held by many ... residents concerning AIDS patients or at least bowed to political pressure ... the court finds A.R.P.E's stated reason for denying the permit to be a pretext.

The formula most relied upon by the courts for analyzing whether the actions taken or policies adopted by a municipality have a "disparate impact" upon persons with disabilities in violation of the Fair Housing Amendments Act was set out in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977). There, in a case alleging racial discrimination, the court established a four-pronged test for evaluating facially neutral conduct that produced a discriminatory effect but was taken with little to no discriminatory intent. The pertinent factors are:

- (1) The strength of the plaintiff's showing of discriminatory effect;
- (2) Whether there is some evidence of discriminatory intent;
- (3) Defendant's professed interest in taking the action complained of; and

(4) Whether the plaintiff seeks to compel the defendant to affirmatively provide housing for members of a protected class or merely seeks to restrain the defendant from interfering with individual property owners wishing to provide such housing.

Potomac Group Home Corporation v. Montgomery County, 823 F.

Supp. 1285 (1993) is particularly illustrative of how the courts apply the “disparate impact” test. In that case the plaintiff was the operator of four group homes in Maryland that provide housing and services to elderly persons who require some assistance with their daily living activities. Notwithstanding the fact that group homes are a permitted use in residential areas as a matter of right, the county’s zoning laws required group home operators to send letters to each neighboring property owner of a proposed group home site, both adjacent and opposite, as well as to neighborhood civic organizations.

The law also required that group homes in Montgomery County be subject to occasional evaluation by a program review board. These program review boards were to be composed of seven to nine members who are representatives of governmental agencies, civic and charitable organizations, municipalities and neighborhood associations.

The court in *Potomac* dispensed with the “neighbor notification” provision of the zoning regulation in short order, finding that, on its face, it created an explicit classification based upon disability and is not supported by any justification of the county:

The neighbor notification rule, and the defendant’s proffered justifications for it, necessarily assume that people with disabilities are different from people without disabilities and must take special steps to ‘become a part of the community.’ This requirement is equally offensive as would be a rule that a minority family must

give notification and invite comment before moving into a predominantly white neighborhood.

The court struck down the program review board hearings upon application of the “disparate impact” test. The court first concluded that the plaintiffs had made a strong showing of discriminatory effect. Like the neighbor notification rule, the program review board hearings are held only for residential facilities for the disabled. The fact that community concerns and community prejudices often dominate these hearings also causes a discriminatory impact upon the group home’s future residents.

Secondly, the court found that the manner in which the defendant applies the board hearing requirement is strong evidence of its intent to appease neighborhood opponents of group homes. Evidence in the record revealed that the county would hold a hearing when there was strong community opposition and forego the requirement when there was none.

Third, the court found that any legitimate regulatory interest of the county in reviewing the provider’s program by way of holding a public hearing of this sort was minimal. Rather than assisting the county in assessing the programmatic aspect of the provider’s application, the neighborhood representatives most often directed the attention of licensing officials away from legitimate concerns.

Finally, the court found that the relief the plaintiff was seeking was merely to have the county remove procedural obstacles so that it may more freely provide housing to the disabled elderly.

Of all of the theories for determining whether local zoning regulations discriminate against the rights of disabled persons to housing, failure to make “reasonable

accommodation” for the needs of such persons is the most fact-based. Nevertheless, a number of cases provide guidance that can be useful in other factual situations.

In *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775 (2002), the city was found to have failed to provide a reasonable accommodation when it refused to grant to a group home for six developmentally disabled individuals, a variance from the requirement in its zoning ordinance that prohibits the siting of such facilities within 2,500 feet of each other. The court determined that the city did not show that the group home would impose undue financial and administrative burdens on the city.

In reaching its decision, the court discussed each element of reasonable accommodation. An accommodation is reasonable if it is both efficacious and proportional to the costs to implement it. An accommodation is unreasonable if it imposes undue financial or administrative burdens or requires a fundamental alteration in the nature of the program or rule.

A requested accommodation is necessary where there is a showing that the request will affirmatively enhance a disabled plaintiff’s quality of life by ameliorating the effects of the disability.

Finally, the plaintiffs must show that without the required accommodation, they will be denied the equal opportunity to live in a residential neighborhood.

In applying those elements to the facts at hand the court concluded:

The mere fact that residents of the proposed group home would at times require the assistance of the local police and other emergency services did not rise to the level of imposing a cognizable administrative and financial burden upon the community ... [T]he plaintiffs, on the other hand, have met their burden of demonstrating that the variance was necessary to provide them with an equal opportunity to use and enjoy a dwelling.

In *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (1993), the plaintiffs, a group home for men who were recovering from drug and alcohol addiction, brought an action against the town to enjoin it from evicting persons with a handicap. The court applied the “reasonable accommodation” test to find the town’s zoning code to violate the rights of residents under the Fair Housing Amendments Act.

The Oxford House was founded in 1975 by a group of men who were recovering from drug and/or alcohol addiction. Three basic rules governed the inhabitants of the Oxford House: (1) they must be democratically self-governed; (2) they must be financially self-supporting; and (3) any person using drugs or alcohol must be immediately expelled. There were no health professionals on the premises, and an individual could stay as long as he wished so long as he remained drug and alcohol free and paid his share of the expenses.

The State of New York entered into an agreement with Oxford House to provide it with a loan fund for the creation of recovery homes. Using some of the proceeds from this fund, Oxford House signed a lease to rent a single-family dwelling in a residential district of the town. Shortly after the lease was signed, neighbors complained to the town officials that recovering alcoholics were living in their community. The record showed that at a public hearing to discuss the Oxford House, neighbors were hostile to it, expressing fears regarding the safety of children and senior citizens.

After the public hearing, the town attorney sent a letter to Oxford House asserting that it was in violation of the town’s zoning code because its residents were not a “family” or the “functional equivalent of a natural family.” Oxford House requested that the town modify the definition of “family” as it was applied to them, because, as

recovering alcoholics and drug addicts, they must live in a residential neighborhood to provide a “stable, affordable, and drug-free living situation as to increase the likelihood that a person will stay sober.”

The court ruled that a modification of the definition of a “family” to allow Oxford House to exist in a single-family district was warranted under the Fair Housing Amendments Act:

Oxford House has no adverse effect on the residential character of the neighborhood that the Town Code seeks to preserve. Moreover, neither the operation of the house nor the residents themselves have caused any financial or administrative burden on the Town. Consequently, the Court finds that the requested accommodation was reasonable and defendant’s failure to make such accommodation was discriminatory conduct.

D. Burden of Proof

The burden is always on the plaintiffs (either the person or persons with a disability or the program) to show that the accommodation it seeks is reasonable on its face. But once the plaintiffs have made this prima facie showing, the defendant (governmental entity) must come forward to demonstrate unreasonableness or undue hardship in the particular circumstances. *See US Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1523 (2002); *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538, 543 (7th Cir. 1995).

II. Equal Protection Clause of the Fourteenth Amendment

Prior to the enactment of the Fair Housing Amendments Act in 1988, the United States Supreme Court had held that the equal protection clause prohibits a city from requiring a special use permit for group homes for mentally retarded persons, when such permits are not required for other similar residences.

In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), a corporation intending to lease a building for the operation of a group home for thirteen retarded men and women, was informed by the city that a special permit would be required, the city having concluded that the proposed group home should be classified as a “hospital for the feebleminded” under the zoning ordinance covering the area in which the home would be located. Accordingly, the corporation applied for the special permit, but the city council, after a public hearing, denied the permit. The corporation filed suit against the city alleging the zoning ordinance, on its face and as applied, violated its equal protection rights, as well as those of its potential residents.

The equal protection clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” When determining the validity of any legislation that is challenged as denying equal protection under the law, the general rule is that the courts will presume the legislation is valid and will be sustained if the classification drawn by the statute is “rationally related” to a legitimate state interest. *See Schweiker v. Wilson*, 450 U.S. 221 (1981); *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

In striking down the city’s ordinance, the court in *Cleburne* questioned whether it is rational to treat the mentally retarded differently.

It is true that they suffer a disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the ... home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.

A municipal zoning ordinance that imposed a 1,000 foot spacing rule between group homes for persons with developmental disabilities or who are mentally retarded

was found to not be rationally related to any legitimate governmental interest and, therefore, in contravention of the equal protection clause of the Fourteenth Amendment. See *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683 (1992). The court concluded that the town had no rational basis for imposing a distance rule on people with disabilities, while allowing biological families and five or fewer unrelated people without disabilities to live anywhere they wish.

There has been no showing that the 1,000-foot distance requirement, which is the equivalent of three-and-one-third football fields, between homes and apartments of people with disabilities is rationally related to any legitimate government purpose. To the contrary, the evidence has shown that this is only related to the Township's ungrounded fears about people with handicaps. Ordinance No. 300 simply makes it more difficult for citizens with disabilities to live near one another in the pursuit of happiness to which we are all entitled.

It should be noted that most actions challenging a local zoning or land use regulation on the basis of denial of equal protection are nearly always accompanied by additional counts alleging violations of the Fair Housing Amendments Act. In such instances, if the court finds a violation of the act, it will not address the equal protection claim. See *Fleet Aero Space Corp. v. Holderman*, 848 F.2d 720, 742 (6th Cir. 1988). ("The general principle in cases involving a constitutional challenge is to avoid striking a statute as unconstitutional if the viable issues in the case may be disposed of on some other reasonable basis.")

III. Americans With Disabilities Act, 42 U.S.C. § 12101, et seq.

In enacting the Americans With Disabilities Act, Congress set forth prohibitions against discrimination in employment (Title I, §§ 12111-12117), public services furnished by governmental entities (Title II, §§ 12131-12165), and public accommodations provided by private parties (Title III, §§ 12181-12189).

Unlike Section 504 of the Rehabilitation Act of 1973, which only covers programs receiving federal financial assistance, Title II of the ADA extends to all the activities of state and local governments, including any of its departments, agencies or other instrumentalities, whether or not they receive federal funds. 42 U.S.C §§ 12131 (1) (A) (B).

The Americans With Disabilities Act provides comprehensive civil rights protections for qualified individuals with disabilities. A “qualified individual with a disability” is defined in the act as an “individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131 (2).

A “disability” with respect to an individual is defined in the ADA as “a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual.” 42 U.S.C. § 12102 (2)(A). Examples of physical or mental impairments include, but are not limited to, such contagious and non-contagious diseases and conditions as orthopedic, visual, speech, and hearing impairments head injury; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease and tuberculosis. Individuals are also protected if they have a record of such impairment or are regarded as having such impairment. 42 U.S.C. §§ 12102 (2) (B) (C).

Persons recovering from or receiving treatment for addiction to alcohol or drugs are disabled individuals for the purposes of the act. 42 U.S.C. §§ 12210 (b) (c).

However, individuals who currently engage in the illegal use of drugs are not protected by the ADA when an action is taken on the basis of their current illegal use of drugs. 42 U.S.C. § 12210 (a). (Emphasis added)

“Major life activities” include, but are not limited to, such functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

The ADA provides that “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.” (Emphasis added).

Relying on the plain language of the ADA, as well as its legislative history, the U.S. Court of Appeals in *Innovative Health Systems v. City of White Plains*, 931 F. Supp. 222 (S.D.N.Y. 1996) held that the zoning decisions of municipalities are an “activity” of municipal government for the purposes of the Americans With Disabilities Act (42 U.S.C. 12101 et seq.). That case involved a state-certified alcohol and drug dependence treatment program that provided individual, group, and family counseling on an outpatient basis and employed psychologists, social workers, and certified addiction counselors to provide those services. All clients of the program had to be drug and alcohol and drug free in order to receive services.

Innovative Health Systems applied to the White Plains building department for building permit to renovate a portion of its leased space in a building located in a high-density, mixed-use zone that allowed a combination of retail, office, governmental, service businesses and housing uses. Its application was opposed by residents and

neighbors of the proposed alcohol and drug treatment program who challenged use of the space as an “office” and who voiced concerns about their safety and security. A review by both the building commissioner and the city’s corporation counsel concluded that the program was a permissible “office” use under the local zoning ordinance. The building commissioner subsequently issued a permit to renovate the leased space. However, upon appeal by the residents of the building in which the program was to be sited, the Zoning Board of White Plains voted 4-1 to reverse the building commissioner’s decision.

The court in *Innovative Health Systems* held that the program had standing to sue under Title II of the Americans With Disabilities Act and Section 504 of the Rehabilitation Act of 1973; that the ADA and Section 504 of the Rehabilitation Act applied to zoning enforcement activities undertaken by public entities; and that the action of the Zoning Board of White Plains in reversing the decision to issue a building permit was discriminatory.

Consequently, cities and towns are required to make reasonable modifications in local zoning policies and regulations that deny equal access to individuals with disabilities when requested to do so, unless it would impose an undue burden or expense on a municipality or fundamentally alter the zoning scheme.

Note that other than the factual element of whether or not a residence is provided to persons with disabilities, the analysis of any local land use or zoning regulation or decision of a city or town will essentially be the same under the Fair Housing Amendments Act, the ADA and Section 504 of the Rehabilitation Act.

IV. Enforcement

The Fair Housing Act gives the U.S. Department of Housing and Urban Development the power to receive and investigate complaints of discrimination, including complaints that a local government has discriminated in exercising its land use and zoning powers. HUD is required by statute to attempt to conciliate the complaints it receives, even before it completes an investigation.

In matters involving land use and zoning regulations, HUD does not issue a charge of discrimination. Instead, HUD refers matters it believes may be meritorious to the Department of Justice that, in its discretion, may decide to bring suit. The Department of Justice may also bring suit in a case that has not been the subject of a HUD complaint by exercising its power to initiate litigation alleging a “pattern or practice” of discrimination or a denial of rights to a group of persons.

A decision by the Department of Housing and Urban Development or the Department of Justice not to proceed with a zoning or land use matter does not preclude individuals who believe they have been the victims of an illegal housing practice from filing their own lawsuit in state or federal court.

Persons who successfully sue a municipality for discriminatory zoning or land use practices may be entitled to monetary damages, as well as declaratory and injunctive relief, under the Fair Housing Amendments Act.

Private parties may also bring lawsuits to enforce their rights under Title II of the Americans With Disabilities Act. The remedies available are the same as those provided under Section 504 of the Rehabilitation Act of 1973 and include declaratory, injunctive and monetary relief and punitive damages. Reasonable attorneys’ fees may also be awarded.

ADA complaints may also be filed with any federal agency that provides financial assistance to the program in question or with the Department of Justice, which will refer the complaint to the appropriate agency. Any individual who believes that he or she is a victim of discrimination prohibited by the regulation may file a complaint. Complaints on behalf of classes of individuals are also permitted.

Complaints should be in writing, signed by the complainant or an authorized representative, and should contain the complainant's name and address and describe the public entity's alleged discriminatory action. A sample ADA complaint form can be found at the end of this guide.

Complaints may also be sent to the following agencies that have been designated for enforcement of Title II for components of state and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas --

- Department of Agriculture: Farming and the raising of livestock, including extension services.
- Department of Education: Education systems and institutions (other than health-related schools), and libraries.
- Department of Health and Human Services: Schools of medicine, dentistry, nursing, and other health-related schools; health care and social service providers and institutions, including grass-roots and community services organizations and programs; and preschool and daycare programs.
- Department of Housing and Urban Development: State and local public housing, and housing assistance and referral.
- Department of Interior: Lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums.
- Department of Justice: Public safety, law enforcement, and the administration of justice, including courts and correctional institutions; commerce and industry,

including banking and finance, consumer protection, and insurance; planning, development, and regulation (unless otherwise assigned); State and local government support services; and all other government functions not assigned to other designated agencies.

- Department of Labor: Labor and the work force.
- Department of Transportation: Transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing.

Additional information can be obtained by contacting:

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Civil Rights Division
Disability Rights Section, NYAV
Washington, D.C 20035-6738

(800) 514-0301 (Voice)

(800) 514-0383 (TDD)

www.ada.gov

Types of Programs

This section will briefly describe various types of social service programs and summarize the protections they may be afforded under state and federal law for the purpose of siting a facility or residence. The legal rights providers of various social services enjoy depend upon whether the program they operate is solely residential, solely educational or a combination of the two. Case law citations have been omitted from this section.

I. Residential Programs

The term “residential program” is used in this guide to refer to housing occupied by groups of unrelated individuals with disabilities. Residential programs are also known as community residences, congregate living facilities or group homes.

A residential program may be owned or operated by a social services corporation or by the individuals who live in the residence.

Residential programs that provide services to a population with a disability must be licensed by the state. Such programs deliver their services through contracts with the Department of Public Health, the Department of Mental Health, the Department of Mental Retardation, the Department of Social Services or the Department of Youth Services, and in some instances, grants from the federal government. They may have 24-hour staff and vary greatly in their structure, size and nature of population served, services provided, and policies and procedures.

Residential programs that solely provide a residence for persons with disabilities (including so-called “halfway houses” for individuals recovering from alcoholism and

drug addiction) derive their legal protections against discrimination in municipal zoning, land use, and health and safety regulations from the Fair Housing Amendments Act of 1988 (42 U.S.C. § 3601) as discussed previously. The Americans With Disabilities Act (42 U.S.C. § 12101 et. seq.) also affords residential programs with substantially similar protections as those provided in the Fair Housing Amendments Act. The protections of Section 504 of the Rehabilitation Act of 1973 also apply where a governmental body is the recipient of federal funding.

Finally, residential programs that are solely residential are protected from discrimination by any local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town by the Massachusetts Zoning Act (G.L. c. 40A, § 3, ¶ 8) (which refers to them as congregate living arrangements among non-related persons with disabilities).

Residential programs for persons with mental retardation or mental illness, or persons with physical handicaps or other disability, may or may not be solely residential in nature. So-called “sober houses” that provide lodging for up to a year for individuals in the last stages of recovery from addiction to alcohol or drugs, are typically solely residential in character.

When a residential program includes an educational component (whether called “rehabilitation,” “therapeutic,” etc.) it also receives the protections of the Dover Amendment that exempts nonprofit educational corporations from municipal zoning ordinance and by-laws, except that they may be subject to “reasonable regulations” concerning the bulk and height of structures and other dimensional requirements.

Residential programs that serve an educational purpose in addition to providing persons with disabilities with a place to live (whether on a short-term or long-term basis) may include “detox” and “intermediate” facilities for persons recovering from alcoholism and drug addiction, as well as “wet shelters” that provide a variety of programming such as social recovery support to transition shelter residents into treatment and counseling programs, triage work to assist residents with housing and education, or clinicians to conduct cases reviews relative to HIV-AIDS or mental illness.

II. Non-Residential Rehabilitative Programs

The term “non-residential rehabilitative program” is generally understood to be any non-residential program that provides educational services to individuals with disabilities. These programs may include community re-entry centers for children in the care and custody of the Department of Youth Services, day treatment programs, outpatient substance abuse programs (such as methadone clinics that provide counseling and other services in addition to dispensing medication), or so-called “clubhouses” that provide support, social skill building, and vocational and employment training for persons with mental disabilities.

No matter what the nomenclature used in the social services industry, non-residential rehabilitative programs derive their legal protections against discriminatory local zoning and land use regulations and decisions from the Dover Amendment (G.L. c. 40A, § 3, ¶ 2), Section 504 of the Rehabilitation Act of 1973 and the Americans With Disabilities Act. Consequently, what is legally controlling is the educational nature of such programs and not how they are described.

Because non-residential rehabilitation programs do not provide individuals with disabilities with a place to live, the Fair Housing Amendments Act is inapplicable to them.

III. Special Needs Schools

Chapter 766 special needs schools are private schools approved by the Massachusetts Department of Education to provide special education and related services to public students with physical or mental disabilities. Such students have been determined by their local school districts to have a disability that has resulted in the student's inability to progress educationally in the regular classroom. Special needs students are eligible for services from the ages of three up to their twenty-second birthday. Special needs schools may be either day or residential schools.

Because of their clear educational purpose, Chapter 766 schools are protected from discriminatory local zoning and land use regulations by the Dover Amendment (G.L. c. 40A, § 3, ¶ 2), if operated by a nonprofit educational corporation. As the review of the state court decisions has revealed, the benefits of the Dover Amendment do not merely extend to classrooms and the like, but also to dormitories, libraries, parking garages, radio stations and other facilities that may be part of the campus of the educational institution.

Finally, because Chapter 766 schools serve children with physical or mental disabilities they also receive protection against discriminatory treatment by municipal government from both Section 504 of the Rehabilitation Act of 1973 and the Americans With Disabilities Act.

Frequently Asked Questions¹⁶

1. What is the Dover Amendment?

The Dover Amendment is a provision in the state Zoning Act that makes it illegal for cities and towns to adopt any zoning ordinance or by-law that prohibits, regulates or restricts the use of land or structures for religious or educational purposes.

2. Does the Dover Amendment protect all educational uses?

No. Only those educational uses that are provided by a nonprofit educational corporation are eligible for protection.

3. What is an educational use?

The term “educational use” is not defined in the Zoning Act. However, Massachusetts courts have historically applied an expansive definition to the term “education” that includes rehabilitative and therapeutic programs.

4. Does the Dover Amendment only apply to classroom buildings?

No. The Dover Amendment applies to dormitories, libraries, athletic facilities, parking garages and the like, if they support the educational purpose of the nonprofit corporation. It also applies to community programs in which residents receive rehabilitation, skill building or other supportive therapeutic services.

¹⁶ Some of these questions were taken from a Joint Statement of the Department of Justice and the Department of Housing and Urban Development.

5. May a municipality impose any regulation on a nonprofit educational use?

Yes. Cities and towns may impose reasonable regulations concerning the bulk and height of structures, yard sizes, lot area, open space, parking and building coverage.

6. May a community require a special permit, variance or impose site plan review approval requirements on a nonprofit educational use?

No. Massachusetts courts have found that such requirements exceed the reasonable dimensional regulations permitted by the Dover Amendment. These requirements also have been found to violate the Fair Housing Amendments Act and the Americans With Disabilities Act when applied to community residences for persons with a disability.

7. What is a “reasonable” dimensional regulation?

The reasonableness of a local zoning requirement will depend upon the facts of each case. A zoning regulation would be unreasonable if compliance would substantially diminish or detract from the usefulness of a proposed structure or impair the character of the campus without appreciably advancing the community’s legitimate concerns.

8. Do group homes receive any special protection in the Zoning Act?

Yes. The Zoning Act specifically prohibits cities and towns from imposing any health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families or groups of similar size or other unrelated persons.

9. Does the Fair Housing Amendments Act pre-empt local zoning ordinances and by-laws?

No. However, it does prohibit municipalities from making zoning or land-use decisions or implementing land-use policies that exclude or otherwise discriminate against protected persons, including individuals with disabilities.

10. Who are persons with disabilities within the meaning of the Fair Housing Amendments Act?

The Fair Housing Amendments Act prohibits discrimination on the basis of handicap, among other classes. “Handicap” has the same legal meaning as the term “disability” which is used in the Americans With Disabilities Act (ADA) and other federal civil rights laws. Persons with disabilities (handicaps) are individuals with mental or physical impairments that substantially limit one or more major life activities. The term mental or physical impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, learning disability, head injury and mental illness. The term major life activity may include seeing, hearing, walking, breathing, performing manual tasks, caring for one’s self, learning, speaking or working.

11. Does the Fair Housing Amendments Act (and the ADA) exclude any persons from the definition of “persons with disabilities?”

Yes. Current users of illegal controlled substances, persons convicted for illegal manufacture of a controlled substance, sex offenders, and juvenile offenders are not considered persons with a disability unless they are diagnosed with a mental impairment.

No protection is afforded to a person who poses a direct threat to the person or property of others. However, determining whether someone poses such a direct threat must be made on an individualized basis, and cannot be based on general assumptions or speculation about the nature of a disability.

12. On what basis will a court invalidate a local land-use or zoning ordinance as a violation of the Fair Housing Amendments Act (as well as the ADA)?

The courts rely on three theories to determine whether such local regulations are discriminatory against persons with disabilities: discriminatory intent; discriminatory effect; and the failure of the municipality to make a “reasonable accommodation” to its regulations for the needs of such persons.

13. What is an example of a zoning requirement with an intent to discriminate?

A local ordinance that imposes a distance requirement (sometimes called a “spacing requirement”) between group homes for persons with mental retardation or mental illness would be facially discriminatory.

14. What is an example of a zoning requirement that has a discriminatory effect?

A local zoning regulation that allows the siting of a group home in a residential district as a matter of right, but requires the group home operator to notify neighbors of the proposed residence and subjects the group home to periodic evaluation by a program review board, would have a discriminatory effect upon the handicapped residents of the home.

15. What is an example of a failure of a municipality to make a “reasonable accommodation” in its zoning ordinance or by-law?

The refusal of a city or town to modify its definition of “family” in its zoning code to permit a group home for men recovering from alcoholism or drug addiction would be a violation of the Fair Housing Amendments Act, the ADA and Section 504 of the Rehabilitation Act.

16. Does the Americans With Disabilities Act apply to local zoning?

Yes. Title II of the ADA prohibits discrimination against persons with disabilities by state and local governments. Local zoning decisions have been found to be an “activity” of cities and towns that are subject to the provisions of the ADA. Consequently, local governments must make reasonable accommodation for persons with disabilities by modifying its zoning decisions or regulations that would otherwise deny equal access to such persons, when requested to do so and when doing so would not impose an undue burden or expense upon the municipality or fundamentally alter its zoning scheme.

17. What action can a provider take if a community imposes upon educational uses a zoning requirement it believes is in violation of the Dover Amendment?

A provider may challenge the legality of any such requirement by appealing the decision of the building inspector (who is in most towns the zoning enforcement officer) to the local Zoning Board of Appeals. Decisions of the ZBA may be appealed by filing an action in state court (either the superior, housing or land courts).

18. How does a provider challenge a local regulation it believes violates the Fair Housing Amendments Act?

A provider may, in the first instance, file a complaint with the U.S. Department of Housing and Urban Development which has authority to receive and investigate complaints of discrimination, including complaints that a city or town has discriminated against persons with disabilities in exercising its land-use and zoning authority. HUD is obligated by statute to attempt to conciliate the complaints that it receives, even before it completes an investigation.

In matters of land-use and zoning, HUD does not issue a charge of discrimination. Instead it refers matters it believes may be meritorious to the U.S. Department of Justice that, in its discretion, may decide to bring suit against the municipality.

A HUD or Department of Justice decision not to proceed with a land-use or zoning complaint does not foreclose a provider or other private party from pursuing a claim in the federal district courts.

19. How does a provider challenge a municipal land-use or zoning practice it believes violates the Americans With Disabilities Act?

ADA complaints may be filed with the U.S. Department of Justice or any other federal agency that has been designated to enforce the ADA with respect to state and local governments. Such agencies include the Department of Housing and Urban Development and the Department of Health and Human Services.

20. May a city or town require a nonprofit social services or educational corporation to make payments in lieu of taxes (PILOTS) to the municipality as a condition of any permit, license or approval?

No. Massachusetts state law (G.L. c. 59, §5) grants property tax exempt status to nonprofit charitable and educational institutions, including social service programs. “Charitable” is defined as “literary, benevolent, charitable or scientific institution or temperance society incorporated in the commonwealth.” However, if any of the income or profits of the business of the charitable organization is divided among the stockholders, the trustees or the members, or is used or appropriated for other than literary, benevolent, charitable, scientific or temperance purposes or if upon dissolution of such organization a distribution of the profits, income or assets may be made to any stockholder, trustee or member, the organization’s property will not be exempt from property taxes. Also, the exemption from property tax is applicable to only that property or portions of such property that are used in furtherance of the charitable or educational purposes of the tax-exempt organization.

Some tax-exempt organizations do enter into *voluntary agreements* to make payments in lieu of taxes or provide “in-kind” contributions to a city or town, but there exists no legal basis for a municipality to compel those organizations to enter into such agreements.

Contact Information

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SAMPLE

U.S. Department of Justice
Civil Rights Division

Disability Rights Section

OMB No. 1190-0009 Exp. Date 04/30/2007

Title II of the Americans with Disabilities Act
Section 504 of the Rehabilitation Act of 1973
Discrimination Complaint Form

Instructions: Please fill out this form completely, in black ink or type. Sign and return to the address on page 3.

Complainant:

Address:

City, State and Zip Code:

Telephone: Home:

Business:

Person Discriminated Against:
(if other than the complainant)

Address:

City, State, and Zip Code:

Telephone: Home:

Business:

Government, or organization, or institution which you believe has discriminated:

Name:

Address:

County:

City:

State and Zip Code:

Telephone Number:

When did the discrimination occur? Date:

Describe the acts of discrimination providing the name(s) where possible for the individuals who discriminated (use space on page 3 if necessary):

Have efforts been made to resolve this complaint through the internal grievance procedure of the government, organization, or institution?

Yes_____ No_____

If yes: what is the status of the grievance?

Has the complaint been filed with another bureau of the Department of Justice or any other Federal, State, or local civil rights agency or court?

Yes_____ No_____

If yes:

Agency or Court:

Contact Person:

Address:

City, State, and Zip Code:

Telephone Number:

Date Filed:

Do you intend to file with another agency or court?

Yes_____ No_____

Agency or Court:

Address:

City, State and Zip Code:

Telephone Number:

Additional space for answers:

Signature: _____

Date: _____

Return to:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Disability Rights - NYAV
Washington, D.C. 20530