

# The Chuckwagon

a quarterly production by

**MONTANA FAIR HOUSING**

Volume 33/November 2002

In true Montana spirit, the Chuckwagon . . . the newsletter to fill your fair housing appetite.

## Tales Roun' the Campfire

A synopsis and/or update of cases filed with the Montana Human Rights Bureau (HRB), the Department of Housing and Urban Development (HUD), and/or federal or district court. This synopsis is not necessarily all inclusive . . .

**MFH, et. al. v. Kraske** -In September MFH and a family living in Worden, filed administrative complaints with HUD against William Kraske of Billings. The complaints allege discrimination in housing based on the Race of one of the children in the household. Allegedly, Mr. Kraske initially rented to the couple, who are both white, and upon discovering that one of the couple's children was African American and Caucasian, Mr. Kraske demanded the family vacate the premises. Mr. Kraske reportedly made reference to the race of the child, making discriminatory remarks and refusing to rent to any "niggers."

**MFH, et. al. v. Whitewater, Inc., et. al.** -In September Montana Fair Housing and two individuals filed administrative complaints with the Department of Housing and Urban Development against Whitewater, Inc., developer and manager of the Mountain Apartments in Whitefish. Allegedly, the respondents, Whitewater, Inc., et. al., failed to design and construct common areas and the interior of ground floor units to comply with the accessibility guidelines of the Fair Housing Amendments Act of 1988. These guidelines require that all multifamily units be designed and constructed in a manner that provides an accessible route to and throughout all ground floor units and throughout the complex's public and common areas. The guidelines require specific placement of environmental controls, reinforced walls where grab bars may be needed in a bathroom, and hardware usable by persons with mobility impairments.

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## Roundin' 'em Up

Articles and/or local or national events to ensure our readers are keeping abreast of new information.

As Montana's population grows and diversifies, its citizens are more apt to deal with zoning, covenant and homeowners' association issues. Many lifelong Montanans mourn the loss of a state free of regulations, with wide open spaces and a philosophy of "I will live where, with whom and around who I want," - now known as NIMBYism (Not In My Back Yard). It is difficult to change. But change we must to "legally" deal with the diversity, changing demographics and lifestyles we are seeing in our state. We are also seeing increasing costs for housing, both in rental and sales. As policies and procedures are developing, we must ensure that they are not discriminatory in nature and/or have the effect of being discriminatory.

Montana Fair Housing is, or has recently, dealt with three

cases exemplifying the rise of this issue in our state. First, in one community, the homeowners association allegedly denied the purchase of a home that was to be used as residential housing for four adults diagnosed with a mental illness. Another Montana community attempted to implement a zoning ordinance that would prevent the rental of units to households with more than two non-blood related individuals. The city council passed the ordinance. The mayor vetoed the council's decision. Despite the obvious need for housing in this community, this same community's zoning ordinances currently prohibit the development of multifamily housing in several areas, limiting the development of affordable multifamily housing. Finally, in yet another community in our state, the homeowners association's covenants prohibited a person with a disability to add a covered walkway over a ramp used for wheelchair access. The individual with the disability owns their own home, and the city and county zoning offices initially refused to accept a request for a reasonable accommodation allowing the construction of the covered walkway.

Following are very brief excerpts from decisions addressing illegal covenants and/or ordinances, and the responsibility of homeowners associations and zoning offices in these matters. Readers should review the entire case record for further information.

**ALBERT GITTLEMAN, Plaintiff, v. WOODHAVEN  
CONDOMINIUM ASSOCIATION, INC. and MAINTENANCE  
MANAGEMENT, INC., Defendants.  
97-Civ.-1003 (WGB)  
US DISTRICT COURT FOR THE DISTRICT OF NJ**

The Association is a nonprofit corporation organized under New Jersey law for the administration and management of the Woodhaven Condominium (the "Condominium") pursuant to the New Jersey Condominium Act (the "Condominium Act"), N.J.S.A. 46:8B-1 et seq. Mr. Gittleman is a unit owner in the Condominium. The Condominium contains 120 units. Mr. Gittleman allegedly suffers from a handicap as that term is defined in the FHAA .

In January 1997, Mr. Gittleman requested exclusive use of a parking space to accommodate his alleged handicap. The Association rejected Mr. Gittleman's request.

The Association purportedly took the position that it could not act on Mr. Gittleman's request without making a material amendment to Paragraph 6(c) of the Master Deed. Consistent with this position, the Association purportedly placed a resolution before the whole membership to amend the Master Deed and allow for assigned parking on an exclusive basis. This resolution did not carry the requisite two-thirds vote, according to Defendant's counsel.

The FHAA was enacted in 1988 to extend the principle of

## Montana Fair Housing

904A Kensington Avenue  
Missoula, MT 59801  
Voice Mail: 406-542-2611  
Fax: 406-542-2235  
Toll Free: 800-929-2611

E-mail: mfhzng@montana.com

Web Site:  
montanafairhousing.click2site.com

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equal opportunity in housing to, among others, those with handicaps. See *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 333 (2d Cir. 1995) (citing H.R.Rep. No. 711, 100th Cong., 2d Sess. (1988)). Pursuant to 42 U.S.C. " 3604(f)(2)(A), 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, because of a handicap of that person." 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." 42 U.S.C. 3604(f)(3)(B).

As an initial matter, the Court agrees with the Association that the Master Deed expressly provides that parking spaces in the Condominium are common elements for the non-exclusive use of the unit owners. The Court also agrees with the Association that the Master Deed precludes the Association from granting an exclusive parking space to a handicapped unit owner without the prior approval of at least two-thirds of the unit owners' votes entitled to be cast.

Here, however, is where the Court's agreement with the Association ends. It does not follow from these observations that the Association is powerless to bring use of the common elements into compliance with federal law. Indeed, as set forth more fully below, an examination of federal housing law and New Jersey law governing condominium associations reveals that the Association is duty bound to: (1) avoid enforcing provisions of the Master Deed that have discriminatory effects; and (2) regulate use of the common elements so as to comply with the requirements of the FHAA. This conclusion rests on two primary grounds: (1) that to the extent the Master Deed contains provisions that, either on their face or as applied, violate the FHAA, they cannot be enforced as written; and (2) that the Association, in its role as manager of the common elements, is the entity charged with enforcing the Master Deed, and therefore, is the only proper party to sue under these circumstances.

The federal regulations issued by HUD and the FHAA's legislative history clarify that enforcement of private agreements, such as the Master Deed, that have discriminatory effects subjects the enforcing party to liability under the FHAA. 24 C.F.R. 100.80(b)(3) makes it unlawful to:

Enforce covenants or other deed, trust or lease provisions which preclude the sale or rental of a dwelling to any person because of race, color, religion, sex, handicap, familial status, or national origin.

Similarly, the FHAA's legislative history confirms that its reach extends to prohibit discrimination based on the enforcement of private agreements, such as the Master Deed here.

Case law also supports the Court's conclusion that the FHAA prohibits discrimination based on the enforcement of private agreements regarding land use. In *Martin v. Constance*, 843 F. Supp. 1321 (E.D. Mo. 1994), a group of private citizens initiated a state court action to enforce a facially non-discriminatory restrictive covenant. The court found that the private citizens acted, at least in part, to prevent an adult home for the developmentally disabled from locating in the neighborhood. The court, citing to 24 C.F.R. 100.80(b)(3) and the FHAA legislative history set forth above, held that the private citizens' attempt to enforce the covenants violated the FHAA.

The gravamen of Mr. Gittleman's Complaint is that the Association failed to promulgate appropriate rules so that he could enjoy equal privileges in the use of the Condominium's common elements. The very terms of the By-Laws empower the Association to make rules and regulations governing the use and enjoyment of the common elements. (Association By-Laws Section 4). The Association's failure to promulgate appropriate rules despite its apparent ability to do so is precisely the type of conduct regulated by the FHAA. See 42 U.S.C. 3604(f)(3)(B) (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") (emphasis added); see also 24 C.F.R. 100.204(b)("Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling.

The accommodation is reasonable because it is feasible and practical under the circumstances.").

Nearly fifty years ago, the Supreme Court of the United States held that judicial enforcement of racially-discriminatory restrictive covenants is forbidden by the Equal Protection Clause of the Constitution. *Shelley v. Kraemer*, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948). In so holding, the Supreme Court made clear that discriminatory practices effectuated by private agreements could not, consistent with the Fourteenth Amendment, be enforced judicially.

The Supreme Court's holding is no less relevant today than it was fifty years ago. As forms of land ownership evolve, the judiciary must adopt its rules of law accordingly. To accept the Association's argument that it is powerless to regulate the common elements of the Condominium in accordance with the dictates of federal anti-discrimination law would exempt a large (and growing) segment of the housing market from the reach of the FHAA and other remedial statutes. This is a result that cannot be tolerated.

As condominium associations assume more of the powers traditionally associated with the state, see Hearings, Assembly Task Force to Study Homeowner Associations, Public Meeting, 11-21-95 (discussing amendments to Condominium Act, including provisions empowering associations to levy fines for failure to comply with by-laws (N.J.S.A. 46:8B-14 (c))), it is only fair that they assume more of the obligations for ensuring that the rights of the unit owners they represent are protected.

UNITED STATES COURT OF APPEALS FOR THE 2nd CIRCUIT  
No. 87-7892 April 5, 1988

HUNTINGTON BRANCH NAACP, HOUSING HELP, INC.,  
MABEL HARRIS, PERREPPER CRUTCHFIELD AND KENNETH  
L. COFIELD, PLAINTIFFS-APPELLANTS, v. THE TOWN OF  
HUNTINGTON NY, KENNETH C. BUTTERFIELD, CLAIR  
KROFT, KENNETH DEEGAN, EDWARD THOMPSON AND  
JOSEPH CLEMENTE, DEFENDANTS-APPELLEES

Twenty years ago, widespread racial segregation threatened to rip civil society asunder. In response, Congress adopted broad remedial provisions to promote integration. One such statute, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1982 & Supp. III 1985) ("Fair Housing Act"), was enacted "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. Today, we are called upon to decide whether an overwhelmingly white suburb's zoning regulation, which restricts private multi-family housing projects to a largely minority "urban renewal area," and the Town Board's refusal to amend that ordinance to allow construction of subsidized housing in a white neighborhood violates the Fair Housing Act.

Huntington is a town of approximately 200,000 people located in the northwest corner of Suffolk County, New York. In 1980, 95% of its residents were white. Blacks comprised only 3.35% of the Town's population and were concentrated in areas known as Huntington Station and South Greenlawn. Specifically, 43% of the total black population lived in four census tracts in Huntington Station and 27% in two census tracts in the South Greenlawn area. Outside these two neighborhoods, the Town's population was overwhelmingly white. Of the 48 census tracts in the Town in 1980, 30 contained black populations of less than 1%.

The Town's Housing Assistance Plan (HAP), which is adopted by the Town Board and filed with HUD as part of Huntington's application for federal community development funds, reveals that the impact of this shortage is three times greater on blacks

than on the overall population. Under the 1982-1985 HAP, for example, 7% of all Huntington families required subsidized housing, while 24% of black families needed such housing. In addition, a disproportionately large percentage of families in existing subsidized projects are minority. In Gateway Gardens, a public housing project built in 1967, 38 of 40 units were occupied by blacks and Hispanics in 1984. Seventy-four percent of those on the project's waiting list were minority. In Whitman Village, a 260-unit HUD subsidized development built in 1971, 56% of the families were minority in 1984. Lincoln Manor, which was built in 1980, is a 30-unit HUD Section 8 project. Thirty percent of the households and 45% of those on the waiting list were minority in 1984. Under a HUD Section 8 program, lower income families can obtain certificates to supplement their rent. Each family, however, must locate its own apartment. In January 1984, 68% of families holding certificates and 61% of those on the waiting list were minority.

Although a disproportionate number of minorities need low-cost housing, the Town has attempted to limit minority occupancy in subsidized housing projects. Michael Miness, the Director of Huntington's Community Development agency and responsible for developing the Town's low-cost housing, and Angela Sutton, Executive Director of the Huntington Housing Authority, repeatedly told whites opposing the Lincoln Manor project that they would impose a racial quota on occupancy. When HUD reviewed the project's management plan which established 5% minority occupancy, however, it advised the Huntington Housing Authority that it would not permit a racial quota at Lincoln Manor. The Town similarly attempted to impose racial quotas on occupancy at a proposed 150-unit subsidized housing project in Huntington Station on the Melville Industrial Associates (MIA) site. When Alan H. Wiener, HUD's Area Director, wrote Kenneth C. Butterfield, Town Supervisor, that "limitations on minority occupancy of housing on the Huntington Station site are not justifiable and will not be permitted," (Letter of June 19, 1981, E-18), the Town Board unanimously passed a resolution withdrawing its support for the project because they could not "ensure a particular ethnic mix." Under the Town's zoning ordinance, multi-family housing is permitted only in an "R-3M Apartment District." On its face, then, this provision limits private construction of multi-family housing to the Town's urban renewal area, where 52% of the residents are minority.

In sum, we find that the disproportionate harm to blacks and the segregative impact on the entire community resulting from the refusal to rezone create a strong prima facie showing of discriminatory effect -- far more than the Rizzo test would require. The Rizzo approach has two components: (1) whether the reasons are bona fide and legitimate; and (2) whether any less discriminatory alternative can serve those ends.

In balancing the showing of discriminatory effect against the import of the Town's justifications, we note our agreement with the Seventh Circuit that the balance should be more readily struck in favor of the plaintiff when it is seeking only to enjoin a municipal defendant from interfering with its own plans rather than attempting to compel the defendant itself to build housing. Bearing in mind that the plaintiffs in this case seek only the freedom to build their own project, we conclude that the strong showing of discriminatory effect resulting from the Town's adherence to its R-3M zoning category and its refusal to rezone the Matinecock Court site far outweigh the Town's weak justifications.

Accordingly, to recapitulate, we find that the Town violated Title VIII by refusing to amend the zoning ordinance to permit private developers to build multifamily dwellings outside the urban renewal area. We also find that the Town violated Title VIII by refusing to rezone the Matinecock Court site. We thus reverse the district court and direct entry of judgment in appellants' favor.

**Montana Fair Housing**  
904A Kensington Avenue  
Missoula, MT 59801

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