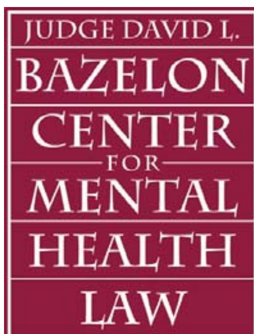

Civil Rights and Human Dignity

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M E M O R A N D U M

TO: Maureen Drouin and Gary Lamson, Vinfen Corporation

FROM: Michael Allen, Senior Staff Attorney, Bazelon Center for Mental Health Law

RE: Mayor's Social Service Task Force Report (Worcester, Massachusetts): Legal Vulnerability Under the Fair Housing Act and Americans with Disabilities Act

DATE: October 25, 2005

Introduction

In October 2005, the Mayor's Social Service Task Force ("Task Force") issued a report entitled *Balancing Quality of Life Issues of Neighborhoods and the City with the Fair Housing Rights of Individuals Living with Disabilities* ("Report"). While it acknowledges that the Fair Housing Act ("FHA") makes discrimination against group homes (and other congregate housing for people with disabilities) illegal, the Report goes on to make a number of recommendations which, if adopted as a matter of city zoning or funding policy, will violate the FHA, the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Section 504"). All three of these federal civil rights laws prohibit discrimination on the basis of disability and require the City to make reasonable modifications in city policy (including zoning and land use policy) in order to provide equal opportunity for people with disabilities to live in the City and to receive the kinds of supportive services they may require.[1]

[1] Because of the similarity in structure and purpose of these three laws, this memorandum will address potential violations in the context of the FHA. In most instances, a violation of the FHA with respect to zoning will also give rise to liability under the ADA and Section 504. One remedy available for violation of Section 504 is a termination of federal funding to the entity held responsible for discrimination.

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Reciting little or no evidence, the Report's introduction suggests that the City is faced with three major issues with respect to group homes:

- A "high concentration" of social service programs in certain neighborhoods[2];
- The absence of a "public process or notification…causing legitimate concerns in the neighbors and creating a fear of the unknown"[3] ; and
- The loss of tax revenue to the city when nonprofit charitable agencies acquired properties and qualified for tax exemptions.[4]

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[2] The Report offers few specifics about the first concern, other than that 116 nonprofits had secured tax exemptions since 1995. The Report reveals neither how many of these are social services providers nor how many run residential programs. Assuming that half might be group homes, and that they may house an average of six residents, that still represents only 58 group homes and 348 residents in a city with nearly 175,000 residents and 37.5 square miles of land. It is unclear whether and where an objectively "high concentration" of group homes or social services providers may exist.

[3] The Report does not list the "concerns" or "fear[s]" of residents, so it is not possible to determine whether they are "legitimate." Further, as outlined below, there is no requirement of a "public process or notification" where a property owner, whether nonprofit or for-profit, can develop or occupy a property "by right." It is only where the owner seeks zoning relief that a public process, such as a variance or special use permit hearing, is required. Presumably, the City of Worcester requires such processes for those seeking zoning relief.

[4] The Report does suggest that the tax-exempt status of nonprofit charitable agencies in Worcester "accounted for an estimated loss of $1.6 million per year in tax revenues to the City." But with total annual revenue of nearly $500 million, of which more than $156 million comes from property taxes, it is unclear whether or not the "loss" to the City is mitigated by the effective social services provided to the City's residents by these nonprofits, including the reduction of homelessness, hospitalizations, use of emergency rooms, etc.

Task Force Recommendations

These three concerns provide the foundation for a sweeping "Best Practice Model of Siting Social Services Programs." While many elements of the Model are adopted voluntarily by social services providers facing community opposition to their programs, the Task Force would make them mandatory[5], and therein lies the violation of the FHA and other civil rights laws.

Notification and "Openness of Process"

As the first element of its Model, the Report calls for mandatory notification of "all the affected parties" once a "possible site" has been identified. By urging the Model's adoption as part of the City's procurement process, the Report also urges mandatory notification of neighbors at or before the time site control is achieved.

Because these policies treat people with disabilities differently than similarly situated people without disabilities, they amount to discrimination under the FHA, ADA and Section 504. This essential point was recognized in *Potomac Group Home Corp. v. Montgomery County*, 823 F.Supp. 1285 (D.Md. 1993), the first case to analyze neighbor notification requirements after passage of the Fair Housing Amendments Act of 1988. There, invalidating a county ordinance requiring notification of neighbors and purportedly addressed to promoting their integration into the community, the federal court noted that similar requirements were not imposed on any other residential use.

[5] The Task Force goes beyond offering a voluntary model that social services providers may choose to adopt. By its terms, the Task Force "recommends that the Executive Office of Health and Human Services (EOHHS), through its procurement process, adopt this model for the siting of all future social service residential programs." Report, at p. 8.

The court found "no rational or legitimate governmental interest supports the neighbor notification requirement." Id. at 1296. It also noted that

> "[t]his 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 obvious result of these notifications to neighbors is the antithesis of the professed 'integration' goal of defendants. Indeed, notices of this sort galvanize neighbors in their opposition to the homes."

Id. Finally, the court noted that neighbors "have no particular expertise" concerning the therapeutic or programmatic elements of running housing for people with disabilities, and that subjecting group homes to a neighbor review process "is perhaps the *most* discriminatory method available…." Id. at 1299 (emphasis in the original).

The U.S. Department of Justice (DOJ) and U.S. Department of Housing and Urban Development (HUD) have also provided guidance in this area. In their Joint Statement on Group Homes, Land Use and the Fair Housing Act (August 18, 1999),[6] the agencies make clear that "[l]ocal zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the Fair Housing Act." Rather than adopt discriminatory notification and other requirements, the agencies suggest that "[n]eighbors who have concerns that a particular group home is being operated inappropriately should be able to bring their concerns to the attention of the responsible [state] licensing agency."

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[6] Available at http://www.usdoj.gov/crt/housing/final8_1.htm .

Even the National League of Cities (NLC), the foremost advocate for local control of zoning and land use matters understands that neighbor notification rules are discriminatory. In its Local Officials Guide entitled *Fair Housing, The Siting of Group Homes for People with Disabilities and Children* (National League of Cities, 1999),[7] NLC says that "[g]roup homes that are entitled to locate 'by right' under local ordinances or state statutes are not required to provide advance notification or be subjected to public hearing requirements" and "[n]otification requirements that are applied only to group homes violate the FHA."[8]

Many group home sponsors have voluntarily adopted variations on the Report's and have found that they are essential to building community support and increasing housing opportunities for people with disabilities.

However, when these requirements are codified and made mandatory, they frequently have the effect of excluding group homes. As recognized in *Potomac Group Home,* public hearings often provide forums for residents to express anger and fear at the prospect of having people with disabilities living near their families. Such vocal opposition, based on stereotypes and myths, exposes prospective group home residents to invasive public scrutiny and heavily influences the local officials charged with granting or denying permits. Thus, the notification and "public process" called for in the Report may actually undermine Worcester officials' legal obligation to give people with disabilities an equal opportunity to live where they choose.

Local officials believe that notification and public hearings are necessary to give neighbors a sense of security and a vehicle for obtaining information and articulating concerns. There are better ways, however, to achieve these goals. Officials argue that these procedures are legally required and cannot and should not be modified just for group homes. This position ignores the fact that the FHA's reasonable accommodation provision allows – and may *require* – a locality to waive its notification and public hearing requirements when requested to do so, and when alternative means of notification, education and community participation can achieve the same desired goals.

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[7] Available at http://www.bazelon.org/issues/housing/cpfha/1group_homes.pdf

[8] *Fair Housing, The Siting of Group Homes for People with Disabilities and Children* (National League of Cities, 1999), at p. 12.

When a group home sponsor has requested an accommodation in the application of the zoning code, local officials must determine whether the requested change fundamentally alters the zoning scheme and whether the change would constitute and undue financial or administrative burden. These inquiries require an analysis of the concrete facts and circumstances of the particular group home in question. The impact of the group home can be measured in objective and quantitative fashion, particularly with respect to the essential aspects of zoning and land use: density, congestion, parking availability and impact on public services. By contrast, the subjective concerns of neighbors add little value to the analysis required of public officials. Modifying notification and public hearing procedures in this manner would not fundamentally alter zoning schemes and may, in fact, reduce the fiscal and administrative burdens associated with public hearings. Local officials would still be able to collect information by meeting with the applicant and visiting the proposed site.

Deciding which officials should be notified and how to respond to community concerns are questions advocates and local officials should address together, by providing more effective and productive educational vehicles. One alternative is to use non-site-specific hearings and public meetings to discuss and collect general information on group homes and people with disabilities. By not being linked to the approval and siting of a specific group home, these forums would be less likely to arouse local opposition. Indeed, under the requirements of the FHA, they "may be necessary" to reduce local housing tensions and ensure equal housing opportunity.

"Guarantees"

In the interest of providing "guarantees" or "assurances" to concerned neighbors, the Report urges City officials to adopt requirements that social services providers have "open discussions" with neighbors, who might serve on "advisory or governing bodies" of those provider organizations. The Report also recommends that social services providers post "bonds" to respond to neighbors' concerns.

No other residential use is required to have such discussions with neighbors, or invite potentially hostile opponents into a decision-making process, or post bonds to guarantee some level of performance. In short, it would be offensive to apply these requirements to any other group protected by the FHA.

As the Introduction to the Report makes clear, some neighbors have a "fear of the unknown." But in the face of the FHA, which was enacted to "end the unnecessary exclusion of persons from handicaps from the American mainstream…[to] repudiate[ ] the use of stereotypes and ignorance…and [to] mandate[ ] that persons with handicaps be considered as individuals,"[9] such fear simply cannot be justification for policy that discriminates on its face and in its application to social services providers and the people with disabilities they serve.

A Model for Siting Social Service Residential Programs

The prescriptive nature of these specific recommendations, flowing both from the intended incorporation into the procurement process and the language itself, also raises significant concerns under the FHA. Again, many social service providers voluntarily employ some of the Report's recommendations, because they deem them appropriate means of engaging local opposition. But mandatory steps, such as "involv[ing] all appropriate elected officials at the earliest possible moment," "inform the local neighborhood," "offer to include neighbors on an advisory committee or governing board," and "schedule an open house or other process to engage neighbors," raise all the FHA objections outlined above.

State and Municipal Recommendations

[9] H.Rpt. 100-711, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (1988).

Distance/Mapping Requirement: The Report would require that providers "map" social service programs within a half-mile radius of their proposed site . Mapping is likely a precursor to "more evenly distribut[ing]" social service programs through the use of spacing requirements, which have been universally condemned by the federal courts as violating the FHA. See *Oconomowoc Res. Programs v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002); *Larkin v. Michigan Department of Social Services*, 89 F.3d 285 (6th Cir. 1996); *United States v. City of Chicago Heights*, 161 F.Supp.2d 819 (D.Ill. 2001). History has demonstrated that such maps become widely circulated among members of the public, and serve as a magnet for ongoing community opposition. In fact, the Report itself contains an attachment mapping existing social service locations.

Rights Enforcement Recommendations

In addition to people with disabilities whose rights may be violated if the Task Force's recommendations become City or state policy, Vinfen and other social service providers who are affected have standing to sue in their own names under the Fair Housing Act. I recommend that affected providers document the Task Force process and monitor City and state policy closely to determine whether any of the Report's recommendations are enacted. If so, and if they limit housing opportunities for people with disabilities, any or all of the following should be actively considered:

- Administrative complaints to HUD and to the Massachusetts Commission Against Discrimination

- A formal letter to complaint to DOJ and to the state Attorney General, asking for an investigation of the City's zoning and land use policies, and its pattern and practice of treating people with disabilities less favorably

- Litigation in federal court, seeking declaratory and injunctive relief, as well as damages and attorney's fees for disability discrimination under the FHA, ADA and Section 504.

I would be pleased to assist you in further analysis of the Report and in taking appropriate enforcement action.