ADDRESSING ZONING BARRIERS TO EQUAL HOUSING OPPORTUNITIES FOR
PEOPLE WITH DISABILITIES
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2018 ABA HIV/AIDS Law and Practice Conference

I. Overview of Fair Housing Act and Americans with Disabilities Act: Prohibitions Against
Housing Discrimination

Generally speaking, individuals who live in group homes and other types of supportive
housing are individuals with disabilities within the meaning of the Fair Housing Act, the
Americans with Disabilities Act, and Rehabilitation Act because addiction and mental
illness are considered disabilities under the law. See, e.g., 24 C.F.R. § 100.201(a)(2)
(noting that “handicap” under the FHA includes emotional or mental illness, along with
drug addiction other than addiction caused by current, illegal use of a controlled
substance); 28 C.F.R. § 41.31(b)(1)(ii) (same regulation under the ADA). In addition, to
the extent that such housing is aimed at providing for the formerly homeless, people with
disabilities constitute over forty percent of the homeless population. Housing alleviates
the extraordinary health risks associated with homelessness, expedites recovery,
improves quality of life, and helps beneficiaries achieve stability and resume
productivity.

“The purpose of the [Fair Housing Amendments] Act was to prohibit discrimination in
the national housing market for handicapped individuals,” Groome Res. Ltd. v. Par. of
Jefferson, 234 F.3d 192, 200-01 (5th Cir. 2000) (footnote omitted), thereby bringing
individuals with disabilities within the Fair Housing Act's “broad and inclusive compass”
to eliminate housing discrimination in the United States. City of Edmonds v. Oxford

Similarly, the ADA, as well as the Rehabilitation Act, which “is a broad mandate of
comprehensive character and sweeping purpose intended to eliminate discrimination
against disabled individuals ... and to integrate them into the economic and social
2011) (quoting PGA Tour, Inc. v. Martin, 532 U.S. 661, 675, 121 S.Ct. 1879, 149
L.Ed.2d 904 (2001)) (internal quotation marks omitted).

Under the Fair Housing Act, it is unlawful “[t]o 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 person residing in or intending to reside in that dwelling after it is ... made
available ... or any person associated with that buyer or renter.” 42. U.S.C. §
3604(f)(1).

Similarly, Title II of the ADA mandates 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 subject to
discrimination by such entity.” 42 U.S.C. § 12132.

Under the Fair Housing Act, unlawful discrimination includes “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B). Additionally, “both the ADA and the Rehabilitation Act impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals.” Bennett–Nelson v. La. Bd. of Regents, 431 F.3d 448, 454 (5th Cir. 2005).

Further, the FHA and ADA also prohibit intentional discrimination under the FHA and ADA. To prove disparate treatment under both statutes, one must show that the defendant intended to discriminate or was improperly motivated in making the discriminating decision. See, e.g., Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Greater New Orleans Fair Hous. Action Ctr., 648 F.Supp. at 808.

Fair Housing Act cases have adopted the same standard for proving discriminatory intent that governs an equal protection claim as articulated by the Supreme Court in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

To assess whether or not discriminatory intent exists, the Fifth Circuit looks to the following Arlington Heights circumstantial factors: (1) historical background of the decision; (2) the specific sequence of events leading up to the decision; (3) departures from the normal procedural sequence; (4) substantive departures; and (5) legislative history, especially where there are contemporary statements by members of the decision-making body. Overton v. City of Austin, 871 F.2d 529, 540; see also Greater New Orleans Fair Hous. Action Ctr., 648 F.Supp.2d at 808 (applying the Arlington Heights factors to find that the Parish discriminated in violation of the FHA).

II. Bethany Homes Case Study

A. Background

1. After Katrina, New Orleans created a Consolidated Plan to combat the growing shortage of affordable housing and homeless population.
2. Gulf Coast Housing Partnership (“Gulf Coast”) is a nonprofit real estate company that develops affordable housing for low-income people in Mississippi and Louisiana.

B. Bethany Homes
1. Gulf Coast bought an abandoned property located at 2535 Esplanade Avenue, which was formerly a nursing home called Bethany Homes.

2. Gulf Coast partnered with Common Ground and Unity of Greater New Orleans (Unity).

3. The property would have 42 residential units and a case management office
   a. 21 units reserved for low-income individuals
   b. 21 units reserved as permanent supportive housing for homeless people with disabilities
   c. Office staffed with employees from Unity who would assist homeless with transition into society

4. $3.2 million in funding came from Piggyback Program
   a. Piggyback Program = state-created fund that assists in redeveloping areas that were hit by Katrina. Funds come in the form of:
      i. Federal community development block grants (block grants)
      ii. Commensurate tax-exempt bond authority
      iii. Low income housing tax credits (tax credits)
   b. The Bond Commission is required to approve the bond financing and the tax credits

C. City Obstruction of Bethany Homes Renovations
   1. First Variance Request: In January 2010, Gulf Coast applied for variance from zoning requirement that requires one parking spot per unit. Gulf Coast wanted 28 parking spaces, instead of the required 42.
      a. Bethany Homes is located in zoning district RM-3, which allows an apartment complex as a “permitted use.”

   2. Neighborhood residents learned of Gulf Coast’s proposal and vehemently opposed, sending numerous letters to members of the Board of Zoning Adjustment, community groups, and city officials.
      a. Fliers referred to the prospective tenants as “drug addicts,” “junkies,” and “transients.”
      b. The following excerpt was taken from one of these fliers, which labels the prospective tenants as “the homeless, ex-offenders, people with mental illness, HIV/AIDS, people with a history of drug usage, and others similarly situated in a concept described as ‘Supportive housing.’ . . . .NO facility of this nature should be located in a residential neighborhood, particularly an Historic Residential Neighborhood!!!!!” [sic]
      c. The president of the Esplanade Ridge and Treme Civic Association wrote a letter to the zoning board saying that “these are people who really need more intensive care. In truth, they should be in an institutional setting.”

   3. First Hearing: On March 8, 2010, the zoning board held a hearing, at which about a dozen members of the community spoke in opposition of
the development project. The zoning board denied the variance without explanation.

4. **Second Variance Request:** Gulf Coast submitted a second variance request on March 31, 2010. In this request, Gulf Coast reduced the number of units from 42 to 40, which matched the number of parking spaces available. The parking lot was irregularly shaped, however, so Gulf Coast requested a waiver from the requirement that parking spaces are setback from the road at least 10 feet. Gulf Coast also proposed to demolish part of the building to accommodate parking.
   a. Over 70 neighborhood residents signed an opposition petition, which was sent to the city
   b. The city told Gulf Coast that they would need approval from the city’s Historic District’s Landmark Commission to complete the proposed partial demolition.
      i. The Bethany Homes building is not a historic building.

5. **Second Hearing:** On May 10, 2010, the zoning board held another hearing. A staff report prepared before the hearing approved the variance request. There was similar neighborhood opposition, and the zoning board voted against the variance, again without explanation.

6. **Third Hearing:** Landmark Commission holds public hearing on the demolition aspect of the project and denies approval of demolition without any explanation.

7. **Third Variance Request:** On November 8, 2010, Gulf Coast submitted a variance request to the zoning board that included:
   a. 43 parking spaces;
   b. Increased green space
   c. Reconfigured parking lot that reduced need for setback variance
   d. Request for reasonable accommodation in the form of zoning board approval for setback waiver.

8. **Fourth Hearing:** The variance request was denied after a 3-3 vote.
   a. Staff report recommended partial approval of the project
   b. Much neighborhood opposition
      i. One speaker said that the proposal aimed to “collect homeless people from all over New Orleans and put them where they can stagger to their drug rehab facility”
   c. The Esplanade Ridge and Treme Civic Association filed a Motion to Dismiss for Lack of Jurisdiction and Opposition to the Application for a Variance.
      i. They argued that the proposed use for Bethany Homes was improperly classified as an apartment complex, when it should have been classified as a residential care center, which is not a permitted use in the RM-3 district.

9. On April 8, 2011, Paul A. May, Director of the City's Department of Safety and Permits, sent a letter to the City Planning Commission dated April 8, 2011, which stated that the proposed use of the Esplanade property did not comply with the zoning ordinance, because the proposed
use involved a supportive service to the tenants (the on-site office that assisted the homeless transition into independent living), which he stated is not an allowed use for a RM–3 zoned district. The developers appealed the Paul May letter to the Board.

D. State Bond Commission Obstructions to Bethany Homes Development

1. The Bond Commission adopted a moratorium in August 2009 that suspended approval of bond financing under the Piggyback Program for low-income housing projects.
   a. They could only make exceptions if the city asked them to.
   b. During this time period, the city asked the Bond Commission to make two exceptions, which it did.
      i. Oretha Castle Haley Development
      ii. B.W. Cooper Project
   c. Gulf Coast asked the mayor numerous times to petition the Bond Commission for financial approval of the Bethany Homes development. The mayor refused without explanation.
   d. The city was aware that Gulf Coast’s $3.2 million in funds would expire unless Gulf Coast secured more financing from the Piggyback Program

E. Denial of City’s Motion to Dismiss


F. DOJ Settlement with the City

1. Remains effective for three years after April 21, 2014. [Currently expired!!]
2. General Provisions
   a. Comply with FHA and ADA
3. Injunctive Relief
   a. Provide all zoning variances for the Bethany Homes development
   b. Allow the project to proceed through the city’s normal approval, inspection and permitting processes; no interference or delay
   c. Amend Comprehensive Zoning Ordinance to provide expressly that supportive housing is a permitted use all zones where multi-family housing is permitted
   d. If city wants to modify its zoning ordinances in a way that would restrict, limit, or affect the status of permanent group homes for disabled people, City must give the US a proposal on the plan at least 15 days before implementation of the modification
   e. Draft a policy that gives people notice on how to request reasonable accommodations on the basis of disabilities from zoning and land use policies
4. Fair Housing Training
   a. City provides training on FHA and ADA within 90 days of the settlement to the following people:
      i. Members of the Board of Zoning Adjustments
      ii. Director and personal staff of the Office of Safety and Permits
   b. Training will be videotaped and show to newly hired or elected members of the above groups within 30 days of the date they start work
   c. A copy of this settlement agreement is given to every person required to get ADA/FHA training
   d. City should maintain records of each trainee’s certification and include the following information:
      i. Attendance at an in-person or recorded training
      ii. Date of training; and
      iii. Receipt and comprehension of the Agreement (blank certification forms attached to the settlement).
   e. City must provide DOJ with copies of these Agreements upon request

5. Development of Permanent Supportive Housing
   a. Fund 350 additional permanent supportive housing beds in New Orleans before the expiration of this agreement [April 21, 2017]
   b. Abide by all specific injunctive relief given to Bethany Homes in this settlement

6. Specific record maintenance requirements
   a. [Omitted]

7. Enforcement of Settlement
   a. Either party to the agreement may move the court to impose a remedy if any party fails to abide by the terms of the settlement

G. DOJ Settlement with the Bond Commission
   1. General Relief
      a. Members of the Board must comply with FHA and ADA
         i. This covers actions to enact a moratorium or similar policy that prevents or delays consideration of affordable housing in NOLA
         ii. (The Board can use non-discriminatory factors to inform decisions though)
   2. Specific Relief
      a. Will not take any action to obstruct, delay, or prevent future bond financing of Bethany Homes
         i. [At the time of the settlement, Bond Commission had lifted the moratorium and approved funding of Bethany Homes]
      b. Cannot adopt any other moratoria or policy that prohibits, limits, or restricts construction of the Bethany Homes project or that
would apply in a discriminatory manner to other affordable housing projects in NOLA

III. Discussion of other exclusionary zoning cases affecting people with disabilities, including housing for individuals with HIV/AIDS


IV. Discussion of proposed Inclusionary Zoning Ordinance for the City of New Orleans and the incorporation of reasonable accommodation policies and procedures with respect to local and municipal zoning ordinances to further equal housing opportunities for individuals with disabilities, including individuals with HIV/AIDS