

After 30 years, it's time to comply with the Fair Housing Amendments Act of 1989

Daniel Lauber, AICP

Law Office **Daniel Lauber**

PLANNING/COMMUNICATIONS

grouphomes.law

708-366-5200

Gregory W. Jones, AICP

Ancel
Glink

ancelglink.com

312-604-9195

American Planning Association – Illinois Chapter Annual Conference – Sept. 27, 2019

Copyright © 2019. All rights reserved. Used by permission.

Zoning with care

Zoning we'll describe constitutes the most restrictive allowed under:

- Fair Housing Amendments Act of 1988
 - Added disability (and familial status) as protected classes
- Sound zoning and planning principles
- Court decisions throughout the nation, and
- 2016 DOJ/HUD Joint Statement “State And Local Land Use Laws and Practices and the Application of the Fair Housing Act”

**When lost: Go back to
the beginning**



The beginning

All community residences for people with disabilities including sober homes:

- ❖ **Emulate biological family**
- ❖ **Normalization and community integration**
- ❖ **Neighbors serve as role models**
- ❖ **To succeed, need to be located in safe residential neighborhoods, not clustered together or concentrated in a neighborhood**

The beginning

What we know about community residences

- ❖ Over 50 studies on impacts on property values, neighborhood safety, and more
- ❖ No adverse impacts as long as *not clustered on a block face and they are licensed or certified*

Clustering *may* occur when more than one or two are on a block face

Differences Between Community Residences, Institutional Uses, and Rooming or Boarding Houses

Characteristic	Community Residence for People With Disabilities	Institutional Uses (Includes Nursing Homes)	Rooming or Boarding House
Proper Environment	Residential Home-like	Institutional Hospital-like	Residential Hotel-like
Appropriate Zoning Districts	Single-family residential preferred Multiple-family in some instances	Institutional, commercial, mixed use, medical	Multiple-family residential
Relationship of Residents	Single housekeeping unit emulating a biological family Sibling-like relationships essential Bonding between residents highly desirable	Relationships not planned nor essential Incidental friendships may develop	No dependency on other residents Incidental friendships may develop Relationships not planned nor essential
Supervision	Staff in the role of the parents; officers in self-governed homes in role of parents	Total staff supervision	Landlord-tenant relationship
Values Fostered	Family values	None	None
Purpose	Achieve normalization and community integration Habilitation or rehabilitation	No effort to achieve normalization or community integration	No effort to achieve normalization, community integration, habilitation or rehabilitation
Relationship to Neighbors On the Block	Interaction with nondisabled neighbors is an essential component of normalization and community integration; neighbors without disabilities serve as role models to foster normalization and community integration	Interaction with neighbors not facilitated; use is largely self-contained. Neighbors have no role related to the occupants of the institutional use	Interaction with neighbors is hit or miss
Residential Integration	Integration with the surrounding community is essential in contrast to the segregation of living in an institution surrounded by people with the same disability	Essentially segregated from the surrounding community such that immediate neighbors are people with the same disability	Not applicable

Differences Between Community Residences, Institutional Uses, and Rooming or Boarding Houses

Characteristic	Community Residence for People With Disabilities	Institutional Uses (Includes Nursing Homes)	Rooming or Boarding House
Primary Functions	<p>Emulate a biological family Provides support in a family-like residential setting; residents dependent on each other like in a biological family</p> <p>Share family and household tasks Educate residents in many of the areas in which parents normally educate their children:</p> <ul style="list-style-type: none"> Personal health and hygiene Eating habits Dressing/clothing care Household duties and chores House maintenance House safety Developing social and interpersonal skills Developing shopping skills Developing public behavior skills Developing recreational skills Using public transportation Use and value of money Using public facilities (stores, restaurants, theaters, recreational facilities, banks) 	<p>Provide medical treatment and institutional care No family-like living; not a residential nature</p> <p>Patients not expected to perform household tasks; patients are cared for No educational role</p>	<p>Lodging for unrelated individuals Residents are completely independent of each other</p> <p>Residents do not share household tasks; each boarder functions as an individual; no attempt to emulate a biological family</p> <p>No educational role</p>

**FFHAA of
1988 Adds
to Sec. 804
(U.S.C. 3604)**

Adds “handicap” to list of protected classes, but also makes unique provisions for people with “handicaps”

“(3) For purposes of this subsection, **discrimination includes ...**

(B) a refusal to make **reasonable accommodations** in rules, policies, practices, or services, **when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”**

— §3604 (f)(3)(B)

Fair Housing Act Kicks In

“The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. **The Act is intended to prohibit the application of special requirements through land–use regulations, 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.**”

— *House of Representatives Report Number 711, 100th Congress, 2d Session 311 (1988), reprinted in 1988 U.S.C.C.A.N. 2173*

Fair Housing Act Keeps Kicking In

“Another method of making housing unavailable has been the **application or enforcement of otherwise neutral rules and regulations on health, safety, and land-use in a manner which discriminates against people with disabilities**. Such discrimination often results from **false or over-protective 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**.”

— *House of Representatives Report Number 711, 100th Congress, 2d Session 311 (1988), reprinted in 1988 U.S.C.C.A.N. 2173*

Zoning intended to...

- ❖ **Enable** community residences to achieve core principles of normalization and community integration by:
 - (1) **Preventing** existing clusters or concentrations from expanding and becoming more intense
 - (2) **Preventing** new concentrations or clusters from forming

Zoning intended to...

Assure people with disabilities receive the support and protection they need to achieve normalization and community integration — in the case of people in recovery — achieve long-term sobriety

- ❖ **Licensing or certification** can provide the much needed protections
- ❖ **Distinguish** between small community residences that emulate a biological family and larger recovery communities — and locate each in the appropriate zoning districts

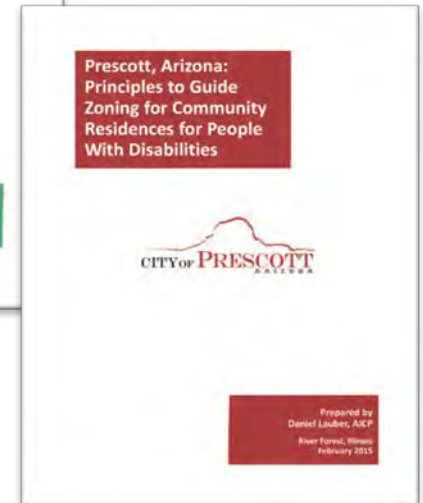
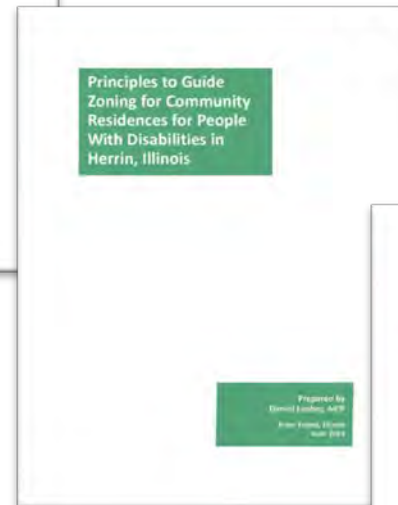
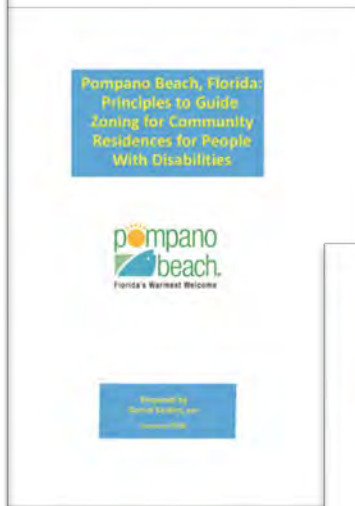
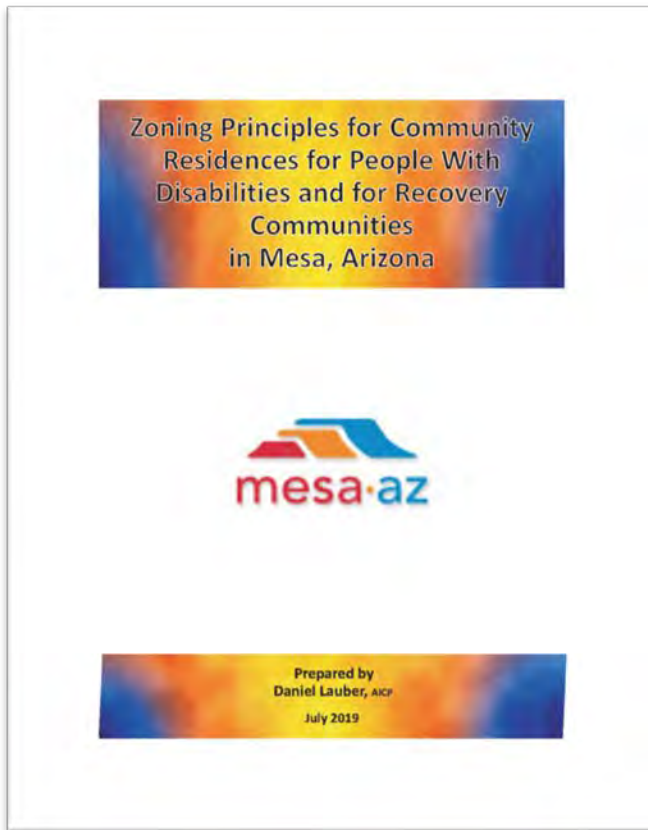
Guiding Principles:

To make the “reasonable accommodation” that the Fair Housing Act requires, zoning protections must be fact–based and:

- ❖ Be **intended to achieve** a legitimate government interest
- ❖ **Actually achieve** that legitimate government interest
- ❖ Constitute the **least drastic means** necessary to achieve that legitimate government interest

How to provide necessary justifications

**Don't amend zoning in a vacuum:
Conduct a proper, fact-based study**



Step 1: Start with definition of “family” or “household”

Zoning code definition of “family”
Example: Cap = 3 unrelated

Fits within cap on number of unrelated individuals that constitutes a “family”
Example: Up to 3 unrelated

Must allow as of right in all residential districts with no additional zoning requirements, including requiring a license

Example: 4 unrelated
Exceeds cap on number of unrelated individuals that constitutes a “family”

Zoning code must make a reasonable accommodation for these community residences

Must use least drastic means that actually achieve a legitimate government interest

When courts toss out zoning requirements like spacing distances and licensing

- 🔴 **Number of residents in community residence falls within cap on number of unrelated individuals in zoning code's definition of "family" or "household"**
- 🔴 **No cap on number of unrelated in "family"**
- 🔴 **"Family" or "household" *not* defined**
- 🔴 **Jurisdiction fails to provide justification for its spacing, licensing, and other requirements imposed on community residences for people with disabilities**

Community residences that exceed cap on unrelateds in definition of “family”

Example: 4 to 10 occupants

Family Community Residence

Relatively permanent tenancy
(Group home or long-term recovery residence)
No time limit on length of residency

Transitional Community Residence

Relatively transient tenancy
(Short-term recovery residence)
Residency limited to weeks or months

All residential districts, allowed as of right if:

- ✓ More than 660 feet from an existing community residence or recovery community, and
- ✓ Licensed or certified (includes Oxford House)

All multifamily districts, allowed as of right if:

- ✓ More than 660 feet from an existing community residence or recovery community, and
- ✓ Licensed or certified (includes Oxford House)

**If *either* criteria is *not* met:
Apply for special use permit**

**If either criteria is *not* met
or site is in a single-family district:
Apply for special use permit**

**If proposed community residence would house more than 10 residents:
Apply for an administrative “disability accommodation” or
special use permit to house more than 10 residents**

Narrowly crafted standards for granting special use

- ❖ **One set of standards for when spacing distance is at issue**

Focus on ability of both community residences to attain normalization and community integration and use “able-bodied” neighbors as role models

- ❖ **Different set of standards for when no license or certification is available**

Focus on ability of community residence to provide protections to occupants similar to protections licensing and certification provide

Narrowly crafted standards for allowing more than 10 occupants

❖ One set of standards for allowing more than 10 residents

Focus on ability of proposed community residence to emulate a biological family to achieve normalization and community integration.

*Must still comply with provisions to prevent overcrowding in housing, building, or property maintenance code that apply to **all** residential uses — U.S. Supreme Court*

Off-Street Parking

Different disabilities generate different off-street parking needs

- ❖ Narrowly tailor requirements to meet actual demand as closely as feasible
- ❖ Should allow for off-site parking and/or on-street permits to satisfy requirements
- ❖ Allow reasonable accommodation requests to reduce number of spaces in special circumstances

Example:

2 off-street spaces per dwelling unit plus 1 space located within 1,200 linear feet off-site for each resident who maintains a motor vehicle on the premises

When size does matter: The ultimate word on number of residents

- 🔴 Building, property maintenance, or housing code provisions to prevent overcrowding that *apply to all dwellings*
- 🔴 First occupant of sleeping area: 70 sq. ft.
- 🔴 50 sq. ft. each additional occupant of sleeping area

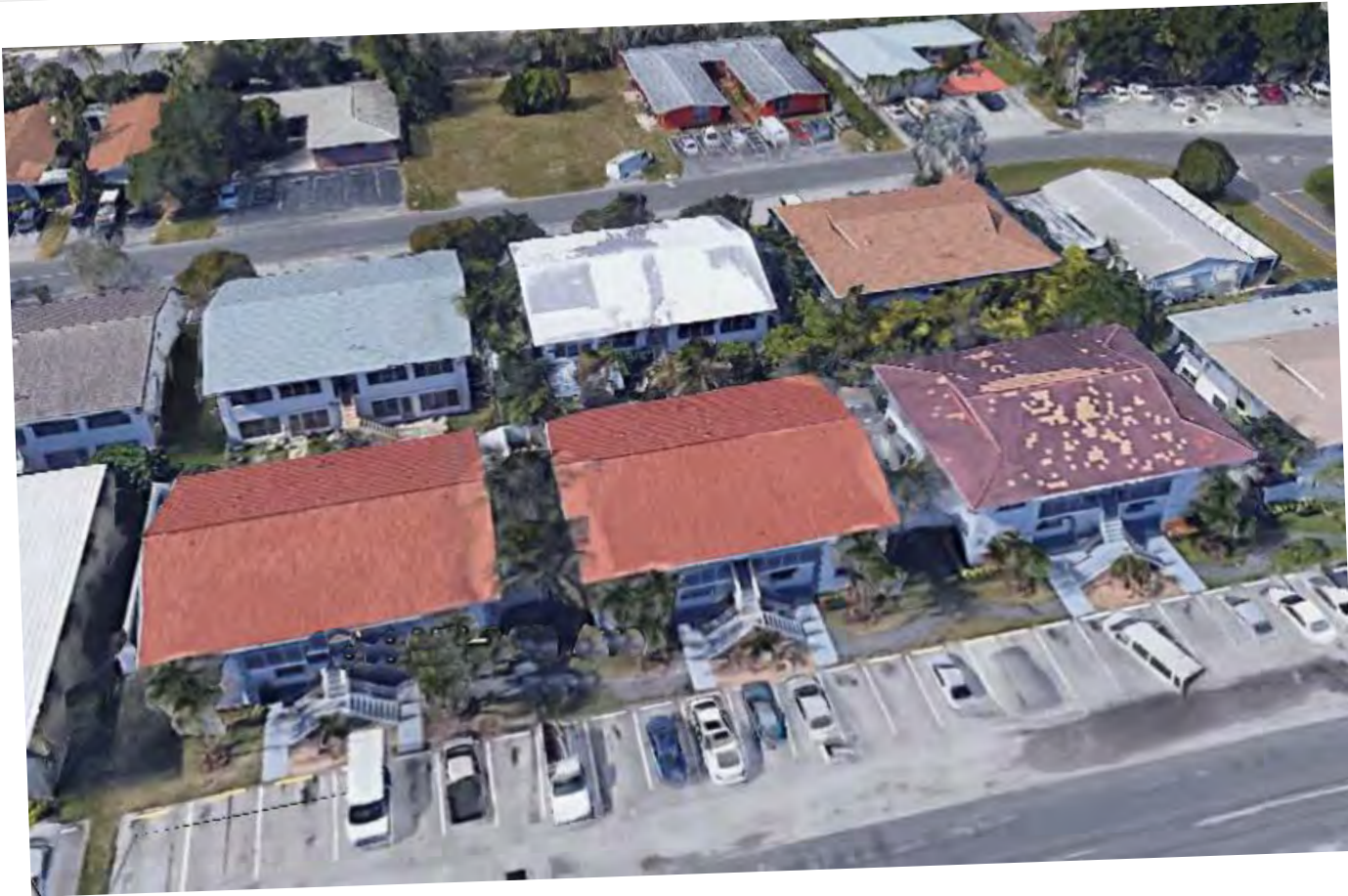


City of Edmonds, Washington v. Oxford House,
115 S.Ct. 1776 (1995)

Regulatory approaches courts disfavor

- 🔴 **Density requirements specific to community residences**
- 🔴 **Lot size requirements specific to community residences**
- 🔴 **Absolute spacing distance without relief**
(no “further reasonable accommodation”)
- 🔴 **Special / conditional use permits as primary regulatory vehicle**
- 🔴 **Unjustifiable life / safety requirements**

A New Ballgame: Recovery Communities



Poster child of clustering: 96 people in recovery in four adjacent buildings

Recovery Communities

With 96 people in recovery in four adjacent buildings, this Pompano Beach recovery community is an even more intense concentration than the fact situation in the *Familystyle* court decision:

- ❖ 21 group homes expanding to 24
- ❖ 119 people with mental illness expanding to 130
- ❖ All within 1 ½ blocks of each other

Recovery Communities



Two West Palm Beach recovery communities under the same operator — indicated by the red dots — house 20 and 26 people in recovery on adjacent lots.

Recovery Communities



Twenty–eight people in recovery occupy this recovery community consisting of four adjacent townhomes in West Palm Beach.

Recovery Communities

“The courts were concerned that the plaintiffs were simply recreating an institutionalized setting in the community, rather than deinstitutionalizing the disabled.”

— *Larkin v. State of Michigan Department of Social Services*, 89 F.3d 285 6th Cir. 1996 describing the decisions in *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F.Supp. 1396 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991).

Use least drastic means that actually achieves legitimate government interest

Recovery Community

**Single-family districts:
Not permitted**

except an existing recovery community may continue as a lawful nonconforming use if it obtains and maintains license or certification



Permitted use in all zoning districts where multifamily or institutional uses are allowed if:

- ✓ **More than 1,200 feet from any existing community residence or recovery community, and**
- ✓ **Licensed or certified**



**If located with the 1,200 foot spacing distance:
Apply for special use permit**