Housing Rights of Older Persons

by Kim Savage and Stephanie Edelstein

I. Introduction

During the past year, attorneys and other advocates have reported a significant increase in the number of older persons who have been denied admission to or evicted from rental housing due to their perceived inability to live independently. We also continue to see community opposition to group living arrangements for the elderly. This article will discuss recent developments in this area, with particular emphasis on the rights of the frail elderly.

II. The Fair Housing Amendments Act

It should come as no surprise to advocates that the landmark Fair Housing Amendments Act of 1988 (FHAA) is proving to be effective in protecting the housing rights of the elderly and frail elderly. The FHAA prohibits discrimination against persons with disabilities in virtually any housing activity or transaction, including the sale or rental of housing and the “refusal to make reasonable accommodation in rules, policies, practices, or services, when accommodations may be necessary to afford such person[s] equal opportunity to use and enjoy a dwelling.” Discrimination against the disabled through state and local zoning, land use, and health and safety regulations is also prohibited. Elderly persons are protected by the FHAA if they (1) have a “[p]hysical or mental impairment which substantially limits one or more ... major life activities,” (2) “have a record of having such an impairment,” or (3) are “regarded as having such an impairment.” One court has specifically held that, since the elderly as a group are “regarded as disabled,” they are covered by the FHAA.

The FHAA goes even farther than Section 504 of the Rehabilitation Act of 1973, extending to all tenants those protections previously limited to persons residing in federally assisted housing. Used together or apart, these statutes can protect clients against discrimination based on disability or perceived disability at all stages of the landlord-tenant relationship.

A. Federally Assisted Housing

In the present affordable housing crisis, federally assisted housing is the primary source of shelter for low-income elderly persons. But advocates have increasingly found that such programs impose tenant selection criteria designed to exclude those who are frail or disabled. A recent case confirms that requiring an applicant for public housing to prove that he or she is capable of independent living violates the FHAA because of its disparate impact on the disabled. Public housing authorities (PHAs) may no longer ask applicants about their ability to live independently, nor may they require that applicants provide confidential medical records to confirm a statement that they can live independently. HUD regulations do permit inquiries as to whether an applicant can meet the standard “requirements of tenancy,” but do not require a tenant to be able to live without “the aid of others.” Use of an “inability to live independently” inquiry as a way of screening out tenants who might be a

2. Id. at 42 U.S.C. § 3604. This definition of “handicap” originates in the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and is used in the HUD regulations on discrimination in federally assisted housing. See 24 C.F.R. § 8.3.
3. This is not apparent from reading the FHAA, but it is clearly articulated in the House Report on the Act. See H.R. REP. NO. 711, 100th Cong., 2d Sess. 22, 24 (1988).
9. Id. at 1008-09.
A nonagenarian at home in her Washington, D.C., apartment.

ministering tenant selection criteria, HUD has advised the following:

1. PHAs should rescind policies which may treat handicapped applicants differently from others. The appropriate criteria for determining suitability for tenancy are those that demonstrate ability to meet the obligations of tenancy such as paying the rent on time, maintaining the dwelling as required by the lease and avoiding disruptive or destructive behavior. Usually the same sources of information that are relied upon in making such determinations with respect to non-handicapped applicants will be sufficient. While a housing provider may fear that an applicant who appears handicapped requires support services not offered by the program, the housing provider may not require or request a special showing by a handicapped individual that he or she can comply with the terms of the lease based on speculation that the applicant’s disability may make compliance more difficult.

10. Id. at 1008. See FHAA, supra note 1, at § 3604(f)(9), which provides that housing “need not be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.”

danger to themselves or others has also been rejected. Questions regarding the extent or nature of an applicant’s disability are prohibited unless the applicant is applying for special needs housing.

The Department of Housing and Urban Development (HUD) has advised PHAs that it is revising the Public Housing Authority Occupancy Handbook to “conform more closely to the requirements of the anti-discrimination laws and to provide technical assistance to PHAs in making determinations of suitability for tenancy affecting handicapped applicants.” As to developing and ad-

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2. Where a handicapped individual is applying for public housing and the individual's eligibility for admission, level of benefits, or qualification for preferences or priorities does not depend upon his or her being a handicapped person, PHAs may not inquire about the existence, severity of any physical or mental impairment, nor require proof that the applicant is "capable of independent living." However, to the extent necessary to determine eligibility and rent, PHAs may require applicants to provide information about the nature and extent of their handicap or related conditions.11

B. Section 202 Housing

Contrary to the restrictions in the tenant selection criteria used by PHAs, an applicant for Section 202 housing12 has no such protections. He or she may be asked about the ability to live independently and denied admission on that basis alone.13 A private sponsor of Section 202 housing has broad discretion in selecting from a pool of eligible applicants and may even reject an applicant who meets the occupancy selection criteria.14 HUD does not require sponsors participating in the Section 202 program to submit their admission criteria for approval other than to confirm that the statutory requirements of age, income level, and nondiscrimination are established in the selection process. Because of this high degree of independence, the actions of a sponsor participating in the Section 202 program cannot be attributed to the federal government. This means that applicants for Section 202 housing have neither a constitutionally protected property interest in that housing nor a right to appeal an owner's decision to reject them.15

III. Reasonable Accommodations

For an elderly person who is already in residence, the "reasonable accommodation" provisions of the FHAAA and Section 504 can protect the right to "age in place." In fact, reasonable accommodations to the needs of an aging tenant may mean the difference between independent living and institutionalization.

The concept of reasonable accommodation continues to evolve and is a case-by-case determination. In 1991, the Massachusetts Supreme Judicial Court held that Section 504 required a landlord, prior to eviction, to accommodate an elderly, mentally disabled woman who caused superficial damage to the walls in her federally subsidized unit.16 The woman, in response to auditory hallucinations, damaged her apartment walls with a broom stick and threw objects at the walls. The court held that the woman should be given time to attend a treatment program and be provided with a rubber bat for those occasions when her behavior could not be controlled. In analyzing the reasonableness of accommodating the tenant's disability, the court stated that "reasonableness" is not susceptible to precise measurement, "but that eviction in view of superficial damage to the walls, the availability of funds to pay for the damage, and the lack of evidence of harm to other tenants would constitute a violation of the statute.17

In other circumstances, reasonable accommodation might entail changing a lease provision as to the due date for rent, taking into account when a tenant actually receives a monthly retirement check, thereby avoiding constant late charges and potential eviction for nonpayment. Likewise, a resident manager might remind a tenant who has difficulty remembering when the rent is due, or, with the tenant's permission, notify a case manager or family member if the rent is not paid.

HUD recently found a PHA in noncompliance with Section 504 because it had relocated an outdoor table to an area that was inaccessible to an elderly, disabled tenant. As a result of HUD's investigation, the PHA was required to install a table in an accessible area and pay damages to the tenant, designate a Section 504 compliance coordinator, establish a grievance procedure for discrimination complaints, install a Telecommunication Device for the Deaf (TDD), and provide auxiliary aids to accommodate the needs of persons using the PHA's services.18 Thus, even a seemingly minor complaint can achieve broad results!

11. HUD Memorandum to Regional Housing Administrators (Dec. 31, 1990).
14. Id. at 939. For earlier cases holding that a sponsor may limit admission to Section 202 housing to some but not all eligible classes, see Brecker v. Queens B'nai B'rith Hous. Dev., 798 F.2d 52 (2d Cir. 1986); Knutzen v. Eben Ezer Lutheran Hous. Center, 815 F.2d 1343 (10th Cir. 1987) (Clearinghouse No. 42,553).
17. Id. at 5-6.
Accommodation of individual needs involves the acceptance by housing managers of supportive services designed to assist a tenant with activities of daily living. This may include light housekeeping and other chore services, home-delivered meals, personal care, and perhaps even a representative payee or other financial management program. While some assisted-living environments are available, the majority are far beyond the means of low- and moderate-income elderly. Moreover, very few managers of federally subsidized housing are required to coordinate or provide services to tenants. In a far-reaching effort to address this issue, the current national housing policy, as articulated in the National Affordable Housing Act, develops the concept of reasonable accommodation by establishing supportive housing programs for the frail elderly that will facilitate the aging population’s independent living. Unfortunately, immediate funding for some of those initiatives remains uncertain.  

Currently, administration of supportive programs remains scattered throughout an assortment of agencies, providing a challenge even to a trained service coordinator, but posing an almost insurmountable barrier to a frail older person. In 1990, HUD entered into a Memorandum of Understanding with the Department of Health and Human Services (HHS), and plans another, specifically with the Administration on Aging, to train local HUD staff on aging issues and to promote coordination of housing and supportive services on a statewide level. However, until the programs in the 1990 Housing Act are fully funded and the Memoranda of Understanding implemented, advocates will of necessity remain the principal source of information about supportive services for their clients, particularly tenants of private housing.

For older clients, the local Area Agency on Aging (AAA) can be a valuable source of information about such services. Funded under the Older Americans Act, AAs at a minimum provide information and referral; many also do case management. AAA staff also can be valuable witnesses as to community resources available to assist a tenant at risk of eviction.

In addition to the reasonable accommodation requirement, the FHAA requires that persons with disabilities be permitted to make reasonable modifications of existing premises at their own expense, if necessary to afford full use of those premises. While this may involve significant alterations, it quite possibly will require only minor changes. A person with failing vision, for example, may wander from one apartment to the next or get off of the elevator on the wrong floor, because he or she cannot read the numbers on the walls or doors. The simple replacement of those numbers with large, clear signs in colors that contrast with the surfaces on which they are placed could avoid further disorientation and even eviction, in the worst-case scenario.

IV. Discrimination in the Private Market

The FHAA also has been used successfully to prevent discrimination in private, nonrental housing. Although it may surprise some advocates, private citizens continue to use state and local zoning ordinances and health and safety regulations to prevent nursing homes and other elder care facilities from operating in their neighborhoods. However, as noted earlier, the FHAA prohibits regulations that discriminate against the handicapped. Typical of these cases is one in which residents of a Puerto Rico neighborhood obtained a state court order requiring the closure of a nearby nursing home because the owners had allegedly failed to obtain all of the necessary zoning variances for operation of the facility. The nursing home owners and its elderly residents joined in a federal court action alleging violations of the FHAA. They obtained an order declaring the actions of

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the local government and the state court discriminatory and enjoining the closure of the home.21

Under the FHAA, the Secretary of HUD is charged with investigating complaints of housing discrimination. 24 However, in those cases in which the complaint involves state or local zoning ordinances or other land use laws, the complaint is to be immediately referred to the Attorney General for possible filing of a "pattern and practice case" in district court, pursuant to section 3614 of the FHAA. 25 In a second case from Puerto Rico, also involving a nursing home, the Attorney General exercised his authority under section 3614 and obtained an injunction in the district court against closure of the facility. 26 A state court had ordered that the home be closed after the local government refused to grant the facility a parking variance under pressure from nearby neighbors who did not want the facility in their community. The Attorney General's decisive action in this case is encouraging, and advocates are urged to consider referring similar complaints in their own states, particularly if irreparable harm may occur as a result of the discrimination.

V. Conclusion

Unaware of their housing rights, or unable to advocate for themselves because of a disabling condition, frailty, or fear of reprisal, older persons are frequently subject to discrimination. Stereotypes of "old people" serve only to expand these barriers and isolate seniors further from their communities. The Fair Housing Amendments Act and Section 504 of the Rehabilitation Act are excellent tools for addressing these issues. Recent case developments confirm that the reasonable accommodation provisions of these statutes can be used to ensure that older tenants retain not only their housing, but also their independence and dignity, as they age.

23. Casa Maria, 752 F. Supp. 1152. Casa Maria is now on appeal in the First Circuit. Defendants, the government and neighbors of the nursing home, are appealing the district court order restraining the state court from proceeding on the grounds of abstention pursuant to Younger and the Anti-Injunction statute.
25. Id. at 42 U.S.C. § 3610(g)(2)(C).

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Kim Savage is a Staff Attorney with the National Senior Citizens Law Center, 1052 W. 6th St., Ste. 700, Los Angeles, CA 90017, (213) 482-3550. Stephanie Edelstein is the Associate Staff Director of the American Bar Association's Commission on the Legal Problems of the Elderly, 1800 M St., NW, Washington, DC 20036, (202) 331-2297.
Reverse Mortgage Program Expands

Addressing a broad spectrum of low- and moderate-income housing issues, the Cranston-Gonzales National Affordable Housing Act of 1990, which took four years to enact, demonstrates an increased federal commitment to meeting the housing needs of frail older persons. Many programs included in the Act anticipate coordination of housing and services, as well as an increase in opportunities for creative development of such systems at the state and local levels.¹

One program that will not require state or local money, but that provides concrete (i.e., “cash”) benefits to older homeowners, is the Home Equity Conversion Mortgage Insurance Demonstration, now greatly expanded and available through all FHA-approved lenders nationwide. Home equity conversion, or reverse mortgage programs, permit elderly homeowners to convert the equity in their homes into cash, without having to sell their homes.

The federal demonstration provides FHA insurance for reverse mortgages in the event of lender default. Borrowers must be age 62 or older, occupy their homes as their principal residences, and have little or no balance due on their mortgages. The home itself must also meet housing code standards. Borrowers can opt to receive a lump sum, regular monthly payments, or a line of credit, and can choose between a fixed-term and an open-ended loan. In addition, borrowers may reserve some equity from the transaction. The loan is repaid at the end of the term or when the last surviving borrower dies, sells the home, or moves from the home. The federal program does not restrict use of the funds for particular purposes.

Although they are not the perfect solution for everyone, reverse mortgages can provide a significant number of elderly homeowners with the resources that they require to meet basic health and shelter needs.² Advocates with clients interested in obtaining FHA-insured mortgages should contact local banks, savings and loan associations, mortgage companies, or credit unions that make FHA loans. Many lenders are still unaware of the program or are inexperienced in providing such loans. However, all of these institutions should have received information and guidance from HUD, in the form of Mortgage Letters 90-17 and 91-1.

Additional information about reverse mortgages is available from the ABA Commission on Legal Problems of the Elderly, 1800 M St., NW, Washington, DC 20036; American Association of Retired Persons, 601 E. St., NW, Washington, DC 20049; and the National Center for Home Equity Conversion, 1210 E. College, Ste. 300, Marshall, MN 56258.³