Land-Use Planning & Litigation for Local Units of Government

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I. Land-Use Planning Generally

The State legislature granted municipalities the right to conduct land-use planning and implement zoning regulations by way of Minn. Stat. §§ 462.351-365 for Cities and Minn. Stat. §§ 394.21-37 for Counties and Towns. In so doing, the legislature identified a number of concerns that land-use planning powers are intended to address:

> The legislature finds that municipalities are faced with mounting problems in providing means of guiding future development of land so as to insure a safer, more pleasant and more economical environment for residential, commercial, industrial and public activities, to preserve agricultural and other open lands, and to promote the public health, safety, and general welfare.

Minn. Stat. § 462.351.

The same concerns are noted in the grant of authority for zoning under Minn. Stat. § 462.357, subd. 1, where it states that such authority is granted "[f]or the purpose of promoting the public health, safety, morals, and general welfare." Under that statute, zoning regulations may be issued to regulate:

> the location, height, width, bulk, type of foundation, number of stories, size of buildings and other structures, the percentage of lot which may be occupied, the size of yards and other open spaces, the density and distribution of population, the uses of buildings and structures for trade, industry, residence, recreation, public activities, or other purposes, and the uses of land for trade, industry, residence, recreation, agriculture, forestry, soil conservation, water supply conservation, conservation of shorelands, as defined in sections 103F.201 to 103F.221, access to direct sunlight for solar energy systems as defined in section 216C.06, flood control or other purposes, and may establish standards and procedures regulating such uses.

Minn. Stat. § 462.357, subd. 1.

As the list shows, municipalities have extensive control over the manner in which they develop. However, this control is not limitless and where land-use controls begin to butt up against personal rights and property rights, litigation soon follows. In the following sections, we will examine two hot button issues where land-use planning and litigation intersect: regulating hate groups and regulating sober homes.

II. Regulating Hate

On July 17, 2020, the Star Tribune reported that a white supremacist group known as the Asatru Folk Assembly had purchased an abandoned Lutheran church in Murdock, Minnesota, and is looking to use it as a regional hub for their organization. This caused a lot of concern, and nearly 50 people in the 275-person town showed up to an October 15 special meeting on the group's permit request. Murdock must now determine whether to approve or deny the permit – a question that largely rests on what their land use controls allow them to do in this situation.

Zoning as a means to prevent hate would be an about face for a tool that initially saw use as a means to enforce segregation. Heather Worthington, a former director of long-range planning for the City of Minneapolis, wrote an opinion piece for The Globe and Mail where she notes:

> If you examine early zoning codes from most U.S. cities in the 1920s and 1930s, you will see an unmistakable pattern: Areas that were deemed hazardous or dangerous on the redlining maps are now zoned for multi-family and industrial or commercial uses; areas that were deemed desirable are now zoned for single-family uses. This was how the system ensured that Black and brown residents would be relegated to denser neighborhoods, closer to industrial areas and without the parks, stores, schools and other amenities that white neighborhoods enjoyed.[1]

Recently, however, more municipalities are adopting land-use policies that promote the inclusion of low-income housing in otherwise affluent developments, reversing this trend. But can land-use controls be used to prevent a hate group from establishing itself in a municipality?

A. First Amendment and Zoning

To answer this question, first we must look to the First Amendment which states, in part, "Congress shall make no law . . . abridging the freedom of speech." First Amendment jurisprudence has developed two different ways of analyzing governmental regulations to determine whether their constitutionality: strict scrutiny and intermediate scrutiny.

Strict scrutiny is the type of judicial review applied in analyzing content-based regulations of speech – where what the speaker is saying is what is being regulated. Under strict scrutiny, the regulation is presumed to be unconstitutional and the municipality bears the burden of proving that it is not. To do so, the municipality must show that the regulation is justified by a compelling governmental interest and is narrowly tailored to achieve that interest.

Content-neutral regulations of speech (generally time, place, or manner restrictions) are only subject to intermediate scrutiny by the courts. Under intermediate scrutiny, the regulation must be justified by a substantial governmental interest and must be narrowly tailored to achieve that interest. Additionally, it must leave open ample alternative avenues of communication.

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[1] https://www.theglobeandmail.com/opinion/article-how-urban-planning-sowed-the-seeds-of-present-day-racial-inequality-in/ (published June 12, 2020) (last accessed December 6, 2020)

Land-use controls and First Amendment rights have clashed before in the Supreme Court. These cases mostly dealt with restrictions placed on adult establishments and restrictions on signs, such as in the following cases.

B. *Young v. American Mini Theatres*, 427 U.S. 50 (1976)

In the 1960's, Detroit adopted an "Anti-Skid Row Ordinance" that it later amended in 1972 to address significant growth in adult establishments in the city. The ordinance placed two restrictions on adult establishments: (1) they could not be located within 500 feet of a residential area; and (2) an adult establishment could not be located within 1,000 feet of two other "regulated uses", which included other adult establishments and bars. The City of Detroit justified these restrictions by stating "the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere."

The Supreme Court, in examining the constitutionality of the Anti-Skid Row Ordinance, looked at the difference in how theaters were treated versus how adult theaters were treated, stating "[e]ven within the area of protected speech, a difference in content may require a different governmental response." The Court noted that:

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice.

The Court focused on a prior ruling which established that under the First Amendment, certain categories of speech are less protected and can be the subject of regulation, including: obscenity, defamation, libel, and fighting words. However, while these categories can be the subject of regulation, that regulation must still be neutral as to the underlying message. Governments can regulate libel, but they cannot only regulate libel critical of the government. Turning to the regulations at hand, the Court found that "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."

In the end, the Court upheld the constitutionality of the ordinances:

> Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures.

C. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)

The City of Ladue, Missouri, had a sign ordinance which prohibited homeowners from displaying any signs on their property except "residence identification" signs, "for sale" signs, and signs warning of safety hazards. These limitations were only applicable to residential areas, and the zoning ordinance had different restrictions on signs for businesses, churches, and nonprofits. One resident, Margaret P. Gilleo, placed a sign in her front lawn with the words "Say No to War in the Persian Gulf, Call Congress Now." The City informed her that her sign was prohibited and that she had to remove it, and she sued for violation of her First Amendment rights.

The Supreme Court in this case acknowledged the difficulty a municipality faces in addressing signs, stating that "[w]hile signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers." The problems identified by the City included safety concerns caused by the signs distracting drivers and aesthetic concerns impacting the economic value of surrounding properties. The City argued that its sign ordinance was based on the government interest in addressing these safety concerns and aesthetic issues.

The Supreme Court found that while municipalities can regulate the physical characteristics of signs, the extent to which the City of Ladue regulated signs cut off a unique form of communication for which no adequate substitute exists. Further, "[w]hereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, its need to regulate temperate speech from the home is surely much less pressing." The City of Ladue's regulation was far too restrictive on speech and thus unconstitutional. The Court did, however, note that their "decision that Ladue's ban on almost all residential signs violates the First Amendment by no means leaves the City powerless to address the ills that may be associated with residential signs."

D. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015)

The Town of Gilbert, Arizona, prohibited the display of outdoor signs without a permit with 23 categorical exemptions including:

- Ideological signs can be up to 20 square feet and have no placement or time restrictions
- Political signs may be up to 32 square feet and only displayed during election season
- Temporary directional signs to an event are limited to four signs, 6 square feet, on a single property and may be displayed for no more than 12 hours before the event and 1 hour after

A church held in various temporary locations would post signs advertising the time and location of its services for more than 24 hours. After being cited for violating the "temporary directional signs" rules, the church filed suit.

The Supreme Court found that the Town's sign ordinance was content based on its face, as the rules applying to a sign were based on the content of the message on the sign (i.e., political, ideological, etc.). To demonstrate, the Court posed the following test case:

> If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government.

Indeed, "speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."

Ultimately, the Court held that the ordinance was subject to strict scrutiny and that it failed to prove a compelling government interest in regulating the different categories of signs in a different manner as it had here. Thus, the ordinance was unconstitutional.

E. Can a municipality ban hate?

While case law has not been developed addressing this issue, we can draw from the above cases where First Amendment rights and land-use intersected to determine how the courts may rule.

A municipality is unlikely to prevail in court if it makes content-based zoning regulations. While it can regulate churches, it cannot regulate churches based on their beliefs. Therefore, any solution that attempts to specifically target a hate group based on their beliefs is not a good solution. While content-neutral generally applicable regulations could affect these groups, they cannot be so restrictive as to close off an avenue of communication entirely – i.e., a municipality can limit the density of churches, but it cannot prohibit them entirely.

A municipality can look for a creative solution to the problem by drafting a content-neutral and generally applicable regulation based on a legitimate government interest, and it would likely be upheld by the courts even if it affected a hate group more. However, such a solution is challenging to identify and may not actually solve the issue in the long-term. Another possibility might be to approach the problem from a different angle – rather than trying to ban hate groups, re-examine current zoning regulations which may disproportionately affect people of color to make the community more inclusive.

III. Sober Homes and Land-Use Regulation

Sober homes, transitional living facilities for people exiting drug rehabilitation programs, have cropped up in increasing numbers, posing tricky legal challenges for municipalities throughout the state looking to regulate them. Land-use regulations applicable to sober homes have been challenged under the Federal Fair Housing Act and the Americans with Disabilities Act and have resulted in the municipalities facing charges of discrimination.

To understand how a municipality may safely regulate these entities, it is important to understand the nature of these claims.

A. The Federal Fair Housing Act (FFHA)

One of the claims sober homes will generally bring in actions against municipalities is a claim of discrimination under the Federal Fair Housing Act (FFHA). The FFHA 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: (A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or (C) any person associated with that buyer or renter. 42 U.S.C. § 3604(f)(1); *See also* 2 Rathkop's The Law of Zoning and Planning § 25:11. The FFHA further provides that it is unlawful to discriminate 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, based on a handicap of such person residing in or intending to reside in that dwelling after it is sold, rented, or otherwise made available. 42 U.S.C. § 3604(f)(2). The "otherwise make unavailable or deny" provision has been held to apply to municipalities. *See Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251 (8th Cir. 1996).

B. The Americans with Disabilities Act (ADA)

A similar claim usually brought alongside the FFHA claim is a claim of discrimination under the Americans with Disabilities Act (ADA). The ADA provides that no individual with a disability "shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. § 12132; *see, e.g., Innovative Health Systems*, 117 F.3d at 37 (zoning is an "activity" of a public entity to which the ADA applies). The federal regulations implementing the ADA make it unlawful for a public entity, in determining a site or location of a facility, to make selections that have the purpose or effect of excluding individuals with disabilities, denying them the benefits of certain locations, or otherwise subjecting them to discrimination. 28 C.F.R. § 35.130(4)(I).

C. Discrimination Claims under the FFHA and ADA

Due to the substantively identical language of the FFHA and ADA, courts interpret them in tandem. *See Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1157 (9th Cir. 2013) *cert. denied*, 135 S. Ct. 436, 190 L. Ed. 2d 328 (2014) (analogizing FHA and ADA interpretation standards); *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 561 (7th Cir. 2003) ("the requirements for showing failure to reasonably accommodate are the same under the ADA and the FHA[ ] so we can treat these issues as one"); *see also Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 573 n. 4 (2d Cir. 2003) ("Due to the similarities between the statutes, we interpret them in tandem."); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002) (ADA is substantively identical to FHAA regarding disability definition and reasonable accommodation requirement).

Three theories of discrimination are available to a sober home alleging a violation of the FHAA or Title II of the ADA: (1) disparate treatment; (2) disparate impact; and (3) a refusal to make a

reasonable accommodation. *Tsombanidis v. City of West Haven*, 129 F.Supp.2d 136, 150 (D. Conn. 2001); *see also Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 790 (6th Cir. 1996); *Wisconsin Correctional Serv. v. City of Milwaukee*, 173 F.Supp.2d 842 (E.D. Wis. 2001); *Remed Recovery Care Centers v. Township of Willistown*, 36 F.Supp.2d 676, 683 (E.D. Pa. 1999). Each are addressed below in turn.

D. Disparate Treatment

To establish a claim under disparate treatment theory, a sober home must show the municipality engaged in intentional discrimination. In other words, the sober home must prove that the residents' status as recovering drug addicts and alcoholics was a motivating factor behind the municipality's enforcement of the zoning code. *See Vill. of Arlington Heights. V. Metro. Housing Dev. Corp*., 429 U.S. 252, 265–66, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). "The critical inquiry is whether a discriminatory purpose was a 'motivating factor' in the decision or actions" of the City. *Tsombanidis*, 129 F.Supp.2d at 151.

Factors to be considered in evaluating a claim of intentional discrimination under the FHA or ADA include: (1) the discriminatory impact of the governmental decision; (2) the decision's historical background; (3) the specific sequence of events leading up to the challenged decision; (4) departures from the normal procedural sequences; (5) departures from normal substantive criteria; and (6) legislative or administrative history, especially contemporary statements by members of the decision-making body. *See Arlington Heights* at 267–268. *See also Tsombanidis* 352 F.3d 565, 580.

E. Disparate Impact

Under a disparate impact theory, a sober home must prove that the challenged ordinance or practice actually or predictably results in discrimination against a protected group and must demonstrate a causal connection between the ordinance or policy at issue and the discriminatory effect. *See Quad Enterprises Co., LLC v. Town of Southold*, 369 Fed. Appx. 202 (2d Cir. 2010).

"The Eighth Circuit has long recognized disparate-impact claims are cognizable under the FHA." *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1110 (8th Cir. 2017) (citation omitted). " 'In contrast to a disparate-treatment case, where a plaintiff must establish that the defendant had a discriminatory intent or motive, a plaintiff bringing a disparate-impact claim challenges practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale.' " *Id*. (quoting *Tex. Dep't of Housing and Cmty. Affairs v. Inclusive Communities Projec*t, —– U.S. ——–, 135 S.Ct. 2507, 2513, 192 L.Ed.2d 514 (2009) (internal quotation omitted)). "But disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of statistical disparity." *Inclusive Communities*, 135 S.Ct. at 2522.

F. Reasonable Accommodation

In order to prevail on a reasonable accommodation claim, the sober home "must make a prima facie showing that the accommodation [it] seeks is reasonable on its face." *Hinneberg v. Big Stone Cty. Hous. & Redevelopment Auth.*, 706 N.W.2d 220, 226 (Minn. 2005). The sober home must prove that the accommodation it is requesting is (a) linked to disability-related needs, (b) necessary to afford the sober home equal opportunity, and (c) is reasonable. *Id*.

The requirements for reasonable accommodation under the ADA are the same as those under the FHA. 42 U.S.C. § 12131(2). An accommodation is reasonable if it is "necessary to afford a handicapped person the equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). Whether a requested accommodation is necessary for purposes of ADA and FHA requires a showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability. *Oconomowoc*, 300 F.3d at 784.

G. Regulating Sober Homes

Like the First Amendment cases and discussion of regulating hate, the validity of regulations on sober homes will largely turn on whether the regulations at issue target sober homes or are generally applicable. Focusing on ensuring that zoning decisions are made with legitimate government reasons, and the desirability of the sober home is never part of the conversation is key in ensuring that courts uphold those decisions.

Limitations on the number of unrelated people living together in a residential district will likely be upheld where there are other areas a sober home can establish itself and where those limitations were set for valid, not discriminatory purposes. Having a zone which does allow for sober homes will provide evidence against a disparate treatment and disparate impact-based discrimination claims.