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Friday Fast Facts

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Farrell Fritz Long Island Land Use and Zoning Blog

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Zoning – Reasonable Accommodations Under the Fair Housing Act

By John C. Armentano
POSTED IN NYS ZONING RESOLUTION, ZONE CHANGES, ZONING BOARD, ZONING CODE

Typically, zoning variances “run with the land”, and absent a specific time limitation, they continue until properly revoked. See, St. Onge v. Donovan, 71 NY2d 507, [1988]. As a result, variances cannot be made to apply only to the current owner. But under the Fair Housing Act (FHA), reasonable accommodations can be made that are essentially personal variances that expire upon the sale of the land and can be subject to “restorative provisions.”

Additionally, the Fair Housing Amendments Act of 1988 (FHAA) makes it 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 of facilities in connection with such dwelling” on the basis of that person’s handicap. 42 U.S.C.A §3604(f)(2).

Discrimination is defined to include refusing to make reasonable accommodations in “rules, policies, practices or services” when necessary to afford a person with a handicap “equal opportunity to use and enjoy a dwelling.” 42 U.S.C.A. §3604(f)(3)(B). See, See, Trovato v. City of Manchester, 992 F. Supp 493 [D. N.H. 1997].

Under the FHAA, an accommodation is “necessary” to afford “equal

opportunity" when plaintiffs have shown that but for the accommodation, they "will be denied an equal opportunity to enjoy the housing of their choice, and the "reasonable accommodations" requirement of the FHAA applies to zoning ordinances. Id.

For example, in the case of Austin v. Town of Farmington 826 F.3d 622 [2d Cir. 2016], the Austins obtained zoning variances to build a pool, fence and deck on their property to accommodate their disabled son. Located in Ontario County, New York, the Town Board of Farmington granted a "temporary accommodation" to allow for the proposed improvements. However, the resolution contained a restoration requirement that the Austins must completely remove, at their expense, the fence and pool within 21 days of the sale of the home or when their disabled child no longer lived at the property. The Austins constructed the pool and fence.

Two years later, the Austins filed suit, challenging the restoration provision. The Austins claimed (i) that the town's denial of a reasonable modification was discriminatory in violation of the FHAA and (ii) the restoration provision was a retaliation by the Town for asserting their rights under FHAA . The district court dismissed the Austins' complaint because the Austins failed to provide any evidence of discriminatory intent.

In affirming in part and vacating in part the dismissal, the Second Circuit held that whether the resolution was reasonable was a complex balancing of factors. The court explained that the requested accommodation was reasonable as was requiring the removal of the pool improvements after the disabled child left the property. The court found that the Town clearly did not want the variances to "run with the land"- to be taken advantage of by later occupants without a disability. The court also considered the likelihood that a permanent variance would cause other landowners to seek similar variances without a disability.

As a result, the court found that there was no evidence of a retaliatory motive, and the restorative provision did not directly deprive the disabled child of his rights under the FHAA. But the court found that a question of fact remained regarding the "reasonableness" of the restorative provision and could not be resolved on the Town's motion to dismiss.

Take away: local planning and zoning boards as well as land use practitioners must be knowledgeable of local zoning codes and our federal disability laws and account for them in their applications and decisions.

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