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Breaking Through Roadblocks

Evoking federal civil rights laws may force reluctant suburban municipalities to approve housing for the elderly.

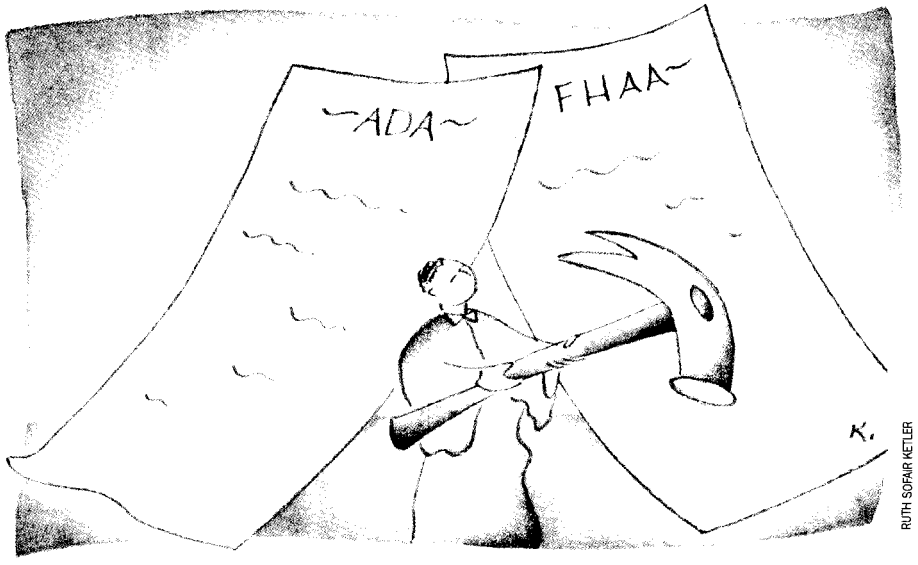
Throughout the United States, rapidly expanding ranks of seniors are creating an increased demand for many types of new housing for seniors. These include active adult communities and apartments for the 55- to 80-year-old active retirees, assisted living residences for the over 75-year-old frail elderly, nursing homes for the 80-plus-year-olds who need more constant and specialized care, as well as continuing care retirement communities, which provide facilities for all three groups on one campus.

Providers and developers of housing for seniors can strengthen their chances of gaining approvals by cloaking themselves in protections afforded by federal civil rights laws previously only used to prohibit racial discrimination in housing. These laws also prohibit discrimination based on age and handicap status and may force reluctant suburban municipalities to approve housing for the elderly despite a preference for single-family houses. Some state laws also may enhance approvability.

Although seniors' housing is considered good for society as a whole, and for the individual communities in which it is built, some towns have put up roadblocks to it. In 1996, Franklin Lakes, New Jersey, chased the potential developer of a large, campus-style seniors' housing project from a 200-acre vacant office facility. In Madison, New Jersey, approval was denied for an assisted living facility to be built on a vacant field. In both communities, the potential project's immediate neighbors wanted to maintain the status quo. Franklin Lakes residents did not want 2,000 seniors voting against school budgets or the traffic caused by care providers going to the site, despite the fact that the planned retenanted office building will create much more traffic at full occupancy. Madison residents did not want to lose a private school's ballfield and used the excuse that the proposed building would be "too big," even though it was below density limits, and that it would cause "too much traffic," despite the fact that none of its residents would drive.

Getting such developments approved in the future should become easier as municipalities realize that if they do not recognize the value of senior housing, they will be subject to federal and state laws and legal decisions that recognize such denials as illegal, unwise, and costly to municipalities in terms of legal expenses and reputation.

One of the most important federal laws for seniors is the federal Fair Housing Amendments Act of 1988 (FHAA), which prohibits discrimination based on factors such as age, race, religion, or handicapped status, by protecting their right to live in a residence of their choice. Municipalities are prohibited from "refusing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford (handicapped) persons(s) equal opportunity to use and enjoy a dwelling." For instance, the U.S. Third Circuit Court of Appeals held that Brick Township, New Jersey, had violated the rights of a developer's prospective handicapped residents for its new nursing home when a use variance was denied. The court first held that residents of a nursing home were in fact covered by the FHAA because the people living there truly "resided" there. Then, in striking down the use variance denial, the court held that "the (township's) blanket exclusion of nursing homes from its residential areas . . . is precisely the sort of isolation of handicapped persons from the mainstream of society that the FHAA was enacted to forbid."



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Upon learning of this decision, Rockleigh, New Jersey, gave up its fight against an assisted living application because its position was clearly indefensible. While age discrimination was not pushed in this case, a vote against housing for the elderly, even for "active adults," easily can be viewed as age-based discrimination that violates federal law.

Many would consider this a strong dose of federal civil rights law applied in a zoning case. It could be interpreted to mean that any housing designed and built to accommodate the "aging in place" of seniors should reap the protection of the FHAA's ban on discrimination based on handicap and age. Just as important, the nature of federal laws allows a developer to make a discrimination claim long before all typical remedies have been exhausted. If developers are rebuffed by a technical review committee, which many towns hold for preliminary review of zoning matters, the developer can immediately, and with validity, stake a federal discrimination claim against the town. This is what one assisted living provider recently did in the Philadelphia suburbs.

The Hovson federal case did not strike down local zoning laws in general. What it did was to apply a balance test, which could provide a good rule to follow in all jurisdictions. In such a test, adopted from a New Jersey Supreme Court case, *Sica v. Wall Twp.*, 1992, the court held that an applicant in a use variance generally must demonstrate that the proposed use will not significantly alter or ruin the neighborhood into which the new use will be brought. The burden of proof shifts, however, from the applicant to the municipality, if the use is one that is "inherently beneficial" to a community. The "inherently beneficial use" provides the "special reason" necessary for the "positive criteria" of the balance test needed for obtaining a zoning variance. Nursing homes, assisted living facilities, and congregate care developments, both for profit and nonprofit, have made it onto this list. A town thus must demonstrate that any detrimental results would be so substantially burdensome as to be clearly bad zoning and planning. Inherently beneficial uses "should have the right to locate on any appropriate site where the physical impact of their operations can be alleviated to a reasonable extent by the imposition of suitable conditions and restrictions" (*Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus*, 1972, as cited in *Sica*.)

Furthermore, towns may not limit the number of unrelated persons living in such a facility with a claim of "preserving family character of a neighborhood." While it is possible to cap the total number of residents in an assisted living facility by using a valid minimum floor space law, no municipality will be able to say that the small square footage in those units is detrimental to their health and would therefore warrant a denial by a municipality, especially when a state department of health already has approved plans for numerous facilities with identical square footage (*City of Edmunds v. Oxford House*, 1995).

The Americans with Disabilities Act (ADA) also prohibits discrimination by a "public entity" on the basis of disability or handicap. A zoning board is a public entity, and its denial of a seniors' housing project that meets the *Sica* test is in fact an ADA violation. A recent ruling from the Massachusetts Attorney General's Office invalidated local zoning laws based on the FHAA and ADA that allowed assisted living in some zones but not in others.

Suppose that a town grants a variance for seniors' housing, and the neighbors sue, charging "spot zoning?" A New Jersey case, *Taxpayers Assoc. of Weymouth v. Weymouth Twp.*, 1963, held that while such variances create spot zoning, because senior housing serves a public good (again, an "inherently beneficial use"), this is not "illegal" spot zoning and therefore will withstand legal challenges.

If a municipality is in a state such as New Jersey or Connecticut that has a state-mandated low- and moderate-income housing requirement as a builder's remedy for new development and the town has not fulfilled its responsibility, this mandate may be used by developers of seniors' housing projects to force a higher density, as density bonuses often are allowed for senior developments because of their benefit to communities. This regional obligation, however, may be numerically limited.

Developers and other advocates for seniors' housing could well become more assertive in obtaining the approvals necessary to build enough projects to meet the rapidly growing demands for new housing alternatives for seniors. Better information should lead to a greater acceptance of such housing, thus facilitating development approval and producing more housing options for seniors. ■