Coates' Canons Blog: Can a Group Home be Zoned Out of the Neighborhood?

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Article: http://canons.sog.unc.edu/?p=6660

This entry was posted on May 15, 2012 and is filed under Land Use & Code Enforcement, Miscellaneous, Social Services

Most zoning ordinances have residential zoning districts. One of these is usually a district where the primary permitted land use is single family detached housing. Multifamily housing and group living arrangements (as well as commercial and industrial land uses) are usually not allowed in these zoning districts.

Use of these zoning districts presents the question of where to draw the boundary between a “single family” residence and a “group” residence. This question is particularly important in determining how to treat small group homes for persons with disabilities, facilities that are designed to provide housing, personal care, and habilitation services in the quiet residential setting of a single family zoning district.

Suppose a zoning ordinance provides that no more than four unrelated individuals are allowed to reside in a “single family” home. Group homes, health care, and institutional uses are allowed in other zoning districts, but not in this district. Under this wording, which of the following group homes would be allowed to locate in that zoning district, assuming they secure the necessary social service license?

1. A regional mental health support organization owns a single-family ranch house. They use it to house six adults with moderate developmental disabilities, providing a structured living environment with a resident manager.
2. A local church owns a large Victorian home. They are using it as a group home for six teenage girls. They provide a safe living environment, counseling, remedial education, and other services for teenagers who have dropped out of school or been convicted of a criminal offense that did not result in incarceration.
3. A national nonprofit organization owns a large home and uses it for a residential program for persons recovering from substance abuse. The organization has a zero tolerance policy for substance abuse by the residents. There are nightly counseling sessions held in the home. The home currently has twelve residents.
4. A for-profit company provides residential treatment for emotionally disturbed teenage boys. The company is using a home to house six boys who have been diagnosed as emotionally disturbed. The home houses six of these boys and it just began operation across the street from the group home described in example one above.

Each of these group homes share common attributes. They provide needed social services. They are relatively small. They provide services in a residential setting, helping to integrate their clients into the community. Given their positive contributions and small scale, a local government could certainly choose as a matter of local policy to allow each of these as a permitted use in their most restrictive residential zoning district or perhaps to allow them as a special or conditional use with site-specific restrictions imposed as needed to assure neighborhood compatibility.

But in this case the city involved has decided to limit homes in this particular residential zoning district to no more than four unrelated residents. This may well reflect the city’s balancing of the community need for these facilities with the interests of residents in the district for a quiet, stable, family neighborhood. After all, at some point the traffic, noise, and other land use impacts of congregate living facilities (be they rooming houses, fraternity houses, or group homes) can be incompatible with a low density residential neighborhood. Here the city set that dividing point between a “single family” residence and an institutional “group home” use at four unrelated persons. Since each of the group homes in our example has more than four unrelated residents, are they all in violation of the local zoning ordinance?

No. Even though each of the facilities is too large to be a “single family” home under the zoning ordinance, state and federal housing laws will in some of these situations override the local zoning restriction.

State statutory protection

North Carolina statutes recognize the important public service provided by group homes that provide health, counseling, or related services to a small number of persons in a family type of environment. The General Assembly recognized that there is often neighborhood opposition to these facilities and that some local governments may unduly restrict this socially desirable service. The General Assembly also recognized the social desirability of allowing local governments to maintain a quiet low-density residential character for some neighborhoods. The need to balance these two legitimate concerns is reflected in provisions added to the statutes in 1981 related to zoning of small group homes.

G.S. 168-22 provides that local zoning ordinances must treat certain "family care homes" as if they were single-family homes. They cannot be prohibited in a zoning district that allows single-family residences. They cannot be subject to any special review requirements, such as a special or conditional use requirement. G.S. 168-23 further provides that private restrictive covenants must also treat family care homes the same as a single family residence.

To qualify for this treatment under North Carolina law, the facility must be designed to provide room, board, and care for six or fewer disabled persons in a family environment. A disabled person for the purposes of this statute includes those with permanent or temporary physical, emotional, or mental disabilities but not those who have been deemed dangerous to themselves or to others (cross-referencing the statute for involuntary commitment to define "dangerous" for purposes of this statute). **G.S. 168-21**. The identity of the owner or operator of the home–be it a nonprofit organization, a for-profit business, an individual, or a religious entity–does not matter for zoning protection purposes.

The group home described in our first example meets this definition of a "family care home" and must be allowed without special review in any single family zoning district. It serves six or fewer residents who have a physical, mental, or emotional disability. While it will have to meet setback, height limit, and all other zoning requirements applicable to other residences in this district, it must not be treated any more restrictively than any other single family home.

The group home described in our second example – the home for troubled teenage girls – illustrates the limits of the protection offered by the state law. To be treated as the equivalent of a single family residence for zoning purposes, the group home must serve persons with a disability. Here the home serves girls who have a very real need, but one that is not a disability as defined by the state law. The residents have dropped out of school or been convicted of a criminal offense. The state zoning protection kicks in only if they have a permanent or temporary physical, mental, or emotionally disability. Unless such a diagnosis is part of the admissions process, this facility would be subject to treatment under the zoning ordinance as a "group home" rather than as a "single family residence."

Federal statutory protection

What about our third example, the home serving twelve persons who are recovering from substance abuse problems? To resolve the zoning status of this group home we must add consideration of federal law to our analysis.

The Fair Housing Act makes it unlawful to make a dwelling unavailable to a person because of race, color, national origin, religion, sex, familial status, or *disability*. A statutory violation is established by showing that a policy or practice of a local government has a disparate impact on a protected class. Prohibited discrimination includes failure to make reasonable accommodation in rules and policies when such is necessary to afford a protected person equal opportunity to use and enjoy a dwelling. **42 U.S.C. § 3604(f)(3) (2010)**. The protections afforded persons with disabilities by the Americans with Disabilities Act (ADA) closely parallel those provided under the Fair Housing Act.

As with our first two examples the initial question is whether the home is serving persons with qualifying disabilities. In the Fair Housing Act, the term "handicap" is used (in contrast with many federal statutes, which favor the word "disability") and it is defined to include persons with physical or mental impairments that substantially limit one or more major life activities. **42 U.S.C. § 3602(h)(1) (2010)**. The definition does not cover persons with either current illegal use of or addiction to a controlled substance, persons convicted of crimes involving the manufacture or sale of illegal drugs, or those who constitute a direct threat to the health or safety of others. However, recovering substance abuse patients are covered. So in our third example the persons residing on site are disabled and qualify for protection.

But the home in our third example has twelve residents. This takes the home out of the state statutory protection, as that is limited to homes with six or fewer residents. But that is not the end of the inquiry for federal statutory purposes, as that law requires local governments to make a "reasonable accommodation." Would allowing this home to have twelve rather than six residents be a reasonable accommodation mandated by federal law? The answer is unclear and depends in part on the particular facts of each situation. There has been a good deal of litigation around the country about just how much accommodation regarding the number of residents must be made. Is eight residents reasonable in a particular home and site, or must ten, twelve, or more residents be allowed? A federal court upheld Wilmington's limit of eight residents, finding there had been no showing that nine rather than eight residents was a necessity for the successful operation of the home. *Oxford House, Inc. v. City of Wilmington*, No. 7:07-CV-61-F, 2010 WL 4484523 (E.D.N.C. Oct. 28, 2010). But this inquiry is inherently fact specific. I It is impossible to generalize beyond saying some accommodation is required, but only a reasonable amount.

Our fourth example raises the question of whether a local government can impose a minimum separation requirement between facilities in order to maintain the single-family, non-institutional character of a neighborhood. The state law, G.S. 168-22, allows a half-mile separation requirement, so that would allow a local government to prohibit a second family care home across the street from an existing home, provided that requirement in written into the zoning ordinance. But what about the requirement in federal law for reasonable accommodation? While some federal courts have upheld separation requirements, others have invalidated substantially similar requirements. As with the number of residents, the question of how much accommodation is "reasonable" depends on the particular facts involved. Nationally, the larger the minimum separation is, the less likely it is to be upheld. In North Carolina, the court in *Oxford House, Inc. v. City of Raleigh*, No. 5:98-CV-113-BO(2), 1999 WL 1940013 (E.D.N.C. Jan. 26, 1999), upheld the city's 375-yard minimum separation between "supportive housing residences," which included facilities serving disabled persons. While Wilmington's half-mile separation was upheld in the *Oxford House, Inc. v. City of Wilmington* case noted above, courts in other states have invalidated substantially similar restrictions. It is reasonable to conclude that some separation is allowed, but as that distance approaches a half mile, the need for some accommodation in individual cases needs to be given careful consideration.

Group homes that provide services to a relatively small number of persons with disabilities in a residential setting meet an important social need. Both state and federal statutes mandate that local zoning ordinances recognize and support these facilities. A North Carolina zoning ordinance may not keep all of them totally out of a single family zoning district. At a minimum, a group home providing care and services for six (and perhaps seven or eight) disabled persons must be treated just like a single family home. A local government may well decide to provide similar zoning treatment to a broader range of other group homes—those serving other populations or larger homes–the same way. But any local zoning restriction that attempts to exclude protected group homes will be invalidated if challenged. Therefore, North Carolina cities and counties must carefully consider and balance the needs of these protected group homes as they also consider the interests of single family neighborhoods.

Links

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=168-22
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=168-21
- www.law.cornell.edu/uscode/text/42/3604
- www.law.cornell.edu/uscode/text/42/3602