

Fair Housing Act Compliance Concerns Arising from Zoning Laws of Jurisdictions within Montgomery County, Ohio and the Impact Upon People with Disabilities

JIM McCARTHY
SIMONE BOOTHE
ANDREW C. SIGMON

Miami Valley Fair Housing Center



Equal Opportunity Specialists

March 2010

MIAMI VALLEY FAIR HOUSING CENTER, INC.
21-23 EAST BABBITT STREET
DAYTON, OH 45405
(937) 223-6035 (PHONE)

www.mvfairhousing.com

About the Authors

JIM McCARTHY is the President/CEO of the Miami Valley Fair Housing Center (MVFHC). He attended the University of Cincinnati and Wright State University. He has been fair housing advocate on the local, state and federal levels since 1998, and has testified before the U.S. House Committee on Oversight and Government Reform – Subcommittee on Domestic Policy on *Foreclosure, Predatory Mortgage and Payday Lending in America's Cities*; the U.S. Senate Committee on Banking, Housing & Urban Affairs on *Mortgage Market Turmoil*; and before Ohio's Foreclosure Prevention Task Force on *How Fair Housing and Fair Lending Are Related to Predatory Lending*.

SIMONE BOOTHE is a law student at the University of Dayton School of Law. She received her B. A. in Political Science from Johnson C. Smith University and M.P.A. from Old Dominion University. Simone has worked with various government and non-profit organizations assisting with the growth and development of underserved communities.

ANDREW C. SIGMON received his B.A. in Political Science from the University of Tennessee, and his J.D. from the University of Dayton School of Law. His contributions to this report are the product of his efforts as a Law Clerk at the Miami Valley Fair Housing Center.

About the Miami Valley Fair Housing Center

The Miami Valley Fair Housing (MVFHC) is a 501(c)(3) non-profit organization whose mission is to eliminate housing discrimination and ensure equal housing opportunity for all people in the region.

Specifically, MVFHC seeks to eliminate housing discrimination against all persons because of race, color, religion, national origin, sex, disability, familial status, or any other characteristic protected under state or local laws. In furthering this goal, MVFHC engages in activities designed to encourage fair housing practices through educational efforts; assists person who believe they have been victims of housing discrimination; identifies barriers to fair housing in order to help counteract and eliminate discriminatory housing practices; works with elected and government representatives to protect and improve fair housing laws; and takes all appropriate and necessary action to ensure that fair housing laws are properly and fairly enforced throughout the Miami Valley.

Executive Summary

This report examines the zoning laws of municipal jurisdictions within Montgomery County, Ohio to determine whether the municipal zoning laws of jurisdictions within Montgomery County pose obstacles to the establishment of Supported Living Homes. A separate review of each jurisdiction is attached to the report.

The Miami Valley Fair Housing Center (MVFHC), Miami Valley In-Ovations (MVIO), and the Montgomery County Board of Developmental Disability Services (MCDDS) collaborated over a period of approximately 20 months, and diverted resources from other programming to complete the study because of difficulties that MVIO encountered as it tried to establish Supported Living arrangements for people with disabilities throughout Montgomery County.

Miami Valley In-Ovations' mission is to provide lifetime affordable housing to people with disabilities in Montgomery and surrounding counties, with an emphasis on serving residents with developmental disabilities.

The Supported Living Concept and Home

At the outset it is important to understand the Supported Living model and how it differs from other types of living arrangements for individuals with disabilities. The basic Supported Living definition is: *up to four people sharing a house or apartment, each choosing where and with whom they want to live, and who cares for them.* At the core of the Supported Living concept is the notion of choice. To best facilitate this notion of choice, Supported Living separates the functions of housing and support services. In fact, the fundamental principles of the Supported Living concept are codified into the Ohio Revised Code. The quality of a Supported Living arrangement is determined by review of certain criteria including: Choices and Options, Personal Income, Housing, Community Membership, Personal Satisfaction, Health, and Safety.¹ Both the statutory language and the Supported Living concept itself convey the inherent differences between Supported Living Homes and institutional settings.

The differences between Supported Living Homes and other types of group living arrangements for individuals with disabilities cannot be overly stressed. ***Supported Living Homes are not group homes.*** Where a group home must obtain a license to operate, and typically provides housing for five or more individuals, Supported Living Homes house up to four and are not required to obtain licensing. Within the residence, the tenants of a Supported Living Home function in a family-like setting. They share living, dining, cooking, and common space; and each tenant has his or her own bedroom.

The MVIO Supported Living Model

The relationship between MVIO and the residents of a Supported Living Home is that of landlord and tenant, respectively. Individuals are referred to MVIO as potential residents, MVIO assesses their needs and desires by matching them with others who wish to live in a certain area and who have

¹ See e.g. <http://codes.ohio.gov/oac/5123:2-12-01>

common interests and levels of care. MVIO then works to locate a property, uses professional contractors to remodel the house when necessary and rent to the individuals.

Properties sought by MVIO are typically four-bedroom homes, duplexes with two-bedrooms per side, or apartment buildings. Properties are ideally located near transit stations and within convenient driving distance to shops and other community services. By capping the number of residents at four, and operating without the requirement of government licensing, Supported Living Homes may fall beneath the maximum occupancy limits for a single-family home in some municipalities; however, this is not always the case. In some instances, a Supported Living Home may be subject to public hearings and/or the process to obtain a conditional use permit. If a municipal jurisdiction does require public hearings, conditional use permits, or imposes other similar restrictions on the establishment of a Supported Living Home, issues of discrimination may arise.

The Fair Housing Amendments Act of 1988

The Fair Housing Amendments Act of 1988 (FHAA) expanded federal Fair Housing law to include individuals with disabilities as a protected class. As such, individuals with disabilities are protected from discrimination in housing based on their disabilities. This principle is far from exclusive to the FHAA. The policy of prohibiting discrimination against individuals with disabilities has been adopted and enforced throughout the body of federal law.²

A “dwelling” is defined under the FHAA as: *Any building, structure, or portion thereof which is occupied as, designed or intended for occupancy as, a residence...*³ Supported Living Homes are typically single-family houses or duplexes converted for use as a single-family home, and thus meet the requirements of a “dwelling” under the FHAA.

As municipal zoning laws are subject to the provisions of the FHAA, municipalities are barred from engaging in certain acts of discrimination. The FHAA makes it unlawful *to 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 that buyer or renter, a person residing or intending to reside in that dwelling after it is sold, rented, or made available; or any person associated with that buyer or renter.*⁴

The FHAA also prohibits discrimination against *any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of that person, a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or any person associated with that person.*⁵

The definition of “handicap” set forth in the FHAA is identical to the definition of “disability” used in the Americans with Disabilities Act (ADA). Therefore, the two terms, “handicap” and “disability” are appropriately used interchangeably. For the sake of consistency, this report and its attached jurisdiction reviews employ the term “disability.” Individuals residing in a MVIO Supported Living Home are individuals with disabilities and are members of a protected class under the FHAA.

² See generally, Rehabilitation Act of 1973, and Americans with Disabilities Act.

³ 42 U.S.C. § 3602 (b).

⁴ 42 U.S.C. § 3604(f)(1).

⁵ 42 U.S.C. § 3604 (f)(2).

Moreover, and perhaps most pertinent to this particular issue, is the FHAA's prohibition on refusing "reasonable accommodations." The FHAA states: *Discrimination includes... 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.*⁶

Although the FHAA itself is silent with respect to defining a "reasonable accommodation", courts have interpreted this provision as such that is binding upon municipal governments.⁷ "This creates an affirmative duty on municipalities...to afford its disabled residents reasonable accommodations in its municipal zoning practices, if necessary to afford such persons equal opportunity in the use and enjoyment of their property."⁸ Therefore, failure to amend a municipal zoning definition, provision, or section that creates or enforces more stringent or exclusionary requirements upon individuals because of their disabilities constitutes an actionable prohibited act under the FHAA.

Review of the municipal zoning laws within Montgomery County presents four primary obstacles to establishing Supported Living Homes. The first obstacle is a narrowly written definition of "Family." Second, a jurisdiction's chosen terminology for defining group living arrangements for individuals with disabilities may be inaccurate or otherwise lacking. The third obstacle is a jurisdiction's residential district regulations. Fourth is adoption of provisions specifically governing the group living arrangements of individuals with disabilities. A matrix summarizing the issues present in municipal jurisdictions within Montgomery County, Ohio that pose obstacles to the establishment of Supported Living Homes is included as an attachment to the report.

In general, the relationship between municipal zoning laws and the establishment of Supported Living Homes can be addressed from three (3) broad perspectives: legal, social, and political. The focal point of this study addresses the legal facet of the relationship between municipal zoning laws and Supported Living. While identifying and suggesting policy for amending municipal zoning laws that may present obstacles to Supported Living is helpful, black letter law is not the sole means to making Supported Living a reality in Montgomery County. To achieve the goal of removing barriers to Supported Living, both the social and political perspectives must also be considered. The discussion of these perspectives included in this report does not extend to each jurisdiction's individual review, but the overarching concepts are applicable across municipal boundaries. Moreover, this discussion does not address every issue that may arise from the different perspectives. Rather, it provides a brief preface to some of the non-legal challenges that may stand in the way of Supported Living.

Although statutory law can present numerous obstacles to Supported Living, community and neighborhood resistance can add to the already difficult endeavor. Attitudes toward group living arrangements for individuals with disabilities often take the form of "NIMBY-ism." NIMBY-ism, derived from the acronym for Not in My Back Yard, refers, in this instance, to acceptance of group living arrangements for individuals with disabilities, but a desire to locate them elsewhere.

⁶ 42 U.S.C. § 3604 (f)(3)(b).

⁷ See *Howard v. City of Beavercreek*, 276 F.3d 802 (6th Cir.2002)

⁸ *Id.*806.

MATRIX

Zoning issues present in municipal jurisdictions within Montgomery County, Ohio that pose obstacles to the establishment of Supported Living Homes.

Jurisdiction	Issue One	Issue Two	Issue Three	Issue Four	Issue Five
Brookville	Definition of family is narrowly defined, because it allows for no more than 3 unrelated persons to live together	Whether Supported Living Homes will be misclassified as a “CORSSF” or “Housing for the Elderly”	Supported Living Homes, if misclassified will be required to obtain a special use permit	Supported Living Homes are not defined in the statute nor do they meet all the elements of any of the types of dwelling units defined	
Butler Township	Definition of family is narrowly defined, because it allows for no more than 3 unrelated persons to live together	Whether Supported Living Homes will be classified as CORSSF	Supported Living Homes if classified as a CORSSF will have to have a special use permit	Supported Living Homes are not defined in the statute nor do they meet all the elements of any of the types of dwelling units defined	
Carlisle	How the zoning board will use its discretion in determining whether they will allow Supported Living Homes	Supported Living Homes are not defined in the statute			
Centerville	Whether the individuals in a Supported Living Home should be classified as a family or should the home be classified as “Residence Family Home”	If classified as a “Residence Family Home” Supported Living Homes will require special permission	Supported Living Homes are not defined in the statute		

AMENDED

COMPLIANT

AMENDED

Jurisdiction	Issue One	Issue Two	Issue Three	Issue Four	Issue Five
City of Clayton	Whether the individuals in a Supported Living Home should be classified as a family or should the home be classified as a “Adult Family Home” or a “Community Social Service Facility”	If classified as a “Community Social Service Facility” than a special use permit is required	If classified as an “Adult Family Home” will a special permit be required, the	Supported Living Homes are not defined in the statute	
		AMENDED			
Clay Township	Definition of family is narrowly defined, because it allows for no more than 3 unrelated persons to live together	Whether Supported Living Homes will be classified as CORSSF or a “Foster Homes for Adults”	Whether classified as a CORSSF or “Foster Home for Adults” Supported Living Homes will be required to obtain a special permit	Supported Living Homes are not defined in the statute	
Dayton	Definition of family is narrowly defined, because it allows for no more than 2 unrelated persons to live together	Whether Supported Living Homes will be classified as a “Adult Family Facility”	Supported Living Homes are not defined in the statute		
		AMENDED			
Englewood	Whether Supported Living Homes will be classified as a “Adult Group Home”	Classifying Supported Living Homes as an “Adult Group Home” is in conflict with state law	Classifying Supported Living Homes as “Adult Group Homes would cause them to be a conditional use in at least two districts	Supported Living Homes are not defined in the statute	

Jurisdiction	Issue One	Issue Two	Issue Three	Issue Four	Issue Five
Farmersville	How the zoning board will use its discretion, as granted by the board, to determine whether Supported Living Homes are permitted or deem them a conditional use	Supported Living Homes are not defined in the statute	The statute is very vague and gives no guidance as to how Supported Living Homes will be classified		
German Township	Whether Supported Living Homs will be classified as a CORSSF	Definition of family is narrowly defined because it allows more than 2 unrelated persons to live together	Supported Living Homes are not defined in the statute		
Harrison Township	Whether Supported Living Homes will be classified as a CORSSF	Definition of family is narrowly defined because it allows more than 3 unrelated persons to live together	Supported Living Homes are not defined in the statute		
Huber Heights	Whether Supported Living Homes will be classified as a "Residential Care and Social Service Facility"	If classified as a "Residential Care and Social Service Facility," Supported Living Homes with require a special use permit	Supported Living Homes are not defined in the statute		
Jackson Township	Definition of family is narrowly defined because allows for no more than 3 unrelated persons to live together	Whether Supported Living Homes will be classified as CORSSF	If classified as a CORSSF Supported Living Homes will be a conditional use	Supported Living Homes are not defined in the statute	

Jurisdiction	Issue One	Issue Two	Issue Three	Issue Four	Issue Five
Jefferson Township	Definition of family is narrowly defined because it allows for no more than 3 unrelated persons to live together	Whether Supported Living Homes will be classified as a CORSSF, Halfway House, Independent Housing, Alternative for Adults, or Rooming House	If classified as a CORSSF, Halfway House, Independent Housing, Rooming House, Supported Living Homes will need a conditional use permit	Supported Living Homes are not defined in the statute	
Kettering	Supported Living Homes are not defined in the statute	Whether Supported Living Homes will be permitted or conditional use			
Miamisburg	Whether Supported Living Homes will be classified as CORSSF	Whether CORSSF's are a permitted or special use as explicit in the statute	Supported Living Homes are not defined in the statute		
Miami Township	Definition of family is narrowly defined because it allows for no more than 3 unrelated persons to live together	Whether Supported Living Homes will be classified as a CORSSF	If classified as a CORSSF Supported Living Homes will be a conditional use	Supported Living Homes are not defined in the statute	
City of Moraine	Definition of family is narrowly defined because it allows for no more than 3 unrelated persons to live together	Whether Supported Living Homes will be classified as a CORSSF and/or "Housing for the Elderly and Handicapped"	Whether CORSSF's are a permitted or special use is not explicit in the statute	Moranine's terminology and definitions differ from similar state and federal terminology and definitions	Supported Living Homes are not defined in the statute

Jurisdiction	Issue One	Issue Two	Issue Three	Issue Four	Issue Five
New Lebanon	Whether Supported Living Homes will be classified as a CORSSF, nursing home, rest home, convalescent home, halfway house, rooming house	If classified as a CORSSF Supported Living Homes will be a conditional use	If classified as a nursing home, rest home, convalescent home, halfway house, or rooming house, Supported Living Homes will explicitly be excluded from being classified as a family	Supported Living Homes are not defined in the statute	
Oakwood	How Supported Living Homes will be classified since they do not fall within one of the categories listed in the statute	Supported Living Homes are not defined in the statute			
Perry Township	Perry Township defines "Handicapped Persons" more narrowly than state and federal statutes	Definition of family is narrowly defined because it allows for no more than 3 unrelated persons to live together	Whether Supported Living Homes will be classified as a CORSSF	If classified as a CORSSF Supported Living Homes will be a conditional use	Supported Living Homes are not defined in the statute
Riverside	Definition of family is narrowly defined because it allows for no more than 3 unrelated persons to live together	Whether Supported Living Homes will be classified as a CORSSF	Supported Living Homes will be classified as a conditional use	Supported Living Homes are not defined in the statute	
Springboro	How the zoning board will use its discretion in determining whether they will allow Supported Living Homes	Supported Living Homes are not defined in the statute			

COMPLIANT

AMENDED

AMENDED

Jurisdiction	Issue One	Issue Two	Issue Three	Issue Four	Issue Five
Trotwood	Whether Supported Living Homes will be classified as a “Family Care Home” or “Community Residence”	Whether “Family Care Home” are a permitted or special use is not explicit in the statute	If classified as a “Community Residence” Supported Living Homes will be subject to general conditional use provisions	Supported Living Homes are not defined in the statute	
Union	Supported Living Homes are not defined in the statute	The statute is vague as to whether a Supported Living Home will be a permitted or conditional use			
Vandalia	Whether Supported Living Homes will be classified as “Residential Facility”	If classified as a “Residential Facility,” Supported Living Homes could be considered a conditional use	Supported Living Homes are not defined in the statute		
Washington Township	Definition of family is narrowly defined because it allows for no more than 3 unrelated persons to live together	Whether a Supported Living Home can be classified as a “Convalescent or Rest Home” or “Health Care Facilities”	Whether “Convalescent or Rest Home” are a permitted or conditional use is not explicit in the statute	Supported Living Homes are not defined in the statute	
West Carrollton	Whether Supported Living Homes will be classified as a “Adult Care Facility,” “MRDD Family Care Facility” or “Rest Home”	West Carrollton definition of “Adult Care Facility” may not be in compliance with state law	If the individuals in Supported Living Homes family, will their use be permitted or conditional		