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Municipal Regulation of Group Homes and Sober Living Arrangements

Navigating Complex Legal and Policy Issues When Zoning for Community Residences for People With Disabilities

WEDNESDAY, APRIL 26, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Daniel Lauber, AICP, **Law Office of Daniel Lauber**, River Forest, Ill.

Henry C. Luthin, First Assistant Corporation Counsel, **City of Boston**, Boston

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Seeking help but finding a scam in sober homes

April 01, 2012 | By Patricia Wen

THIS STORY APPEARED IN The Boston Globe

Donald Ahlgren, 28, thought he would find a safe haven in a sober home, but... (Fred Field for The Boston ...)

Two years ago, Donald Ahlgren faced a dilemma common among the legions of drug addicts just out of detoxification programs: He needed an affordable place to live that wouldn't reject him because of his past.

To his surprise, he had his pick of places.

These low-budget rooms were typically in apartment buildings or houses, and tucked in some of the most recession-plagued neighborhoods of Boston and nearby suburbs. Landlords advertised them as "sober homes," an informal term used for rentals marketed to recovering substance abusers. Residents are warned about mandatory urine testing — typically three times a week — and zero-tolerance rules, but also promised a supportive you-can-do-it environment.

"For a time, I was wanted," recalled Ahlgren, 28, a North Reading native who had spent years in and out of drug rehabilitation programs and the courts.

Yet he quickly realized that many of these places did not seem to care much about preventing relapses. For all the attention to urine testing, Ahlgren said, he and other tenants sometimes got high on the side and then found, to their surprise and relief, that landlords did not evict them after "dirty" results.

Ahlgren soon discovered the dark side of this little-known niche of the drug world: Recovering addicts were cash cows for a financial alliance between sober homes and private drug-testing labs. Landlords needed the labs to show they were serious about sobriety, largely to get referrals to fill their rooms. And the labs needed access to lots of indigent substance abusers whose drug-screening tests qualified for lucrative Medicaid reimbursements worth millions of dollars a year.

These business relationships troubled Ahlgren and also drew the scrutiny of prosecutors, who now allege that a number of labs and sober homes engaged in fraud and abuse of Medicaid, the government's health insurance program for the poor. On Friday, one major lab agreed to pay $20 million to settle state charges that it improperly billed for testing in sober homes.

Prosecutors have said that, as labs aggressively competed to sign up addicts for testing some resorted to bribing sober home operators for exclusive access to their tenants. Several lab executives — including a Brookline doctor who treated Ahlgren — have also been indicted in schemes that, among other things, required addicts to undergo excessive urine testing — much more frequent than is typically recommended by substance abuse specialists.

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The crackdown came too late for many struggling addicts like Ahlgren, who succumbed again to the grip of narcotics. He would eventually get clean, though only after going to extremes: He almost begged to be put behind bars again to escape from a world where all that anyone seemed to care about was his Medicaid card.

"It's a big game," he said. "It's all about the money."

An effective program

After being released from a detoxification program in the summer of 2010, Ahlgren told his mother he was ready to change. He wanted to stop his OxyContin and heroin cravings, which had begun when he was in high school and had driven him to burglarize houses to pay for the drugs.

Though skeptical at first, Anne Marie Hallahan, a day-care teacher, knew her son had worked hard to get sober and she began seeing a sparkle in his eyes that reminded her of his happier days as an award-winning black-belt karate competitor.

He expressed an interest in sober homes, realizing that it wasn't best for him to live any more with family and friends. When Ahlgren's mother agreed to subsidize the rent — about $150 a week for a shared room — Ahlgren told her that she would not regret it. He promised he would eventually find work and become independent.

"I want you to be proud of me," he said.

A drug treatment counselor recommended a sober home called New Horizon House. The house, in a residential section of Quincy, was part of a scattered complex of a half-dozen properties in Boston and Quincy, which Carl Smith, the 66-year-old landlord, had converted into sober homes for some 90 recovering substance abusers.

Sober homes are similar to halfway houses, providing shared bedroom space and communal living areas — and occasionally meals — for a weekly fee. Their numbers grew over the past decade as landlords found this specialized corner of the rental market profitable. But the homes are unregulated, and, other than ensuring that their properties meet building safety codes, landlords do not have to provide any special services or enforce any rules.

Still, most require urine testing, which is typically paid for by insurance. For instance, Medicaid pays about $100 to $200 for each urine screen, as long as a doctor signs a form saying the test is medically necessary.

"We certainly don't want people who are using drugs in the house," Smith, a former convict with a degree in mental health counseling, said in a court deposition. "We want people who are there to be in a recovery program."

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Ahlgren learned that New Horizon's testing rules were ironclad: All tenants had to use Dr. Punyamurtula Kishore of Brookline as their primary care doctor, or one of his associates, and submit three urine samples each week, at scheduled times, to Kishore's lab and clinic operation, Preventive Medicine Associates.

This regimen differed from what many top addiction specialists, including John F. Kelly of the Center for Addiction Medicine at Massachusetts General Hospital, recommend for most recovering addicts in such settings, which is random testing — not scheduled — once every week or two.

Kishore's business had enjoyed stunning growth — he had about 30 offices throughout the state, employing about 370 people, including some 30 physicians. By 2010, Preventive Medicine enjoyed $4.9 million in annual Medicaid payments for urine screening.

Kishore's business began to thrive soon after Attorney General Martha Coakley's office launched criminal investigations of his competition. Willow Labs of Lynn had agreed in 2007 to a $8 million settlement for submitting Medicaid claims without proper medical approval. And in 2010, state prosecutors indicted Calloway Labs of Woburn and two executives for allegedly delivering bribes to sober home operators through sham companies and using fake doctors' signatures on Medicaid claims. Calloway settled for $20 million this past week, while the executives, who have pleaded not guilty, await trial later this year.

With much of his competition tainted, Kishore, 61, made sales pitches to sober homes emphasizing that he was a medical doctor and employed other doctors, who could properly authorize drug tests.

Kishore prepared promotional materials comparing commercial labs — "Performs testing, then asks for referral after the fact (illegal)" — to his own lab — "Does a complete physical and obtains a complete patient history, then orders and performs testing (legal)."

The physician began attracting more business, including from some sober-home managers who saw him as a dedicated doctor, one of the few willing to focus on substance abusers.

Ahlgren would have one face-to-face meeting with Kishore.

As a condition of staying at New Horizon, he had to attend relapse-prevention group sessions in Kishore's Quincy clinic. During one, Ahlgren listened to a large, avuncular-looking doctor who spoke about the daily struggles against temptation. Kishore talked about resisting the thrill-seeking life, which increasingly tempted Ahlgren as he saw so many people around him using drugs and drinking. He had begun to smoke marijuana from time to time.

Dueling facilities

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After a month or so at New Horizon, Ahlgren decided to try a new place. Tenants moved easily among sober homes because their rent was paid weekly and the landlords were always interested in attracting new tenants.

Ahlgren went to live in a cluster of a half-dozen town houses in the Fort Hill section of Roxbury, where he met a tall, charismatic former drug addict named David Perry. Perry sees himself on a public service mission to provide housing to an overlooked population, though his reputation in Roxbury suffered when he — along with a partner, David Fromm — ran a large sober-house operation, called Safe Haven, that shut down amid neighborhood outcry in 2007 over unruly and overcrowded conditions, as well as tenants' drug and alcohol abuse.

Perry later started his own sober-home business, Recovery Educational Services, and when Ahlgren moved in, he found a familiar urine-screening routine: He had to submit three specimens a week, at scheduled times. They were sent to Precision Testing Laboratories — Fromm's new venture.

Soon, Ahlgren got pulled into a bitter feud between Precision and Kishore's labs, which had stolen away a number of sober-home clients from Fromm's business, including New Horizon. Precision suspected something shady, perhaps kickbacks, and the company asked Ahlgren in the fall of 2010 to submit an affidavit for a lawsuit they were preparing.

Ahlgren ended up becoming a bit player in the effort to take down Kishore, testifying in his sworn statement that, at New Horizon, he and other tenants were required to use Kishore's clinics for medical referrals and urine tests.

Ahlgren felt he had to submit the affidavit. He had become friendly with Perry, joining him occasionally to speak before recovering addicts' groups. By now Ahlgren was struggling badly, taking OxyContin, heroin, and anything else he could get his hands on. He said he appreciated how Perry gave him a break, more than once, when Ahlgren's urine screens turned out badly and he vowed to change.

"I'm very compassionate," said Perry recalling Ahlgren's occasional lapses. "Donny tried."

Last March, Precision filed a multimillion-dollar civil lawsuit against Kishore and his business, and among Kishore's subpoenaed bank records, Precision's lawyers later found what they were looking for - about a dozen $1,000 checks to Smith's New Horizon House, with the memo field saying "facility fee."

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Prosecutors would find even more. In Kishore's records, they turned up checks to numerous sober home operators; prosecutors viewed them as bribes, though the payments were veiled as salaries for no-show jobs or fees for alleged rental of beds or space in sober homes. Some checks were drawn from an account in the name of a nonprofit institution that Kishore had created as an educational resource for drug treatment specialists, the National Library of Addictions.

Kishore was indicted last fall, charged with fraudulently billing Medicaid nearly $4 million for tens of thousands of urine screens that allegedly induced through bribery. The indictment against Kishore and his business also named eight sober home operations that allegedly accepted Kishore's bribes in return for exclusive access to their tenants.

Carl Smith of New Horizon was among the defendants, charged with accepting some $34,000 from Kishore's operation, including weekly payments for doing "little or no work."

In all, the case involved more than 860 Medicaid recipients and more than 53,000 claims. Kishore and Preventive Medicine Associates pleaded not guilty and defended the payments to sober homes as legitimate business expenses. Smith also pleaded not guilty.

The alleged corruption involving sober homes and labs has led state health authorities to look into regulating these homes, and while no specifics have been released, they are expected to issue a report later this year. Meanwhile, Medicaid is now forcing labs to give detailed medical justification for urine tests involving sober house tenants, prompting Precision Labs to complain that this population is being singled out.

Substance abuse counselors, however, say they welcome the state's scrutiny. Some sober homes provide a supportive transitional environment for recovering addicts, they say, but others simply pursue profits, and their loose environment often tempt addicts to resume their habits.

"They're really just boarding houses, and as long as you pay rent, they don't care," said Nicholas Tenaglia, program director of the Men's Addiction Treatment Center in Brockton.

One morning in December, as a Globe reporter made an unannounced visit to Kishore's Brookline offices, the physician appeared in the hallway. He was dressed in a suit coat and formal slacks, which concealed the GPS ankle bracelet he was required to wear as a condition of bail.

Kishore spoke amiably about his "public health mission" to help desperate substance abusers, a population many doctors avoid because recovery is so often difficult, prolonged, and full of setbacks. He said he regrets that his patients had been forced to scatter in search of new clinics when he shut down his operation after Medicaid stopped paying him.

Seeking help but finding a scam in sober homes

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THIS STORY APPEARED IN The Boston Globe

Kishore looked wistfully down the hallway, with doors leading to now-empty offices. "We were a pretty big enterprise at one time," he said, then politely cut short the conversation. He has declined requests for further interviews.

Meanwhile, Ahlgren's mother watched helplessly as her son's life spiraled out of control. She spoke highly of one of the last sober homes where her son stayed, Twelve Step Education Program of New England, in Woburn. But other than that, she felt the money she spent for this kind of housing was wasted.

"These sober homes turned out to be just dumping grounds," she said.

She was convinced that her son needed long-term hospitalization. She said Medicaid declined to cover an extended stay, and he did not know where to turn. Ahlgren, gaunt and pale, worried that he would steal again to feed his habit. Late last summer, he called a probation officer assigned to him from an out-of-state burglary conviction: Take me in, please, he pleaded, before I do something.

Now in a state prison in Warren, Maine, Ahlgren said he got sober by going cold turkey in the structured environment behind bars. He said asking to be incarcerated was one of his best decisions.

"It's sad, but I feel safer here than I did on the streets."

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Woburn lab to pay $20m penalty

March 31, 2012 | By Patricia Wen

THIS STORY APPEARED IN The Boston Globe

A major medical testing company based in Woburn agreed Friday to pay $20 million to settle criminal charges that it defrauded Medicaid of millions of dollars through an elaborate kickback scheme involving sham companies, fake doctor signatures, and excessive urine testing for indigent drug addicts, according to Massachusetts Attorney General Martha Coakley.

In July 2010, Calloway Laboratories and two of its top executives were among those indicted by a Middlesex County grand jury on charges that they created straw companies through which they funneled bribes to managers of group homes for recovering drug addicts, often called sober homes.

In return for these bribes, the managers allegedly required recovering substance abusers to undergo unnecessary urine screening for drugs. The specimens were sent to Calloway Labs and the tests were paid for by Medicaid, the government's medical insurance for the poor.

Only after paying millions of dollars in insurance reimbursements to Calloway did Medicaid investigators discover the scheme, which allegedly began in 2005 and continued until 2010. Much of the lab work was not ordered by a doctor or authorized medical provider, as required by law, and many claims included phony doctors' signatures, according to the indictment.

"We alleged that this kickback scheme was one of the most egregious abuses of the Medicaid program our office has handled," Coakley said in a press release issued Friday afternoon.

Her office characterized the $20 million settlement as "restitution" to resolve allegations from its indictment of the firm.

David Ball, a spokesman representing Calloway Labs, said the company's settlement did not include any admission of guilt. A statement issued by Ball said the case grew out of outdated practices that Calloway no longer uses. During the past few years, the company "has enhanced its rigorous compliance program to comply with all regulatory requirements in the provision of its services and billing practices," the statement said.

Calloway was founded in 2003 and employs about 500 employees in more than 40 states.

The settlement only resolves charges against the company itself. The individuals named in the case - the lab's former chief executive, Arthur Levitan of Weston, and former chief operating officer, Patrick Cavanaugh of Gloucester - have pleaded not guilty, as have two employees of a sober home operation called New England Transitions - William Maragioglio of Malden and Kelli Ann Cavanaugh of Lynn. Prosecutors say Kelli Ann and Patrick Cavanaugh are siblings.

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The individual cases are scheduled to go to trial later this year. Under the settlement, Levitan and Cavanaugh will no longer be employed by the company or allowed to consult. The company has agreed to a three-year compliance and monitoring program with the state.

This settlement is the seventh resulting from an ongoing state investigation of private labs that focus on drug-screening urine tests for substance abusers; the work can be lucrative because of what had been generous Medicaid reimbursements for these tests, which ranged from about $100 to $200 for each urine screen. To date, the cases have returned about $30 million to the state's Medicaid program.

Another major case announced last fall involved another urine-screening lab, Preventive Medicine Associates, which was run by an addiction-medicine physician, Dr. Punyamurtula Kishore of Brookline. That case, involving allegations of millions of dollars in excessive Medicaid billing, is pending. Kishore and the firm have pleaded not guilty.

The state's Medicaid director, Dr. Julian Harris, said these prosecutions "point to a scheme that is a blatant abuse of taxpayer dollars" meant to pay for the medical needs of the state's most vulnerable populations.

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UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Fair Housing and Equal Opportunity

Conciliation Agreement

under

Title VIII of the Civil Rights Act of 1968 as amended
By the Fair Housing Amendments Act of 1988

between

The United States
Department of Housing and Urban Development

and

Robert and Barry Levy
(Complainants)

and

City of New Bedford.
(Respondent)

Case Numbers: 01-07-0353-8 (Fair Housing Act)

Preamble

The Parties to this Conciliation Agreement (hereinafter collectively "the Parties") are Complainants Robert and Barry Levy (hereinafter "Complainants"), The City of New Bedford, (hereinafter "Respondent"), and the United States Department of Housing and Urban Development (hereinafter "the Department").

On May 22, 2007, Complainants filed a complaint with the Department alleging that Respondent was denying persons with disabilities full access and enjoyment to the subject properties. The Complainants further allege the land use and zoning ordinances of the City were being applied in a discriminatory manner and Respondents refused to grant a reasonable accommodation to the regulations. The Complainants operate a program for recovering alcoholics/addicts in the subject property to assist persons with disabilities in exercising or protecting their Fair Housing Rights. The complaint was filed under the Fair Housing Act, 42 U.S.C. §§ 3601-19 (hereinafter "the Act"). Respondent denies any intentional violation of the Fair Housing Act.

The Parties agree that it is in their best interests to avoid further administrative proceedings and the potential for protracted and costly legal proceedings. Accordingly, the Parties enter into this Conciliation Agreement in order to resolve their dispute.

I. General Provisions

1. It is understood that the Parties enter into this Agreement freely and voluntarily, and that no party has been coerced, intimidated, threatened, or in any way forced to become a party to this Agreement.

2. This Agreement will become effective as of the date signed by the Director of the New England Office of Fair Housing and Equal Opportunity. The Director, acting on behalf of the Secretary of the Department of Housing and Urban Development (hereinafter "the Secretary"), retains authority to approve or disapprove this Agreement.

3. It is understood that this Agreement does not constitute evidence of a determination by the Department of any violation of the Fair Housing Act or any other federal statute. Respondent agrees that the Secretary has the authority to enforce the Fair Housing Act.

4. In exchange for the Respondent's performance of the provisions of this Agreement, the Complainants hereby waive, release and

covenants not to file a civil action against the Respondent, or to under take further administrative action against the Respondent with respect to the matters which were or which might have been alleged in the subject fair housing complaint. This release and waiver applies to the complaint existing between the signatories to this Agreement, and applies to any other complaints filed by Complainants which may be pending with the Department, including all matters pending up to the effective date of this Agreement. Additionally, the Department agrees not to take any further action with respect to the complaint or any other complaints filed by the Complainants which may be pending with the Department.

5. This Agreement does not in any way limit or restrict the Department's authority to investigate and act upon any future complaints involving Respondent.

6. It is understood that, according to Section 810(b)(4) of the Act, this Agreement shall become a public document. The Department, however, shall hold confidential all information of a personal or financial nature, concerning the Parties to this Agreement, and not contained in the body of this Agreement.

II. SETTLEMENT

1) The Respondent agrees to grant the Complainants an exemption to the City of New Bedford Zoning By-laws restricting no more than Two(2) unrelated persons living together in one household in a residential neighborhood. The City will allow 3 tenants to reside in each of the six(6)two bedroom apartments. The reasonable accommodation will allow the properties located at 94 Clark Street and 65 Reynolds Street to operate as residential apartments for recovering alcoholics and drug addicts.

2) The Complainants agree the maximum number of residents allowed to occupy 94 Clark Street is eighteen(18)and the maximum number of residents allowed to occupy 65 Reynolds Street is eighteen(18).

3) The Complainants agree the maximum number of vehicles under resident ownership that will be allowed to park overnight at the combined location of both on-street parking areas of the properties is Twelve(12), six(6)for each house, regardless of the actual number of residents residing at the properties.

4) The ownership of both properties mentioned above agree to comply with all present and future residential fire and safety codes including but not limited to Massachusetts Building Code and Title V of the Massachusetts State Sanitary Code. The owners agree to conform to all City fire and safety codes.

5) The Complainants agree to notify in writing the appropriate local building and public safety official as to who the

responsible person is to contact regarding issues relating to building and public safety issues. They agree the name, address, and telephone number will be kept on file at the City Inspectional Services office.

6) The Parties agree only persons in recovery from drug and alcohol problem will be housed at both of the above mentioned apartment houses. The Complainants understand and agree no persons convicted of sex offenses will be allowed to reside at either of the properties used as residential apartments for persons with disabilities.

7) The Complainants agree the "Rights and Rules" for sober house residents are presently in force and effect and will remain substantially the same as long as each property is used as a residence for handicapped persons as defined under the act. The Complainants agree to deliver a copy of House Rules along with a copy of the Tenant Application Form to the Department of Inspectional Services within 30 days of the signing of the Conciliation Agreement.

8) The Complainants agree to allow an annual inspection by the City Department of Inspectional Services of the properties located at 65 Reynolds Street and 95 Clark Street. The City officials agree to notify the owners 14 days in advance of the date for the Inspection.

9) The Complainants understand and agree each of the six (6) apartments in both buildings will consist of 2 bedrooms, a living room, and kitchen. The Complainants agree to monitor the exterior areas of the premises to keep to a minimum residents and visitors from loitering in front of the property.

As directed by this Agreement, any required certifications and documentation of compliance must be submitted to:

Office of Fair Housing & Equal Opportunity
U.S. Department of Housing and Urban Development
10 Causeway Street
Boston, MA 02222-1092

SIGNATURES

These signatures attest to the approval and acceptance of this Conciliation Agreement:

_____

Robert Levy DATE
(Complainant)

_____

Barry Levy DATE
(Complainant)

For The City of New Bedford, Massachusetts

By_____
??????????? DATE
?????????

By_____
Jane Medeiros Friedman DATE
City Solicitor

_____

Marcella O. Brown, Director DATE
New England Office of FHEO
Office of Fair Housing and
Equal Opportunity

REASONABLE ACCOMMODATION
PURSUANT TO THE FAIR HOUSING ACT

Pursuant to the Fair Housing Act 42 U.S.C. 3604 (f) (3) (B) the City of New Bedford grants a Reasonable Accommodation to _____ _____(hereinafter "the Provider") at _____ _____ (hereinafter "the Subject Facility"), that would otherwise be in violation of the zoning laws of the City of New Bedford;

Specially Chapter 9 Section(s) _____of the New Bedford Code of Ordinances.

In granting said reasonable accommodation, the City of New Bedford finds that the Provider has substantiated that it will or does provide housing for persons with disabilities as defined by the Fair Housing Act. In reaching this finding, the City of New Bedford relies upon the policies and procedures set forth in the following documents, which have been submitted by the Provider, and further relies upon the Provider's agreement to comply with said policies and procedures during the term of this Reasonable Accommodation:

The operating rules of the Subject Facility

The application for admission to the Subject Facility

A description of the operation of the Subject Facility, accompanied by supporting documents.

The Provider has certified that the Subject Facility is designed and intended for persons with disabilities as defined by the Fair Housing Act. If applicable, the provider has certified that it will use its best efforts to ensure that all residents are persons with disabilities as defined by the Fair Housing Act.

The Provider has certified that it will comply with all building code and health department requirements, nuisance laws and other generally applicable laws, ordinances, rules and regulations of the City of New Bedford with the exception of _____, which, in furtherance of this Reasonable Accommodation, will not be enforced against the Subject Facility.

The Provider has certified that the Subject Facility will not be used as a temporary shelter for homeless persons during the term of this Reasonable Accommodation.

The living quarters at the Subject Facility will comply with the regulations from the State Department of Public Health including, but not limited to, the requirements of 105 CMR 410.400 (B): "In a dwelling unit, every room occupied for sleeping purposes by one occupant shall contain at least 70 square feet of floor space: each room occupied for sleeping purposes by more than one occupant shall contain at least 50 square feet of floor space for each occupant" and comply with the State Building Code 780 CMR 12008.0 Occupant Load – Table 1008.1.2

Maximum Floor Area Allowances per Occupant – Residential: 200 gross floor area in square feet per occupant.

The Provider has agreed to the following conditions:

1. _____.

2. _____.

If, at any time, the City has reason to believe that the Provider and or Subject Facility is in violation of the terms and conditions of this Reasonable Accommodation, the City reserves the right to require that the Provider cure said violation(s) within (30) thirty days. If the Provider demonstrates that it has taken action to cure said violation(s) but, due to conditions beyond its control, cannot do so within thirty (30) days, the City shall extend said cure period by a reasonable amount of time, as determined by the Commissioner of Inspectional Services. If the Provider fails to cure said violation(s), in the time allotted, the City reserves the right to revoke the Reasonable Accommodation granted herein.

The City has a right to ensure that the Subject Facility continues to comply with terms and conditions presented to City.

This Reasonable Accommodation is revocable if the Provider violates the terms or conditions of the reasonable accommodation or is found to be out of compliance with any building code or health department requirements, nuisance laws or other generally applicable laws, ordinances rules or regulations of the City of New Bedford.

_____ _____

Commissioner of Inspectional Services Date of Issuance

As the Provider of housing to handicapped persons, pursuant to the Fair Housing Act, and as the applicant for a reasonable accommodation for the Subject Facility located at _____, New Bedford, MA, I hereby agree to the conditions cited herein.

_____ _____

Applicant Date

APPLICATION FOR A REASONABLE ACCOMMODATION

PURSUANT TO THE FAIR HOUSING ACT, AS AMENDED

42 U.S.C. § 3604 (f) (3) (B)

Name of Owner:

Address of Owner:

Name of Applicant/Provider:

Name of Subject Facility:

Address of Subject Facility:

Required Attachments:

Articles of Organization or other identification

Diagram of the living space (need not be to scale) showing the sleeping rooms with their dimensions and computation of square feet, and the other rooms with their designations or descriptions. State the number of residents that will occupy each sleeping room. State the total number of residents in the dwelling unit.

Certification under the pains and penalties of perjury that the Subject Facility is designed and intended for persons with disabilities as defined by the Fair Housing Act. For group homes where effective treatment or services for residents with disabilities requires that all residents have disabilities, the City may require certification that the applicant/Provider will use its best effort to ensure that all residents are individuals with disabilities.

Certification under the pains and penalties of perjury that the Subject Facility will not be used as a temporary shelter for homeless persons during the term of a reasonable accommodation granted to the applicant by the City of New Bedford, including any extensions thereto,

Certification under the pains and penalties of perjury that the Applicant/Provider will comply with all rules and regulations that are submitted by the Applicant/Provider, to the City of New Bedford, in support of this Application.

Suggested attachments:

Copies of all operating documents including applications, rules and regulations, admission or occupation agreements, program agreements, medication storage agreements and any other

agreements or forms that will confirm the operation of the Subject Facility as a facility for persons with disabilities, and a narrative describing the operation of the Subject Facility.

Description of the procedures that will be implemented by the Applicant/Provider to ensure that issues arising as a result of the reasonable accommodation will be addressed (e.g. if the reasonable accommodation results in a higher number of adults living in a property than would otherwise be permitted in the property under generally applicable zoning laws the Applicant/Provider should describe procedures to address on street parking).

The Applicant/Provider agrees to discuss conditions to make the Subject Facility compatible with the neighborhood.

_____ _____

Signature – OWNER Date

_____ _____

Signature – APPLICANT/PROVIDER Date

Time of Request: Wednesday, July 01, 2015 16:36:51 EST
Client ID/Project Name:
Number of Lines: 217
Job Number: 1827:519727735

Research Information

Service: Natural Language Search
Print Request: Current Document: 1
Source: Massachusetts Ct of Appeals Unpublished
Search Terms: safe haven

Send to: CUI, MA Report
MA REPORTS PUBLIC ACCESS CUI
701 E WATER ST
CHARLOTTESVILLE, VA 22902-5499

SAFE HAVEN SOBER HOUSES, LLC, & others[1] vs. CHARLES "CHUCK" TURNER & another.[2]

1 David Perry and David Fromm.
2 William Good.

14-P-239

APPEALS COURT OF MASSACHUSETTS

2015 Mass. App. Unpub. LEXIS 726

July 1, 2015, Entered

JUDGES: Fecteau, Agnes & Sullivan, JJ.[9]

9 The panelists are listed in order of seniority.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs, Safe Haven Sober Houses, LLC, David Perry, and David Fromm (collectively, Safe Haven), filed suit against former city of Boston (city) councilor Charles "Chuck" Turner and the former commissioner of the city's inspectional services department (ISD), William Good, alleging, among other things, violations of the Fair Housing Amendments Act (FHAA) and *42 U.S.C. § 1983 (2012)*, civil conspiracy, violations of *G. L. c. 40A, § 3*, and defamation. After an eight-day bench trial, a judge of the Superior Court found for the defendants on all counts. The plaintiffs appealed. We affirm.

Discussion. "When reviewing the trial judge's decision, we accept his findings of fact as true unless they are clearly erroneous, and we give due regard to the judge's assessment of the witnesses' credibility. See *Mass.R.Civ.P. 52(a)*, as amended, *423 Mass. 1402 (1996)*." *Andover Hous. Authy. v. Shkolnik, 443 Mass. 300, 306 (2005)*. "A finding [of fact] is clearly erroneous . . . [if], although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Woodward Sch. for Girls, Inc. v. Quincy, 469 Mass. 151, 159 (2014)*, quoting from *Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 509 (1997)*. We review conclusions of law de novo. *Martin v. Simmons Properties, LLC, 467 Mass. 1, 8 (2014)*.

FHAA. The FHAA prohibits discrimination in housing based on handicap.[3] *Andover Hous. Authy. v. Shkolnik, supra.* See *42 U.S.C. § 3604(f)(1)-(2) (2012)*.[4] Persons recovering from drug and alcohol addiction are considered to be handicapped persons under the statute. See *Peabody Properties, Inc. v. Sherman, 418 Mass. 603, 606 (1994)*. See also *South Middlesex Opportunity Council, Inc. v. Framingham, 752 F. Supp. 2d 85, 95 (D. Mass. 2010)*. Owners of homes housing such residents are also protected under the FHAA. See *Edmonds v. Oxford House, Inc., 514 U.S. 725, 728-729 (1995)*.

3 "'[H]andicap' is defined as '(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.'" *Peabody Properties, Inc. v. Sherman, 418 Mass. 603, 606 (1994)*, quoting from *42 U.S.C. § 3602(h)*.

4 The statute provides in relevant part: "[I]t shall be unlawful . . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap . . . [or] [t]o 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."

The plaintiffs characterize their claim as one of disparate treatment. To succeed on a claim alleging a violation of the FHAA based on disparate treatment, the plaintiffs must demonstrate that some discriminatory purpose was a motivating factor in the decisions made. See *Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-266 (1977)*. Safe Haven maintains that once it has shown that a discriminatory purpose "played a role," it is entitled to judgment in its favor. The statute requires, however, that a plaintiff show injury "because of" a handicap. "Proof that the decision . . . was motivated in part by a . . . discriminatory purpose [does] not necessarily . . . require[] invalidation of the challenged decision. Such proof . . . shift[s] to the [defendant] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." *Id. at 270 n.21*. See generally *University of Texas S.W. Med. Center v. Nassar, 133 S. Ct. 2517, 2527 (2013)* (tracing history of "but-for" causation in disparate treatment claims under Federal antidiscrimination laws). Contrast *42 U.S.C. § 2000e-5(g)(2) (2012)*.

Safe Haven points to telephone calls[5] and electronic mail messages (e-mails)[6] from Turner threatening to shut Safe Haven down, followed shortly thereafter by enforcement activity by Good, and argues that these communications and subsequent enforcement activities (not detailed here) establish conclusively that discrimination was a motivating factor. Safe Haven also points to hostile e-mails and comments from neighborhood residents and groups. It contends that these attitudes infected the entire process, and that Good's responses to these overtures were indicative of a discriminatory purpose. The judge acknowledged the "hard" facts, stating that several aspects of the testimony and the record were "concerning." Assuming without deciding that these observations by the judge were sufficient to show that either Turner or Good was motivated by a discriminatory purpose, it was for the judge to determine whether the same actions would have been taken but for the improper considerations. The judge ultimately found "that both with respect to Mr. Good and Mr. Turner there [were] good faith efforts [on] both of their parts to administer and enforce what can only be considered a very complex set of laws, regulations, [and] practices and cases that were all part of the predicate here." In short, the judge did not find that impermissible considerations were the but-for cause of the actions of either defendant.

5 Perry testified at trial that Turner called him and "he indicated that he [Turner] did not believe that -- he didn't like the idea of me running sober houses where I was. He told me that he intended to shut me down. He told me that he knew the people that would do it and he told me to expect a call from Inspectional Services and then he hung up."

6 Turner sent an e-mail to various community groups containing the following statements upon which Save Haven relies:

> "One unit has been identified as a sober house and a complaint has been filed in housing court regarding the fact that the owners of the development, 'the Fromm Brothers' are violating the law through operating a sober house without the required occupancy permit.
>
> . . .
>
> "I am trying to get Darryl Smith of ISD to come to our meeting on the 9th to give an update on ISD's actions, what they anticipate doing in the future, and when they think the issue of the illegal sober house can be resolved through their efforts?
>
> . . .
>
> "I understand how slow and frustrating this process is. However, I believe that there are enough levers for us to be able to remove the sober house operation from the Juniper Street development."

The judge's conclusion was based on findings and rulings that were supported in the record. With respect to Turner, the trial judge found that Turner was influenced

by the "strong feelings [of] members of the community," as well as his own concerns regarding what he felt was a significant change in use of the properties where the eleven Safe Haven homes were located, without appropriate review and oversight by city agencies.[7] The judge found that Turner "did not exhibit a prejudice or a bias or antipathy of any sort against these kinds of facilities," and that Turner was not opposed to sober houses or the existence of sober housing in the Roxbury section of the city, as evidenced by his support and advocacy on behalf of other sober homes and treatment facilities in the area. Rather, the judge found that Turner had good faith concerns over the facilities as they were operated by Perry and Fromm.

> 7 The eleven sober homes were located in a larger development built by Fromm and presented to the community as single-family townhouse condominium residences. At the time of trial, the evidence showed that there had been overdoses (including deaths) in some of the sober home units, sober home residents were being housed in basements and garages without city permits, there were multiple sober home residents in each bedroom, and several registered sex offenders were living in the sober homes. The situation raised complex questions regarding proper classification of the sober homes, whether as group homes, lodging houses, or family units, the applicability of various health and safety codes, and zoning laws, and the interplay with the FHAA. These matters were separately addressed in proceedings in the Superior Court and the Housing Court against the city, proceedings which were consolidated pursuant to *G. L. c. 211B, § 9*. We express no opinion with respect to those proceedings.

With respect to Good, the judge found that community opposition did have "some impact" on him. However, the judge also found that "Mr. Good did not feel any particular community pressure that was any different than in other projects where there was community opposition." The judge found that Good did not act to "appease the discriminatory viewpoints" of the community opposition. *Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin., 740 F. Supp. 95, 104 (D. Puerto Rico 1990)*. See *South Middlesex Opportunity Council, Inc. v. Framingham, 752 F. Supp. 2d at 98-99*. Rather, the judge found that Good acted in response to the documented violations that ISD discovered on the Safe Haven residences when ISD investigated complaints.[8]

> 8 Safe Haven also contends that it was error for the trial judge to conclude that the defendants would have been entitled to qualified immunity with respect to their FHAA claims. Since we find that there was no violation of the FHAA, we need not reach this argument.

In sum, while the record could have been interpreted in any number of ways, the judge's findings that discriminatory purposes were not the cause of the actions taken by the individual defendants were supported by the record and were not clearly erroneous.

42 U.S.C. § 1983. Safe Haven makes no argument regarding the merits of its claim under *42 U.S.C. § 1983* in its appellate brief. "[F]ailure to address this issue on appeal waives [the] right to appellate review of the judge's ruling on the merits of the [claim]. See *Mass.R.A.P. 16(a)(4)*, as amended, *367 Mass. 921 (1975)*." *Abate v. Fremont Inv. & Loan, 470 Mass. 821, 833 (2015)*.

Civil conspiracy. Safe Haven contends that the judge erred in finding that it failed to prove by a preponderance of the evidence that the defendants acted in concert to effectuate the removal of Safe Haven from the neighborhood. "To prove their claims for civil conspiracy, the plaintiffs must show an underlying tortious act in which two or more persons acted in concert and in furtherance of a common design or agreement." *Bartle v. Berry, 80 Mass. App. Ct. 372, 383-384 (2011)*.

The judge found that Good provided written updates to elected officials, including Turner, regarding ISD's actions at Safe Haven properties and attended community meetings to explain ISD's position regarding Safe Haven to residents of the community. However, the judge credited testimony that Good routinely communicated with elected officials and members of the community concerning ISD matters as part of his ordinary practice as the commissioner of ISD. This evidence, while establishing communication between the defendants, did not compel a finding that they acted in concert as a matter of law. See *Gutierrez v. Massachusetts Bay Transp. Authy., 437 Mass. 396, 415-416 (2002)*. The judge did not ignore Safe Haven's evidence of agreement. Rather, he found it insufficiently persuasive, finding there was "some, but not a preponderance of evidence" of an agreement between the defendants to "put pressure on Safe Haven or use ISD to shut Safe Haven down." It was for the judge to assess the credibility and weigh the evidence. *Buster v. George W. Moore, Inc. 438 Mass. 635, 642 (2003)*. His findings were not clearly erroneous.

Violation of G. L. c. 40A, § 3. The plaintiffs contend that the judge erred in concluding that Good was not personally liable under *G. L. c. 40A, § 3*. The trial judge found that there was no bad faith or malice on the part of Good or Turner, a factual finding which, as discussed above, was supported in the record. The defendants were therefore shielded from "liability under the doctrine of

common-law immunity" for their discretionary acts, including communication with elected officials and community members regarding Safe Haven. *Nelson v. Salem State College, 446 Mass. 525, 538 (2006).*

Defamation. Plaintiff David Perry contends that Turner defamed him by referring to him as a liar in a 2007 Boston Herald newspaper article. The article, entitled "Why Is This Man Being Called a Liar?" reported that a clinical psychologist and trial consultant, a former tenant, local officials, and city inspectors were concerned about widespread drug use among Safe Haven's residents, lack of enforcement of curfews and overnight restrictions, and possible zoning violations. The article also reported that a District Court judge refused to refer patients to Safe Haven based on unfavorable reports regarding the quality of service. One former resident was quoted as saying he was high while living in a Safe Haven residence. Perry stated that he provides "safe, structured sober housing" and does "everything [he] can do within [his] power to make sure that anyone living under one of the Safe Haven roofs comes home to a safe, clean, sober environment." However, the article then reported that when Turner approached Perry about the Safe Haven residences, Perry denied running a sober house. Perry denied making the statement to Turner. Turner is quoted as stating, "[H]e's lying and just making everyone angrier. . . . We have to wonder about his respect for the people who use this service."

"[A]n expression of 'pure opinion' is not actionable." *Hipsaver, Inc. v. Kiel, 464 Mass. 517, 526 n.11 (2013)* (citation omitted). "[A] statement of opinion is nonactionable if it is drawn from a disclosed fact that is either true or nondefamatory, regardless of whether the opinion was justified, so long as the statement does not imply the existence of other, undisclosed facts that are both false and defamatory. See *National Assn. of Govt. Employees, Inc. v. Central Bdcst. Corp., 379 Mass. 220, 227-228 (1979)*; *Fleming v. Benzaquin, 390 Mass. 175, 187-188 (1983)*." *Tech Plus, Inc. v. Ansel, 59 Mass. App. Ct. 12, 25 (2003).* See *King v. Globe Newspaper Co., 400 Mass. 705, 708 (1987).*

Looking at the statement in the context of the article as a whole, Turner's statement to the Boston Herald was an expression of his subjective interpretation of events, and thus an opinion. See *Howell v. Enterprise Publishing Co., 455 Mass. 641, 671-672 (2010)*. The Boston Herald article set out perspectives from multiple sources, quoted extensively from Perry in his own defense, and cited the views expressed by persons other than Perry or Turner. Turner's "assertion of deceit reasonably could be understood only as [his] personal conclusion about the information presented," not as a statement of objective fact based on undisclosed evidence. *Riley v. Harr, 292 F.3d 282, 292 (1st Cir. 2002)*, quoting from *Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 730 (1st Cir. 1992).*

Safe Haven argues that Turner's accusation was in fact based on an exchange between Turner and Perry, and that Turner misunderstood the difference between a sober house and a treatment facility. The judge so found, but also found that Perry's short and nonexplanatory answers to Turner's questions contributed to the confusion, and that Turner honestly believed he had been misled. The statement (denied by Perry) that Perry denied running a sober house was disclosed and is not defamatory. See *National Assn. of Govt. Employees, Inc. v. Central Bdcst. Corp., supra at 226*. The fact that Turner's opinion may be erroneous is not the issue. See *Cole v. Westinghouse Bdcst. Co., 386 Mass. 303, 311*, cert. denied, *459 U.S. 1037 (1982)*. The distinction between treatment programs and sober houses appears nowhere in the newspaper article, and nothing in the article suggested that Turner was relying on a set of facts unknown to the reader. In light of the facts asserted in the article, readers "could make up their own minds and generate their own opinions or ideas which might or might not accord with [Turner's]." *National Assn. of Govt. Employees, Inc. v. Central Bdcst. Corp., supra*.

Judgment affirmed.

By the Court (Fecteau, Agnes & Sullivan, JJ.[9]),

9 The panelists are listed in order of seniority.

Entered: July 1, 2015.

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ORDINANCE TO ELIMINATE PUBLIC NUISANCE PRECIPITATED BY PROBLEM PROPERTIES IN THE CITY

City of Boston Code, Ordinances, Chapter XVI, is hereby amended by adding the following subsection

16-55 PUBLIC NUISANCE PROPERTIES.

16-55.1 Purpose

The purpose of this ordinance is to empower the City to police properties that have become a public nuisance by exhibiting a notorious atmosphere of criminal and other disturbing activity so elevated as to endanger the common good and general welfare of a specific neighborhood or the City in general.

16-55.2 Definitions

PUBLIC NUISANCE. A public nuisance is an unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or that otherwise threatens the general welfare of a neighborhood or the City in general through documented pervasive criminal activity, code violations, or other causes precipitating the deployment of any City resource.

PROBLEM PROPERTY A problem property meets the following criteria: The Police Department has been called to the property not fewer than four times within the preceding 12 month period for any incident involving any criminal offense including but not limited to disturbing the peace, trespassing, underage drinking or assault; or 2, the Air Pollution Control Commission has received not fewer than four sustained complaints for noise within the preceding 12 month period; or 3, the Inspectional Services Department or the Public Health Commission have received not fewer than four sustained and upheld complaints within the preceding 12 month period for noxious, noisome or unsanitary conditions. Provided, however, that in making a final designation of a property as a Problem Property, the Chair of the Task Force shall take into consideration the nature of the complaints, the number of dwelling units at the property, and the nature of the use of said property.

16-55 3 Application

Any property in the City that is found by the Mayor's Problem Properties Task Force to be a problem property as defined in section 16-55.2 shall constitute a public nuisance. The Chair of the Task Force shall formally communicate to the Mayor, and the Council President, that a property falling within the definition of Problem Property is a public nuisance The Chair of the Task Force shall designate the appropriate member of the

Task Force to notify the owner of the property by regular and certified mail and the tenants by affixing a notice of the violation to the front door.

16-55.4 Enforcement

After declaring the problem property a public nuisance, the members of the Task Force heading the originating department or the designee of the Chair of the Task Force shall issue a citation to any or all of the tenants and the owner of the property immediately for perpetuating the public nuisance at the time of any incident requiring the deployment of any City resources or personnel following the property being placed on the problem properties list.

16-55.5 Non-criminal Dispositions

In accordance with Section 21D of Chapter 40 of the Massachusetts General Laws, the City may pursue a non-criminal disposition of any citation issued for violations under this chapter

16-55.6 Penalties

Any tenant residing within or owner of a problem property declared to be a public nuisance cited under this chapter with violations prescribed by the State Sanitary Code or State Building Code shall be fined up to $300 for each criminal or non-criminal citation authorized by said codes caused by their acts or omissions subsequent to the property being added to the problem property list. If the violation is ongoing, each day that the violation persists will constitute a separate violation for which an additional $300 fine will be imposed.

16-55.7 Remediation

Any owner of a property determined to be a problem property shall file a management plan with the Inspectional Services Department, within thirty days of having been deemed a problem property that outlines and verifies the owner's strategy and steps devised to bring the property up to code.

16-55.8 Verifiable and Certified Inspection

In order for a property to be removed from the problem properties list by the Problem Properties Task Force, an owner must file with the Inspectional Services Department a sworn statement following an inspection certifying that the property is in compliance with the minimum standards of human habitability for a residential dwelling as set forth in the Massachusetts State Sanitary Code, as it may be adopted or amended from time to time. The inspection shall be performed and the sworn statement shall be signed by an Authorized Inspector which shall be defined as a person who (i) is a Commonwealth of Massachusetts Registered Sanitarian or a Commonwealth of Massachusetts Certified Health Officer or a Commonwealth of Massachusetts Certified Home Inspector, (ii) has

demonstrated a proficiency in the application of the State Sanitary Code by satisfactorily completing the ISD certificate program for qualifying authorized professionals to perform inspections under Section 9-1.3 of the City of Boston Code, and (iii) has been issued a certificate of completion upon payment to ISD of one hundred twenty five dollars ($125.00). An authorized inspector shall be prohibited from charging more than one hundred thirty three percent (133%) of the fee charged by the City of Boston for an inspection performed under this section.

This section shall not apply to Problem Properties which have been designated due to valid police complaints.

16-55.9 Receivership

Should the owner of a property placed on the problem properties list not respond to the Problem Properties Task Force notification within sixty days, the Inspectional Services Department is authorized to petition the Housing Court for the appointment of a receiver to rehabilitate that property.

16-55.10 Reporting

The Inspectional Services Department shall, no later than three (3) months after the one (1) year anniversary of the enactment date of this ordinance, dispatch to the Mayor, and City Council's Committee on Government Operations, a report on all problem properties that were on the problem properties list during the preceding year.

In City Council JUL 13 2011
Passed
Rosaria Salerno *City Clerk*
Approved
Mayor

An Ordinance Regarding Penalties for Chronic Problem Properties

Whereas: Properties where illegal activity occurs on a regular basis have adverse effects on the health, safety, welfare, and quality of life of residents in Boston's neighborhoods; and

Whereas: Some persons that own or control such properties in the City of Boston, allow their properties to be used for illegal activity, with the result that these properties have become chronic problem properties in the neighborhood; and

Whereas: The current provisions of the City of Boston ordinance relating to noise and disturbing the peace do not provide an adequate tool for abating such chronic problem properties; and

Whereas: The City through its public safety, code enforcement and regulatory agencies is in a unique position to gather data on such properties and to establish an active plan tailored to address the specific problems posed by specific properties; and

Whereas: Chronic problem properties within the City of Boston cause a financial burden upon the City by the numerous calls for service to the properties because of the illegal activities that repeatedly occur or exist on such properties. Now, Therefore,

Be it ordained by the City Council of Boston, as follows:

16-56.1 **Penalties for Valid Complaint Problem Properties**

(a) Definitions.

The term "Problem Property" shall have the same meaning as set forth in Ordinance 16 – 55.2.

The term "Valid Complaint" shall refer to an investigated finding, documented by on-duty police department personnel dispatched or caused to respond to an incident, that a criminal offense has taken place in a dwelling unit within a property, on a particular property or at a specific location which disturbs the health, safety and welfare of other inhabitants of said property or location. The term shall not include incidents involving an occupant of the premises as the victim of the crime

The term "Police Response" shall mean any and all police action deemed appropriate by the Police Commissioner to protect the health, safety and welfare of inhabitants of a property or location where Valid Complaints have been documented. Coordination of police action shall be subject to the rules and regulations of the police department.

(b) Police Response.

The Police Commissioner, as deemed appropriate to protect the health, safety, and welfare of other inhabitants of a property or location where a Valid Complaint has been made, is hereby authorized and empowered to assign a member or members of the police department to staff as police response on said property or location;

(i) Upon being dispatched or caused to respond to an incident, in a dwelling unit within a property, on a particular property or at a specific location, involving a criminal offense, police department personnel shall investigate the complaint to determine whether it is a Valid Complaint;

(ii) Upon finding a Valid Complaint, police department personnel shall make a record of the incident and shall keep, within the department's control, a record of the number of incidents which occur in said dwelling unit within a property, particular property or location;

(iii) After four (4) Valid Complaint incidents have occurred in a twelve-month period relating to the occupancy of a dwelling unit within a property, on a particular property or at a specific location, the Police Commissioner, or his designee, may notify the Chair of the Mayor's Task Force on Problem Properties and shall submit to the Chair the all-calls report relating to police response at said dwelling, particular property or location;

(c) Duties of the Task Force.

(i) The Chair shall create a master file of all information received from the Commissioner pertaining to that dwelling unit, particular property or location and shall discuss said information with the members of the Task Force at a monthly meeting held at City Hall;

(ii) If a specific address falls within the definition of a Problem Property, the Chair of the Task Force shall notify, in writing, the property owner by regular and certified mail, return receipt requested, sent to the property owner's residence or usual place of business that is on record at the assessor's office. The Task Force notification shall identify:

a. The property owner and list the specific address that has been designated a problem property;

b The number of Valid Complaint incidents which have occurred on said property within a twelve-month period;

c The Boston Police District Captain the property owner may contact to coordinate a plan to resolve the incidents at the particular property or location, and/or inform the Boston Police of problem occupant(s);

d Where and to whom the property owner must address a letter of appeal of the Task Force's decision;

(iii) In making a final designation of a property as a Problem Property, the Chair of the Task Force shall take into consideration the nature of the complaints, the number of dwelling units at the property, and the nature of the use of said property.

(iv) Upon receipt of confirmation from the Police Commissioner, or his designee, that the owner of a particular property deemed problematic has cooperated with the Boston Police Department in addressing each specified Valid Complaint, the Task Force shall remove said property from designation as a Problem Property;

(d) Cost of Police Response Assigned to Problem Properties

(i) The Police Commissioner, or his designee, shall keep an accurate record of the cost of police response to a dwelling unit within a property, a particular property or a specific location, and such record shall include the number of officers who are part of the determined response;

(ii) The Police Commissioner shall forward such record to the Collector-Treasurer;

(iii) After eight (8) Valid Complaint incidents in a twelve-month period relating to occupants of a dwelling unit within a property, a particular property or a specific location, the Police Commissioner, at his discretion, shall determine whether the cost of a police response should be assessed to the property owner and shall notify and submit said determination to the Chair of the Task Force;

(iv) The Chair of the Task Force shall notify, in writing, the property owner of the Commissioner's decision to assess the cost of the police response. The Task Force notification shall:

a Be delivered by regular and certified mail, return receipt requested, sent to the property owner's residence or usual place of business that is on record at the assessor's office;

b. Identify the number of Valid Complaint incidents that have occurred since the first notification;

c Where appropriate, inform the property owner of his failure to contact the Boston Police District Captain to coordinate a plan to resolve the incidents at a dwelling unit within a property, particular property or location, and/or inform the Boston Police of problem occupant(s);

d. Inform the property owner that he shall be subject to the penalties addressed in subsection *(e)*;

e. Indicate where and to whom the property owner must address a letter of appeal of police response costs assigned to him;

f. Inform the property owner he has seven (7) days to file an appeal;

(v) The Police Commissioner should consider the following factors in making his decision to assess costs:

a The nature, scope, and seriousness of the incident(s);

b. Whether the incident(s) resulted in an arrest;

c. A history of criminal activity taking place at the property or location;

d. The property owner's, and occupant's, willingness to cooperate with police;

e. The total number of properties owned by the property owner relative to the number of said properties deemed problematic;

(vi) Nothing in this ordinance shall limit the statutory authority of the Police Commissioner to investigate crimes, allocate police resources and enforce the laws of the Commonwealth of Massachusetts and the City of Boston;

(e) Penalties.

(i) The Collector-Treasurer is hereby authorized and empowered to bill the property owner for the costs the City incurred for its police response in addition to any incidental costs during the period of police response to the particular property or location. The property owner is responsible for payment of the bill in full within thirty (30) days of receiving the bill. All amounts collected by the Collector-Treasurer shall be deposited into the general fund of the City;

(ii) Any unpaid bill for police response, including interest and/or collection costs, shall be added to the real estate tax on the property and collected as part of that tax. Failure to pay real estate taxes

will render the property owner delinquent and the Collector-Treasurer shall commence foreclosure proceedings;

(c) Property Owner's Rights.

(i) The property owner may, within seven (7) days of receipt of the Task Force's notification, appeal the Commissioner's decision to assess costs by requesting, in writing, a hearing before a three (3) person panel appointed by the Mayor;

(ii) A three (3) person panel appointed by the Mayor shall be assembled as follows:

a. At least one member shall be a nominee of the Greater Boston Real Estate Board;

b. One seat on the panel shall be appointed to a member of a neighborhood crime watch, a member of a neighborhood association and a member of a community development corporation, who shall rotate in their service on the panel;

c. The third member shall be a resident of the City of Boston;

(iii) Once the panel makes a decision it must be in writing. If the panel finds in favor of the property owner, the cost of the penalty shall be abated;

(d) Eviction.

In the event the property owner has, in good faith, commenced eviction proceedings against the tenant(s) responsible for the incidents at the property, then the application of this ordinance shall be stayed until the eviction process is concluded. The Police Commissioner of the department may continue police response at the particular property or location, at his discretion, at all times after the eviction proceeding has been completed; provided, however, that such costs shall not be assessed to the property owner if the eviction proceedings conclude in favor of the property owner.

(e) Charges to Constitute Municipal Lien Pursuant to MGL c. 40 s. 58

All charges to recover costs imposed in this ordinance shall constitute a municipal lien on the property so charged in accordance with Massachusetts General Laws chapter 40 section 58.

(f) Report.

The Chair of the Task Force shall submit a report to the Mayor and City Council no later than three (3) months after the one (1) year anniversary of the enactment date of this ordinance. This report shall include the total cost of administration of this ordinance, as well as an accounting of all revenues collected in association with it Said report shall also contain data regarding all dwellings within a property, particular properties or locations which remain problem properties and those that are no longer designated as problem properties. The report shall also include the general impact, if any, that the implementation of this order has had on the health, safety, and welfare of residents of the City of Boston.

In City Council JUL 13 2011

Passed

Rosaria Salerno **City Clerk**

Approved

Mayor

CITY OF BOSTON

In City Council

An Ordinance Establishing the Problem Properties Task Force

Be it ordained by the City Council of Boston, as follows, that the City of Boston Code be amended by adding the following ordinance:

Section 1. CBC Chapter IX is hereby amended by inserting after section 9-12 (Security for Student Housing) the following new section: -

Section 9-13.1 Establishing a Problem Properties Task Force

There is hereby established in the Mayor's Office an advisory panel to be known as the Problem Properties Task Force, the members of which shall meet and share information concerning various properties in the City of Boston as more fully outlined herein. The panel shall advise the Mayor or his designee of the actions taken by various City Departments and public agencies to address problems associated with such property and each member of the panel may use the information about such property in order to better enforce the laws, ordinances, codes or regulations that fall within such member's jurisdiction.

a. The Task Force shall be chaired by a member of the Mayor's staff who shall have the full confidence of the Mayor, and shall be housed in a department of the Mayor's Office as the Mayor shall from time to time designate.

b. Members of the Task Force shall be::
The Police Commissioner
The Fire Commissioner
The Commissioner of Inspectional Services
Director of the Office of Neighborhood Services
The Commissioner of Public Health
The Collector Treasurer
The Director of the Air Pollution Control Commission
The Corporation Counsel

c. The Task Force shall have regular monthly meetings in City Hall and may meet at other locations in the City. Emergency meetings shall be held at the call of the Chair.

d. Upon the effective date of this Ordinance, each member of the Task Force shall make a diligent search of the records of his or her department and gather all records of multiple calls from the public concerning specific addresses in the last 12 month period. Such records shall be forwarded to the Chair who shall establish master files for each address forwarded containing all records concerning that address. Such files may be kept in electronic form. Notwithstanding the forgoing, the Police Commissioner shall not forward any record that is part of a criminal investigation.

e. A Problem Property shall be defined as any property to which the Police Department has been called not fewer than four times within the preceding 12 month period for any incident involving any criminal offense including but not limited to disturbing the peace, trespassing, underage drinking or assault; or any property concerning which the Air Pollution Control Commission has received not fewer than four complaints for noise within the preceding 12 month period; or any property that the Inspectional Services Department or the Public Health Commission has received not fewer than four complaints within the preceding 12 month period for noxious, noisome or unsanitary conditions Provided, however, that the final designation of a property as a Problem Property shall be made by the Chair taking into consideration the nature of the complaints, the number of dwelling units at the property, and the nature of the property.

f. Upon review of each file, the members of the Task Force may determine that a particular property warrants heightened scrutiny by the agency or agencies that they head.
   i. In the case of properties in or around which recurring criminal activity has occurred in the preceding 12 months, the Boston Police Commissioner shall consider whether to increase surveillance of said property and all other enforcement actions permitted by law.
   ii. In the case of properties which have had multiple building and/or sanitary code violations in the preceding 12 months, the Inspectional Services Commissioner and the Executive Director of the Public Health Commission shall, as appropriate, consider whether to expedite code enforcement proceedings and all other enforcement actions permitted by law.
   iii. In the case of properties which have had recurring violations of noise regulations in the preceding 12 months, the Executive Director of the Air Pollution Control Commission shall coordinate with the Law Department to institute proceedings for injunctive relief.
   iv. Properties described in this paragraph shall be designated as "Problem Properties".

g. The Chair of the Task Force shall perform such duties as may be prescribed by ordinance, including notifying a property owner of the designation of his or her property as a Problem Property, and notifying a property owner of the intention to impose charges to recover the cost of public safety expenses related to that property.

h. The Corporation Counsel shall commence foreclosure proceedings for any such property described above in paragraph f. which has delinquent real estate taxes.

i. The Chair of the Task Force shall issue a written report to the Mayor and City Council on the actions undertaken by the agencies represented by its members on Problem Properties for the period of the enactment of this Ordinance to the second anniversary of its enactment. The report shall be delivered not later than three months after the second anniversary of the enactment of this Ordinance.

Section 2. This ordinance shall take effect upon passage.

In City Council JUL 13 2011
Passed

Rosaria Salerno ***City Clerk***

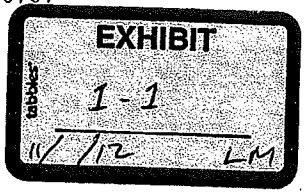
Approved

Thomas M. Menino ***Mayor***

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
NOS. **08H84CV000054**
08H84CV000767



CITY OF BOSTON INSPECTIONAL SERVICES DEPARTMENT,

Plaintiff

VS.

DAVID FROMM. DAVID W. PERRY, STEVEN W. MACINNIS, ERIC S. SMITH, JUNIPER GARDENS, LLC, SANDRA E. FROMM, KEITH REALTY CORP., AND SAFE HAVEN SOBER HOUSES, LLC.,

Defendants

DAVID FROMM, DAVID W. PERRY, and SAFE HAVEN SOBER HOUSES, LLC.

Plaintiffs-in-counterclaim,

VS

CITY OF BOSTON INSPECTIONAL SERVICES DEPARTMENT and CITY OF BOSTON,

Defendants-in-counterclaim

MEMORANDUM OF DECISION ON CROSS-MOTIONS FORSUMMARY JUDGMENT

These cases involve claims and counterclaims arising from the use of eleven (11) single-family residences in the Roxbury district of Boston as "sober houses" (a form of group housing that offers a drug and alcohol free living environment to persons in

recovery) to house up to thirteen unrelated adult males who identify themselves as recovering drug addicts and alcoholics.

In the case of *City of Boston Inspectional Services Department v. Fromm*, et. al., 08H84CV000054, (the "code enforcement" case) the City of Boston (hereinafter the "City" and/or "ISD") seeks to enjoin defendants David Fromm, David W. Perry and Safe Haven Sober Houses, LLC (referred to collectively as "Safe Haven") from using basement and garage spaces in the eleven (11) single-family residences in the Roxbury section of Boston as bedrooms without first obtaining the necessary certificates of occupancy.[1] It is undisputed that Safe Haven renovated the basement and garage spaces to create bedrooms without having obtained building permits and have used those renovated spaces as bedrooms without securing permits to change the permitted occupancy of those spaces from storage to living space.

After ISD had initiated criminal code enforcement actions, Safe Haven filed applications for building permits to address those building code violations. The City denied Safe Haven's applications for building permits. The City contends that it properly denied Safe Haven's permit applications because Safe Haven is using the single-family dwellings as rooming or lodging houses without having applied for and obtained conditional use permits. Safe Haven contends that it use of the residences is allowed as of right because the tenants constitute a family within the meaning of the Boston Zoning Code. The parties agree that Safe Haven has been using each residence to house more than five unrelated adults. The parties disagree as to how that use ought to be categorized as a matter of fact and law.

The City in the code enforcement case is seeking an injunction to enjoin Safe Haven from using the basement and garage space for residential purposes unless and until it secures the necessary permits and certificates of occupancy that reflects the actual use of those residences.

Safe Haven has asserted a defense and counterclaims in the code enforcement case. Safe Haven contends that it is operating a "sober house" for unrelated adult tenants who are recovering drug addicts and alcoholics. Safe Haven alleges that the adult tenants

[1] The other defendants are Steven W. Macinnis, Eric S. Smith, Juiper Gardens, LLC, Sandra E. Fromm and Keith Realty Corp.

are handicapped or disabled as a result of their drug and alcohol addiction, and that up to thirteen tenants have occupied each single-family residence in a manner that either 1) constitutes a family as defined in the Boston zoning code (a single, non-profit housekeeping unit), or 2) constitutes "congregate living arrangements among non-related persons with disabilities" within the meaning of G.L. c. 40A, § 3. Safe Haven's counterclaims allege in substance that by refusing to permit a group of unrelated disabled tenants to live as a single-family unit in each dwelling the City is discriminating against the occupants based upon their disabilities in violation of state and federal law.[2] Safe Haven asserts that the City has improperly denied its request for relief from the provisions of the Boston zoning code (to the extent those provisions prohibit the operation of a "sober house" in the 3F zoning district) as a reasonable accommodation. The accommodation that Safe Haven has requested, and that it alleges the City has improperly denied, is to allow Safe Haven's disabled resident population, although not related by blood, to occupy the single-family residences in the same numbers and in the same manner as the City would permit other residents who constituted a "traditional" single-family household. Simply stated, Safe Haven argues that if a "traditional" family could legally house thirteen family members related by blood in a single-family dwelling, then Safe Haven as a reasonable accommodation should be entitled to legally house thirteen disabled tenants living as single housekeeping unit in that same single-family dwelling. Safe Haven further argues that in response to organized opposition from neighborhood residents and politicians the City discriminated against protected recovering addicts by misusing health, safety and land-use requirements to force Safe Haven to cease operating in furtherance of an official policy to keep recovery addicts from living together in residential communities in Boston.

While the City's code enforcement case was pending, Safe Haven filed an appeal with the City of Boston Zoning Board of Appeals ("ZBA") from ISD's denial of Safe Haven's applications for building and use permits to extend living space into certain basements and garages at the single-family residences. The ZBA denied Safe Haven's appeal. Safe Haven commenced a civil action in the Suffolk Superior Court appealing

[2] The claims are for violation of G.L. c. 40A, § 3 (Count I), violation of 42 U.S.C. § 1983 (Count II), violation of G.L. c. 12, § 11 (Count III), negligence (Count IV), and violation of the federal Fair Housing Amendments Act (Count V).

from that zoning decision (the "zoning" case). The case was captioned *David Perry, David Fromm and Safe Haven Sober Houses, LLC v. City of Boston*, et al., SU-CV-2008-02262-A.

Because the code enforcement and zoning cases raise similar factual and legal issues involving the interpretation of the residential occupancy and use provisions of the applicable statutes, zoning code and state building code, the Chief Justice for Administration and Management, acting pursuant to authority contained in G.L. c. 211B, § 9, assigned me to sit as a justice of the Superior Court Department to hear, determine or otherwise supervise the disposition of the zoning case. That case was administratively transferred to the Housing Court and assigned Housing Court case number 08H84CV00767.[3] I thereupon consolidated the code enforcement and zoning cases for trial.

This matter is before the court on cross-motions for summary judgment. For the reasons set forth in this memorandum I conclude that,

1) Zoning Case (08H84CV00767): The cross-motions for summary judgment in the zoning case shall be denied;
2) Code Enforcement Case (08H84CV000054):
    a. The cross-motions for summary judgment shall be denied on Safe Haven's counterclaims for violation of G.L. c. 40A, § 3 (Count I) and violation of the Fair Housing Amendments Act (Count V);
    b. The City's motion for summary judgment shall be allowed on Safe Haven's counterclaims for violation of 42 U.S.C. § 1983 (Count II), violation of G.L. c 12, §11I (Count III) and negligence (Count IV).

[3] There is a third civil action involving Safe Haven pending in the Superior Court, *Safe Haven, Fromm and Perry v. Charles "Chuck" Turner, Diane Wilkerson, Boston Herald, Inc., Robert Brown and City of Boston Inspectional Services Department, SU-CV-2007-02247* (hereinafter "Superior Court case"). The plaintiffs in that third action allege that the named defendants acting alone and in concert engaged in improper actions in an effort to "shutdown" Safe Haven. The claims include defamation, interference with contractual or advantageous relations, negligent and intention infliction of emotional distress, and civil conspiracy. A judge of the Superior Court, Brassard, J., dismissed the complaint as against the City of Boston Inspectional Services Department (because it was an entity of the City of Boston not subject to suit). Safe Haven had filed a similar suit in the Housing Court (07H84CV000273). On July 12, 2007, the parties filed a notice of voluntary dismissal dismissing the claims without prejudice against the City and ISD. Although some of the parties are different, many of the factual disputes raised in the Superior Court case are identical to the factual disputes raised in the code enforcement and zoning cases pending in the Housing Court.

Undisputed Facts

The City of Boston Inspectional Services Department ("ISD") is a department of the City of Boston (the "City") responsible for enforcement of the state sanitary code, state building code, and the City's zoning code. The City of Boston Zoning Board of Appeals ("ZBA"), through its members, is authorized to hear appeals from decisions of ISD to grant or deny building permit or certificate of occupancy applications.

Safe Haven and Its Properties. In March 2006, David Perry and David Fromm formed Safe Haven Sober Houses, LLC ("Safe Haven"), a for-profit Massachusetts limited liability corporation. Safe Haven was created for the purpose of operating "sober houses" for recovering alcoholics and drug addicts. As is set forth in Safe Haven's Certificate of Organization, the LLC was formed for the purpose of engaging in "rental, leasing, management, ownership and development of real estate and interests therein for the purpose of providing safe, structured, sober living environment for persons and providing related services to support such living environment." Safe Haven did not seek or obtain state licenses from the Department of Public Health (or any other state department) to operate its residences as a group home, a halfway house, a recovery home or as a social model recover home.[4]

David Fromm is the legal owner of the parcel of land known as 2591, 2593 and 2595 Washington Street. There are three (3) two story, single family townhouse residences located on the parcel. David Perry is the legal owner of the two-story, single family townhouse condominium residence located at 2597 Washington Street. Steven W. MacInnis is the legal owner of the two-story, single-family townhouse condominium residence located at 2599 Washington Street. Eric S. Smith is the legal owner of the two-story, single-family townhouse condominium residence at 2601 Washington Street. Juniper Gardens, LLC is the legal owner of a parcel of land known as 31-35 Juniper Street. There are three (3) two-story, single-family townhouse condominium residences located on the parcel. Sandra Fromm is the sole shareholder, officer and director of the LLC. Keith Realty Corporation is the legal owner of the parcel of land known as 37-39

[4] It appears to be undisputed that Perry and Fromm anticipated that they could earn substantial profits from the Safe Haven operation. They estimated that Safe Haven would realize income of approximately $15,400.00 per week or $64,600.00 per month from rent payments.

Juniper Street. There are two (2) single-family residences located on the parcel. David Fromm is the sole shareholder, officer and director of the corporation.

Each of the eleven single-family residences were designed and constructed to have three bedrooms. The approved building plans for the six residences at 2591-2595 and 2597-2601 Washington Street show that each residence has a basement with an area for utility hook-ups and a stairwell leading to the living space above. The approved building plans for the five residences at 31-35 and 37-39 Juniper Street show that each residence has a single car garage and a basement with an area for utility hook-ups and a stairwell leading to the living space above. In 2003 ISD issued building permits for each of these residences based on the approved plans.

In January 2005 Perry, acting as an agent for the then owner Keith Realty Corporation, filed an application to amend the construction plans for 2597-2601 Washington Street to extend the living space into the basement for each of the three single-family residences. The application was abandoned before ISD took any action. On August 30, 2005 ISD issued a Certificate of Occupancy for each of the three single family residences at 2597-2601 Washington Street based upon the approved construction plans.

In April 2006, Perry acting as an agent for Keith Realty Corporation filed an application to amend the construction plans for 2591-2595 Washington Street to install a brick patio in the rear of the three residences, and finish the basement areas, which would include partitioning a utility room, creating an entranceway and creating a main living room. ISD approved that portion of the application pertaining to the basements for "storage only." ISD did not approve that portion of the application that sought permission to convert the basements into habitable living space. On April 28, 2006, ISD issued a Certificate of Occupancy for each of the three single family residences at 2591-2595 Washington Street based upon the approved construction plans.

On April 28, 2006, ISD issued a Certificate of Occupancy for each of the three single family residences at 31-35 Juniper Street based upon the approved construction plans.

On November 6, 2006, ISD issued a Certificate of Occupancy for each of the two single-family residences at 37-39 Juniper Street based upon the approved construction plans.

In March 2006 Safe Haven leased these eleven (11) single-family residences from the owners for the purpose of operating its "sober house" venture. The properties are located at 2591-2595 Washington Street, 2597-2601 Washington Street, 31-35 Juniper Street and 37-39 Juniper Street, all in the Roxbury neighborhood of Boston. Safe Haven also leased the single-family residence at 10 Guild Street. Each townhouse residence contains three bedrooms, a living room, a kitchen and at least one bathroom.

Shortly after Safe Haven took control of the eleven single-family residences it began to enter into individual residential tenancy agreements with persons who stated they were recovering alcoholics and drug addicts. Safe Haven placed each tenant in a room at one of the eleven single-family residences on Washington and Juniper Streets (and at the one single family residence on Guild Street).

Safe Haven did not notify the City or ISD that it intended to operate these properties as "sober houses." Safe Haven chose not to seek a license to operate a residential rehabilitation program as a "recovery home" for addicts or otherwise submit to the regulatory supervision of the Massachusetts Department of Public Health under the provisions of 105 CMR §164.000 et seq.[1]

Occupancy and Use of Safe Haven Residences. Safe Haven entered into individual tenancy at will rental agreements with each occupant. Safe Haven entered into tenancies with persons who self-identified as being in recovery and who stated that they had been sober or drug free, often for as little as one day before their tenancy began. Up to thirteen (13) tenants would be housed in each single-family residence. The tenants in each residence did not enter into one communal rental agreement with Safe Haven. The tenants did not pool their funds for the purpose of making one collective weekly or monthly rent payment to Safe Haven. Safe Haven charged each tenant a one-time processing fee and a weekly rent (initially $140.00 and increased to $160.00). Each tenant paid his weekly rent directly to Perry. In exchange for the weekly rent each tenant was granted permission to live at one of the Safe Haven residences. Safe Haven agreed to provide heat, hot water, electricity and telephone/internet access. Safe Haven provided

each tenant with use of a bed, sheets, blankets and pillows. It provided each tenant with use of a bureau and closet. Perry controlled and made the final decision as to which residence, and which bedroom in that residence, the tenant would occupy. Perry exercised the authority to reassign a tenant to another residence or to another bed within the same residence. Perry alone controlled the frequency with which tenants were reassigned to other residences or beds. The tenants had no collective control or say in these assignments. Each tenant had access to the bathroom and common area living room (if was not being used as a bedroom) in their assigned residence. In each assigned residence the tenants had access to the common area kitchen; however the tenants did not pool their funds to buy food and did not share meals. Safe Haven did not provide the tenants with food or prepared meals. If a tenant failed to pay rent when due or otherwise comply with the tenancy agreement Safe Haven had the right to terminate that tenant's tenancy and evict him from the residence. It is undisputed that Safe Haven allowed some tenants to continue to live at the Safe Haven properties even after the tenant had tested positive for drug or alcohol use.

It was Safe Haven alone that determined whether a person was a recovering drug addict or alcoholic, and whether to accept that person as a tenant. The tenants in each single-family residence had no collective control or say with regard to who would be permitted to live at that residence as a tenant. The tenants in each single-family residence had no collective control or say with regard to whether a tenant would be required to vacate the residence. Safe Haven alone retained the control and authority to make those decisions.

Perry established the rules for the Safe Haven tenants. As a condition of their tenancy each tenant agreed to abide by those rules. Tenants could not use drugs or alcohol, and they had to submit to drug screening tests. It does not appear that the drug testing that was performed was done under the supervision of any state agency. The rules included provisions that tenants could not enter another tenant's bedroom unless that tenant was present, and that a tenant could not take anything belonging to another tenant, including food, without that tenant's permission. Perry reserved for himself the right to enter any of the Safe Haven residences and the bedrooms in those residences without advance notice to or permission from the tenants to check on the residents and inspect the

condition of the rooms. Perry alone had the authority to designate one tenant in each residence as the "house leader." That house leader was typically assigned to a single room. The house leader would assign chores and serve as Perry's "eyes and ears" in the residence.

At its peak period of operation, Safe Haven had housed on average 120-130 tenants at the eleven single-family residences. At least five (5) and as many as thirteen (13) tenants occupied each three-bedroom residence at any given period. Over a period of approximately two years approximately 800 tenants resided at the eleven single-family residences. It is undisputed that many (if not all) of the tenants were self-identified recovering alcoholics and drug addicts. It is undisputed that a number of those occupants were allowed to remain as tenants although screening tests determined that they had used drugs and/or alcohol while living at the residences.

Physical Changes to Residences. Sometime after March 2006 Safe Haven converted the garage space in each of the five residences at 31-35 and 37-39 Juniper Street into bedroom living space. After the conversion was completed Perry assigned tenants to live in those garage spaces. Safe Haven did not seek or obtain building or use permits from ISD to convert the garage spaces into bedroom living spaces. ISD never issued a new or amended Certificate of Occupancy allowing Safe Haven to use the garage spaces as bedroom living spaces in each single-family residence.

Sometime after March 2006 Safe Haven began to use the basement space at each of the six residences at 2591-2595 and 2597-2601 Washington Street as bedroom living space. After the conversion was completed Perry assigned tenants to live in those basement spaces. Safe Haven did not seek or obtain building permits from ISD to convert the basement spaces into bedroom living spaces. ISD never issued a new or amended Certificate of Occupancy allowing Safe Haven to use the basement spaces as bedroom living spaces.

Sometime after March 2006 Safe Haven, apparently without first seeking the tenants' permission, converted the dining rooms in each of the three residences at 2597-2601 Washington Street into bedrooms (this eliminated the ability of the then current tenants to use what had been a common area space in the residence). After the conversion was completed Perry assigned tenants to live in those newly created

bedrooms. Safe Haven did not seek or obtain building permits from ISD to convert the dining rooms into bedrooms. ISD never issued a new or amended Certificate of Occupancy allowing four-bedroom (or more) at each residences.

City's Actions. The City and ISD received complaints from neighborhood residents and politicians that Safe Haven was operating unlicensed rooming/lodging houses by renting rooms in the eleven single-family residences to drug addicts and alcoholics. Acting in response to these complaints, in March 2007 ISD attempted to inspect the Safe Haven properties on Washington Street and Juniper Street to ascertain how they were being used and occupied. The ISD inspectors spoke with Perry at one of the residences. Members of the press were present at the time the ISD inspectors attempted to inspect the properties. Perry did not give ISD permission to enter.

In April 2007, acting on an application filed by ISD, the Roxbury Division of the District Court issued an administrative search warrant authorizing ISD to inspect the Washington Street and Juniper Street properties. Between April 12 and 18, 2007 ISD executed the administrative warrants and conducted inspections of the Safe Haven residences. Members of the press were again present at the time the ISD inspectors inspect the first of the residences. ISD discovered that more than five unrelated adults were living at each residence and that Safe Haven had renovated and extended living space in the basements and garages of the residences without having obtained the required building permits and were using those spaces for residential purposes without the necessary occupancy certificates.

In April 2007 ISD issued violation notices to Safe Haven with respect to the eleven single-family residences for failure to secure permits to 1) change occupancy of the basements from storage to living space, 2) extend living space into the garages, and 3) change occupancy from legal single-family dwelling to a group home. ISD ordered Safe Haven to vacate the illegal bedroom space and apply to ISD for all necessary building and use permits. In July 2007 ISD issued new or amended violation notices to Safe Haven citing it for using the single-family residences as rooming houses as defined by 105 CMR 410.020 without a proper license or a certificate of occupancy.[5]

[5] Apparently, ISD acted once it realized that Safe Haven was not operating as a state licensed group home.

In May 2007 Safe Haven and Perry submitted a written request to the City seeking as a reasonable accommodation "relief from the City of Boston's zoning regulations and/or building code regulations that place limitations on congregate living arrangements among disabled persons that are not imposed upon families of similar size."

In June 2007 ISD initiated criminal enforcement actions against Safe Haven based upon the above referenced violation notices.

On July 19, 2007, Safe Haven filed applications for building permits to extend the living space into the basements and garages of the single-family residences. In December 2007 ISD denied Safe Haven's permit applications based upon its conclusion that the actual use of the residences was in violation of the Boston Zoning Code. Specifically, ISD determined that 1) the Safe Haven residences were being used as lodging houses, 2) there was insufficient lot size, 3) there was insufficient useable open space, and 4) there was insufficient off-street parking. It is undisputed that if it were determined that the residences were being used permissively by the tenants as a "family" then the properties had sufficient lot size, open space and off-street parking. It is undisputed that reasons 2 through 4 were based solely upon ISD's conclusion that the single-family dwellings were being used as lodging houses without conditional use permits.

In November 2007 the City made a written response to Safe Haven's May 2007 request for a reasonable accommodation. In substance the City denied that it prohibits on a per se basis five or more unrelated disabled or non-disabled persons from residing together as "a family" in a single-family residence so long as those unrelated persons use and occupy the dwelling as a "single housekeeping unit." The City denied Safe Haven's request or a reasonable accommodation because it determined that Safe Haven's tenants did not occupy each Safe Haven residence as a "single housekeeping unit." It took the position that the tenants were residing in a lodging house as individual lodgers.

After receiving notice of ISD's building permit denials and the City's rejection of its request for a reasonable accommodation, Safe Haven did not apply to the City for conditional use permits under the provisions of the zoning code to operate its "sober houses" under the "lodging house" classification either permissively or as a reasonable accommodation. Instead, in January 2008 Safe Haven filed an appeal from the permit denials with the ZBA alleging that ISD "wrongfully concludes that the property at issue

is being operated as an illegal lodging house." On April 8, 2008, after conducting a hearing, the ZBA rejected Safe Haven's appeal.

Discussion

Safe Haven argues on summary judgment that the tenants residing at the eleven single-family residences were disabled persons in recovery from drug addiction and alcoholism. As such these tenants were members of a protected class under the federal Fair Housing Amendments Act (FHAA) and G.L. c. 40A, § 3. Safe Haven argues that although its tenants were not members of a "traditional" family related by blood they nonetheless occupied the single-family residences in a shared or "congregate living arrangement" as a "single, non-profit housekeeping unit." Safe Haven argues that because it was aiding and assisting these disabled persons in recovery by providing housing in a supportive environment it was entitled to a reasonable accommodation under the FHAA. The reasonable accommodation Safe Haven requested, and argues it is legally entitled to, is that the City provide "relief from the City of Boston's zoning regulations and/or building code regulations that place limitations on congregate living arrangements among disabled persons *that are not imposed upon families of similar size*" (Emphasis added). Safe Haven further argues that the City, in the execution of an official municipal policy, custom or practice directed against recovering drug addicts and alcoholics, engaged in coordinated actions to close Safe Haven that amounted to intentional discrimination.

The City argues on summary judgment 1) that because Safe Haven permitted a significant number of active users of illegal drugs to become and remain as tenants at the single-family residences at issue in this case, the Safe Haven population did not constitute a community of "qualified individuals with a disability" entitled to protection under the state and federal antidiscrimination laws; 2) that even if there was a community of "qualified individuals with a disability" at each single-family residence, Safe Haven's requested accommodation was not reasonable because the tenants did not organize or live as a single-family unit and Safe Haven did not treat the tenants as an autonomous single-family unit, and 3) that Safe Haven is using the single-family residences as lodging

houses without conditional use permits.[6] The City further argues that in seeking to enforce the building and zoning codes it did not engage in any conduct that constituted intentional discrimination or that deprived Safe Haven or its tenants of rights secured by the Constitution or laws of the United States. Further, the City argues that it is not liable to Safe Haven under 42 U.S.C. § 1983 because any constitutional or statutory injury it may have suffered as a result of actions taken by the City did not result from the implementation of any city policy, custom or practice directed against recovering drug users and alcoholics. Finally, the City argues that it is not a person subject to the provisions of G.L. c. 12, § 11I, and that Safe Haven failed to comply with the presentment requirement set forth in G.L. c. § 4 that is a precondition to brining a negligence claim against the City.

The standard of review on summary judgment "is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117,120 (1991). See Mass. R. Civ. P. 56 (c). The moving party must demonstrate with admissible documents, based upon the pleading depositions, answers to interrogatories, admissions documents, and affidavits, that there are no genuine issues as to any material facts, and that the moving party is entitled to a judgment as a matter of law. *Community National Bank v. Dawes*, 369 Mass. 550, 553-56 (1976). All evidentiary inferences must be resolved in favor of the non-moving party. See *Simplex Techs, Inc. v. Liberty Mut. Ins. Co.*, 429 Mass. 196, 197 (1999). "A party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if the moving party demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). Once the moving party meets its initial burden of proof, the burden shifts to the non-moving party "to show with admissible evidence the existence of a dispute as to material facts." *Godbout v. Cousens*,

[6] The City seems to suggest that Safe Haven's business operation was focused on securing a steady flow of rent from its tenants as part of a for-profit lodging house business rather than maintaining a supportive drug and alcohol free environment for recovering addicts.

396 Mass. 254, 261 (1985). The non-moving party cannot meet this burden solely with "vague and general allegations of expected proof." *Community National Bank*, 369 Mass. at 554; *Ng Brothers Construction, Inc. v Cranney*, 436 Mass. 638, 648 (2002) (*"[a]n adverse party may not manufacture disputes by conclusory factual assertions; such attempts to establish issues of fact are not sufficient to defeat summary judgment"*).

I shall address each claim and counterclaim in light of the established and disputed facts set forth in the summary judgment record.

City's Injunction Action and Safe Haven's Zoning Appeal. Safe Haven does not dispute that it extended living space into the basements and garages of the single-family residences for use as bedrooms without first obtaining building permits from ISD. It was only after ISD commenced its enforcement action that Safe Haven filed its applications for building permits. ISD refused to issue the building permits resulting in Safe Haven's zoning appeal.

To prevail on its injunction claim for an order to enjoin Safe Haven from using the garages and basements of the single-family residences as bedroom living space the City must establish that either Safe Haven is using the residences as lodging houses or that Safe Haven's use of the residences is otherwise not an allowed use because the tenants in each unit do not constitute a "family" within the meaning of the Boston Zoning Code.

To prevail on its zoning appeal Safe Haven must establish that the ZBA's decision (based upon a finding that Safe Haven was operating a lodging house and was not entitled to a use variance) was erroneous because its tenants occupy the single-family residences as of right as a "family" in accordance with the zoning code.

The City does not dispute that Safe Haven would be entitled to the issuance of the building permits (subject to compliance with all fire and building codes) if the unrelated tenants in each of the eleven Safe Haven residences were living as a single, nonprofit housekeeping unit and thus constituted a family within the meaning of the zoning code.

Initially ISD issued violation notices in which it classified the Safe Haven single-family residences as "group homes." When it realized this was not correct, it issued violations notices in which it classified the Safe Haven residences as "rooming houses" as defined in the State Sanitary Code, 105 CMR § 410.20. The sanitary code definition

of a "rooming house" includes "lodging houses" within its definition. The zoning code defines "lodging house" but does not define "rooming house." For purposes of determining whether the Safe Haven residences are operated as lodging houses for land use classification purposes it is the zoning code definition of a "lodging house" that governs.

The Boston Zoning Enabling Act governs Safe Haven's zoning appeal. See, St. 1956, c. 655, § 11, as amended by St. 1993, c. 461, § 5 (the "Zoning Enabling Act"). Under Section 11 of the Zoning Enabling Act, "[u]pon an appeal under this section, the court shall hear all pertinent evidence and determine the facts, and upon the facts as so determined, annul such decision if found to exceed the authority of such board or make such other decree as justice an equity may require." The standard of review applicable to G.L. c. 40A, § 17 zoning appeals apply to appeals under the Boston Zoning Code. See, *Steamboat Realty, LLC v. Zoning Bd. of Appeal of Boston*, 70 Mass.App.Ct. 601, n. 6 (2007). The court conducts a de novo review of the ZBA decision, making its own findings of fact, and determining the legal validity of the ZBA's decision based upon those facts. *Strand v. Planning Board of Sudbury*, 7 Mass.App.Ct. 935, 936 (1979). It is from those facts that the court determines whether or not the ZBA exceeded its own authority even where the ZBA did not provide a particularized reason or any specific evidence to support its decision. The decision of the ZBA "cannot be disturbed unless it is based on legally untenable grounds, is unreasonable, whimsical, capricious, or arbitrary." *Roberts v. Southwestern Bell Mobile Systems, Inc.*, 429 Mass. 478, 486 (199), quoting *MacGibbon v Bd. of Appeals of Duxbury*, 356 Mass. 635, 639 (1970). The decision will be affirmed if there exists a rational basis for the decision that is supported by the trial record. See, *Davis v. Zoning Bd. of Chatham*, 52 Mass.App.Ct. 349, 355-356 (2001).

The eleven single-family residences that constitute the Safe Haven properties are located in the 3F zone of the Boston Zoning Code. Residential use as a single-family

dwelling is permitted as of right in the 3F zone. See Boston Zoning Code, Article 50, Table B.[7] The definition of "Family" in the zoning code in effect in 2007 was:

> **Family**, one or more persons occupying a dwelling unit and living as a single, non-profit housekeeping unit provided that a group of five or more persons who are not within the second degree of kinship shall not be deemed to constitute a family, except that a group residence limited as defined in Section 2A-1 shall be deemed a family.

In January 2005 the City entered into what is known as the *Sang Vo* consent decree. See, *Sang Vo v. City of Boston* (D. Mass, C.A. NO. 00-11733-RWZ). The Sang Vo consent decree states in relevant part, " . . . [f]or purposes of lodging house requirements and enforcement, "family" shall mean two or more persons related by blood, marriage, adoption *or analogous family union* and living as a single, nonprofit housekeeping unit" (Emphasis added).[8] In accordance with the *Sang Vo* consent decree the City modified its housing policy so that, notwithstanding the definition of "Family" in the zoning code, the fact that more than five unrelated persons occupied a residence would not alone disqualify them from being considered a "Family" as defined in the zoning code. This policy was in effect when Safe Haven applied for its building permits in 2007. Therefore, in 2007 the Safe Haven tenants could have qualified as an "analogous family union" and thus a "Family" for zoning purposes if they were living as a single, nonprofit housekeeping unit. The zoning code definition of "Family" was amended on March 13, 2008 to bring it into line with the *Sang Vo* consent decree.[9] It is this 2008 definition that I shall use in my analysis of the claims and counterclaims in this case.

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[7] The court cannot take judicial notice of the Boston Zoning Code. However, the parties do not dispute the authenticity and accuracy of the zoning code provisions at issue in these cases. Therefore, I shall refer to those provisions when necessary as if they were properly authenticated.

[8] The *Sang Vo* consent decree further states, "A family shall be considered as one 'person,' 'lodger,' or 'boarder' for all purposes of lodging home requirements and enforcement under the Lodging House Statute and applicable Building and Zoning Code provisions."

[9] As amended in March 2008 the term "Family" is defined as " one person or two or more persons related by blood, marriage, adoption, or other analogous family union occupying a dwelling unit and living as a single, non-profit housekeeping unit, provided that a group of five or more persons who are enrolled as full-time, undergraduate students at post secondary educational institution shall not be deemed to constitute a family. A group residence, limited, as defined in this Section 2A-1 shall be deemed a family."

As is set forth in Table B, a "Group Residence, Limited" is an allowed use in the 3F zone and a "Group Care Residence, General" is a prohibited use. A "Group Residence, Limited" is defined as:

> **Group Residence, Limited**, premises licensed, regulated or operated by the Commonwealth of Massachusetts or operated by a vendor under contract with the Commonwealth for the residential living, care, or supervision in any single dwelling unit of five or more mentally ill or mentally retarded persons *or persons with disabilities* (Emphasis added).[10]

A "Group Care Residence, General" is defined as:

> **Group Care Residence, General,** *premises for the residential care or supervision (but not including custodial care) of ex-alcoholics, ex-drug addicts*, pre-release or post-release convicts or juveniles under seventeen years of age who are under the care of correctional agencies of the Commonwealth, *but not including premises licensed, regulated, or operated by the Commonwealth of Massachusetts or operated by a vendor under contract with the Commonwealth for the residential living, care, or supervision in any single dwelling unit of five or more* mentally ill or mentally retarded persons or *persons with disabilities* (Emphasis added).

Reading these two zoning code definitions together with the definition of "Family," a group residence that provides care or supervision to five or more unrelated recovering alcoholics or recovering drug addicts is a use allowed as of right in the 3F zone provided the operator of the group residence is licensed or regulated by the Commonwealth of Massachusetts. It is the Department of Public Health that regulates residential treatment and/or rehabilitation programs for recovering alcoholics or recovering drug addicts. See, 105 CMR § 164.00, et seq.

As is set forth in Table B, residential use as a "lodging house" in the 3F zone is a conditional use that requires a special permit from the ZBA. Safe Haven has never sought a special permit from the ZBA to operate its "sober houses" as "lodging houses" and has never asked the City (or the ZBA) as a reasonable accommodation to issue a conditional use permit to operate its "sober houses" as "lodging houses."

To a certain extent Safe Haven has by its own decisions and actions created the "use" classification dispute that the court is being asked to resolve. For reasons that do

[10] This definition of "Group Residence, Limited" was amended in 1991 to bring it into compliance with the federal Fair Housing Amendments Act, 42 U.S.C. § 3601 et seq. The amendment added the phrase "persons with disabilities."

not appear in the summary judgment record, Safe Haven has never sought or submitted its "sober house" operation to licensure or regulation by the Department of Public Health ("DPH"). Had it done so, Safe Haven's "sober house" use of the eleven single-family residences would have been permitted as of right as a "Group Residence, Limited" under the provisions of the zoning code. See, *Granada House, Inc. v. City of Boston*, (Suffolk Sup. Ct., No. 96-6624-E, slip op.). Nonetheless, for purposes of ruling on this summary judgment motion only, I shall assume that because Safe Haven maintains it does not provide treatment to recovering drug addicts and alcoholics it was not legally obligated to operate its "sober house" subject to DPH licensure or regulation.

Having chosen not to take the steps necessary to bring itself within the "Group Residence, Limited" definition and having chosen not to seek a conditional use permit to operate as a "lodging house" Safe Haven's only defense in the City's injunction case and only argument on the merits of its zoning appeal is that the City erred in classifying its use as falling under the "lodging house" classification.[11] If the single-family residences were properly classified as "lodging houses" under the zoning code definition in existence in 2007, Safe Haven would not be entitled to issuance of the building permits unless it proved it is entitled to a reasonable accommodation under state and federal anti-discrimination statutes.

However, even if ISD and the ZBA erred in classifying the residences as "lodging houses," to prevail on its zoning appeal Safe Haven must establish that its actual use of the residences is otherwise allowed as of right under the applicable provisions of the zoning code or must be allowed as a reasonable accommodation under state and federal anti-discrimination statutes. To establish that its use is allowed as of right Safe Haven must prove that the tenants lived as a "single, non-profit housekeeping unit" and therefore constitute a "Family" within the meaning of the zoning code (as modified by the *Sang Vo*

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[11] In *Boston Sober Housing Corporation v. Automatic Sprinkler Appeals Board*, 66 Mass.App.Ct. 701, 705, fn 5, the court affirmed a decision of the ASAB that the plaintiff's "sober house" was in fact properly classified as a lodging or boarding house. The court pointed out that the City of Chelsea, in response to the plaintiff's request for a reasonable accommodation under FHAA, provided "a reasonable accommodation to the zoning laws that preclude boarding or lodging houses in the area." In *Hoex v. City of Malden*, 75 Mass. App. Ct. 1101, the court noted that the plaintiff did not dispute that her "sober house" is being operated as a "lodging" or "boarding" house.

Lodging house use in the 3F zone in Boston is conditional, not prohibited. It may be approved by the ZBA as a conditional use.

consent decree prior to the March 2008 zoning code amendments). To establish that it is entitled to relief from the use provisions of the zoning code as a reasonable accommodation, Safe Haven must prove that the tenants at the "sober houses" met the statutory definition of a qualified disabled person and that the requested accommodation was reasonable.

Safe Haven argues that at the time ISD rejected its building permit applications the Safe Haven properties were not properly classified as lodging houses because each residence had kitchen facilities available to the residents. Safe Haven argues that it was error for ISD to classify them as a lodging house in 2007. I agree.

The zoning code in effect in 2007 defined "Lodging House" in relevant part as:

> ". . . any dwelling in which living space, *without kitchen facilities*, is let to five or more persons who are not within the second degree of kinship" (emphasis added)

It was not until March 2008 that the City amended the definition of "Lodging House" in the zoning code to include dwellings that had kitchen facilities. See G.L. c. 140, § 22A.[12] The amendment also incorporated the changes required under the *Sang Vo* consent decree.[13] While, the March 2008 amendment does not relate back to the 2007 permit applications, it would apply to consideration of Safe Haven's reasonable accommodation request.[14]

Although ISD erred in classifying the Safe Haven residences as lodging houses, to prevail on its zoning appeal Safe Haven must establish that its use of the single-family

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[12] It appears that the City did not adopt the provisions of G.L. c. 140, §22A until 2008.

[13] In accordance with the *Sang Vo* consent decree, on March 13, 2008 the zoning code definition of "Lodging House" was amended to read, "*any dwelling* (other than a dormitory, fraternity, sorority house, hotel, motel, or apartment hotel) *in which living space, with or without common kitchen facilities, is let to five or more persons, who do not have equal rights to the entire dwelling and who are not living as a single, non-profit housekeeping unit*. Board may or may not be provided to such persons. For the purposes of this definition, a family is one person" (Emphasis added).

[14] A fact finder could conclude that the only accommodation Safe Haven would be entitled to owing to the nature of the protected class and the use classifications available under the zoning code is one that would require the ZBA to issue a conditional use permit so that Safe Haven could operate its "sober houses" as "lodging houses" subject to compliance with other statutory and code provisions applicable to lodging houses. See, *Massachusetts Sober Housing Corporation v. Automatic Sprinkler Appeals Board*, supra. Whether Safe Haven would be entitled to exemption from some or all of those other provisions would depend on the specific reason put forward and whether it would adversely impact an matter of public health or safety.

residences was allowed under the zoning code. Specifically, Safe Haven must show that either 1) its tenants are living as a single, non-profit housekeeping unit and thus constitute a "Family," or 2) it is entitled to relief from the zoning code as a reasonable accommodation under the FHHA.

With respect to the actual use and operation of the Safe Haven residences, the summary judgment record shows that 1) Safe Haven operated its '"sober houses" as a for-profit entity without any state license, regulation or supervision; 2) Safe Haven did not provide its tenants with treatment services to address drug or alcohol dependency, though it did require that the tenants submit to drug screening tests; 3) the tenants entered into individual tenancy agreements with Safe Haven; 4) the tenants at each residence did not pool their funds to pay rent or enter into any collective occupancy agreements with Safe Haven; 5) each tenant paid a weekly rent to Safe Haven; 6) Safe Haven controlled each tenant's house, room and bed assignment and retained the authority at its choosing to move a tenant from house to house and from bedroom to bedroom; 7) Safe Haven alone determined who could live at the residences; 8) Safe Haven alone determined whether a tenant would be evicted or otherwise forced to vacate the residence; 9) Safe Haven alone established the house rules, and Safe Haven alone had the authority to enforce those house rules; 10) the tenants did not pool their funds for the purpose of purchasing or preparing meals; 11) there was a significant tenant turnover at each residence (more than 800 residents lived in rooms at Safe Haven over a two year period); 12) the tenants had at best little control over any aspect of the management or organization of their households, and 13) the tenants did not have the decision making authority to choose new residents or to evict other residents who used drugs or alcohol during their tenancy.

The City cites to cases where on similar facts regarding household organization and control the appeals court has ruled that "large numbers of unrelated people living in an unregulated home in a residential neighborhood" did not constitute a use "analogous to single-family housing as to entitle the house to the legal status of a single family house." *Massachusetts Sober Housing Corporation v. Automatic Sprinkler Appeals*

Board, supra.;[15] see also, *Hall v. Zoning Board of Appeals of Edgartown*, 28 Mass.App.Ct. 249, 254 (1990).

While the issue is a close one, based upon the evidence in the summary judgment record I believe that there exist genuine disputed issues of material fact as to whether the Safe Haven tenants were occupying the residences as a single housekeeping unit within the meaning of the zoning code. A reasonable fact finder could conclude from a view of all the evidence that while Safe Haven asserted significant control over many aspects of everyday life, the tenants at the "sober houses" were nonetheless living collectively and cooperatively in a supportive residential community that provided them with a safe environment that was important to their efforts to recover from their drug and alcohol addictions. It is for the fact finder (be it jury or judge) to decide as a matter of fact whether the Sober House tenants were living as a single, non-profit housekeeping unit so as to constitute a "Family" allowed as of right to live in the single-family residences.

Accordingly, neither party is entitled to summary judgment on the City's claim for injunctive relief in 08H84CV000054 or on Safe Haven's zoning appeal claim in 08H84CV000767.

Safe Haven's G.L. c. 40A, § 3 Counterclaim (Count I). Safe Haven alleges that the tenants occupied each single-family residence in a manner that constituted "congregate living arrangements among non-related persons with disabilities" within the meaning of G.L. c. 40A, § 3, and that the City's refusal to allow them to reside at the residences as a family constituted discrimination based upon their disability in violation of the statute.

G.L. c. 40A, § 3 states in relevant part:

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[15] In *Boston Sober Housing Corporation*, at 705, fn 5, the court affirmed a decision of the ASAB that the plaintiff's "sober house" was in fact properly classified as a lodging or boarding house. The sober house model in that case appears to have been more tenant-controlled than the model used by Safe Haven. The sober house at issue in the *MHSC* case was run under the Oxford House sober housing model. The three governing principles of the model are 1) residents democratically elect their own officers, 2) the sober house must be self-supporting with each resident paying the weekly share of the house operating expenses, and 3) residents who use alcohol or drugs must be expelled immediately. Id. at p. 701. The court pointed out that the City of Chelsea, in response to the plaintiff's request for a reasonable accommodation under FHAA, provided "a reasonable accommodation to the zoning laws that preclude boarding or lodging houses in the area." A lodging house use is not prohibited in Boston's 3F zone.

> Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town *shall not discriminate against a disabled person. Imposition of* health and safety laws or *land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination.* The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge. (Emphasis added).

The state law definition of a qualified handicapped or disabled person is substantially similar to that used under federal law. See, G.L. c. 151B § 1(17). However, the statute does not define the phrase "congregate living arrangements." The concept as applied to persons with disabilities is not without some identifiable characteristics.

The Boston Zoning Code identifies two forms of congregate living arrangements. The first is a "group residence" licensed, regulated or operated by the Commonwealth of Massachusetts or operated by a vendor under contract with the Commonwealth. Consistent with G.L. c. 40A, § 3, under the zoning code unrelated disabled persons residing in a *regulated group residence* are entitled to reside in single-family residences as a family in the same manner as would a family related by blood. Because Safe Haven has chosen not to operate its "sober houses" subject to state licensure and regulation, it does not constitute a congregate living arrangement under this first formulation. See, *Granada House v City of Boston*, supra. (the City was found to have violated § 3 because it prohibited in a residentially zoned district the operation of *a licensed residence* for men and women recovering from drug and alcohol addiction). The second form of a congregate living arrangement is one where unrelated persons with disabilities live collectively by choice in a single-family residence as a single, non-profit housekeeping unit.[16] Safe Haven argues that it falls under this second formulation, and that the City's failure to treat the Safe Haven tenants the same as it would a single-family of similar size

[16] It appears that in *Safe Haven v Good*, supra. fn. 3, a recent decision issued by the Appeals Court pursuant to Rule 1:28, the court categorized the Safe Housing operation as "unlicensed **congregate** housing for recovering alcoholics and drug addicts in single-family dwellings." It is unclear whether the court was using the term "congregate" as a general descriptive term or as an indication that it believed the Safe Haven operation constituted "congregate living" within the protection of G.L. c. 40A, § 3. To the extent that it is the latter, I do not find the conclusion based upon the limited facts that were before the Appeals Court panel to be persuasive. To bring itself within the protection of G.L. c. 40A, § 3, I believe that Safe Haven must prove that its tenants lived as a single, non-profit housekeeping unit.

related by blood constitutes discrimination under G.L. c. 40A, § 3. This discrimination claim requires resolution of the same factual issue that is central to the injunction and zoning appeal claims. For the same reasons I stated in my discussion of the injunction and zoning claims, I conclude that there exist disputed issues of material fact as to whether the Safe Haven tenants were occupying the residences as a single, non-profit housekeeping unit so as to constitute a congregate living arrangement within the meaning of G.L. c. 40A, § 3.

Accordingly, neither party is entitled to summary judgment on Safe Haven's G.L. c. 40A, §3 counterclaim (Count I).

Safe Haven's Fair Housing Amendments Act Counterclaim (Count V). The Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. § 3601, et seq. "prohibits discriminatory housing practices based upon a person's handicap . . . Individuals in recovery from drug or alcohol addiction, as well as owners of group homes for recovering addicts, are protected under the FHAA. *Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728-729 (1995)." *Sober Houses, LLC v. Good*, supra. at p. 1112. Under § 3604 (f) (1), the term "handicap is defined as:

> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities;
>
> (2) a record of having such an impairment, or
>
> (3) being regarded as having such an impairment, but such terms does not include current, illegal use of or addiction to a controlled substance. See § 3062(h).

Safe Haven has alleged that 1) its tenants are handicapped based upon their drug addiction or alcoholism, and 2) the City has refused to afford them a reasonable accommodation in the form of "relief from the City of Boston's zoning regulations and/or building code regulations that place limitations on congregate living arrangements among disabled persons that are not imposed upon families of similar size." Safe Haven further argues that the City engaged in intentional discrimination arguing that the City departed from its normal code inspection/enforcement procedures and departed from its substantive criteria for determining whether a residence was being used in compliance

with the zoning code. Safe Haven argues that the reason the City acted in this manner and refused to classify the Safe Haven tenants as a single family household was because of the tenants' status as recovering drug addicts and alcoholics. Safe Haven argues that the City wanted to keep these disabled tenants from living in a residential neighborhood in response to prejudicial fears and concerns raised by neighborhood politicians and residents.

To prevail on an FHAA claim Safe Haven must prove that its tenants are protected under the FHAA and that some discriminatory purpose was a "motivating factor" behind the challenged action. *Sober Houses, LLC v. Good*, supra., citing to *Community Servs. Inc. v. Wind Gap Mun. Authy.*, 421 F. 3d 170, 177 (3d Cir. 2005); *Community Hous. Trust v. Department of Consumer & Regulatory Affairs*, 257 F. Supp. 2d (D.D.C. 2003).

A plaintiff may establish discriminatory intent through direct or circumstantial evidence, or by making a prima facie case of discrimination under the *McDonnell Douglas* framework. See, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973). Safe Haven claims that the City, acting through its agents and employees, impermissibly targeted the Safe Haven operation and improperly departed from its normal procedures for evaluating zoning use issues in response to pressure it received from neighborhood politicians and residents to force people believed to be drug addicts and alcoholics out of the Safe Haven properties and out of their neighborhood. Under the FHAA a municipality can be held liable for the wrongful conduct of its employees and agents. *Meyer v. Holley*, 537 U.S. 280, 285 (2003 (*"[I]t is well established that the [FHAA] provides for vicarious liability"*).

There is evidence in the summary judgment record that would allow a jury to infer that City employees and agents, responding to political and community pressure, departed from the normal procedures and substantive criteria for evaluating building code zoning use issues in an effort to force the closure the Safe Haven residences based upon concerns arising from the characteristics of the "sober house" population. This evidence includes, but is not limited to, the relationship between the City employees and the organized community opposition, the manner in which the initial ISD inspections were conducted, the presence of media at the inspections, ISD's possible intentional misuse of

"group home general" and then "rooming house" designations to buttress the legal rationale for issuing violation notices.

On the other side of the ledger there is evidence in the summary judgment record that would allow a jury to infer that Safe Haven's willful noncompliance with building permit and use requirements (the improper extension of living space without permits or change of use approvals), its apparent exercise of total control over the tenant households and its secretiveness surrounding its operations were significant factors that motivated the City employees and agents to act as they did.

Based upon the evidence in the summary judgment record, there exist disputed issues of material fact with respect to whether 1) a significant majority of the Safe Haven tenants were qualified handicapped persons,[17] 2) the Safe Haven residents were living by choice as a single, non-profit housekeeping unit and thus were entitled to the requested accommodation,[18] and 3) the City acted with discriminatory intent when it investigated and issued zoning violation notices to Safe Haven.[19]

Accordingly, neither party is entitled to summary judgment on Safe Haven's FHAA counterclaim (Count V).[20]

Safe Haven's 42 U.S.C. § 1983 Counterclaim (Count II). Section 1983 states in relevant part that "[e]very person who under color of any statute, ordinance, regulation,

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[17] The City argues that a number of the Safe Haven tenants were not qualified disabled persons under the FHAA because they were active drug or alcohol users. Safe Haven chose not to accept any state regulatory oversight of its for-profit "sober house" operation. Because Safe Haven was not subject to any regulatory supervision, Safe Haven's assertion standing alone is insufficient to establish that its tenants were predominantly persons in recovery from drug addiction (as opposed to current users of illegal drugs) and alcohol addiction, and thus were qualified handicapped persons under the FHAA. These factual assertions require proof. There is evidence in the summary judgment record that would allow a fact finder to infer that in addition to accepting as tenants adult men in recovery, Safe Haven also accepted as tenants active drug and alcohol users and would allow other tenants who had been in recovery to remain as tenants when they were found to be using drugs or alcohol. Current users of illegal drugs would not be qualified handicapped persons under the FHAA. What I cannot tell from the summary judgment record is the percentage of the 800 tenants who fell into the persons in recover category as opposed to the current user of illegal drugs category.

[18] See fn. 14, supra.

[19] With respect to this allegation I agree that there exists a disputed issue of material fact based upon the analysis set forth in *Safe Haven v Good*, supra.

[20] The City did not ask the Court to consider whether it was entitled to qualified immunity to the extent Safe Haven is seeking damages. See, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Ahearn v. Vose*, 64 Mass.App.Ct., 403, 413 (2005).

custom or usage of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Safe Haven argues the City while acting under color of state law, deprived Safe Haven and its tenants of rights secured under the Constitution (14th amendment), federal law (FHAA) and state law (G.L. c. 40A, § 3 and the Boston Zoning Code). Safe Haven claims that the City impermissibly targeted the Safe Haven "sober house" operation and improperly departed from its normal procedures and substantive criteria for evaluating zoning use issues in response to pressure it received from neighborhood politicians and residents to force people believed to be drug addicts and alcoholics out of the Safe Haven properties and out of their neighborhood.

Unlike a claim under the FHAA, a municipality cannot be held liable under § 1983 for constitutional violations of its employees based upon a theory of respondeat superior. *Baron v. Suffolk Cty. Sheriff's Dep't.*, 402 F.3d 225, 236 (1st Cir. 2005). To support a claim under § 1983, Safe Haven must prove, not only that the City deprived it of rights secured under law, but that the deprivation of right resulted in substantial part from the execution of an unconstitutional or illegal official City custom, policy or practice. *Monell v. New York Dept of Social Services*, 436 U.S. 658, 694 (1978); *Young v. City of Providence*, 404 F. 3d 4, 25-26 (1st Cir. 2005).

There is evidence in the summary judgment record from which a jury could infer that City employees and agents used neutral building and zoning regulations to target handicapped persons residing at the Safe Haven residences in violation of rights secured under federal and state law. Whether or not this is the case, "[a] single incident of misconduct, without other evidence, cannot provide the basis for municipal liability under [section] 1983." *Bordanaro v. McLeod*, 871 F. Supp. 1018, 1036-37 (D. Mass. 1989). There is no evidence that the City (or its employees) have taken similar action against any other entities purporting to operate as a "sober house" or against persons in recovery to keep them from exercising their legally protected right.

There is no evidence in the summary judgment record that the City had an official custom, policy or practice directing its employees and agents to use the enforcement

provisions of the zoning and building codes to keep recovering drug addicts and alcoholics from exercising their legally protected right to live together as a household in residential neighborhoods. *Bd. Of County Comm'rs v. Brown*, 520 U.S. 397, 403-404 (1997).[21]

Accordingly, the City is entitled to summary judgment on Safe Haven's § 1983 counterclaim (Count II).

Safe Haven's G.L. c. 12, § 11I Counterclaim (Count III).

Safe Haven has asserted a claim against the City alleging that it breached G.L. c. 12, § 11I, the Massachusetts Civil Rights Act ("MCRA"). The MCRA provides that,

> "*Any person* whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages." (Emphasis added).

A municipality is not a "person" as that term is used in the MRCA. *Howcroft v. City of Peabody*, 51 Mass.App.Ct. 573, 591-593 (2001). Accordingly, Safe Haven cannot assert a claim against the City for injunctive relief or money damages under the MCRA.

Accordingly, the City is entitled to summary judgment on of Safe Haven's MRCA counterclaim (Count III).

Safe Haven's Negligence Counterclaim (Count IV). Safe Haven has alleged that the City breached a duty of care owed to Safe Haven and its residents to enforce the zoning and building codes without threatening, intimidating them or otherwise preventing them from exercising their constitutional rights. To the extent this allegation raises a claim of negligence (as opposed to an intentional tort), Safe Haven has not alleged that it or its tenants have suffered any injury to person or property arising from the City's

[21] In fact, the City's zoning code as a matter of land use policy allows persons with disabilities, including recovering addicts, to live in residential communities as of right. See Boston Zoning Code, Article 50, Table B, (a "Group Residence, Limited" is an allowed use in the 3F zone). The zoning code also allows lodging houses in the 3F residential zone as a conditional use.

negligent or wrongful act.[22] Further, a negligence claim brought against a municipality is governed by G.L. c. 258. There is no evidence in the summary judgment record that Safe Haven complied with the presentment requirement set forth in G.L. c. 258, §4. Proper presentment is a necessary condition precedent to bringing a negligence claim against a municipality. *Weaver v, Com.*, 387 Mass. 43 (1982).

Accordingly, the City is entitled to summary judgment on Safe Haven's negligence Counterclaim (Count IV).

Conclusion

For these reasons, it is **ORDERED** that:

1) On Safe Haven's zoning appeal claim in 08H84CV00767, the cross-motions for summary judgment are **DENIED**;

2) On the City's claim for injunction relief in 08H84CV000054, the cross-motions for summary judgment are **DENIED**;

3) On Safe Haven's counterclaims in 08H84CV000054 for a) violation of G.L. c. 40A, § 3 (Count I), and b) violation of the Fair Housing Act (Count V), the cross-motions for summary judgment are **DENIED**;

4) On Safe Haven's remaining counterclaims in 08H84CV000054, for a) violation of 42 U.S.C. § 1983 (Count II), b) violation of G.L. c 12, §11I (Count III) and c) negligence (Count IV), the City's motion for summary judgment is **ALLOWED**;

5) The Clerk shall schedule the case for trial with a Rule 16 order to issue.

SO ORDERED.

JEFFREY M. WINIK
FIRST JUSTICE

October 26, 2012

cc: Sean P. Nehill, Esq,
Melissa A. Potvin, Esq.
Andrew J.Tine, Esq.

[22] A plaintiff cannot recover pecuniary damages in a negligence action. See, *Bay State Spray & Provincetown Steamship, Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103, 107 (1989) ("[I]n this State when economic loss is the only damage claimed, recovery is not allowed in tort-based strict liability . . . or in negligence."); *Garweth Corp. v. Boston Edison Co.*, 415 Mass. 303, 305 (1993).

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May 2, 2012

In response to Chapter 283, Section 10 of the Acts of 2010, the Department of Public Health (DPH) Bureau of Substance Abuse Services (BSAS) conducted a study of alcohol and drug free (ADF) housing, also known as "sober homes."

The law requires the study to explore the feasibility of licensing, regulating, registering or certifying sober homes or operators, and document the number of sober homes operating in the state, the standards and requirements necessary to protect the health and safety of the home's residents and any problems created by the operation of sober homes, including impacts on neighborhoods and surrounding areas.

To complete this report, DPH undertook a comprehensive process that included conducting significant research on all of the areas in the report, including legal research/analysis and comparative policies with other states; DPH also held multiple meetings with constituents and providers. Federal housing law preempts some areas of state regulation, necessitating a thorough review of case law as well. As will be outlined in the report, the Department's statutory and regulatory authority over ADF housing is limited, and much of the research offered new information on ADF housing to DPH staff. Although this process brought the Department beyond the requested date in the legislation, this comprehensive review has resulted in several findings that we hope will offer constructive next steps at the state, municipal and provider levels, including:

1. DPH BSAS' existing statutory and regulatory authority is limited to the licensure of alcohol and drug treatment facilities and programs. BSAS has no authority over housing and therefore does not regulate ADF Housing.

2. The federal Fair Housing Amendments Act (FHAA) limits DPH authority to implement mandatory licensure, regulation, registration or certification requirements directed specifically at ADF Housing providers and residents. Federal courts have repeatedly rejected state and local efforts to regulate ADF Housing.

3. Local governments should be encouraged and supported in their use of existing nondiscriminatory legal tools to address legitimate health and safety, building, fire, zoning and criminal impacts of ADF Housing where they occur.

4. Residents of ADF Housing should be educated about existing consumer protection remedies to assert their rights against unscrupulous operators of ADF Housing.

5. DPH should continue to investigate and triage as appropriate complaints related to ADF Housing providers, including complaints alleging that providers advertise, offer or require residents to participate in an unlicensed substance abuse treatment program, on or off-site.

6. The Legislature could consider legislation and provision of funding for implementation by DPH of a voluntary training program for ADF Housing providers, with a directive to all state agencies and their vendors to refer clients to BSAS-trained ADF Housing providers only.

As a follow-up to this study, DPH will work in collaboration with the Department of Housing and Community Development (DHCD) and the Office of Consumer Affairs and Business Regulation to convene a working group on Sober Homes to determine a strategy for addressing these findings. We will invite members of the Legislature to participate in this process and look forward to continuing to work together to examine this important issue.

Sincerely,

John Auerbach
Commissioner

Study Regarding Sober (Alcohol and Drug Free) Housing In response to Chapter 283, Section 10, of the Acts of 2010

Massachusetts Department of Public Health, Bureau of Substance Abuse Services

I. Legislative Mandate and Summary of Findings

This report responds to the Massachusetts Legislature's directive (Chapter 283, Section 10 of the Acts of 2010) to the Department of Public Health, Bureau of Substance Abuse Services (BSAS), to prepare a study of alcohol and substance free housing, sometimes referred to as "sober housing" or Alcohol and Drug Free Housing ("ADF Housing").

ADF Housing is a form of group housing that offers an alcohol and drug free living environment for individuals recovering from alcohol or substance use disorders. As a condition of occupancy, residents of ADF Housing agree not to use alcohol or substances. Over the years, surrounding neighbors and community stakeholders have expressed concerns to municipalities, legislators and BSAS about the presence of ADF Housing in local communities. Concerns also have been expressed regarding the need to protect residents from unscrupulous ADF Housing providers.

These complaints and concerns prompted the General Court to request this study from BSAS to address the following issues:

- Documentation of the number of sober homes operating in the Commonwealth;
- Any problems created by the operation of sober homes, including impacts on neighborhoods and surrounding areas;
- Standards and requirements necessary to protect the home's residents; and
- The feasibility of licensing, regulating, registering or certifying sober homes or operators.

The report's findings are based on the following information:

- Review of other states' policies, regulations, etc. related to ADF Housing;
- Legal analysis of relevant local, state and federal laws;
- Meetings with ADF Housing operators;
- Meetings and conversations with local municipal officials regarding problems with ADF Housing;
- Summary of complaints about ADF Housing; and
- Compilation of ADF Housing numbers through various methodologies.

The major findings of the report are as follows:

A. BSAS' existing statutory and regulatory authority is limited to the licensure of alcohol and drug treatment facilities and programs.[1] BSAS has no authority over housing and therefore does not regulate ADF Housing. However, to the extent that an ADF Housing provider offers or requires residents to participate in a substance abuse treatment program on or off-site, BSAS has authority to require licensure of that treatment program.

B. The federal Fair Housing Amendments Act (FHAA) limits the Commonwealth's and BSAS' authority to implement mandatory licensure, regulation, registration or certification requirements directed specifically at ADF Housing providers and residents. Federal courts have repeatedly rejected state and local efforts to regulate ADF Housing.

C. Local governments should be encouraged and supported in their use of existing nondiscriminatory legal tools to address legitimate health and safety, building, fire, zoning and criminal impacts of ADF Housing.

D. Residents of ADF Housing should be educated about existing consumer protection remedies to assert their rights against unscrupulous operators of ADF Housing.

E. BSAS should continue to investigate and triage as appropriate complaints related to ADF Housing providers, including complaints alleging that providers advertise, offer or require residents to participate in an unlicensed on or off-site substance abuse treatment program.

F. With additional resources, BSAS could implement a voluntary training program for ADF Housing providers, with a directive to all state agencies and their vendors to only refer clients to BSAS-trained ADF Housing providers. BSAS estimates the cost of implementation of such a voluntary training program at a minimum to be from $242,103.00 - $257,625.00 per year. Appendix A provides a detailed budget breakdown of the projected costs.

II. Description and Number of ADF Homes Operating in Massachusetts

A. Description of ADF Housing

This report uses the term "ADF housing or homes" to refer to the variety of group housing arrangements, however designated or legally structured, that provide an alcohol and drug free living environment for people in recovery from substance use disorders. ADF Housing is also referred to as sober housing, alcohol and substance free housing, clean-and-sober housing, alcohol-free or sober-living environments, three-quarter way

[1] 105 CMR 164.000 "Licensure of Substance Abuse Treatment Programs."

houses, re-entry homes and other similar names. ADF Housing includes both transitional and permanent housing models which may be operated by a variety of entities, including state and federal government agencies, licensed mental health and addiction treatment agencies, for-profit and non-profit organizations, the occupants themselves, or private landlords.

Some ADF Housing models are funded in full or part by state and federal agencies, including, among others, Housing and Urban Development (HUD), and the MA Department of Housing and Community Development (DHCD). For example, MassHousing, the Massachusetts Housing Finance Agency, is an independent, quasi-public agency charged with providing financing for affordable housing in Massachusetts. The Center for Community Recovery Innovations, Inc. (CCRI), a nonprofit subsidiary corporation of MassHousing, provides one-time gap funding to (1) increase the availability of affordable, alcohol and drug free housing in Massachusetts; (2) promote intervention, recovery and successful tenancies for residents with chemical dependency; and (3) provide equitable service and resources, geographically and for all populations, with a special focus on housing and services for women with children, adolescent/young women, youth, veterans, ex-offenders or other underserved populations.

ADF Housing models that are funded by state or federal agencies have contractual requirements meant to ensure that the homes are in compliance with all relevant housing laws and regulations. Most often, residents in these homes are provided case management services to support their ongoing sobriety. In fact, BSAS partners with DHCD to provide funding for case management services in DHCD-supported ADF Housing.

ADF Housing can be distinguished from conventional private housing occupied by individuals and families by the fact that residents of ADF Housing are in recovery from substance use disorders, and agree not to drink alcohol or use substances as a condition of occupancy. The residents themselves reinforce their recovery through support from other recovering persons.

The structure of ADF Housing and residency requirements vary widely as they are established by the individual operators or funders. For example, ADF Housing may have live-in staff, require participation in house meetings, mandate random drug testing, and require residents to abide by house rules. Residents may participate in a variety of recovery-related activities in the community including attending Alcoholics Anonymous or Narcotics Anonymous meetings, in addition to employment training or educational programs. Some residents receive licensed mental health or addiction treatment services while living in ADF Housing; yet, a number of homes simply require the maintenance of sobriety as the only condition of residency. ADF Housing providers require that residents pay rent in advance by the week or the month. Rents vary and mirror the non-ADF Housing market in that rents range anywhere from $125.00 per week to thousands of dollars per month.

A well-known national model of ADF Housing is the Oxford House model. Oxford Houses are democratically run, self-supporting alcohol and drug free homes. Each house has between six and 15 residents. There are separate Oxford Houses for men and women, with some for women with children. The number of Oxford Houses nationally has grown from one in 1975 to over 1,200 in 2010, including 12 houses with 114 beds in Massachusetts.[2] An umbrella organization connects all Oxford Houses and allocates resources, allowing new houses to be developed. The Massachusetts Sober Housing Corporation operates an additional four homes in Massachusetts according to Oxford House principles.

It is well understood that when persons with substance use disorders are presented with a stable housing environment, they are more likely to sustain recovery than persons who do not have this basic need met. ADF Housing provides important recovery support for individuals who otherwise may have few housing options due to poverty, estrangement from usual social and familial support systems and/or a history of incarceration. Individuals who reside in ADF Housing are able to live independently in the community since they are no longer in the acute phase of their illness. Having access to ADF Housing avoids homelessness, relapse to substance use, increased medical costs, a return to criminal activity and an increase in the rate of premature death.

B. ADF Housing Estimates

In April 2007, BSAS invited all identified ADF Housing providers to a meeting to discuss concerns expressed by both members of the Legislature and municipalities, about the seemingly sudden proliferation of ADF Housing. At the meeting, BSAS encouraged ADF Housing providers to work cooperatively with local authorities, offering "Best Practice" suggestions on being a "good neighbor" in their local communities. At the same time, BSAS also distributed a written survey to attempt to understand what, if any, services were being provided in these homes that might require BSAS licensure as a treatment program. Approximately 27 of the nearly 200 invited ADF Housing operators attended the April meeting; BSAS received 18 completed surveys. Based on these surveys it did not appear that the ADF Housing operators involved were providing any treatment services that required licensure by BSAS.

As ADF Housing is subject to state and federal fair housing laws, the Commonwealth is prohibited in all but very narrow circumstances from imposing requirements on ADF Housing that differ from requirements imposed on other types of housing. There is not now, nor has there ever been, a comprehensive centralized directory or listing of ADF Housing in the Commonwealth. The absence of a centralized registry makes it impossible to accurately document the number of ADF homes in the state. BSAS has attempted to document the number of ADF homes through an internet and newspaper search, as well as using information that BSAS has collected in the form of advertisements, flyers, complaints, and word of mouth since the April 2007 meeting. This method of documentation has identified approximately 300 privately-operated ADF homes throughout the Commonwealth. BSAS believes that this represents only a fraction

[2] See Oxford House web site: http://www.oxfordhouse.org/directory_listing.php. Accessed 9/13/2011.

of the total number of such homes. This estimate excludes ADF Housing sites operated or subsidized by state and federal agencies, or homes operated using the Oxford House model. These ADF Housing models have regulatory, contractual or -- in the case of the Oxford House model -- additional requirements from a well-established national umbrella organization designed to ensure their safe operation and compliance with applicable state, local and federal laws.

III. Legal Authority to Regulate ADF Housing

Individuals in recovery who are not currently using alcohol or substances are disabled within the meaning of the federal Fair Housing Amendments Act (FHAA), the Massachusetts Zoning Act, and other federal and state laws that prohibit discrimination on the basis of disability. These laws limit the ability of state and local governments to establish regulatory, zoning or land use requirements directed specifically at ADF Housing providers or residents; including regulation in the form of mandatory licensure, registration or certification requirements. However, as explained below, ADF Housing is subject to reasonable local and state health, safety, building, fire, land use, zoning and criminal law requirements consistent with state and federal anti-discrimination laws.

A. The Federal Fair Housing Amendments Act (FHAA)[3]

The FHAA[4] prohibits housing discrimination on the basis of handicap in the sale or rental of housing or in the provision of services or facilities in connection with housing. (42 U.S.C. § 3604(f)(1)-(2)). The FHAA prohibits discrimination by individuals, and by local, state and federal government. Individuals in treatment or recovery from substance use who are not currently using alcohol or substances are protected under the FHAA. (See, e.g., Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993); U.S. v. Southern Management Corp., 955 F.2d 914, 921-23 (4th Cir. 1992)).

In application, the FHAA prohibits local and state governments from imposing any licensure, regulatory, certification, zoning, land use, health and safety or other requirements on ADF Housing that have a discriminatory intent or effect. The FHAA also requires local and state governments to modify or alter otherwise neutral requirements that might interfere with an individual's "equal opportunity to use and enjoy a dwelling under the 'reasonable accommodation' requirement of the law." The FHAA does not prohibit reasonable local or state restrictions on the number of occupants permitted to occupy a dwelling. (See City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995) (invalidating ordinance excluding housing occupied by more than five (5) unrelated persons in single-family residential zone)).

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[3] Title II of the Americans with Disabilities Act (ADA) (42 U.S.C. § 12131 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 *et seq.)*), and the Massachusetts Fair Housing Law (M.G.L. c. 151B) all impose non-discrimination requirements on local and state governments similar to those contained in the FHAA and are not discussed separately here.

[4] The Fair Housing Act (42 U.S.C. § 3601 *et seq.)* was amended by the Fair Housing Amendments Act (FHAA) in 1988 to prohibit discrimination on the basis of handicap. (42 U.S.C. § 3602(h))

A recent federal case illustrates the extent to which the FHAA restricts a local or state government's ability to regulate ADF housing. In Human Resource Research and Management Group, Inc. et al. v. County of Suffolk, 687 F. Supp. 2d 237 (E.D.N.Y. 2010), the federal district court struck down four (4) provisions of a local ordinance that applied to "substance abuse houses": (1) a site-selection provision establishing a notice and approval procedure to assess the desirability of the proposed substance abuse housing in the area under consideration; (2) a requirement that each substance abuse house must have a "certified site manager " living on site 24-hours per day, seven days a week; (3) a limitation of six individuals receiving substance abuse services in the house; and (4) a licensing requirement, which includes a fee and an inspection provision. The court ruled that because the ordinance on its face applied to housing for persons recovering from substance abuse, the law is subject to heightened scrutiny under the FHAA. Applying that standard, the court found that the local government failed to prove, using studies or other reliable evidence, that the requirements of the ordinance served to further any legitimate governmental interest, and that the requirements are the least restrictive way to advance that interest. (Id. at 241-42).

Under the FHAA, state or local laws that facially discriminate against housing for persons with disabilities, such as ADF housing, is subject to heightened scrutiny. (See e.g., Suffolk, 687 F. Supp.2d at 256; Community House, Inc. of Boise, Idaho, 490 F.3d 1041, 1050 (9th Cir. 2007); Larkin v. State of Michigan Dep't. of Social Services, 89 F.3d 285, 290 (6th Cir. 1996); and Bangerter v. Orem City Corp., 46 F.3d 1491, 1503-1504 (10th Cir. 1995)). Under that standard, the government bears the burden to show with reliable studies or evidence that the law (1) benefits the persons in recovery, or (2) responds to legitimate safety concerns, rather than being based on stereotypes. With respect to both requirements, the law must be the least restrictive means to achieve the government's interest. If a nondiscriminatory alternative exists, the facially discriminatory law is invalid under the FHAA. Applying this standard, federal courts have repeatedly rejected state and local efforts to regulate ADF housing. (See, e.g., Nevada Fair Housing Center, Inc. v. Clark County, NV, 565 F. Supp. 2d 1178 (D. Nev. 2008) (invalidating group home statute imposing spacing requirements and establishing registry of group homes for disabled) and Jeffrey O. v. City of Boca Raton, 511 F. Supp. 2d 1339 (S.D. Fla. 2007) (invalidating local ordinance barring sober homes from residential areas and occupancy limit of three unrelated people in residential area)).

In sum, the FHAA imposes a significant complication to local or state governments seeking to impose licensure, regulatory, registration or certification requirements on ADF Housing. The Commonwealth and BSAS would need to prove with reliable evidence or studies that any proposed mandatory licensure, certification or registration requirement (1) benefits the residents of ADF Housing, or responds to legitimate safety concerns in the community, (2) is narrowly tailored, and (3) that a nondiscriminatory alternative means of achieving those goals is not available.

B. State Zoning Act

In addition to the FHAA, the Massachusetts Zoning Act (MZA) specifically prohibits local government actions that discriminate against persons with disabilities:

> Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. (MGL c. 40A, §3, ¶4).

The 1959 "Dover Amendment" to the State Zoning Act also exempts nonprofit educational uses from local zoning ordinance or bylaw use restrictions, except for "reasonable regulations" concerning bulk, dimensional and parking requirements. (M.G.L. c. 40A, §3, ¶2). To qualify as an educational use, the "dominant activity" of the use must be educational. (Fitchburg Housing Authority v. Bd. of Zoning Appeals of Fitchburg, 380 Mass. 869, 874 (1980)). ADF housing would not qualify for such an exemption. While treatment programs involve educating individuals, the "dominant activity" of ADF housing is residential, not educational.

ADF Housing may be protected from local land use and health and safety regulations under both paragraphs 2 and 4 of Section 3 the State Zoning Act. (See, e.g., Granada House, Inc. v. City of Boston, 1997 WL 106688 (Mass. Super. Ct.) (interpreting the anti-discrimination language in §3 with reference to the FHAA to invalidate a local zoning requirement prohibiting a residential treatment program from locating in a residential neighborhood)).

C. State and Local Regulation of ADF Housing

ADF Housing may be regulated by local and state government consistent with the FHAA and State Zoning Act. The FHAA and the State Zoning Act allow enforcement of nondiscriminatory regulations concerning bulk, dimensional and parking requirements, and occupancy limits. In addition, ADF Housing is subject to the State Sanitary Code, which provides standards for fitness for human habitation and is enforced by local boards of health. (M.G.L. c. 111, § 127A and 105 CMR 410.000). ADF Housing is subject to the State Building Code (MGL c. 143) and the State Fire Code (M.G.L. c. 148) which are enforced by local building and fire authorities. (See, e.g., Mass. Sober Housing Corporation (MSHC) v. Automatic Sprinkler Appeals Board, 66 Mass. App. Ct. 701, 702 (2006) upholding automatic fire sprinkler system requirement applied to ADF Housing). Finally, state and local law enforcement agencies have the authority and responsibility to enforce criminal law if illegal activity is occurring on or near ADF Housing.

Therefore, the FHAA and the State Zoning Act impose significant challenges to state and local government efforts to implement licensure, regulatory, registration or certification requirements for ADF Housing that are not required for other types of housing.

D. Regulation of ADF Housing in Other States

A 2009 research report prepared for the Connecticut Legislature[5] and a recent informal survey of state substance abuse treatment agencies did not identify any state that has adopted a mandatory regulatory, licensure or certification program for ADF Housing. Some states exercise authority through contracts, loans and grants that provide funding for ADF Housing providers or residents. All states regulate substance abuse treatment services, including residential treatment services. As explained above, under the FHAA federal courts have invalidated various local and state efforts to regulate ADF Housing.

IV. Documentation of Complaints or Problems Allegedly Related to the Operation of ADF Housing

As a response to the growing concern of legislators, municipal officials and citizens of communities experiencing a proliferation of ADF Housing, BSAS established a public facing, web-based voluntary listing of ADF Housing operators in January 2008: http://www.mass.gov/eohhs/provider/licensing/facilities/residential-facilities/adf-housing-registry/

The purpose of the listing was threefold:

- Provide a centralized listing with basic information on ADF Housing such as rental costs, residency expectations, ADA accessibility, etc;
- Provide information in a Frequently Asked Questions (FAQ) format regarding the differences between ADF Housing and licensed BSAS treatment programs; and
- Provide a centralized complaint log where complaint allegations concerning ADF Housing operators were investigated and/or triaged by BSAS to the appropriate state or local authorities.

As part of this 2008 effort, BSAS sent a letter to criminal justice officials outlining the differences between BSAS-licensed treatment programs and facilities and ADF Housing, in addition to informing them of the voluntary listing opportunity. Additionally, BSAS encouraged judges and parole and probation officers who routinely refer people to ADF Housing, to refer only to those ADF Housing operators who provided information to BSAS. Although criminal justice officials encouraged ADF Housing operators to provide this information, the overwhelming majority of them did not. In fact, today there are only 10 ADF homes listed on the BSAS website. BSAS believes that the reason for the lack of response from ADF Housing operators is directly related to the fact that there was no incentive or benefit to the operators for voluntary participation.

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[5] "Sober Houses," Office of Legislative Research, Saul Siegel, Chief Analyst, September 2, 2009, available at http://www.cga.ct.gov/2009/rpt/2009-R-0316.htm.

BSAS is aware of the numerous complaints received regarding ADF Housing operators. These complaints have been lodged by residents of ADF Housing, neighbors and municipal officials. The nature of complaints range from nuisance complaints (noise) to more serious complaints regarding substandard housing conditions, alcohol and drug use on the property, and fatal and non-fatal overdoses of residents. Although BSAS has received frequent complaints about ADF Housing, the majority of complaints are in reference to only a few ADF homes relative to the number of homes that exist in the Commonwealth. In other words, there are many complaints about a few homes and no complaints about the vast majority of others.

BSAS has determined that all complaints about ADF homes fall into specific categories and have existing avenues for resolution. For example:

- All nuisance complaints (such as noise), disruptive behavior of residents, and drug use complaints are typically handled by the local police;
- Complaints regarding occupancy and substandard living conditions are typically handled by municipal Building and Fire Departments;
- Complaints regarding unlicensed substance treatment programs are typically handled by the DPH, specifically BSAS;
- Complaints regarding unfair housing practices, including eviction practices, are typically handled in housing court; and
- Complaints regarding unscrupulous ADF Housing operators are typically handled through the Attorney General's Consumer Protection Division within the Consumer Protection and Advocacy Bureau.

In general, it is not possible to comprehensively document or quantify the impact of ADF Housing on residents, neighborhoods and local municipalities for two reasons. First, depending upon the nature of the complaint, the avenue for resolution rests with various local and state agencies. Second, there is no mandated central repository where substantiated complaints are logged[6].

Although BSAS was able to document egregious complaints related to a few ADF homes, the Department was also able to identify currently existing avenues for resolution of those complaints. Overall, despite the large number of ADF houses in the Commonwealth, there appears to be few major problems that need addressing. This is likely due to the fact that a majority of ADF housing providers routinely comply with all applicable building, safety, zoning and occupancy requirements.

[6] And for the reasons explained in the legal analysis section of the report, it is unlikely that a state law *requiring* registration of ADF Housing, or tracking of complaints involving ADF Housing, is permissible under the FHAA. (See, e.g., Nevada Fair Housing Center v. Clark County, et al., 565 F. Supp. 2d 1178, 1184 (D. Nev. 2008) (invalidating state statute requiring Nevada Health Division to compile and maintain registry of unlicensed group homes for persons with disabilities, including ADF Housing, under the FHAA))

V. BSAS Licensure of Substance Abuse Treatment Facilities and Programs

BSAS' existing statutory and regulatory authority is limited to the licensure of alcohol and drug treatment facilities and programs.[7] BSAS has no authority over housing and therefore does not regulate ADF Housing. However, as the single state authority responsible for substance abuse prevention and treatment, BSAS licenses all substance abuse treatment facilities and programs in the Commonwealth under 105 CMR 164.000, "Licensure of Substance Abuse Treatment Programs." These regulations are divided into two sections; part one of the regulations applies to all levels of care and part two establishes additional requirements depending upon the level of care. Four levels of care are defined in the regulations:

1) Acute treatment services that include inpatient and outpatient detoxification programs;
2) Outpatient services such as traditional outpatient counseling and day treatment programs;
3) Opioid treatment programs such as outpatient methadone programs; and
4) Residential rehabilitation which is comprised of:
    - Residential Rehabilitation for Adults;
    - Residential Rehabilitation for Adults with their Families;
    - Residential Rehabilitation for Adolescents; and
    - Residential Rehabilitation for Operating under the Influence Second Offenders.

The residential designations above are largely descriptive and self-explanatory. BSAS licenses residential treatment programs for adults, in male-only, female-only and co-ed settings. These residential treatment programs include short-term Transitional Support Service programs, as well as longer term (6-12 month) residential treatment programs that operate using one of three clinical models: social model, recovery model or therapeutic community model. Additionally, licensure requirements are detailed for residential treatment for adults living with their children up to 18 years old (sometimes referred to as family residential programs), including a specialized family program that serves single men with their children or men with their partner and children, specialized programs for adolescents with substance use disorders, and a 14 day residential program for those individuals who have been convicted a second time for driving under the influence of alcohol or drugs.

Part one of the regulations establishes licensing procedures and requirements applicable to all levels of care. Included under this section are regulations that define minimum standards for such things as governance of a facility/program, required notifications to the Department, finances, non-discrimination and accommodation, written policies and procedures, confidentiality, staffing patterns, training and supervision, required inspections and child safety.

[7] 105 CMR 164.000 "Licensure of Substance Abuse Treatment Programs."

Part two of the regulations defines additional requirements for specific levels of care. Additional requirements for Residential Rehabilitation in part two are found in 105 CMR 164.000-164.454. The following section of the report will discuss some of the additional regulatory requirements that distinguish residential substance abuse treatment programs from ADF Housing.

In general, residential rehabilitation treatment programs are defined in 105 CMR 164.400 as offering ". . . organized substance abuse treatment and education services featuring a planned program of care in a 24-hour residential setting. Services are provided in permanent facilities where clients reside on a temporary basis . . ." Additionally, services are required to operate 24 hours a day, 7 days per week, 365 days a year. While the regulations require compliance with all applicable building, occupancy, fire, and zoning laws, the focus of the regulations is on ensuring that minimum standards are met regarding the treatment of substance use disorders in residential rehabilitation facilities.

These treatment mandates include among others:

- Establishment of minimum staffing patterns, including qualifications for specially trained staff members in adolescent and family treatment programs and nursing staff in Transitional Support Services and Second Offender programs;
- Specific service requirements for children in family residential programs;
- Specific in-service training for all staff employed by the program focused on treatment of addictive disorders and related corollary issues;
- Initial clinical assessment;
- The provision of ongoing daily clinical services and monitoring to improve the resident's ability to remain alcohol and substance free;
- The provision of psychiatric consultation, diagnostic and evaluative services;
- Referral to appropriate medical, ongoing psychiatric and gambling treatment services that may not be provided directly by the program;
- Safe storage and administration of medications for general medical, psychiatric and substance abuse conditions;
- Ensuring the facility is kept free of illicit drug and alcohol use; and
- Provision of confidential space for individual and group treatment.

Since ADF Housing operators provide only housing, not treatment, they are not subject to these regulations. However, to the extent that an ADF Housing provider offers or requires residents to participate in a substance abuse treatment program on or off-site, BSAS has authority to require licensure of that treatment program.

VI. What the Commonwealth and Local Governments Can Do to Address Impacts of ADF Housing and Protect the Residents of ADF Housing

A. The FHAA limits the Commonwealth and BSAS' authority to implement mandatory licensure, regulation, registration or certification requirements directed specifically at ADF Housing providers and residents.

Federal courts have repeatedly rejected state and local efforts to regulate ADF Housing providers and residents. The Commonwealth and BSAS would need to prove with reliable evidence or studies that any proposed mandatory licensure, certification or registration requirement (1) benefits the residents of ADF Housing, or responds to legitimate safety concerns in the community, (2) is narrowly tailored, and (3) that a nondiscriminatory alternative means of achieving those goals is not available. Applying this standard, federal courts have invalidated numerous and wide-ranging state and local government efforts to regulate ADF Housing, including registration, neighborhood notification, site selection, occupancy, and on-site management requirements. It is the Department's opinion that these legal parameters significantly contributed to BSAS' inability to identify any state or local government that has adopted a mandatory regulatory program for privately-funded and operated ADF Housing that has withstood legal challenge under the FHAA.

B. Local governments should be encouraged and supported in their use of existing nondiscriminatory legal tools to address legitimate health and safety, building, fire, zoning and criminal impacts of ADF Housing.

ADF Housing is subject to existing state and local laws and regulations applicable to all residential properties. Cities and towns have the legal authority and responsibility to enforce health, safety, zoning, building and fire code, and criminal law requirements applicable to all residential properties, including ADF Housing. Local governments should be encouraged and supported in their use of existing nondiscriminatory legal tools to address impacts of ADF housing, if any. The availability of nondiscriminatory legal tools to address local impacts and to protect residents of ADF Housing suggests that state regulation directed specifically at ADF Housing would be difficult to defend under the FHAA.

C. Residents of ADF Housing should be educated about existing consumer protection and fair housing remedies to assert their rights against unscrupulous operators of ADF Housing.

Residents of ADF Housing – like any tenants – can pursue legal remedies for unsafe or unsanitary living conditions or unfair business practices of ADF Housing providers in housing court or superior court under the state Consumer Protection Act. (M.G.L. c. 93A & 940 CMR 3.17) In addition, residents of ADF Housing can pursue legal remedies under state and federal fair housing laws. (M.G.L. c. 111, § 151B & 804 CMR 02.00).

D. BSAS will continue to investigate and triage complaints related to ADF Housing, including complaints alleging that providers advertise or offer an unlicensed substance abuse treatment program or facility, on or off-site.

BSAS is the single state authority responsible for substance abuse prevention and treatment. ADF Housing – appropriately – is not licensed, funded or regulated by BSAS because it is housing for people in recovery from substance use, not a substance use treatment program or facility. ADF homes are able to refer residents to BSAS licensed treatment providers, as well as licensed mental health providers, employment agencies and to community medical care. In fact, assisting ADF Housing residents with connection to appropriate community supports for recovery may serve the best interest of some residents.

BSAS has the statutory authority and will continue to investigate allegations about any ADF Housing operator who is allegedly providing treatment services, and require them to immediately cease and desist the activity until such time as BSAS licensure has been obtained. In this case, the entity would no longer be an ADF home, but a licensed BSAS treatment facility/program, subject to all of the requirements of licensure, including providing documented evidence of need for the service in the particular community.

BSAS currently triages to the appropriate state and local authorities all complaints it receives about ADF Housing that are not related to the need for licensure. BSAS plans to continue this function going forward.

E. With funding, BSAS could implement an expansive and effective voluntary training program for ADF Housing providers. Additionally, the Legislature could consider a legislative mandate that other state agencies such as probation and parole only refer clients to BSAS-trained ADF Housing providers.

BSAS could establish a voluntary training program for ADF Housing providers building upon the current structure described in Section IV of this report. BSAS would exclude from participation in this voluntary training process ADF Housing operated or funded by federal and state agencies, as those homes already have existing contractual, and in some cases, regulatory requirements as a condition of funding. BSAS would also exclude houses operated as part of the Oxford Model from voluntary certification for similar reasons detailed in Section III of this report.

BSAS proposes a voluntary training program for privately-funded ADF Housing providers with a refresher course to be offered every two years. BSAS would list on its website the ADF Housing providers that have participated in the voluntary training. In order to remain on the list, an ADF Housing provider must continually have someone associated with the home who has received the training. The training program would consist of the provision of the following information:

- federal, state and local laws;
- all relevant local, state and federal laws pertaining to housing for persons with disabilities;
- municipal authorities' contact information for the community where the ADF Housing is located;

- activities requiring BSAS licensure;
- BSAS website that offers ADF Housing operators the opportunity to provide additional information in a central location about their residency requirements;
- licensed substance abuse treatment programs serving the community where the ADF Housing is located;
- tenants' rights and eviction procedures;
- sample tenancy agreements; and
- "Best Practices" related to being a "good neighbor".

BSAS does not currently have the funding necessary to implement this program and it estimates the minimum annual cost of implementation of such a voluntary training program to be $242,103 - $257,625 per year based on the Bureau's very modest estimation that 300 ADF homes exist in Massachusetts that are eligible to participate in this training (see page 7). It is important to note that with the potential implementation of this program and the expected increase in identified eligible homes which would simultaneously occur, the BSAS would see a proportionate increase in costs. A full financial analysis (based on the assumption of 300 homes), including detailed line item costs, are included in Appendix A.

BSAS has learned from experience that voluntary initiatives will not work unless there is a significant incentive for ADF Housing providers to participate. Specifically, the Legislature would have to require that all state agencies and their vendors refer persons exclusively to ADF homes that have obtained training. A significant number of ADF Housing referrals come from state agencies such as the Office of Commissioner of Probation or the Department of Corrections. Making voluntary training a requirement for receiving housing referrals would provide a monetary incentive for ADF Housing operators to participate in the process. If the Legislature were to undertake this action, BSAS suggests there be a minimum of a one-year grace period from the time the law is enacted until the time it will be enforced. During this one-year interim period, BSAS would develop, advertise and deliver the voluntary training curriculum and create the website listing of participants. The advantage of this approach is that it would result in a centralized list of all ADF homes that have completed the training, something BSAS does not have at this time. The training itself should help to provide ADF Housing operators with a clear understanding of the laws they are subject to and present a "best practice" standard in terms of tenant protections and the importance of becoming a part of a community.

VII. Conclusion

The General Court requested that BSAS study the issue of ADF Housing and address the following items:

- Documentation of the number of sober homes operating in the Commonwealth;
- Any problems created by the operation of sober homes, including impacts on neighborhoods and surrounding areas;
- Standards and requirements necessary to protect the home's residents; and

- The feasibility of licensing, regulating, registering or certifying sober homes or operators (Chapter 283, Section 10 of the Acts of 2010).

BSAS has outlined the difficulties of reliably quantifying the number of ADF homes in the Commonwealth and documenting the real problems and impacts associated with ADF Housing. In both cases, the difficulty lies in the fact that there is no centralized repository for this information. Nevertheless, BSAS outlined a number of strategies it employed to address these questions as comprehensively as possible. Currently, BSAS projects that there are, at a minimum, 300 ADF homes operating in the Commonwealth. This projection excludes those ADF homes that are funded directly with state and federal dollars and homes operated under the umbrella of the Oxford Houses.

BSAS was able to document some problems and complaints associated with a few ADF Housing operators. In all cases, avenues for resolution were already available. BSAS was also able to document some complaints that were successfully resolved by local municipalities by using available legal tools.

Finally, BSAS documented complaints from neighbors anticipating problems due to the proposed siting of an ADF home in the neighborhood. These concerns usually involved fear of increased traffic volume and criminal activity, and plunging home values. BSAS was unable to verify that these anticipated problems materialize in any significant way in neighborhoods where ADF homes exist. Municipalities and neighbors may have general unfounded fears that state and federal laws exempt ADF Housing from all regulation. However, this is not the case. ADF Housing providers and residents are subject to nondiscriminatory enforcement of reasonable health and safety, building, fire, zoning, land use, and criminal laws.

This BSAS study concludes that:

- There would likely be no significant benefit to the residents of ADF Housing through the imposition of mandatory licensure, regulatory, registration or certification requirements. In fact, all relevant standards and protections necessary to protect the residents already exist in housing regulation and in consumer protection laws;
- There are no significant safety concerns in neighborhoods where ADF Housing operators are located; in fact, many ADF Housing go unnoticed by neighbors and municipal officials due to their minimal impact in the community; and
- There are no available nondiscriminatory alternative means for achieving the perceived goals of resident and community safety; in fact, the report's list of typical categories of complaints reflects what those specific alternative means for addressing impacts are.

In light of limitations imposed by the federal Fair Housing Amendments Act (FHAA) on governmental authority to require mandatory licensure, regulation, registration or certification requirements directed specifically at ADF Housing, BSAS has proposed a voluntary training process as an alternative to mandatory regulation. In order for the alternative process to be effective, BSAS recommends that the Legislature require that

state agencies and their vendors refer individuals only to those ADF homes that have obtained and maintain voluntary training from BSAS. Implementation of the BSAS proposal would require the Legislature to provide funding for the training initiative, estimated at $242,103.00 - $257,625.00 per year assuming that there are 300 homes that are eligible to receive training. Additionally, BSAS will continue to investigate and triage complants concerning ADF homes.

BSAS thanks the General Court for seeking the Department's assistance in understanding the complex array of issues surrounding ADF Housing. This report addresses the questions posed as comprehensively and as objectively as possible, outlining both the legal restrictions related to mandatory regulation of ADF Housing and a proposed alternative voluntary training program. The Department hopes that this report will assist the General Court in determining the best course of action to take in relationship to ADF Housing.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

Washington, D.C.
November 10, 2016

JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE

STATE AND LOCAL LAND USE LAWS AND PRACTICES AND THE APPLICATION OF THE FAIR HOUSING ACT

INTRODUCTION

The Department of Justice ("DOJ") and the Department of Housing and Urban Development ("HUD") are jointly responsible for enforcing the Federal Fair Housing Act ("the Act"),[1] which prohibits discrimination in housing on the basis of race, color, religion, sex, disability, familial status (children under 18 living with a parent or guardian), or national origin.[2] The Act prohibits housing-related policies and practices that exclude or otherwise discriminate against individuals because of protected characteristics.

The regulation of land use and zoning is traditionally reserved to state and local governments, except to the extent that it conflicts with requirements imposed by the Fair Housing Act or other federal laws. This Joint Statement provides an overview of the Fair Housing Act's requirements relating to state and local land use practices and zoning laws, including conduct related to group homes. It updates and expands upon DOJ's and HUD's Joint

[1] The Fair Housing Act is codified at 42 U.S.C. §§ 3601–19.

[2] The Act uses the term "handicap" instead of "disability." Both terms have the same legal meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that the definition of "disability" in the Americans with Disabilities Act

Statement on Group Homes, Local Land Use, and the Fair Housing Act, issued on August 18, 1999. The first section of the Joint Statement, Questions 1–6, describes generally the Act's requirements as they pertain to land use and zoning. The second and third sections, Questions 7–25, discuss more specifically how the Act applies to land use and zoning laws affecting housing for persons with disabilities, including guidance on regulating group homes and the requirement to provide reasonable accommodations. The fourth section, Questions 26–27, addresses HUD's and DOJ's enforcement of the Act in the land use and zoning context.

This Joint Statement focuses on the Fair Housing Act, not on other federal civil rights laws that prohibit state and local governments from adopting or implementing land use and zoning practices that discriminate based on a protected characteristic, such as Title II of the Americans with Disabilities Act ("ADA"),[3] Section 504 of the Rehabilitation Act of 1973 ("Section 504"),[4] and Title VI of the Civil Rights Act of 1964.[5] In addition, the Joint Statement does not address a state or local government's duty to affirmatively further fair housing, even though state and local governments that receive HUD assistance are subject to this duty. For additional information provided by DOJ and HUD regarding these issues, see the list of resources provided in the answer to Question 27.

Questions and Answers on the Fair Housing Act and State and Local Land Use Laws and Zoning

1. How does the Fair Housing Act apply to state and local land use and zoning?

The Fair Housing Act prohibits a broad range of housing practices that discriminate against individuals on the basis of race, color, religion, sex, disability, familial status, or national origin (commonly referred to as protected characteristics). As established by the Supremacy Clause of the U.S. Constitution, federal laws such as the Fair Housing Act take precedence over conflicting state and local laws. The Fair Housing Act thus prohibits state and local land use and zoning laws, policies, and practices that discriminate based on a characteristic protected under the Act. Prohibited practices as defined in the Act include making unavailable or denying housing because of a protected characteristic. Housing includes not only buildings intended for occupancy as residences, but also vacant land that may be developed into residences.

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is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988"). This document uses the term "disability," which is more generally accepted.

[3] 42 U.S.C. §12132.

[4] 29 U.S.C. § 794.

[5] 42 U.S.C. § 2000d.

2. What types of land use and zoning laws or practices violate the Fair Housing Act?

Examples of state and local land use and zoning laws or practices that may violate the Act include:

- Prohibiting or restricting the development of housing based on the belief that the residents will be members of a particular protected class, such as race, disability, or familial status, by, for example, placing a moratorium on the development of multifamily housing because of concerns that the residents will include members of a particular protected class.
- Imposing restrictions or additional conditions on group housing for persons with disabilities that are not imposed on families or other groups of unrelated individuals, by, for example, requiring an occupancy permit for persons with disabilities to live in a single-family home while not requiring a permit for other residents of single-family homes.
- Imposing restrictions on housing because of alleged public safety concerns that are based on stereotypes about the residents' or anticipated residents' membership in a protected class, by, for example, requiring a proposed development to provide additional security measures based on a belief that persons of a particular protected class are more likely to engage in criminal activity.
- Enforcing otherwise neutral laws or policies differently because of the residents' protected characteristics, by, for example, citing individuals who are members of a particular protected class for violating code requirements for property upkeep while not citing other residents for similar violations.
- Refusing to provide reasonable accommodations to land use or zoning policies when such accommodations may be necessary to allow persons with disabilities to have an equal opportunity to use and enjoy the housing, by, for example, denying a request to modify a setback requirement so an accessible sidewalk or ramp can be provided for one or more persons with mobility disabilities.

3. When does a land use or zoning practice constitute intentional discrimination in violation of the Fair Housing Act?

Intentional discrimination is also referred to as disparate treatment, meaning that the action treats a person or group of persons differently because of race, color, religion, sex, disability, familial status, or national origin. A land use or zoning practice may be intentionally discriminatory even if there is no personal bias or animus on the part of individual government officials. For example, municipal zoning practices or decisions that reflect acquiescence to community bias may be intentionally discriminatory, even if the officials themselves do not personally share such bias. (See Q&A 5.) Intentional discrimination does not require that the

decision-makers were hostile toward members of a particular protected class. Decisions motivated by a purported desire to benefit a particular group can also violate the Act if they result in differential treatment because of a protected characteristic.

A land use or zoning practice may be discriminatory on its face. For example, a law that requires persons with disabilities to request permits to live in single-family zones while not requiring persons without disabilities to request such permits violates the Act because it treats persons with disabilities differently based on their disability. Even a law that is seemingly neutral will still violate the Act if enacted with discriminatory intent. In that instance, the analysis of whether there is intentional discrimination will be based on a variety of factors, all of which need not be satisfied. These factors include, but are not limited to: (1) the "impact" of the municipal practice, such as whether an ordinance disproportionately impacts minority residents compared to white residents or whether the practice perpetuates segregation in a neighborhood or particular geographic area; (2) the "historical background" of the action, such as whether there is a history of segregation or discriminatory conduct by the municipality; (3) the "specific sequence of events," such as whether the city adopted an ordinance or took action only after significant, racially-motivated community opposition to a housing development or changed course after learning that a development would include non-white residents; (4) departures from the "normal procedural sequence," such as whether a municipality deviated from normal application or zoning requirements; (5) "substantive departures," such as whether the factors usually considered important suggest that a state or local government should have reached a different result; and (6) the "legislative or administrative history," such as any statements by members of the state or local decision-making body.[6]

4. Can state and local land use and zoning laws or practices violate the Fair Housing Act if the state or locality did not intend to discriminate against persons on a prohibited basis?

Yes. Even absent a discriminatory intent, state or local governments may be liable under the Act for any land use or zoning law or practice that has an unjustified discriminatory effect because of a protected characteristic. In 2015, the United States Supreme Court affirmed this interpretation of the Act in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[7] The Court stated that "[t]hese unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."[8]

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[6] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977).
[7] ___ U.S. ___, 135 S. Ct. 2507 (2015).
[8] *Id.* at 2521–22.

A land use or zoning practice results in a discriminatory effect if it caused or predictably will cause a disparate impact on a group of persons or if it creates, increases, reinforces, or perpetuates segregated housing patterns because of a protected characteristic. A state or local government still has the opportunity to show that the practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests. These interests must be supported by evidence and may not be hypothetical or speculative. If these interests could not be served by another practice that has a less discriminatory effect, then the practice does not violate the Act. The standard for evaluating housing-related practices with a discriminatory effect are set forth in HUD's Discriminatory Effects Rule, 24 C.F.R § 100.500.

Examples of land use practices that violate the Fair Housing Act under a discriminatory effects standard include minimum floor space or lot size requirements that increase the size and cost of housing if such an increase has the effect of excluding persons from a locality or neighborhood because of their membership in a protected class, without a legally sufficient justification. Similarly, prohibiting low-income or multifamily housing may have a discriminatory effect on persons because of their membership in a protected class and, if so, would violate the Act absent a legally sufficient justification.

5. Does a state or local government violate the Fair Housing Act if it considers the fears or prejudices of community members when enacting or applying its zoning or land use laws respecting housing?

When enacting or applying zoning or land use laws, state and local governments may not act because of the fears, prejudices, stereotypes, or unsubstantiated assumptions that community members may have about current or prospective residents because of the residents' protected characteristics. Doing so violates the Act, even if the officials themselves do not personally share such bias. For example, a city may not deny zoning approval for a low-income housing development that meets all zoning and land use requirements because the development may house residents of a particular protected class or classes whose presence, the community fears, will increase crime and lower property values in the surrounding neighborhood. Similarly, a local government may not block a group home or deny a requested reasonable accommodation in response to neighbors' stereotypical fears or prejudices about persons with disabilities or a particular type of disability. Of course, a city council or zoning board is not bound by everything that is said by every person who speaks at a public hearing. It is the record as a whole that will be determinative.

6. Can state and local governments violate the Fair Housing Act if they adopt or implement restrictions against children?

Yes. State and local governments may not impose restrictions on where families with children may reside unless the restrictions are consistent with the "housing for older persons" exemption of the Act. The most common types of housing for older persons that may qualify for this exemption are: (1) housing intended for, and solely occupied by, persons 62 years of age or older; and (2) housing in which 80% of the occupied units have at least one person who is 55 years of age or older that publishes and adheres to policies and procedures demonstrating the intent to house older persons. These types of housing must meet all requirements of the exemption, including complying with HUD regulations applicable to such housing, such as verification procedures regarding the age of the occupants. A state or local government that zones an area to exclude families with children under 18 years of age must continually ensure that housing in that zone meets all requirements of the exemption. If all of the housing in that zone does not continue to meet all such requirements, that state or local government violates the Act.

Questions and Answers on the Fair Housing Act and Local Land Use and Zoning Regulation of Group Homes

7. Who qualifies as a person with a disability under the Fair Housing Act?

The Fair Housing Act defines a person with a disability to include (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment.

The term "physical or mental impairment" includes, but is not limited to, diseases and conditions such as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV infection, developmental disabilities, mental illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance), and alcoholism.

The term "major life activity" includes activities such as seeing, hearing, walking breathing, performing manual tasks, caring for one's self, learning, speaking, and working. This list of major life activities is not exhaustive.

Being regarded as having a disability means that the individual is treated as if he or she has a disability even though the individual may not have an impairment or may not have an impairment that substantially limits one or more major life activities. For example, if a landlord

refuses to rent to a person because the landlord believes the prospective tenant has a disability, then the landlord violates the Act's prohibition on discrimination on the basis of disability, even if the prospective tenant does not actually have a physical or mental impairment that substantially limits one or more major life activities.

Having a record of a disability means the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

8. What is a group home within the meaning of the Fair Housing Act?

The term "group home" does not have a specific legal meaning; land use and zoning officials and the courts, however, have referred to some residences for persons with disabilities as group homes. The Fair Housing Act prohibits discrimination on the basis of disability, and persons with disabilities have the same Fair Housing Act protections whether or not their housing is considered a group home. A household where two or more persons with disabilities choose to live together, as a matter of association, may not be subjected to requirements or conditions that are not imposed on households consisting of persons without disabilities.

In this Statement, the term "group home" refers to a dwelling that is or will be occupied by unrelated persons with disabilities. Sometimes group homes serve individuals with a particular type of disability, and sometimes they serve individuals with a variety of disabilities. Some group homes provide residents with in-home support services of varying types, while others do not. The provision of support services is not required for a group home to be protected under the Fair Housing Act. Group homes, as discussed in this Statement, may be opened by individuals or by organizations, both for-profit and not-for-profit. Sometimes it is the group home operator or developer, rather than the individuals who live or are expected to live in the home, who interacts with a state or local government agency about developing or operating the group home, and sometimes there is no interaction among residents or operators and state or local governments.

In this Statement, the term "group home" includes homes occupied by persons in recovery from alcohol or substance abuse, who are persons with disabilities under the Act. Although a group home for persons in recovery may commonly be called a "sober home," the term does not have a specific legal meaning, and the Act treats persons with disabilities who reside in such homes no differently than persons with disabilities who reside in other types of group homes. Like other group homes, homes for persons in recovery are sometimes operated by individuals or organizations, both for-profit and not-for-profit, and support services or supervision are sometimes, but not always, provided. The Act does not require a person who resides in a home for persons in recovery to have participated in or be currently participating in a

substance abuse treatment program to be considered a person with a disability. The fact that a resident of a group home may currently be illegally using a controlled substance does not deprive the other residents of the protection of the Fair Housing Act.

9. In what ways does the Fair Housing Act apply to group homes?

The Fair Housing Act prohibits discrimination on the basis of disability, and persons with disabilities have the same Fair Housing Act protections whether or not their housing is considered a group home. State and local governments may not discriminate against persons with disabilities who live in group homes. Persons with disabilities who live in or seek to live in group homes are sometimes subjected to unlawful discrimination in a number of ways, including those discussed in the preceding Section of this Joint Statement. Discrimination may be intentional; for example, a locality might pass an ordinance prohibiting group homes in single-family neighborhoods or prohibiting group homes for persons with certain disabilities. These ordinances are facially discriminatory, in violation of the Act. In addition, as discussed more fully in Q&A 10 below, a state or local government may violate the Act by refusing to grant a reasonable accommodation to its zoning or land use ordinance when the requested accommodation may be necessary for persons with disabilities to have an equal opportunity to use and enjoy a dwelling. For example, if a locality refuses to waive an ordinance that limits the number of unrelated persons who may live in a single-family home where such a waiver may be necessary for persons with disabilities to have an equal opportunity to use and enjoy a dwelling, the locality violates the Act unless the locality can prove that the waiver would impose an undue financial and administrative burden on the local government or fundamentally alter the essential nature of the locality's zoning scheme. Furthermore, a state or local government may violate the Act by enacting an ordinance that has an unjustified discriminatory effect on persons with disabilities who seek to live in a group home in the community. Unlawful actions concerning group homes are discussed in more detail throughout this Statement.

10. What is a reasonable accommodation under the Fair Housing Act?

The Fair Housing Act makes it unlawful to refuse to make "reasonable accommodations" to rules, policies, practices, or services, when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling. A "reasonable accommodation" is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. Since rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others may sometimes deny them an equal opportunity to use and enjoy a dwelling.

Even if a zoning ordinance imposes on group homes the same restrictions that it imposes on housing for other groups of unrelated persons, a local government may be required, in individual cases and when requested to do so, to grant a reasonable accommodation to a group home for persons with disabilities. What constitutes a reasonable accommodation is a case-by-case determination based on an individualized assessment. This topic is discussed in detail in Q&As 20–25 and in the HUD/DOJ Joint Statement on Reasonable Accommodations under the Fair Housing Act.

11. Does the Fair Housing Act protect persons with disabilities who pose a "direct threat" to others?

The Act does not allow for the exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. Nevertheless, the Act does not protect an individual whose tenancy would constitute a "direct threat" to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others unless the threat or risk to property can be eliminated or significantly reduced by reasonable accommodation. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (for example, current conduct or a recent history of overt acts). The assessment must consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate or significantly reduce the direct threat. See Q&A 10 for a general discussion of reasonable accommodations. Consequently, in evaluating an individual's recent history of overt acts, a state or local government must take into account whether the individual has received intervening treatment or medication that has eliminated or significantly reduced the direct threat (in other words, significant risk of substantial harm). In such a situation, the state or local government may request that the individual show how the circumstances have changed so that he or she no longer poses a direct threat. Any such request must be reasonable and limited to information necessary to assess whether circumstances have changed. Additionally, in such a situation, a state or local government may obtain satisfactory and reasonable assurances that the individual will not pose a direct threat during the tenancy. The state or local government must have reliable, objective evidence that the tenancy of a person with a disability poses a direct threat before excluding him or her from housing on that basis, and, in making that assessment, the state or local government may not ignore evidence showing that the individual's tenancy would no longer pose a direct threat. Moreover, the fact that one individual may pose a direct threat does not mean that another individual with the same disability or other individuals in a group home may be denied housing.

12. Can a state or local government enact laws that specifically limit group homes for individuals with specific types of disabilities?

No. Just as it would be illegal to enact a law for the purpose of excluding or limiting group homes for individuals with disabilities, it is illegal under the Act for local land use and zoning laws to exclude or limit group homes for individuals with specific types of disabilities. For example, a government may not limit group homes for persons with mental illness to certain neighborhoods. The fact that the state or local government complies with the Act with regard to group homes for persons with some types of disabilities will not justify discrimination against individuals with another type of disability, such as mental illness.

13. Can a state or local government limit the number of individuals who reside in a group home in a residential neighborhood?

Neutral laws that govern groups of unrelated persons who live together do not violate the Act so long as (1) those laws do not intentionally discriminate against persons on the basis of disability (or other protected class), (2) those laws do not have an unjustified discriminatory effect on the basis of disability (or other protected class), and (3) state and local governments make reasonable accommodations when such accommodations may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling.

Local zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the Fair Housing Act. For example, suppose a city's zoning ordinance defines a "family" to include up to a certain number of unrelated persons living together as a household unit, and gives such a group of unrelated persons the right to live in any zoning district without special permission from the city. If that ordinance also prohibits a group home having the same number of persons with disabilities in a certain district or requires it to seek a use permit, the ordinance would violate the Fair Housing Act. The ordinance violates the Act because it treats persons with disabilities less favorably than families and unrelated persons without disabilities.

A local government may generally restrict the ability of groups of unrelated persons to live together without violating the Act as long as the restrictions are imposed on all such groups, including a group defined as a family. Thus, if the definition of a family includes up to a certain number of unrelated individuals, an ordinance would not, on its face, violate the Act if a group home for persons with disabilities with more than the permitted number for a family were not allowed to locate in a single-family-zoned neighborhood because any group of unrelated people without disabilities of that number would also be disallowed. A facially neutral ordinance, however, still may violate the Act if it is intentionally discriminatory (that is, enacted with discriminatory intent or applied in a discriminatory manner), or if it has an unjustified

discriminatory effect on persons with disabilities. For example, an ordinance that limits the number of unrelated persons who may constitute a family may violate the Act if it is enacted for the purpose of limiting the number of persons with disabilities who may live in a group home, or if it has the unjustified discriminatory effect of excluding or limiting group homes in the jurisdiction. Governments may also violate the Act if they enforce such restrictions more strictly against group homes than against groups of the same number of unrelated persons without disabilities who live together in housing. In addition, as discussed in detail below, because the Act prohibits the denial of reasonable accommodations to rules and policies for persons with disabilities, a group home that provides housing for a number of persons with disabilities that exceeds the number allowed under the family definition has the right to seek an exception or waiver. If the criteria for a reasonable accommodation are met, the permit must be given in that instance, but the ordinance would not be invalid.[9]

14. How does the Supreme Court's ruling in *Olmstead* apply to the Fair Housing Act?

In *Olmstead v. L.C.*,[10] the Supreme Court ruled that the Americans with Disabilities Act (ADA) prohibits the unjustified segregation of persons with disabilities in institutional settings where necessary services could reasonably be provided in integrated, community-based settings. An integrated setting is one that enables individuals with disabilities to live and interact with individuals without disabilities to the fullest extent possible. By contrast, a segregated setting includes congregate settings populated exclusively or primarily by individuals with disabilities. Although *Olmstead* did not interpret the Fair Housing Act, the objectives of the Fair Housing Act and the ADA, as interpreted in *Olmstead*, are consistent. The Fair Housing Act ensures that persons with disabilities have an equal opportunity to choose the housing where they wish to live. The ADA and *Olmstead* ensure that persons with disabilities also have the option to live and receive services in the most integrated setting appropriate to their needs. The integration mandate of the ADA and *Olmstead* can be implemented without impairing the rights protected by the Fair Housing Act. For example, state and local governments that provide or fund housing, health care, or support services must comply with the integration mandate by providing these programs, services, and activities in the most integrated setting appropriate to the needs of individuals with disabilities. State and local governments may comply with this requirement by adopting standards for the housing, health care, or support services they provide or fund that are reasonable, individualized, and specifically tailored to enable individuals with disabilities to live and interact with individuals without disabilities to the fullest extent possible. Local governments should be aware that ordinances and policies that impose additional restrictions on housing or residential services for persons with disabilities that are not imposed on housing or

[9] Laws that limit the number of occupants per unit do not violate the Act as long as they are reasonable, are applied to all occupants, and do not operate to discriminate on the basis of disability, familial status, or other characteristics protected by the Act.

[10] 527 U.S. 581 (1999).

residential services for persons without disabilities are likely to violate the Act. In addition, a locality would violate the Act and the integration mandate of the ADA and *Olmstead* if it required group homes to be concentrated in certain areas of the jurisdiction by, for example, restricting them from being located in other areas.

15. Can a state or local government impose spacing requirements on the location of group homes for persons with disabilities?

A "spacing" or "dispersal" requirement generally refers to a requirement that a group home for persons with disabilities must not be located within a specific distance of another group home. Sometimes a spacing requirement is designed so it applies only to group homes and sometimes a spacing requirement is framed more generally and applies to group homes and other types of uses such as boarding houses, student housing, or even certain types of businesses. In a community where a certain number of unrelated persons are permitted by local ordinance to reside together in a home, it would violate the Act for the local ordinance to impose a spacing requirement on group homes that do not exceed that permitted number of residents because the spacing requirement would be a condition imposed on persons with disabilities that is not imposed on persons without disabilities. In situations where a group home seeks a reasonable accommodation to exceed the number of unrelated persons who are permitted by local ordinance to reside together, the Fair Housing Act does not prevent state or local governments from taking into account concerns about the over-concentration of group homes that are located in close proximity to each other. Sometimes compliance with the integration mandate of the ADA and *Olmstead* requires government agencies responsible for licensing or providing housing for persons with disabilities to consider the location of other group homes when determining what housing will best meet the needs of the persons being served. Some courts, however, have found that spacing requirements violate the Fair Housing Act because they deny persons with disabilities an equal opportunity to choose where they will live. Because an across-the-board spacing requirement may discriminate against persons with disabilities in some residential areas, any standards that state or local governments adopt should evaluate the location of group homes for persons with disabilities on a case-by-case basis.

Where a jurisdiction has imposed a spacing requirement on the location of group homes for persons with disabilities, courts may analyze whether the requirement violates the Act under an intent, effects, or reasonable accommodation theory. In cases alleging intentional discrimination, courts look to a number of factors, including the effect of the requirement on housing for persons with disabilities; the jurisdiction's intent behind the spacing requirement; the existence, size, and location of group homes in a given area; and whether there are methods other than a spacing requirement for accomplishing the jurisdiction's stated purpose. A spacing requirement enacted with discriminatory intent, such as for the purpose of appeasing neighbors' stereotypical fears about living near persons with disabilities, violates the Act. Further, a neutral

spacing requirement that applies to all housing for groups of unrelated persons may have an unjustified discriminatory effect on persons with disabilities, thus violating the Act. Jurisdictions must also consider, in compliance with the Act, requests for reasonable accommodations to any spacing requirements.

16. Can a state or local government impose health and safety regulations on group home operators?

Operators of group homes for persons with disabilities are subject to applicable state and local regulations addressing health and safety concerns unless those regulations are inconsistent with the Fair Housing Act or other federal law. Licensing and other regulatory requirements that may apply to some group homes must also be consistent with the Fair Housing Act. Such regulations must not be based on stereotypes about persons with disabilities or specific types of disabilities. State or local zoning and land use ordinances may not, consistent with the Fair Housing Act, require individuals with disabilities to receive medical, support, or other services or supervision that they do not need or want as a condition for allowing a group home to operate. State and local governments' enforcement of neutral requirements regarding safety, licensing, and other regulatory requirements governing group homes do not violate the Fair Housing Act so long as the ordinances are enforced in a neutral manner, they do not specifically target group homes, and they do not have an unjustified discriminatory effect on persons with disabilities who wish to reside in group homes.

Governments must also consider requests for reasonable accommodations to licensing and regulatory requirements and procedures, and grant them where they may be necessary to afford individuals with disabilities an equal opportunity to use and enjoy a dwelling, as required by the Act.

17. Can a state or local government address suspected criminal activity or fraud and abuse at group homes for persons with disabilities?

The Fair Housing Act does not prevent state and local governments from taking nondiscriminatory action in response to criminal activity, insurance fraud, Medicaid fraud, neglect or abuse of residents, or other illegal conduct occurring at group homes, including reporting complaints to the appropriate state or federal regulatory agency. States and localities must ensure that actions to enforce criminal or other laws are not taken to target group homes and are applied equally, regardless of whether the residents of housing are persons with disabilities. For example, persons with disabilities residing in group homes are entitled to the same constitutional protections against unreasonable search and seizure as those without disabilities.

18. Does the Fair Housing Act permit a state or local government to implement strategies to integrate group homes for persons with disabilities in particular neighborhoods where they are not currently located?

Yes. Some strategies a state or local government could use to further the integration of group housing for persons with disabilities, consistent with the Act, include affirmative marketing or offering incentives. For example, jurisdictions may engage in affirmative marketing or offer variances to providers of housing for persons with disabilities to locate future homes in neighborhoods where group homes for persons with disabilities are not currently located. But jurisdictions may not offer incentives for a discriminatory purpose or that have an unjustified discriminatory effect because of a protected characteristic.

19. Can a local government consider the fears or prejudices of neighbors in deciding whether a group home can be located in a particular neighborhood?

In the same way a local government would violate the law if it rejected low-income housing in a community because of neighbors' fears that such housing would be occupied by racial minorities (see Q&A 5), a local government violates the law if it blocks a group home or denies a reasonable accommodation request because of neighbors' stereotypical fears or prejudices about persons with disabilities. This is so even if the individual government decision-makers themselves do not have biases against persons with disabilities.

Not all community opposition to requests by group homes is necessarily discriminatory. For example, when a group home seeks a reasonable accommodation to operate in an area and the area has limited on-street parking to serve existing residents, it is not a violation of the Fair Housing Act for neighbors and local government officials to raise concerns that the group home may create more demand for on-street parking than would a typical family and to ask the provider to respond. A valid unaddressed concern about inadequate parking facilities could justify denying the requested accommodation, if a similar dwelling that is not a group home or similarly situated use would ordinarily be denied a permit because of such parking concerns. If, however, the group home shows that the home will not create a need for more parking spaces than other dwellings or similarly-situated uses located nearby, or submits a plan to provide any needed off-street parking, then parking concerns would not support a decision to deny the home a permit.

20. When does a state or local government violate the Fair Housing Act by failing to grant a request for a reasonable accommodation?

A state or local government violates the Fair Housing Act by failing to grant a reasonable accommodation request if (1) the persons requesting the accommodation or, in the case of a group home, persons residing in or expected to reside in the group home are persons with a disability under the Act; (2) the state or local government knows or should reasonably be expected to know of their disabilities; (3) an accommodation in the land use or zoning ordinance or other rules, policies, practices, or services of the state or locality was requested by or on behalf of persons with disabilities; (4) the requested accommodation may be necessary to afford one or more persons with a disability an equal opportunity to use and enjoy the dwelling; (5) the state or local government refused to grant, failed to act on, or unreasonably delayed the accommodation request; and (6) the state or local government cannot show that granting the accommodation would impose an undue financial and administrative burden on the local government or that it would fundamentally alter the local government's zoning scheme. A requested accommodation may be necessary if there is an identifiable relationship between the requested accommodation and the group home residents' disability. Further information is provided in Q&A 10 above and the HUD/DOJ Joint Statement on Reasonable Accommodations under the Fair Housing Act.

21. Can a local government deny a group home's request for a reasonable accommodation without violating the Fair Housing Act?

Yes, a local government may deny a group home's request for a reasonable accommodation if the request was not made by or on behalf of persons with disabilities (by, for example, the group home developer or operator) or if there is no disability-related need for the requested accommodation because there is no relationship between the requested accommodation and the disabilities of the residents or proposed residents.

In addition, a group home's request for a reasonable accommodation may be denied by a local government if providing the accommodation is not reasonable—in other words, if it would impose an undue financial and administrative burden on the local government or it would fundamentally alter the local government's zoning scheme. The determination of undue financial and administrative burden must be decided on a case-by-case basis involving various factors, such as the nature and extent of the administrative burden and the cost of the requested accommodation to the local government, the financial resources of the local government, and the benefits that the accommodation would provide to the persons with disabilities who will reside in the group home.

When a local government refuses an accommodation request because it would pose an undue financial and administrative burden, the local government should discuss with the requester whether there is an alternative accommodation that would effectively address the disability-related needs of the group home's residents without imposing an undue financial and administrative burden. This discussion is called an "interactive process." If an alternative accommodation would effectively meet the disability-related needs of the residents of the group home and is reasonable (that is, it would not impose an undue financial and administrative burden or fundamentally alter the local government's zoning scheme), the local government must grant the alternative accommodation. An interactive process in which the group home and the local government discuss the disability-related need for the requested accommodation and possible alternative accommodations is both required under the Act and helpful to all concerned, because it often results in an effective accommodation for the group home that does not pose an undue financial and administrative burden or fundamental alteration for the local government.

22. What is the procedure for requesting a reasonable accommodation?

The reasonable accommodation must actually be requested by or on behalf of the individuals with disabilities who reside or are expected to reside in the group home. When the request is made, it is not necessary for the specific individuals who would be expected to live in the group home to be identified. The Act does not require that a request be made in a particular manner or at a particular time. The group home does not need to mention the Fair Housing Act or use the words "reasonable accommodation" when making a reasonable accommodation request. The group home must, however, make the request in a manner that a reasonable person would understand to be a disability-related request for an exception, change, or adjustment to a rule, policy, practice, or service. When making a request for an exception, change, or adjustment to a local land use or zoning regulation or policy, the group home should explain what type of accommodation is being requested and, if the need for the accommodation is not readily apparent or known by the local government, explain the relationship between the accommodation and the disabilities of the group home residents.

A request for a reasonable accommodation can be made either orally or in writing. It is often helpful for both the group home and the local government if the reasonable accommodation request is made in writing. This will help prevent misunderstandings regarding what is being requested or whether or when the request was made.

Where a local land use or zoning code contains specific procedures for seeking a departure from the general rule, courts have decided that these procedures should ordinarily be followed. If no procedure is specified, or if the procedure is unreasonably burdensome or intrusive or involves significant delays, a request for a reasonable accommodation may,

nevertheless, be made in some other way, and a local government is obligated to grant it if the requested accommodation meets the criteria discussed in Q&A 20, above.

Whether or not the local land use or zoning code contains a specific procedure for requesting a reasonable accommodation or other exception to a zoning regulation, if local government officials have previously made statements or otherwise indicated that an application for a reasonable accommodation would not receive fair consideration, or if the procedure itself is discriminatory, then persons with disabilities living in a group home, and/or its operator, have the right to file a Fair Housing Act complaint in court to request an order for a reasonable accommodation to the local zoning regulations.

23. Does the Fair Housing Act require local governments to adopt formal reasonable accommodation procedures?

The Act does not require a local government to adopt formal procedures for processing requests for reasonable accommodations to local land use or zoning codes. DOJ and HUD nevertheless strongly encourage local governments to adopt formal procedures for identifying and processing reasonable accommodation requests and provide training for government officials and staff as to application of the procedures. Procedures for reviewing and acting on reasonable accommodation requests will help state and local governments meet their obligations under the Act to respond to reasonable accommodation requests and implement reasonable accommodations promptly. Local governments are also encouraged to ensure that the procedures to request a reasonable accommodation or other exception to local zoning regulations are well known throughout the community by, for example, posting them at a readily accessible location and in a digital format accessible to persons with disabilities on the government's website. If a jurisdiction chooses to adopt formal procedures for reasonable accommodation requests, the procedures cannot be onerous or require information beyond what is necessary to show that the individual has a disability and that the requested accommodation is related to that disability. For example, in most cases, an individual's medical record or detailed information about the nature of a person's disability is not necessary for this inquiry. In addition, officials and staff must be aware that any procedures for requesting a reasonable accommodation must also be flexible to accommodate the needs of the individual making a request, including accepting and considering requests that are not made through the official procedure. The adoption of a reasonable accommodation procedure, however, will not cure a zoning ordinance that treats group homes differently than other residential housing with the same number of unrelated persons.

24. What if a local government fails to act promptly on a reasonable accommodation request?

A local government has an obligation to provide prompt responses to reasonable accommodation requests, whether or not a formal reasonable accommodation procedure exists. A local government's undue delay in responding to a reasonable accommodation request may be deemed a failure to provide a reasonable accommodation.

25. Can a local government enforce its zoning code against a group home that violates the zoning code but has not requested a reasonable accommodation?

The Fair Housing Act does not prohibit a local government from enforcing its zoning code against a group home that has violated the local zoning code, as long as that code is not discriminatory or enforced in a discriminatory manner. If, however, the group home requests a reasonable accommodation when faced with enforcement by the locality, the locality still must consider the reasonable accommodation request. A request for a reasonable accommodation may be made at any time, so at that point, the local government must consider whether there is a relationship between the disabilities of the residents of the group home and the need for the requested accommodation. If so, the locality must grant the requested accommodation unless doing so would pose a fundamental alteration to the local government's zoning scheme or an undue financial and administrative burden to the local government.

Questions and Answers on Fair Housing Act Enforcement of Complaints Involving Land Use and Zoning

26. How are Fair Housing Act complaints involving state and local land use laws and practices handled by HUD and DOJ?

The Act gives HUD the power to receive, investigate, and conciliate complaints of discrimination, including complaints that a state or local government has discriminated in exercising its land use and zoning powers. HUD may not issue a charge of discrimination pertaining to "the legality of any State or local zoning or other land use law or ordinance." Rather, after investigating, HUD refers matters it believes may be meritorious to DOJ, which, in its discretion, may decide to bring suit against the state or locality within 18 months after the practice at issue occurred or terminated. DOJ may also bring suit by exercising its authority to initiate litigation alleging a pattern or practice of discrimination or a denial of rights to a group of persons which raises an issue of general public importance.

If HUD determines that there is no reasonable cause to believe that there may be a violation, it will close an investigation without referring the matter to DOJ. But a HUD or DOJ

decision not to proceed with a land use or zoning matter does not foreclose private plaintiffs from pursuing a claim.

Litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and DOJ encourage parties to land use disputes to explore reasonable alternatives to litigation, including alternative dispute resolution procedures, like mediation or conciliation of the HUD complaint. HUD attempts to conciliate all complaints under the Act that it receives, including those involving land use or zoning laws. In addition, it is DOJ's policy to offer prospective state or local governments the opportunity to engage in pre-suit settlement negotiations, except in the most unusual circumstances.

27. How can I find more information?

For more information on reasonable accommodations and reasonable modifications under the Fair Housing Act:

- HUD/DOJ Joint Statement on Reasonable Accommodations under the Fair Housing Act, *available at* https://www.justice.gov/crt/fair-housing-policy-statements-and-guidance-0 or http://www.hud.gov/offices/fheo/library/huddojstatement.pdf.

- HUD/DOJ Joint Statement on Reasonable Modifications under the Fair Housing Act, *available at* https://www.justice.gov/crt/fair-housing-policy-statements-and-guidance-0 or http://www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf.

For more information on state and local governments' obligations under Section 504:

- HUD website at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/disabilities/sect504.

For more information on state and local governments' obligations under the ADA and *Olmstead*:

- U.S. Department of Justice website, www.ADA.gov, or call the ADA information line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).
- Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, *available at* http://www.ada.gov./olmstead/q&a_olmstead.htm.
- Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of *Olmstead*, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=OlmsteadGuidnc060413.pdf.

For more information on the requirement to affirmatively further fair housing:

- Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).
- U.S. Department of Housing and Urban Development, Version 1, Affirmatively Furthering Fair Housing Rule Guidebook (2015), *available at* https://www.hudexchange.info/resources/documents/AFFH-Rule-Guidebook.pdf.
- Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Vol. 1, Fair Housing Planning Guide (1996), *available at* http://www.hud.gov/offices/fheo/images/fhpg.pdf.

For more information on nuisance and crime-free ordinances:

- Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf.

American Planning Association

Making Great Communities Happen

Policy Guide on Community Residences

Adopted by Special Delegate Assembly, September 21, 1997
Ratified by Board of Directors, September 22, 1997

Municipalities and counties throughout the nation continue to use zoning to exclude community residences from the single-family residential districts despite 25 years of planning standards[1] and the vast majority of court decisions[2] that recognize community residences for people with disabilities as a residential use. Misconceptions about their nature and impacts abound although there is a wealth of scientific evidence that community residences for people with disabilities generate no adverse impacts on the surrounding community and function as residential uses. More recently the Fair Housing Amendments Act of 1988[3] prohibited zoning regulations of community residences that are based on unfounded myths and fears about the residents, and appeared to explicitly disallow the use of special use permits as the primary means of regulating community residences. Yet this misclassification and exclusion continues unabated throughout most of the nation.

During the 1970s and 1980s, every state, as well as the federal government, started to reshape its policies toward people with severe disabilities. States recognized that warehousing people with disabilities in institutions was not only extremely costly, but also ineffective. A large proportion of those who were institutionalized could live in much less restrictive environments such as a familylike environment in a house or apartment surrounded by other residential uses. They did not require the high level of care furnished by an institution. Overwhelming evidence showed that allowing individuals with disabilities to live in a familylike setting in the community in a community residence was not only much less expensive than consigning them to institutions, but also substantially more effective. In a familylike setting, people with disabilities could learn the life skills we teach our own children on a daily basis. Living in a community residence, namely a group home or halfway house, fosters normalization in which these individuals learn to lead as normal a life as possible. As the courts have noted time and again, community residences are the very opposite of an institution in terms of how they function and perform, and in terms of how they use the land. To achieve a familylike setting, these community residences need to be located in the same residential zoning districts as dwellings occupied by biological families.

Definitions

Because there is so much misunderstanding of this subject, it is essential to first define several terms.

Group Home

A dwelling unit occupied as a single housekeeping unit in a familylike environment by up to approximately 12 to 15 persons with disabilities plus support staff. Residents are supervised by a sponsoring entity or its staff which furnishes habilitative services to the group home residents. A group home is owned or operated under the auspices of a nonprofit association, private care provider, government agency, or other legal entity, other than the residents themselves or their parents or other individuals who are their legal guardians. Interrelationships between residents are an essential component of a group home. A group home imposes no time limit on how long an individual can reside in the group home. A group home is a relatively permanent living arrangement where tenancy is measured in years.

The group home constitutes a *family, a single housekeeping unit* where residents share responsibilities, meals, and recreational activities as in any family. The intention is for group home residents, like members of a biological family, to develop ties in the community. Like people without disabilities, these individuals attend schools, work, and may receive other support services in the community. The group home staff is specially trained to help the residents achieve the goals of independence, productivity, and integration into the community. Together, the staff and residents constitute a *functional family*.[4] The group home's staff teaches the residents with disabilities the same life activities taught in conventional homes. They learn personal hygiene; shopping cleaning, laundry, and recreational skills; how to handle money; how to take public transportation; how to use community facilities. They learn how to live as a family. *The group home fosters the very same family values our most exclusive residential zoning districts advance.*

The primary purpose of the group home is to provide a familylike setting with ongoing supervision and support for persons unable to live independently in the community. It is *not a clinic where treatment is the principal or essential service provided*. A treatment regime may be incorporated into the daily routine of persons with disabilities wherever they may live, whether with their families, in an institution, or in a group home. So, just like the person with a disability who lives with her family, the group home resident may have a daily habilitation regime to follow. *Any treatment received at home is incidental to the group home's primary purpose.*[5]

Residency in a group home is long term relatively permanent and measured in years, not months or weeks. There is no limit on how long an individual can live in a group home. A group home can house people with developmental disabilities (mental retardation, autism, etc.), mental illness, physical disabilities, or addiction to drugs or alcohol. When the residents have a drug or alcohol addiction, the group home is called a recovery home.

The number of individuals who live in a group home varies from just two or three to as many as 12 to 15, or in rare cases as many as 20. For people with developmental disabilities, it is felt that smaller homes are more productive. Group homes for people with mental illness tend to house six to 15 residents for both therapeutic and financial reasons. Group homes for the frail elderly can require as many as 20 residents to be financially and therapeutically sound. The maximum number of residents is determined by applying a jurisdictions housing code for residential uses to the property.

Some group home residents graduate from this type of community living arrangement to live on their own with only occasional visits from professional staff. Most, however, will live out their lives in a group home.

Recovery homes for people with drug or alcohol addictions are another type of group home. Occupants typically sign an annual lease and can live in a recovery home for years.

A singlefamily residential district is essential for most group homes to succeed, although for some, a multiplefamily district can work. Group home operators want to establish group homes in the same sort of pleasant, safe neighborhoods you and I strive to live in, for the same reasons we seek them.

Halfway house or recovery community

A temporary residential living arrangement for persons leaving an institutional setting and in need of a supportive living arrangement in order to readjust to living outside the institution. These are persons who are receiving therapy and counseling from support staff who are present when residents are present, for the following purposes: (a) to help them recuperate from the effects of drug or alcohol addiction (a disability); (b) to help them reenter society while housed under supervision while under the constraints of alternatives to imprisonment including, but not limited to, prerelease, work release, or probationary programs (not a disability); or (c) to help persons with family or school adjustment problems that require specialized attention and care in order to achieve personal independence (not a disability). Interrelationships between residents is an essential component of a halfway house. Residency is limited to a specific number of weeks or months.

People with drug or alcohol addictions often need to live in a halfway house as a transitional living arrangement before they can live more independently in the community or return to their homes. The key for them is to learn to abstain completely from using drugs or alcohol. Treatment usually consists of an initial withdrawal period followed by intensive counseling and support both through treatment programs and through residential living arrangements. Such community residences are based on the group home model with some significant differences with implications for proper zoning regulation.

The halfway house or recovery community helps people with drug or alcohol addictions readjust to a normal life before moving out on their own. A person with an addiction is admitted only after completing detoxification. The halfway house staff helps residents adjust to a drugfree lifestyle, learn how to take control of their lives, and learn how to live without drugs. Nearly all halfway houses place a limit, measured in months, how long someone can live there. Unlike a group home, the halfway house aims to place all its residents into independent living situations upon graduation. For both therapeutic and financial reasons, most halfway houses need 10 to 15 residents to be successful. Because the number of residents in a halfway house is greater than in a group home and their length of tenancy shorter, halfway houses more closely resemble multiplefamily housing than singlefamily residences, although, like group homes, they work best in singlefamily neighborhoods.[6]

Disability

A physical or mental impairment that substantially limits one or more of a persons major life activities, impairs their ability to live independently, or a record of having such an impairment, or being regarded as having such an impairment. Prison preparolees, for example, do not, as a class, fit this definition.

Most people with disabilities do not require a community residence to live in the community. More than 80 percent of them live with their families or on their own with some support services.[7] Still, in 1990 over 3.9 million Americans had disabilities so severe that they were prevented from working at a job or doing housework or they required assistance with daily tasks like getting in and out of bed, dressing, bathing, shopping, or light housework, or had a developmental disability, Alzheimers disease, or senility making many of them appropriate candidates to dwell in a community residence.[8]

This set of policy guidelines of the American Planning Association does not advocate for or against community residences, the broad term that includes group homes and halfway houses. It does not include hospices, emergency shelters, residences for victims of abuse, or other group living arrangements.[9] This policy guideline seeks to establish the maximum level of zoning regulation permissible for community residences for people with disabilities in accord with sound planning principles, the Fair Housing Amendments Act of 1988 (FHAA), and case law. These policy guidelines do not suggest that any community or state with less restrictive zoning provisions should make their zoning provisions more restrictive.

Exclusionary zoning practices

Limiting the number of unrelated individuals who can dwell together has been one of the most commonly used zoning techniques to exclude community residences from singlefamily districts.

The definition of family in most zoning codes allow no more than three, four, or five unrelated individuals to occupy a dwelling unit. Some allow no unrelated people to live together, even as roommates.[10] The U.S. Supreme Court upheld these restrictive definitions in *Village of Belle Terre v. Borass*[11]. Since most community residences need six or more residents to succeed therapeutically and financially, this restriction has effectively blocked most community residences from locating in the residential areas in which they need to locate.

Another common technique has been to require a special use permit for a community residence to locate in a residential district.[12] At a public hearing, an applicant must demonstrate that its proposed land use meets the criteria for granting a special use permit. In the case of community residences, neighbors commonly claim that the proposed community residence will reduce property values and introduce crime and congestion to the neighborhood. Many opponents assert that the

community residence is a business rather than a dwelling. In many allwhite communities, opposition is driven by a fear of racial integration, namely that group home residents and staff may be of African ancestry. All of these objections reflect false impressions of community residences and their occupants.

City officials quite often yield to objections by neighbors and reject the application of the community residence even when the applicant demonstrates it meets the criteria for awarding the special use permit. This was the scenario that led to the U.S. Supreme Courts 1985 decision in *City of Cleburne v. Cleburne Living Center* where the Court ruled the city had illegally denied the group homes special use permit based on the neighbors unfounded fears and myths about the group home and its residents.[13]

This technique is extremely effective at limiting the housing opportunities for people with disabilities who need a community residence to live in. When a special use permit is required, the buyer usually seeks to purchase the property with a clause that makes the sale contingent on receiving the special use permit. That sort of provision is quite common in the sale of commercial property, but extremely rare in the sale of owneroccupied residential property. Few homeowners can afford to sell their houses subject such a contingency clause. Most homeowners need the proceeds from the sale of their current house to buy a new one. Consequently, few homeowners are willing to sell to a group home operator who insists on this kind of contingency clause and few group home operators can afford to take the risk that their special use permit application will be denied and theyll be stuck with a house they cannot use as a group home.

In 1974 the American Society of Planning Officials (one of APAs predecessor organizations) surveyed 400 U.S. cities and found that the zoning ordinances of fewer than 25 percent provided specifically for community residences. Of those that mentioned group homes or halfway houses, the vast majority either prohibited them from singlefamily districts or required them to obtain a special use permit to locate in such residential zones.[14]

Ten years later, the zoning picture for community residences was still grim. The General Accounting Office found that 65.5 percent of the time local zoning ordinances or practices prevented or made it difficult for group homes for people with developmental disabilities to locate in the singlefamily districts their operators preferred.[15] Subsequent recent research prior to adoption of the Fair Housing Amendments Act of 1988 found that little had changed.[16]

Role of the Fair Housing Amendments Act of 1988

Rather than simply add people with disabilities to the list of protected classes under the Fair Housing Act, Congress added a new section to the act that declared 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.[17]

Much of the FHAA litigation has revolved around the issue of reasonable accommodation. Given this statutory language, it is hard to see how anybody can contend that the FHAA requires that community residences be treated the *exactly the same* as singlefamily residences. The statute requires only that a reasonable accommodation be made in a citys zoning ordinance to give people with disabilities an equal opportunity to use and enjoy a dwelling. This does not mean that they have a right to dwellings they cannot afford to buy or rent. It does not mean that a city must change its zoning to allow communes, boarding houses, or fraternities in its most exclusive singlefamily districts.

But this provision does mean that a city is required to bend its zoning rules to enable *members of the protected class,* many of whom need a community residence living arrangement to live outside an institution, to establish such residences in singlefamily and multiplefamily zoning districts. And it means that *a city cannot impose additional barriers to community residences for people with disabilities.*

Consequently, if a zoning ordinance defines family as any number of unrelated persons living together as a singlehousekeeping unit, the locality cannot impose any additional restrictions on community residences. A community residence which, of course, constitutes a singlehousekeeping unit with 12 unrelated residents complies with this definition of family.

However, if a zoning ordinance places a cap on the number of unrelated people who can dwell together, the FHAA requires the local ordinance to make a reasonable accommodation to enable community residences for people with disabilities to locate in every zoning district where residences are allowed. While the FHAA does not mention zoning or group homes, its legislative history provides a clear picture of what the FHAA sought to accomplish:

These new subsections would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or landuse requirements on congregate living arrangements among nonrelated persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.

The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. *The Act is intended to prohibit the application of special requirements through landuse regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community*.[18] [emphasis added]

The legislative history goes on to suggest that restrictions on community residences that are based on fact, not fiction, may be legal. The paragraph that follows in the House Committee Report suggests that municipalities can impose rationallybased zoning regulations on community residences:

Another method of making housing unavailable has been the application or enforcement of otherwise neutral rules and regulations on health, safety, and landuse in a manner which discriminates against people with disabilities. Such discrimination *often results from false or overprotective assumptions* about the needs of handicapped people, as well as *unfounded fears of difficulties* about the problems that their tenancies may pose. These and similar practices would be prohibited.[19]

The FHAA essentially codified the majority opinion of the courts regarding community residences. For more than 20 years, the vast majority of court decisions involving attempts to locate community residences in singlefamily zoning districts found community residences to be akin to the traditional family[20] and constitute functional families that belong in singlefamily zones unlike fraternities and sororities, communes, and other loose, temporary group living arrangements.[21]

It is clear from court decisions under the FHAA that when a jurisdictions definition of family does not cap or limit the number of unrelated individuals who may occupy a dwelling unit the FHAA prohibits imposing additional zoning requirements on community residences for people with disabilities.[22]

Unlike capless communities, jurisdictions that place a limit on the number of unrelated persons who can live together, can regulate community residences to an extent. Court decisions strongly suggest that zoning restrictions on community residences can be legal if you can answer yes to all three of the following questions:

- Is the proposed zoning restriction intended to achieve a legitimate government purpose?
- Does the proposed zoning restriction actually achieve that legitimate government purpose?
- Is the proposed zoning restriction the least drastic means necessary to achieve that legitimate government purpose?

In *Bangerter v. Orem City Corporation,* the Tenth Circuit articulated these questions a bit differently. The court stated that [r]estrictions that are narrowly tailored to the particular individuals affected could be acceptable under the FHAA if the benefits to the handicapped in their housing opportunities clearly outweigh whatever burden may result to them.[23]

Findings

1 Community residences are a residential use of land.

For zoning purposes, community residences are much closer in terms of land use to a residence ordinarily occupied by a conventional family than any other land use. The majority of courts have ruled that are a community residence is the opposite of an institution, boarding house, or a commercial use.

2 Community residences have no effect on the value of neighboring properties.

More than 50 studies have examined their impact on property values probably more than for any other small land use. Although they use a variety of methodologies, all researchers have discovered that group homes and halfway houses do *not* affect property values of even the house next door. They have no effect on how long it takes to sell neighboring property, including the house next door. They have learned that community residences are often the best maintained properties on the block. And they have ascertained that community residences function so much like a conventional family that most neighbors within one to two blocks of the home don't even know there is a group home or halfway house nearby.[24]

3 Community residences have no effect on neighborhood safety.

A handful of studies have also looked at whether community residences compromise neighborhood safety. The most thorough study, conducted for the State of Illinois, concluded that the residents of group homes are much less likely to commit a crime of any sort than the average resident of Illinois. It revealed a crime rate of 18 per 1,000 people living in group homes compared to 112 per 1,000 for the general population.[25]

4 Community residences do not generate adverse impacts on the surrounding community.

Other studies have found that group homes and halfway houses for persons with disabilities do not generate undue amounts of traffic, noise, parking demand, or any other adverse impacts.[26]

5 Community residences should be scattered throughout residential districts rather than concentrated in any single neighborhood or on a single block.

For a group home to enable its residents to achieve normalization and integration into the community, it should be located in a normal residential neighborhood. If several group homes were to locate next to one another, or be placed on the same block, the ability of the group homes to advance their residents' normalization would be compromised. Such clustering would create a *de facto* social service district in which many facets of an institutional atmosphere would be recreated and would change the character of the neighborhood.

Normalization and community integration require that persons with disabilities be absorbed into the neighborhood's social structure. The existing social structure of a neighborhood can accommodate no more than one or two group homes on a single block. Neighborhoods seem to have a limited absorption capacity for servicedependent people that should not be exceeded.[27] Social scientists note that this level exists, but they can't quite determine a precise level. Writing about servicedependent populations in general, Jennifer Wolch notes, At some level of concentration, a community may become saturated by services and populations and evolve into a servicedependent ghetto.[28]

According to one leading planning study, While it is difficult to precisely identify or explain, saturation is the point at which a community's existing social structure is unable to properly support additional residential care facilities [group homes]. Overconcentration is not a constant but varies according to a community's population density, socioeconomic level, quantity and quality of municipal services and other characteristics. There are no universally accepted criteria for determining how many group homes are appropriate for a given area.[29]

Nobody knows the precise absorption levels of different neighborhoods. However, the research strongly suggests that as the density of a neighborhood increases, so does its capacity to absorb people with disabilities into its social structure. Higher density neighborhoods presumably have a higher absorption level that could permit group homes to locate closer to one another than in lower density neighborhoods that have a lower absorption level.[30]

This research demonstrates there is a legitimate government interest to assure that group homes do not cluster. While the research on the impact of group homes makes it abundantly clear that group homes a block or more apart produce no negative impacts, there is concern that group homes located more closely together can generate adverse impacts on both the surrounding neighborhood and on the ability of the group homes to facilitate the normalization of their residents, which is, after all, their raison dtre.

6 Community residences should be licensed or certified to protect the welfare of their residents.

The individuals who occupy a community residence constitute a vulnerable population unable to fully care for themselves. Licensing helps ensure that the operator is qualified to furnish the requisite care and support services the group home residents need. It helps assure that staff is qualified and properly trained, and sets a minimum standard of care. The welfare of the residents of a community residence constitutes a legitimate government interest, narrowly tailored to the individuals who live in a group home, and whose benefits clearly outweigh whatever burden may result.

Policy Positions

Zoning is essentially performance oriented. When officials select the uses that are permitted as of right in each zoning district, they make the implicit assumption that these land uses belong in the district and do not generate adverse impacts on the surrounding properties. Special or conditional uses are those that belong in a district, but are known to produce adverse impacts under certain conditions unless precautions are taken. The extensive research on the impacts of community residences shows that they generate no adverse impacts on the surrounding neighborhood as long as they are licensed and not clustered on a block. There is no need to subject community residences to special use permit procedures because the licensing and spacing threshold issues are purely factual questions that can be determined administratively and do not require the extra scrutiny of a special use permit hearing.

General Policy Position

Based on sound planning and zoning principles, the American Planning Association recognizes that community residences for people with disabilities are residential uses that should be allowed as of right in all zoning districts where other residences are permitted uses. When the proposed community residence complies with the jurisdictions zoning code definition of family, no additional restrictions can be imposed. When the number of residents in the home exceeds the cap on the number of unrelated individuals set in the definition of family, the jurisdiction should amend its zoning code to make a reasonable accommodation to provide for community residences in all residential districts within the capacity of the jurisdiction to absorb additional community residences into its social structure.

Specific Policy Positions Supported by the American Planning Association and its chapters

POLICY 1: **A proposed community residence for people with disabilities that complies with the jurisdictions definition of family should be allowed as of right in all residential districts under the definition of family. (Additional) Zoning requirements that are more restrictive than those applicable to residential uses in the underlying district are not permitted**.

By adding people with disabilities to coverage of the Fair Housing Act, the Fair Housing Amendments Act of 1988 effectively prohibits placing additional zoning requirements on a community residence for people with disabilities that otherwise meets the zoning code requirements for other residential uses.

POLICY 2: **When a proposed group home for persons with disabilities does not comply with the jurisdictions definition of family, then the jurisdiction is required to make a reasonable accommodation in its zoning code to allow group homes for people with disabilities as of right in all residential districts if it meets these two requirements:**

1. That a rationally based spacing requirement be provided to avoid an undue concentration of community residences and
2. When the proposed group home or its operator must be licensed or certified by the appropriate state, national, regional, or local licensing or certification body.

If a proposed group home fails to meet both tests, then a zoning ordinance should allow the operator to apply for a special use permit.

The Fair Housing Amendments Act of 1988 requires jurisdictions to make a reasonable accommodation to enable community residences for people with disabilities to locate in residential districts. Such accommodations must be the least drastic necessary to actually achieve a legitimate government purpose. Based on sound planning principles and the extensive evidence found by studies on the impacts of community residences, the American Planning Association believes that this approach outlined here constitutes the *maximum* permissible degree of zoning restrictions.

A one block spacing distance appears to be long enough to assure that community residences achieve the normalization they seek for their residents and help preserve the residential character of a neighborhood. Concentrating or clustering several community residences on a block can recreate an institutional atmosphere exactly the opposite of what community residences seek to achieve.

Since the residents of a community residence are a vulnerable population, requiring licensing or certification helps assure their welfare and safety in the least intrusive manner.

Group homes include recovery homes for people with drug or alcohol addictions. Like other group homes, recovery homes are longterm residences that do not limit how long individuals may live there. They should not be confused with halfway houses for people with disabilities, including drug or alcohol addiction.

POLICY 3: **When a proposed halfway house for persons with disabilities does not comply with the jurisdiction's definition of family, then the jurisdiction is required to make a reasonable accommodation in its zoning code to allow halfway houses for people with disabilities as of right in all multiplefamily residential districts if the proposed halfway house meets these two requirements:**

1. That a rationally based spacing requirement be provided to avoid an undue concentration of community residences and
2. When the proposed group home or its operator must be licensed or certified by the appropriate state, national, regional, or local licensing or certification body.

If a proposed group home fails to meet both tests, then a zoning ordinance should allow the operator to apply for a special use permit.

From a zoning perspective, halfway houses perform more like multiplefamily housing than singlefamily housing. They don't emulate a family quite as closely as a group home does. They billet many more people. They place a limit on length of residency, unlike a group home which is a more permanent living arrangement akin to singlefamily housing.

POLICY 4: **Halfway houses should be allowed in all singlefamily zones by special use permit due to their multiplefamily characteristics that warrant the extra scrutiny provided by the special use permit or comparable review process when locating in a singlefamily district.**

On many occasions the operator of a halfway house may prefer to locate it in a singlefamily district. Halfway houses are not, per se, incompatible with singlefamily homes. However, the heightened scrutiny of a conditional use permit hearing is warranted to assure that a proposed halfway house will be compatible with the other land uses in a singlefamily district. The standards to apply are the same ones used for other special uses.

POLICY 5: **Local planners should, on an informal basis, seek to facilitate communication between the operators of proposed community residences and the surrounding community to help foster full integration of the residents of a community residence into the community. Planners should help neighbors learn how each proposed community residence emulates a family and how it serves as a residence that is properly located in a residential zone, not an institutional use that belongs outside residential districts. They should disseminate to neighbors and public officials the findings of the extensive research on the absence of adverse impacts of community residences on the surrounding community**.

Authority

1. *See* M. Jaffe and T. Smith, *Siting Group Homes for Developmentally Disabled Persons* (American Planning Association Planning Advisory Service Report No. 397 (1986); D. Lauber and F. Bangs, Jr., *Zoning for Family and Group Care Facilities* (American Society of Planning Officials PAS Rep. No. 300, 1974); and N. Williams, *American Land Planning Law* 12, 17, 25 (1988, Supp. 1994).

2. *See* N. Williams, *American Land Planning Law* 12, 17, 25 (1988, Supp. 1994).

3. Fair Housing Amendments Act of 1988, 42 U.S.C. 3604(f)(1) et. seq.

4. Gailey at 9798.

5. H. R. Turnbull, III, *CommunityBased Residences for Mentally Handicapped People* 12 (1980). Some courts have found this distinction to be crucial when determining that group homes function as families and are residential uses allowable in residential zoning districts.

6. Oxford House, which has been the subject of so much FHAA litigation falls somewhere between the group home and halfway house. Unlike the halfway house, Oxford House places no limit on the length of stay. Unlike a group home, or even halfway house, Oxford House has no staff. The residence is run by its officers who are elected periodically from among its residents. Unlike a group home, Oxford House needs 10 to 15 residents to function successfully, both therapeutically and financially. The courts have generally construed Oxford House to be a group home.

7. See D. Braddock, R. Hemp, L. Bachelder, G. Fujiura, *The State of the States in Developmental Disabilities* 8 (4th ed. 1994); Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 et. seq.

8. Id. at 12.

9. This policy guideline focuses solely on the zoning treatment for group homes and halfway houses for people with disabilities, the two most common types of community residences. Other types of community residences may warrant zoning treatment different from that recommended here.

10 D. Lauber, Group Think, in *Planning* 11, at 12 (October 1995).

11. 416 U.S. 1 (1974).

12. Also known as a conditional use permit, the special use permit was designed to allow for extra scrutiny to be applied to land uses that belong in a zoning district, but that may generate adverse impacts unless certain conditions were observed. Robert Leary, *Zoning*, 439 William Goodman and Eric Fruend, eds., *Principles and Practices of Urban Planning* (International City Management Association, 1968).

13. 105 S. Ct. 3249 (1985).

14. D. Lauber and F. Bangs, Jr., *Zoning for Family and Group Care Facilities* 9 (American Society of Planning Officials PAS Rep. No. 300, 1974).

15. General Accounting Office, *Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled* 61 (1983). Several regional studies have also found that few municipal zoning ordinances provided for community residences. In 1983 it was found that only four of the 31 municipalities in the Seattle, Washington, area defined the term group home and that only three allowed them as a permitted use in even one residential district. Eighteen allowed them by special use permit in at least one zoning district, not necessarily residential, and 13 did not provide for them at M. RitzdorfBrozovsky, *Impact of Family Definitions in American Municipal Zoning Ordinances* 119, 214215 (1983) (unpublished dissertation, University of Washington). A California study found that not a single municipality in suburban San Francisco allowed group homes for more than five residents as a permitted use in residential districts; only one allowed group homes for five or less residents as a permitted use in all residential districts; two allowed them as a permitted use in some residential districts; nine allowed them as special uses in some residential districts; and seven did not allow group homes at all. Bay Area Social Planning Council, *Effect of Zoning Regulations on Residential Care Facilities in San Mateo County: Report and Recommendations of the Study Committee C7* (March 1970) . In New Yorks suburban Westchester County, only one of 33 communities allowed group homes as of right in residential districts. S. Hettinger, *A Place They Call Home: Planning for Residential Care Facilities* 33 (Westchester County Dept. of Planning 1983).

16. M. Jaffe and T. Smith, *Siting Group Homes for Developmentally Disabled Persons* (American Planning Association Planning Advisory Service Report No. 397 (1986).

17. 42 U.S.C. 3504(f)(3)(B).

18. H.R. Rep. No. 711, 100th Congress 2d Session, reprinted in 1988 U.S.C.C.A.N. 2173, (1988).

19. H.R. Rep. No. 711, 100th Congress 2d Session, reprinted in 1988 U.S.C.C.A.N. 2173, (1988) (emphasis added).

20. *City of White Plains v. Ferraioli,* 313 N.E.2d, 756, 758 (citation omitted).

21. Norman Williams has kept a running tally of these cases in his treatise, 2 Williams, American Land Planning Law 52.12 (1987, Supp. 1994). Over 90 judicial decisions involving community residences for people with disabilities and definitions of family and other zoning restrictions are cited there. Pre1988 decisions run three to one in favor of allowing community residences for people with disabilities in singlefamily districts despite restrictive definitions of family or requirements for a special use permit. This figure includes only those cases that involved community residences for people with disabilities, not other populations not subsequently covered by the 1988 amendments to the Fair Housing Act.

22. See, *Oxford HouseEvergreen v. City of Plainfield,* 769 F. Supp. 1329 (D.N.J. 1991) (since Oxford House complied with citys capless definition of family and there is no state license required to operate an Oxford House the city could not disallow the Oxford House from the singlefamily district in which it located); *Support Ministries for Persons with AIDs v. Village of Waterford,* New York, 808 F. Supp. 120 (N.D. N.Y. 1992) (city must issue the permits sought to establish home for persons with AIDS under definition of familyas opposed to boarding house); *Merritt v. City of Dayton,* No. C391448 (S.D. Ohio, April 7, 1994) (3,000foot spacing requirement struck down where home met definition of family); *Marbrunak, Inc. v. City of Stow, Ohio,* 1992 U.S. App. LEXIS 20455 (parents of four grown women with developmental disabilities established a family consortiumhouse as a permanent residence for their daughters with support staff in s singlefamily district; city sought to require special use permit as a boarding house and to require additional safety code requirements because the residences had developmental disabilities; court rules that the home complied with the citys capless definition of familyand, since no state license was required to operate it, the house must be treated the same as other residences.

23. 1995 WL 10478 (10th Cir. Utah).

24. For a comprehensive compilation of descriptions of over 50 of these studies, see Council of Planning Librarians, There Goes the Neighborhood: A Summary of Studies Addressing the Most Often Expressed Fears About the Effects of Group Homes on Neighborhoods in Which They Are Placed (CPL Bibliography No. 259, April 1990); M. Jaffe and T. Smith, *Siting Group Homes for Developmentally Disabled Persons* (Am. Plan. A. Plan. Advisory Serv. Rep. No. 397 (1986). See e.g., City of Lansing Planning Department, *Influence of Halfway Houses and Foster Care Facilities Upon Property Values* (monograph 1976) (found no negative impacts on selling price of houses near or adjacent to halfway houses for people with alcohol addictions, adult exoffenders, juvenile exoffenders).

25. Daniel Lauber, *Impacts on the Surrounding Neighborhood of Group Homes for Persons with Developmental Disabilities,* 15 Illinois Planning Council on Developmental Disabilities (1986).

26. Daniel Lauber, *Zoning for Family and Group Care Facilities* at 10.

27. Kurt Wehbring, *Alternative Residential Facilities for the Mentally Retarded and Mentally Ill* 14 (no date) (mimeographed).

28. Jennifer Wolch, "Residential Location of the Service Dependent Poor," 70 *Annals of the Association of American Geographers*, at 330, 332 (Sept. 1982).

29. S. Hettinger, *A Place They Call Home: Planning for Residential Care Facilities* 43 (Westchester County Department of Planning 1983). See also D. Lauber, *Zoning for Family and Group Care Facilities* at 25.

30. Lauber, *Zoning for Family and Group Care Homes* at 25.

Three decades on, group home zoning still at issue

Community residences for people with disabilities—group homes, recovery communities, sober living homes, small halfway houses—remain a LULU (locally unwanted land use) that generates vigorous neighborhood opposition even 27 years after enactment of the Fair Housing Amendments Act of 1988, which made people with disabilities a protected class and required jurisdictions to make a "reasonable accommodation" in their zoning for community residences.

Much of the inertia arises from municipal attorneys catering to elected officials by insisting that the FHAA does not require community residences to be allowed as of right in residential districts and advocates who insist that the FHAA prohibits any restrictions on these community residences.

As usual, the truth rests between the two extremes.

Sorting it out

Case law and sound planning and zoning practices and principles provide clear guidance to bring zoning into FHAA compliance.

People with substantial disabilities often cannot live alone or with their biological families. They need support in a family-like setting to engage in the everyday life activities most of us take for granted.

The essential characteristic of all community residences is that they seek to emulate a biological family by providing as "normal" a living environment as possible and incorporating their residents into the social fabric of the surrounding community. Licensing protects this vulnerable population.

Extensive research and litigation over zoning for community residences tell us:

- They constitute a residential use.
- When not clustered together, more than 50 studies report they do not affect property values, property turnover rates, neighborhood safety, traffic, noise, or parking demand.
- To achieve normalization and community integration, community residences should be scattered throughout all residential districts rather than concentrated in any neighborhood.
- The FHAA requires local governments to make a "reasonable accommodation" in their zoning to enable people with disabilities to live in the dwelling of their choice.

Many advocates and judges do not understand the circumstances under which courts have invalidated licensing and spacing requirements between community residences:

- When a community residence fits within the zoning code's definition of "family," it must be treated the same as other families and cannot be excluded from the family definition. In the absence of such a definition or cap on the number of unrelated individuals that constitutes a family, jurisdictions must treat community residences for people with disabilities the same as any other group of unrelated individuals. When the definition of family places a cap on the number of unrelated individuals living as a single housekeeping unit and a community residence fits within that limit, it too must be treated like any other family. Any additional zoning requirements for community residences are facially discriminatory.
- When a jurisdiction fails to conduct a proper study that finds a need for spacing and licensing requirements before it adopts its zoning for community residences and when it fails to present expert testimony to justify these requirements.
- When local zoning provisions are not in accord with a state's sloppily written statute requiring local zoning to treat community residences the same as single-family homes. Community residences are sufficiently different from single-family homes to make it unwarranted to treat them identically when the number of occupants of a community residence exceeds the cap on unrelated people in the local definition of family.

But for therapeutic or financial reasons, many if not most community residences need to house more unrelated individuals with disabilities than a jurisdiction's definition of family allows.

That's when the FHAA's "reasonable accommodation" requirement kicks in. The case law collectively requires local zoning for community residences to use the least drastic means necessary to actually achieve intended legitimate government interests.

These interests include preventing clustering of community residences on a block (which undermines their ability to achieve their purposes and function properly, and could alter the residential character of the neighborhood), as well as licensing.

The bottom line is that a proposed community residence for more unrelated people than allowed under a family definition must be allowed as a permitted use in all zones where residential uses are sanctioned if the community residence is at least a typical block away from an existing community residence and has the proper state (or national) licensing or certification.

The heightened scrutiny of a special use permit is warranted when a proposed community residence would be located within this block-long spacing distance or if the state doesn't require licensing or certification. Otherwise requiring a special use permit flies in the face of the FHAA as well as sound planning and zoning principles.

As the conscience of our communities, planners must persuade elected officials to bring their zoning for community residences for people with disabilities into compliance with sound planning and zoning principles within the context of the Fair Housing Act.

— Daniel Lauber, AICP

A planner and attorney, Lauber introduced the use of spacing distances in PAS Report 300, Zoning for Family & Group Care Facilities, *published in 1974. He is the author of model community residence zoning guidelines for APA and the American Bar Association.*

Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James F. Holderman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	99 C 4461	DATE	3/20/2001
CASE TITLE	USA vs. CITY OF CHICAGO HEIGHTS		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

Citation: United States v. City of Chicago Heights, 161 F.Supp.2d 819 (N.D.Ill. 2001)

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due_____. Reply to answer brief due_____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ■ Status hearing set for 24 APR 01 at 9:00 A.M..

(6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial[set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ General Rule 21 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] Pursuant to Memorandum Opinion and Order entered this day, defendant's motion to strike is denied, plaintiff's motion for partial summary judgment is granted, and defendant's motion for summary judgment is denied. There being no just reason for delay, judgment is entered in favor of plaintiff and against defendant on its reasonable accommodation claim and on its challenge to the defendant's 1998 Zoning Code. Defendant is permanently enjoined from forbidding Thresholds to build its group home at its desired location, 619 W. 15th Street in the City of Chicago Heights.

(11) ■ [For further detail see order attached to the original minute order.]

	No notices required, advised in open court.		number of notices
	No notices required.		
✓	Notices mailed by judge's staff.		MAR 2 1 2001
	Notified counsel by telephone.		date docketed
	Docketing to mail notices.		
	Mail AO 450 form.		docketing deputy initials
	Copy to judge/magistrate judge.		3/20/2001
JS	courtroom deputy's initials	Date/time received in central Clerk's Office	date mailed notice
			JS
			mailing deputy initials

Document Number

Citation: United States v. City of Chicago Heights, 161 F.Supp.2d 819 (N.D.Ill. 2001)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

CITY OF CHICAGO HEIGHTS,

Defendant.

No. 99 C 4461

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiff, the United States of America ("the Government"), brought this action against defendant, the City of Chicago Heights ("the City"), under the Fair Housing Act, as amended, 42 U.S.C. § § 3601 et. seq. ("FHAA"), seeking declaratory and injunctive relief, as well as compensatory damages and the imposition of a civil penalty. The Government brings this action on behalf of Thresholds, Inc. ("Thresholds"), an Illinois corporation which establishes and operates group homes for persons who suffer from mental illness. The Government alleges that: (1) the City intentionally discriminated against Thresholds' proposed residents on the basis of their handicap, mental illness, by refusing to grant Thresholds a special use permit in violation the FHAA ("intentional discrimination claim"); (2) the City violated the FHAA by failing to make a reasonable accommodation in its zoning laws to allow Thresholds to locate within 1,000 feet of another alleged "community family residence" ("reasonable accommodation claim"); and (3) the City's new Zoning Code, enacted the same day the City denied Thresholds' request for a special use permit, December

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21, 1998, violates the FHAA on its face ("1998 Zoning Code claim").

The Government filed suit against the City pursuant to § 3614(a) of the FHAA, which provides that the Attorney General is authorized to commence a civil action in a United States district court "[w]henever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance." 42 U.S.C. § 3614(a). The Government has filed a motion for partial summary judgment on its reasonable accommodation and 1998 Zoning Code claims. The City filed a cross-motion for summary on the same two claims, plus a motion for summary judgment on the Government's intentional discrimination claim. The City also filed a motion to strike selected portions of the Government's evidence submitted in support of its motion for summary judgment. For the following reasons, the City's motion to strike is DENIED. The Government's motion for partial summary judgment is GRANTED in its entirety, and the City's motion for summary judgment is DENIED in its entirety.

STATEMENT OF FACTS[1]

I. Background

Thresholds is an Illinois non-profit corporation accredited by the Commission on Accreditation of Rehabilitation Facilities and licensed with the Illinois Department of Human Resources. Thresholds is in the business of providing psycho-social services to individuals with mental illness, including schizophrenia, bipolar disorder, and major depression. Defendant, the City

[1] The following statement of facts comes from the parties' Local Rule 56.1(a) and 56.1(b) statements of material facts and accompanying exhibits.

of Chicago Heights, is a municipality located in Cook County, Illinois, and organized under the laws of Illinois. Chicago Heights exercises zoning and land use authority over land within its boundaries.

Thresholds' primary goal is to integrate persons with serious mental illness into the community. Thresholds provided rehabilitative help to its clients, helping them to learn social skills, to resume their education, to live independently, and to go back to work. Thresholds treats between 6,000 and 7,000 persons annually from approximately 24 branches in the Chicago area. One way in which Thresholds provides these services is by establishing group homes and other residential settings in which persons with mental illness can live, aided by professional staff. Thresholds' group homes provide a supportive, family-like atmosphere to aid in the transition to community living.

Dr. Thomas Simpatico, the Government's expert witness, is Chief of the Bureau of Chicago Network Operations for the Illinois Department of Human Services, Office of Mental Health. Dr. Simpatico testified at his deposition to the prevalence of mental illness and that "group homes offer an ideal environment in which to help people anticipate and overcome the obstacles encountered in everyday living while fostering the greatest possible degree of autonomy." The group home is often the only appropriate treatment setting for persons for whom the hospital represents too restrictive of an environment but who are not well organized enough for independent living. Dr. Simpatico opined that "group homes are necessary for the successful treatment of persons with serious and persistent mental illness." Dr. Simpatico testified that he is aware of the location and concentration of all Office of Mental Health funded resources, and that group homes are badly needed in the south suburbs of Chicago, including Chicago Heights. Dr. Simpatico based his opinion on his knowledge of epidemiological data regarding serious and persistent mental illness and knowledge of the current levels of systems funding for mental health services. In particular, Dr. Simpatico testified that the

Office of Mental Health funds only three group homes located in the City, one with an eight-person capacity, and two with a four-person capacity. Dr. Simpatico also testified that there is a need for residential services for more than sixteen persons with serious mental illness in Chicago Heights.

The National Association of the Mentally Ill ("NAMI"), South Suburbs, is a parent group who wanted housing for their own children in the south suburbs. At the time Thresholds sought to locate a group home in the south suburbs of Chicago, NAMI was in partnership with Thresholds in providing services for persons with mental illness. In particular, NAMI wanted housing that serviced their towns, one of which was the City. The president of NAMI wrote a letter to Angelo Ciambrone, the City's mayor, telling the Mayor Ciambrone that the Thresholds' project would benefit the City.

II. 1972 Zoning Code

The City's land use and zoning regulations are contained within the City of Chicago Heights Zoning Code. At the time Thresholds submitted its request for a special use permit and the City denied that request, the 1972 Zoning Code was in effect. The group home provisions in the City's 1972 Code were the result of an amendment enacted on October 15, 1990. For the sake of simplicity, this court refers to the Zoning Code under which Thresholds' special use permit was denied as the "1972 Zoning Code." The 1972 Zoning Code was amended on December 21, 1998. That new 1998 Zoning Code is also at issue in this litigation. Again for the sake of simplicity, this Court refers to that Code as the 1998 Zoning Code.

The purposes of the group home provision of the 1972 Code were stated as part of the 1990 amendments in a series of "Whereas" clauses. Those clauses are as follows:

WHEREAS, it has been shown that large numbers of people with disabilities need to live together in community residences with support staff as a functional family to be enabled to live within the community and not be inappropriately forced to live in an institution or nursing home;

WHEREAS, community residences for persons with disabilities are often the only way large numbers of people with disabilities can be enabled to live within the community;

****

WHEREAS, the national Fair Housing Amendments Act of 1988 (102 U.S. Stat. 1619) prohibits discrimination in housing against persons with handicaps or disabilities;

WHEREAS, community residences for persons with disabilities is a residential use and should be allowed in all areas of the municipality where other residential uses are permitted;

WHEREAS, over 40 research studies of the impacts of community residences for people with disabilities find that such residences generate no adverse impacts on the surrounding communities so long as they are licensed and not clustered on a block.

WHEREAS, it is necessary to prevent clustering of community residences on a block in order to facilitate normalization, one of the main functions of a community residence, and preserve the residential character of the neighborhood.

To that end, a "family community residences" was permitted to locate in a single-family district if it obtained a Certificate of Occupancy.

The City's 1972 Zoning Code differentiated between "families," "community family residences," and "group community residences." The 1972 Zoning Code defined "family" as:

> one or more persons related by blood, marriage or adoption, or a group of not more than five (5) persons (excluding servants), who need not be related by blood, marriage or adoption, living together and maintaining a common household . . .

The 1972 Zoning Code defined "family community residence" as:

> a single dwelling unit occupied on a relative permanent basis in a family-like environment by a group of not more than eight (8) unrelated persons with disabilities, plus paid professional staff provided by the sponsoring agency, either living with the residents on a twenty-four hour basis, or present whenever residents with disabilities are present at the dwelling; and complies with the zoning regulations for the district in which the site is located.

"Group community residences" were defined identically to "family community residences" except that they were homes of between nine and fifteen people. Pursuant to the 1972 Zoning Code, family community residences were permitted uses in single-family residential zones provided they received a certificate of occupancy. To receive a certificate of occupancy, community residences were required to meet two requirements: (1) that the group home be "located at least one thousand (1,000) feet from any existing community residence . . . except when a special use permit is issued to allow a community residence to locate closer than one thousand (1,000) feet to an existing community residence, and (2) the community residence demonstrates that it either obtained or is eligible for licensing or certification required by the state of Illinois to operate the residence. A family community residence that met these requirements could locate in a single-family residential zone as of right. If a community residence did not meet these requirements, that is, if it were located within 1,000 feet of an existing community residence, a special use permit was necessary under the 1972 Zoning Code. "Group community residences" could locate in single-family zones only if they obtained special use permits, regardless of their distance to other group homes.

The 1972 Zoning Code set forth the authorization required for a special use permit. It provides that the City Council alone has the authority to grant or deny an application for a special use permit. The 1972 Zoning Code further provided that for each application for a special use permit, the Zoning Board of Appeals ("ZBA") "shall report to the city council its findings and

recommendations." That Code provided that "prior to submitting its report to the city council the zoning board of appeals shall review the report of the plan commission and give due consideration to the plan commissions' findings and recommendations. The 1972 Zoning Code provided that the ZBA shall keep minutes of its proceedings and that "findings of fact shall be included in the minutes of each case and the reasons for granting or denying each application shall be specified." The 1972 Zoning Code also set forth the standards the ZBA must use in determining whether or not to recommend the granting of a special use application. The ZBA is a seven-member board appointed by the mayor and the City Council. The Plan Commission is a nine-member board, appointed by the mayor.

III. Thresholds Seeks to Locate in Chicago Heights

Beginning in the Spring of 1995, Thresholds expressed an interest in locating in Chicago Heights, particularly at 619 West 15th Street, to Joseph Christofanelli, the former City Planner. On May 30, 1995, Christofanelli wrote to Thresholds that the property "is currently zoned as a R-1 Single Family Residence District," and that the zoning classification is appropriate for a family community residence. On November 9, 1995, Thresholds entered into an option to purchase agreement for the property at 619 West 15th Street. On August 1, 1995, Thresholds purchased the property. The application for HUD section 811 funding required, among other things, that Thresholds engage an architect and engineer, obtain working drawings and specifications for the proposed group home, conduct environmental testing on the site, prepare a survey, obtain a contractor, and have that contractor prepare a cost breakdown for the project. Thresholds submitted its application for HUD funding on July 7, 1997. At various times in 1996 and 1997, Thresholds communicated with the City employees in the water, building, and fire departments regarding sewer

hook-ups and inspection for the proposed group home.

On November 24, 1997, Christofanelli informed Thresholds by letter that its proposed construction of a family community residence "is denied due to another family community residence located at 662 West 14th Place." Christofanelli stated that the existing family community residence at 662 West 14th Place was within 1,000 feet of the 15th Place property and cited the 1,000 feet spacing requirement for community residences. Christofanelli's letter was the first time Thresholds became aware that there was another facility within 1,000 feet of the 15th Street property.

On May 21, 1998, Thresholds submitted a special use permit application to the City requesting a waiver of the spacing requirement to permit it to construct and operate a group home for eight adult persons with mental illness and a professional staff member. In making the request, Thresholds asked the City to make a "reasonable accommodation" for people with disabilities, who would reside there, as set forth in the Fair Housing Act Amendments of 1998, 42 U.S.C. § 3604(f)(4)(B). Thresholds included, among the attachments to the application, a copy of the warranty of deed showing that it had purchased the property at 619 West 15th Street. Thresholds' special use permit application was the first application the City had ever received requesting a waiver of the City's spacing requirement under the 1972 Zoning Code.

Thresholds' application for a special use permit was sent to the City Council. On June 1, 1998, the City Council sent the application to the Zoning Board of Appeals ("ZBA") for a public hearing. At a July 1, 1998 public hearing, Christofanelli stated that Thresholds' proposed site was within approximately 450 to 500 feet of another family community residence. Thresholds was represented by Julia Rupp, its Director of Administration, Mary Lang Antilotti, Program Director for Thresholds South Suburbs, and Don Pyles, a member of Thresholds' Board of Directors, at the

July 1, 1998 meeting. Rupp described Thresholds as serving people with mental illness for the past 35 years, and stated "[w]e're probably the largest provider and one of the most respected nationally." Rupp described the operation of the proposed group home: it would serve adults with mental illness, would be supervised -- trained staff would be present whenever residents were present and there would be a a live-in staff person, and the residents would be required to attend some kind of structure during the day, such as work or work adjustment training. Rupp further testified that 99% of the residents take medication for their illness, that medication was a very important part of the program, and that the resident staff monitors the taking of medication. Rupp stated that Thresholds tries to move people into the home that are from the area, that Thresholds already serves people from the Chicago Heights area at a day program, and that NAMI wanted housing in the area for their family members that live here. Rupp also explained that Thresholds had been told by Christofanelli that the land was properly zoned for a group home before purchasing the property, that the building would be paid for with money from HUD, that the process of obtaining money from HUD is very long, and that Thresholds was not told of the other home until it had a contractor and was ready to start the project. Rupp also addressed concerns over density of group homes, explaining that Thresholds wants "to be integrated in the community . . . one of the things we like about our community is diversity and integration." Rupp explained that the 14th Street home had only three residents, and that they had different disabilities than Thresholds' proposed residents. Rupp also answered concerns that the residents would be violent, explaining that Thresholds is very assertive about making sure that persons are stable and able to stay in the community before they are accepted by Thresholds and that Thresholds always gets along very well with its neighbors.

The Plan Commission held a meeting on July 29, 1998. Thresholds was again represented

by Rupp, Lang-Anzilotti, and Pyles. There, Thresholds provided an overview of the program and described its proposed residents. Thresholds explained that it had applied for HUD funding and that it takes a long time to get that funding in place. Thresholds requested that the City make a reasonable accommodation as outlined in the FHAA. Community residents appeared at the meeting and spoke against the Thresholds application. Christofanelli estimated that there were 25 to 30 people present in the audience, which was more than the norm. Six people from 15th Street and 16th Place spoke to the Commission, stating that they worried about encroaching negative influences, including crack houses and drug dealers, and that a community residence would be another negative influence that would lower the property value of their homes. Rupp assured the audience that their property values would not go down, and that she would provide research studies if anyone wanted to see them. At the end of the July 29, 1998 meeting, the Plan Commission voted unanimously to recommend that the City Council deny Thresholds' application for a special use permit. Christofanelli testified that any deliberation over a special use permit application occurs at the formal meetings of the Plan Commission. One member of the Plan Commission testified that there was no discussion among the members of the Plan Commission as to how they would vote before the vote. The Plan Commission minutes for the meeting do not set forth any reasons for recommending that the Thresholds application be denied. The recommendation of the Plan Commission is set forth in a letter dated December 2, 1998. That letter recommended denial of the application and contained no findings.

A ZBA meeting was held August 19, 1998 to discuss Thresholds' application for special use permit. Thresholds' application was tabled, but community residents were present and permitted to speak against the application. Those residents who spoke stated that they supported the 1,000 foot

spacing requirement. The residents were informed that they could take the issue up at the next scheduled meeting of the City Council, August 24, 1998. The residents did appear at the City Council meeting and voiced their objection to Thresholds' application, although the matter was not on the agenda. At a September 23, 1998 meeting of the ZBA, the application was again tabled.

At an October 21, 1998 meeting between representatives of the United States Attorney's Office and Christofanelli and City Corporation Counsel August Anzemlo, the City offered to exchange the property Thresholds owns at 619 West 15th Street with another parcel of land elsewhere in the City. Thresholds rejected the offer because of worries that it would delay the project by a minimum of two years.[2] Thresholds' Executive Director, Dr. Jerry Dincin, testified that he had once before agreed to trade sites in the City of Chicago and as of August, 2000, five years had gone by and the Thresholds' housing still had not been built. The City offered to do everything in its power to speed up Thresholds' HUD funding if Thresholds accepted the alternate site. The City also offered to assist Thresholds in any way possible with its applications for city permits.

The ZBA met again on December 2, 1998. Thresholds' application was the only item on the agenda. Community residents again appeared at the meeting and presented a petition which contained approximately 144 signatures, urged the City to deny the request from Thresholds, stated that two homes within 500 feet of each other "will overtax the resources of the neighborhood," and stated "[d]ue to the extreme drugs and alcohol in the area, it would be in the best interests of the perspective [sic] occupants and present residents of the neighborhood to build this home in another area." The residents also voiced oral objections to the application, including comments such as "we

[2]The City "denied" this fact, but offers no factual support for its denial. It is therefore deemed admitted under Local Rule 56.1(b)(3)(B).

have enough problems." Any deliberation over a special use permit by the ZBA happened at the formal meetings of the ZBA. Christofanelli testified that "chances are" that he told the ZBA how the Planning Commission had voted, that the vote "would be important information for them," that he did not tell the ZBA the reasons for the Planning Commission's vote because the Commission stated no reasons for the vote in its letter, and that he did not recall the ZBA asking for the reasons for the Plan Commission vote. The ZBA voted unanimously at its December 2, 1998 meeting to recommended that the City Council deny Thresholds a special use permit. The recommendation of the ZBA is set forth in a letter dated December 3, 1998. The ZBA made no written findings of fact, nor did it set forth in writing the reasons for its recommendation or the evidence considered by the ZBA in making its recommendation to deny Thresholds' special use permit application.

On December 21, 1998, the City Council met to vote on Thresholds' application. Three City Councilpersons testified that they were given no written findings of fact explaining the basis for the ZBA's recommendation to deny Thresholds' permit. Mayor Ciambrone testified that he did not know the reasons the Plan Commission or the ZBA voted to recommend denying the application. Community residents again appeared and voice opposition to the application; no resident spoke in favor on the application. The comments generally reflected concern over "crazy people" wandering the neighborhoods and devaluing of property in the neighborhood. One alderman asked if there was anyone from Thresholds present. Rupp stated to the Council that Thresholds representatives had attended hearings and answered residents' concerns, had gone to the City three years prior to ensure that it had appropriate zoning, that the project would be paid for by HUD and the funding had taken a long time, that Thresholds was about to break ground when it was informed about the other group home, and that the City's zoning which prevented Thresholds from moving in is against the FHAA.

Rupp then offered to answer any questions. In response, Mayor Ciambrone stated "I think we had the hearing before the Plan Commission and Zoning Board." One alderman asked whether Thresholds' funding would be jeopardized if it did not go forward. Rupp responded that funding was tied to that location, that it was possible to move, but that the process was lengthy and that it would take years to obtain the funding, and that Thresholds had to move a location once before in Chicago and that the funding had been substantially delayed as a result. One alderman requested additional time to study the matter. The Mayor did not respond to that request, but instead called for a roll-call. The City Council voted at the December 21, 1998 meeting to deny Thresholds' application for a special use permit. Three members voted to abstain and the Mayor cast the tie-breaking vote to deny the application.

Joseph Christofanelli is the former City Planner and the head of the City's Planning and Zoning Department. The City designated Christofanelli, pursuant to Federal Rule of Civil Procedure 30(b)(6), as its representative to testify on its behalf regarding the reasons for the December 21, 1998 decision of the City Council to deny the request to grant a special use permit to Thresholds to operate a family community residence at 619 West 15th Street, how the City reached that decision, the facts that support that decision, the persons consulted with reference to that decision, and what documents the City relied upon in reaching its decision. Christofanelli testified that the City Council voted to reject the application because they accepted the recommendations of the Plan Commission and the ZBA. Christofanelli did not testify to any other reason the City Council voted to reject the application. Christofanelli also testified that the City Council was not compelled by law to accept the recommendation of the ZBA and the Planning Commission.

August Anzelmo is and was at all times relevant to this action corporation counsel to the

City. The City designated Anzelmo as its representative, pursuant to Rule 30(b)(6), to testify on its behalf regarding whether the City maintains in this action that granting Thresholds a special use permit to construct its group home at 619 West 15th Street is a reasonable accommodation, and if not, to testify as to any and all reasons the City has for believing that the requested accommodation, a special use permit, is not reasonable or necessary to afford the prospective residents an equal opportunity to use and enjoy a dwelling, the facts which support those beliefs, the persons consulted with reference to whether granting the special use permit is reasonably necessary, and the documents the City relies upon relating to its beliefs on reasonable accommodation. Anzelmo testified that the City does not contend that the operation of the Thresholds group home at 619 West 15th Street would alter the residential character of the neighborhood. Anzelmo testified that the City does not claim that allowing Thresholds to operate its group home on 15th Street would pose a threat or danger to public health, injure or harm others in using their property, substantially diminish or impair property values in the vicinity of the proposed home, or impede surrounding property owners in developing and improving their properties. Anzelmo also testified that the City does not claim that there are inadequate utilities, that there is inadequate off-street parking, or that there would be difficulty with respect to vehicles entering and leaving the proposed home. Anzelmo testified that a financial burden could exist for the City in the form of increased litigation costs arising from other group home providers also seeking exceptions to the spacing requirement, that those costs would be financial and administrative burdens on the City, that Thresholds' location would "wreak havoc" on the City's Zoning Ordinance, and that granting the accommodation would render the dispersal provision "meaningless" because it would open the door for similar requests and create a precedent that would lead to undesirable clustering of group homes.

IV. The 1998 Zoning Code

On December 21, 1998 the City enacted a new Zoning Ordinance, No. 98-36 (the "1998 Zoning Code"). The 1998 Zoning Code has nine requirements that a "group home" must meet in order to locate in a single-family district. Among the nine conditions required of group homes in the 1998 Code are:

(1) the use shall occupy a detached single-family dwelling, which is consistent in type and general outward appearance with other residences in the area where it is located;

(2) the facility shall be operated by a governmental, religious or other non-profit agency;

(3) occupancy shall not exceed one person per room, meaning a whole room used for living purposes.

(4) an inspection by the code enforcement department ensures that existing building code requirements for residences are met prior to any occupancy or re-occupancy.

The 1998 Zoning Code defines "group home" as:

> a detached, single family dwelling owned and operated by a governmental, religious or other not-for-profit agency occupied on a relatively permanent basis operated as a functional equivalent of a traditional family by a group of not more than eight (8) unrelated persons (inclusive of resident staff) who . . . require assistance and/or supervision, and who reside together as a single housekeeping unit; and, which meets the requirements of all relevant Federal, State, and local codes . . .

The above stated four conditions apply only to group homes. Group residences of greater than eight persons are not allowed even as special uses in single-family zones under the 1998 Zoning Code.

V. The Residence at 662 West 14th Place

Through discovery, the Government found more information about the nature of the 14th Place residence within 1,000 feet of Thresholds' proposed residence upon which the City's denial was based. The residence located at 662 West 14th Street is on a different street than Thresholds' proposed site. Melissa Wright, the Associate Director of the Office of Developmental Disabilities, Illinois Department of Human Services, submitted a declaration which stated that information about the 14th Place home is within her office's data base, of which she has knowledge. From that knowledge, Wright stated that the 14th Place home is a five-person home for people with developmental disabilities in which the clients receive 24-hour "shift staff" as opposed to "foster care" support. The night shift is reported as "awake." The residents of the 14th Place home have a diagnosis of mental retardation; one resident has mild retardation, one has severe mental retardation, and three have profound mental retardation. Two of the five residents are primarily non-ambulatory, and all are restricted in their ability to move around.

Dr. Simpatico visited both the 14th Place home and Thresholds' proposed site, and testified that in his clinical opinion, placing the Thresholds group home at its desired location would not create an institutional environment in that area. Dr. Simpatico's opinion was based on the fact that the two locations are functionally separate and open on to separate streets, on the fact that each home would serve clinically distinct populations, and the fact that the residents at the 14th Street home are profoundly impaired and cannot leave the home unattended. Dr. Simpatico testified that he believed that the distance between the two residences would "in no way compromise[] the treatment of either group."

ANALYSIS

I. The City's Motion to Strike Selected Paragraphs of the Government's Rule 56.1(a) Statement of Facts

The facts, as outlined above, are almost entirely undisputed. However, the City moved to strike some of the Government's facts on the basis that the Government relies upon "new" evidence that was never submitted to the City in Thresholds' special use permit application. In support, the City argues a variety of legal positions. The first argument is that this court may not consider evidence that was not submitted to the City in Thresholds' application for a special use permit. That argument demonstrates the City's fundamental misunderstanding of the nature of this litigation. These cross-motions for summary judgment are not a review of an administrative decision made below, such that this court reviews the City's decision for abuse of discretion and considers only the evidence submitted to the administrative body. Rather, a district court action challenging a zoning decision under the FHAA is a de novo proceeding in which evidence need not have been presented to the defendant or an administrative body in order to be considered. Evidence the City did not consider at the time it decided to deny Thresholds' special use permit may not be relevant to resolving the City's intent, but it is relevant to whether the City failed to reasonably accommodate Thresholds. As such, the Government's evidence that was not previously submitted to the City is no more "new" or irrelevant than any other evidence which is ever obtained through discovery once litigation has begun.

The City cites no authority to support its position that this court is limited to the evidence submitted to it, and this court's research has also revealed no such authority. To the contrary, other district courts have considered evidence which was not considered by the municipal decision-maker.

See ReMed Recovery Care Ctr. v. Township of Willistown, 36 F. Supp. 2d 676, 686 n.8 (E.D. Pa. 1999) ("Although ReMed apparently did not present this evidence to the Board, this court is not limited to consideration of the record before the Board and may consider new evidence presented by either party."); see also Stuart Circle Parish v. Board of Zoning Appeals, 946 F. Supp. 1225, 1229 (E.D. Va. 1996) (declining to exercise Younger abstention from federal court because a parallel state court proceeding was generally limited to the record before the Zoning Board of Appeals, while the federal court was not). Moreover, the FHAA and the policy behind the statute all favor the position that this court is not limited to the evidence submitted to the City only. Under the FHAA, the Attorney General is authorized to enforce its anti-discrimination provisions by "commenc[ing] a civil action in any appropriate United States district court." 42 U.S.C. § 3614(a). The statute does not authorize nor require the United States to appear as a party in municipal proceedings. As such, the Government was not a party to the City's zoning action, and therefore should not be limited to the evidence presented there. A contrary result would restrict the Government's ability to enforce the FHAA and would require group homes to hire expensive attorneys and experts to make their records complete at the municipal level.

The City also argues that the Government's "new" evidence violates the principle of judicial estoppel, which bars a litigant who has prevailed in one proceeding from taking the opposite position in a subsequent proceeding. See, e.g., Czajkowski v. City of Chicago, 810 F. Supp. 1428, 1434 (N.D. Ill. 1992). The City's argument is misguided for three reasons. First, the Government was not a party to any prior proceeding in this matter, and therefore has alleged and maintained only one position throughout this controversy -- that the City discriminated against Thresholds in various ways. Second, Thresholds, on whose behalf the Government brought this action, was not the

prevailing party at the municipal level, such that the doctrine of judicial estoppel is not triggered. Finally, even if Thresholds had prevailed at the municipal level, it has maintained a consistent position throughout its involvement with the City. While discovery has fleshed out Thresholds' claims by adding additional evidence to support them, Thresholds has always maintained that the City's refusal to grant it a conditional use permit would constitute a violation of the FHAA. The evidence and arguments submitted by the Government in support of its motion for summary judgment which were not presented to the City are not barred by the doctrine of judicial estoppel.

For the reasons stated, the City's motion to strike is without merit. The opinions, data, and facts relied upon by Dr. Thomas Simpatico and evidence concerning the nature of the group home located at 622 West 14th Place was properly submitted in support of the Government's summary judgment motion and will be considered by this court.

The City also moved to strike evidence of community opposition to Thresholds' proposed special use permit from the Government's 56.1(a) Statement of Uncontested Facts because the Government is not moving for summary judgment on its intentional discrimination claim, so the City's motives in denying the permit are not relevant. The Government submitted the facts "only to show the context in which the City's decision was made," and did not rely upon those facts in its argument section. This court agrees that community opposition is not relevant to the issue of reasonable accommodation, and therefore cannot and will not consider that evidence in ruling on the Government's motion for summary judgment. Evidence of community opposition voiced to the ZBA, Planning Commission, and the City Council is, of course, relevant to the City's motion for summary judgment on the Government's intentional discrimination claim. This court thus will consider evidence of community opposition in ruling on the City's motion for summary judgment

on the Government's intentional discrimination claim.

With those preliminary matters out of the way, this court considers the merits of the parties' cross-motions for summary judgment.

II. The Government's Motion for Partial Summary Judgment on Reasonable Accommodation and 1998 Zoning Code Claims

While the City moved for summary judgment on the Government's entire complaint, including the intentional discrimination claim, the Government's motion for partial summary judgment is limited to two of its claims: (1) that the City's failure to grant Thresholds a special use permit to operate within 1,000 feet of a residence located at 662 West 14th Street constitutes a failure to provide Thresholds with a reasonable accommodation in violation of the Fair Housing Act, as amended ("FHAA"), 42 U.S.C. § 3604(f)(2)(A) and 3604(f)(3)(B); and (2) that the City's 1998 Zoning Code contains unlawful restrictions on group homes in violation of the FHAA. The Fair Housing Act declares it unlawful "[t]o 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." 42 U.S.C. § 3604(f)(1)(A). The Government argues that the City's undisputed actions violate the FHAA, and that the FHAA mandates this court to enjoin those actions.

A. Reasonable Accommodation Claim

The Government first argues that the City violated the FHAA by relying upon its 1,000 foot spacing requirement for community family residences to deny Thresholds the right to locate at 619 West 15th Street because the other alleged "community family residence," located less than 1,000 feet away at 662 West 14th Place is not a "community family residence" within the meaning of the 1972 Zoning Code. As such, the Government argues, Thresholds has the right to locate at its

proposed location as a matter of right. In the alternative, the Government argues that the City violated the FHAA by falling to reasonably accommodate Threshold in refusing to grant Thresholds a special use permit to locate at its desired location despite the 1,000 foot spacing requirement.

1. Thresholds' Entitlement to Locate at 619 West 15th Street as a Matter of Right

Under the City's 1972 Zoning Code, as amended in 1990, a "family" was defined as: "five or more persons related by blood, marriage, or adoption, or a group of not more than five (5) persons (excluding servants), who need not be related by blood, marriage or adoption, living together and maintaining a common household." In contrast, "family community residence" was defined in the 1972 Zoning Code as "a single dwelling unit occupied on a relative permanent basis in a family-like environment by a group of no more than eight (8) unrelated persons with disabilities." The "community family residence" located at 662 West 14th Street, less than 1,000 feet from the proposed Thresholds site, is a five-person home in which clients with developmental disabilities receive 24-hour "shift-staff" support, as opposed to "foster care" support. The night shift staff is reported as "awake." As such, the 662 West 14th Place residence fits the definition of "family" as well as the definition of "family community residence" under the 1972 Zoning Code.[3]

[3]The City does not deny that the residence at 662 West 14th Place houses five or less persons or otherwise fails to meet the definition of "family" under the 1972 Zoning Code. Nor does the City attempt to justify treating the residence as a community residence rather than as a family. Instead, the City moved to strike the Government's evidence in support of this argument, a declaration signed by Melissa Wright, the Associate Director of the Office of Developmental Disabilities for the Illinois Department of Human Services, on the basis that the evidence was not presented to the City. This court has denied that motion. See Sec. I, infra. Accordingly, the facts are admitted. The City also argues that the argument should not be considered because it was not alleged in the Government's complaint in this litigation. This court finds that the Government was under no obligation to allege this theory in its complaint. The Government's complaint, alleging failure to reasonably accommodate Thresholds' residents, was more than sufficient to meet the requirements of Fed. R.

662 W 14th Place not a group home -- no spacing distance applies -pp. 22-23

The Government argues that Thresholds is entitled to locate within 1,000 feet of the 662 West 14th Place residence because it is a "family" within the meaning of the 1972 Zoning Code, and a city may not subject a group home which meets the definition of "family" to conditions which are not imposed on other "families." In support, the Government cites Children's Alliance v. City of Bellevue, 950 F. Supp. 1491 (W.D. Wash. 1997). In that case, the court held that a statute which defined both "family" and "group facility" and specified that if a group home fit within both definitions, the "group facility" characterization controlled, resulting in different treatment for groups on account of their familial status or handicap, was facially discriminatory. Id. at 1497. Here, the Zoning Code does not explicitly state that "family community residence" trumps "family" when a group home meets both definitions. However, the City clearly did choose to label the home at 662 West 14th Place as a "family community residence" rather than as a family, or else Thresholds would not have needed to apply for a special use permit in order to locate within 1,000 feet of it. As such, in practice, under the 1972 Zoning Code, groups of five or less unrelated persons with disabilities are subject to conditions to which similarly situated groups of five or less unrelated persons without disabilities are not. The City offers no justification for treating two groups, identical in size and familial status, differently on the basis of disability. As such, the City cannot treat the residence at 662 West 14th Place as a "family community residence," subject to location restrictions, rather than as a "family," not subject to those restrictions, without violating the FHAA.

Civ. P. 8. Thresholds and the Government were informed by the City that the residence at 662 West 14th Place was a family community residence, and relied upon that representation. The Government now has the benefit of discovery to show that the City's representation was erroneous. Rather than cite to facts or law in support of its position, the City hides behind labels of the Government's argument, calling it "specious," a "mockery of this litigation," and "maddening." Those labels will not suffice to defeat summary judgment.

Court declares that the existing "group home" is a "family" and therefore a city cannot use it to anchor a spacing distance between group homes

Accordingly, the residence at 662 West 14th Place cannot legally be considered a "family community residence" within the meaning of the 1972 Zoning Code. As such, there is no evidence that there is a legitimate "family community residence" within 1,000 feet of the proposed Thresholds site, and Thresholds is entitled to locate at its proposed location as a matter of right.

Even if the 662 West 14th Place residence were legitimately considered a family community residence, the City was required to reasonably accommodate Thresholds within its Zoning Code. The City failed to reasonably accommodate Thresholds by denying its application for a special use permit.

2. The City's Refusal to Grant Thresholds a Conditional Use Permit

Even if the residence at 662 West 14th Place were a legitimate family community residence, thus subjecting Thresholds' proposed site to the 1,000 foot spacing limitation, the City is required to make reasonable accommodations for Thresholds. Discrimination covered by the FHAA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [handicapped] person[s] equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). Both the Supreme Court and the Seventh Circuit have recognized the FHAA's stated policy "to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601, its "broad and inclusive" compass, City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731, 115 S. Ct. 1776, 1780 (1995), and its "broad mandate to eliminate housing discrimination against and equalize housing opportunities for disabled individuals, Bronk v. Ineichen, 54 F.3d 425, 428 (7th Cir. 1995).

Cases decided under the FHAA have held or assumed that the Act applies to municipalities, including reasonable accommodations in zoning ordinances. See Hemisphere Bldg. Co. v. Village

of Richton Park, 171 F.3d 437, 438 (7th Cir. 1999) (reasonable accommodation claim against village). It is undisputed that the proposed residents of the Thresholds site are handicapped persons within the meaning of the Act, that Thresholds requested an accommodation from the City in the form of a special use permit in order to enable eight persons with mental illness to live in a group home at 619 West 15th Street, and that the City denied that special use permit. Therefore, the only remaining issue is whether the requested accommodation was both reasonable and necessary. If the requested accommodation was both reasonable and necessary under the undisputed facts, then the Government is entitled to summary judgment on its reasonable accommodation claim.

a. Necessity of Thresholds' Proposed Accommodation

As stated above, under the FHAA, discrimination includes a refusal to make reasonable accommodations when such accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B). "[T]he concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995). Plaintiffs must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice. Smith & Lee Assoc., Inc. v. City of Taylor, 102 F.3d 781, 795 (6th Cir. 1996).

The Seventh Circuit has recognized that for groups of handicapped persons who seek to live together, either for mutual support or to permit full-time care by a staff, joint living arrangements are "essential." Brandt v. Village of Chebanse, 82 F.3d 172, 174 (7th Cir. 1996). The City itself acknowledged the necessity of group homes in enacting its group home ordinance. That ordinance, passed on October 15, 1990 amending the 1972 Zoning Code, recognizes, inter alia:

(1) It has been shown that large numbers of people with disabilities need to live together in community residences with support staff as a functional family to be enabled to live within the community and not be inappropriately forced to live in an institution or nursing home;

(2) Community residences for persons with disabilities are often the only way large numbers of people with disabilities can be enabled to live within the community;

(3) Community residences for persons with disabilities is a residential use and should be allowed in all areas of the municipality where other residential uses are permitted; and

(4) Over 40 research studies of the impacts of community residences for people with disabilities find that such residences generate no adverse impacts on the surrounding communities so long as they are licensed and not clustered on a block.

As such, the City itself has acknowledged that granting a special use permit to allow Thresholds to operate a group home "will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." See Bronk, 54 F.3d at 429.

The Government also submitted extensive evidence demonstrating the need for facilities like Thresholds in the south suburbs of Chicago and Chicago Heights in particular. The National Association for the Mentally Ill, South Suburbs ("NAMI"), a group of parents of mentally ill persons, identified a need to bring housing for their children in that area. Dr. Simpatico, Chief of the Bureau of Chicago Network Operations for the Illinois Office of Mental Health, testified that group homes are needed in the south suburbs of Chicago and Chicago Heights in particular. The City also admits substantial evidence demonstrating the necessity of Thresholds' services. For example, the City admits that Thresholds has helped persons who suffer from schizophrenia, bipolar disorder, and major depression, and that one way Thresholds provides services is by establishing group homes where persons with mental illness can live aided by professional staff in a supportive, family-like atmosphere to aid the transition to community living. The City also admits that group

homes have a beneficial result to group home residents in general.

Despite this evidence, the City argues that its refusal to grant Thresholds a special use permit merely makes locating in the City more expensive for Thresholds and that Thresholds has no right to demand the exact location on which it may locate. In so arguing, the City states that the FHAA does not "give handicapped persons an unfettered right to demand waivers of facially non-discriminatory zoning ordinances." That may be true, but the ordinance at issue here is facially discriminatory; "family community residence" is defined as a group of no more than eight unrelated persons with disabilities. As such, if the residents of Thresholds did not have disabilities, Thresholds would not be considered to be a "family community residence" and would not be subject to the City's 1,000 foot spacing requirement. For the same reasons, the City's reliance upon Brandt v. Village of Chebanse, 82 F.3d 172 (7th Cir. 1996) and Hemisphere Bldg. Co., Inc. v. Village of Richton Park, 171 F.3d 437 (7th Cir. 1999) is unavailing. In Brandt, the Seventh Circuit held that a city's refusal to allow the plaintiff to build multi-unit housing was not a violation of the FHAA because the zoning ordinance restricting multi-unit housing did not distinguish between disabled and non-disabled persons, and the plaintiff wished to build the units for economic, rather than therapeutic, reasons. Brandt, 82 F.3d at 174. Similarly, in Hemisphere, the Seventh Circuit held that a facially nondiscriminatory maximum density requirement ordinance which merely raises the cost of housing and hurts everyone who would prefer to pay less and forgo whatever benefits the higher cost might confer need not be waived for the handicapped. Hemisphere, 171 F.3d at 440. The Seventh Circuit held that the duty of reasonable accommodation is limited to rules, policies, practices, or services that hurt handicapped people by reason of their handicap, rather than that hurt them solely by virtue of what they have in common with other people, such as a limited amount of

money to spend on housing. Id. at 440. Here, the City's spacing ordinance is of the type that hurts people, including Thresholds' proposed residents, by reason of their handicaps. As such, Brandt and Hemisphere's holdings, that rules which simply make it more expensive for a group to live in a particular dwelling do not violate the FHAA, do not apply to this case.

The City also argues that the Government has not shown that Thresholds' proposed location is necessary vis-a-vis another location. Specifically, the City argues that the Government has not shown that Thresholds' proposed location would ameliorate its residents' disabilities any more than some other location, including the location offered by the City in response to this controversy. The thrust of the City's argument is that the Government bears the burden of demonstrating that Thresholds' particular chosen location at 619 West 15th Street is both reasonable and necessary. While the City is correct that the Seventh Circuit has never expressly held that a handicapped person has an absolute right to the residence that he or she chooses, the remainder of the City's argument is flatly wrong. As this court reasoned in denying the City's motion to dismiss, whether the offer of another parcel of land could ever be considered a reasonable accommodation under the FHAA is doubtful, as the statute makes it unlawful to "make unavailable or deny a dwelling to any buyer or renter because of the handicap of . . . a person intending to reside in that dwelling after it is . . . made available." 42 U.S.C. § 3604(f)(1)(B). The statute thus speaks to the denial of the opportunity to live in particular dwellings, not the denial of housing all together. The Seventh Circuit has expressed scepticism to the City's reading of the statute, noting that the statute refers specifically to inequality of opportunity to live in a dwelling, but has declined to expressly answer the question as to whether a city's providing handicapped housing somewhere within its borders is sufficient to satisfy the statute. Erdman v. City of Ft. Atkinson, 84 F.3d 960, 963 (7th Cir. 1996).

The City argues that such a rule would eliminate a plaintiff's burden of showing that the requested accommodation was reasonable and necessary. That is not the case. In a case such as this, a private plaintiff or the Government will always bear the burden of showing the necessity of a group home in the area in question -- i.e., that the home would ameliorate the effects of disabled persons' disabilities -- and that the request to locate in a given location is reasonable. This court is not holding that all group homes are necessary nor that all requests for spacing variances are reasonable. In contrast, the City's reasoning leads to an untenable result. No court has ever placed the burden on a group home to show that its desired location is necessary or somehow unique in its ability to ameliorate the effects of its residents' disabilities. Rather, courts have interpreted the FHAA to require a showing that the requested accommodation is one way of ameliorating the effects of the disability. See, e.g., Oconomowac Residential Programs, Inc. v. City of Greenfield, 23 F. Supp. 2d 941, 958 (E.D. Wis. 1998) ("[T]he CBRF is one mode of ameliorating [plaintiff's residents'] inability to live independently"). If the City's interpretation of the reasonable accommodation test were the rule, it is doubtful that any group home ever could prevail on a FHAA claim, because there will always be some other parcel of property upon which a comparable residence could be established. Under the City's logic, a city could always prevail by showing that there were other locations available for the home to locate somewhere in the city. However, the FHAA does not only outlaw discrimination in the denial of all housing; it outlaws discrimination in the denial of particular dwellings.

The City has admitted to the ameliorative effects of group homes, and has not disputed that Thresholds would provide such benefits to citizens of the south suburbs and Chicago Heights in particular. The City's offer of another parcel of land or possible presence of other parcels of land

suitable for Thresholds' purposes but not within 1,000 feet of another group home does not make Thresholds' proposed site unecessary. Accordingly, the undisputed facts show that Thresholds' proposed location in the City was necessary is a matter of law.

b. Reasonableness of Thresholds' Proposed Accommodation

Under the FHAA, a necessary accommodation is reasonable unless it requires "a fundamental alteration in the nature of a program" or imposes "undue financial and administrative burdens." Erdman v. City of Ft. Atkinson, 84 F.3d 960, 962 (7th Cir. 1996) (citing Southeastern Community College v. Davis, 442 U.S. 397, 410, 412, 99 S.Ct. 2361, 2369, 2370 (1979)). Determining whether a requested accommodation is reasonable requires, among other things, balancing the needs of the parties involved. Id. at 963. "The requirement of reasonable accommodation does not entail an obligation to do everything humanly possible to accommodate a disabled person; cost (to the defendant) and benefit (to the plaintiff) merit consideration as well." Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995). The City argues that granting Thresholds a conditional use permit would require a fundamental alteration in the nature of the zoning program and imposes undue financial burdens on the City.

i. Fundamental Alteration of Zoning Program

The Government argues that the special use permit requested by Thresholds was specifically authorized by the 1972 Zoning Code and therefore cannot, as a matter of law and logic, require a fundamental alteration of the City's zoning scheme. The declared purpose of the group home spacing requirement in the 1990 amendments to the 1972 Code was "to prevent clustering of community residences on a block in order to facilitate normalization . . . and preserve the residential character of the neighborhood." To that end, the 1972 Zoning Code's list of "permitted uses" in

single-family residential districts included "family community residences" (group homes), so long as "the community residence is located at least 1,000 feet from any existing community residence, as measured from lot line to lot line, except when a special use permit is issued to allow a community residence to locate closer than 1,000 feet to an existing community residence." As such, the 1972 Zoning Code specifically anticipated and authorized a group home consisting of eight or fewer persons to exist within 1,000 feet of another such home, so long as it obtained a special use permit. The 1972 Zoning Code also allowed for groups of fifteen disabled residents in a single group home to operate in single-family residential neighborhood upon obtaining a special use permit. Here, the two combined homes 500 feet apart would house only thirteen disabled individuals. The City thus contemplated this number and density of disabled persons in its own 1972 Zoning Code.

The City argues that under this logic of looking to the zoning code in question as evidence of the lack of a fundamental alteration, the spacing ordinance will become a nullity, and any home will be permitted to locate wherever it chooses. This court disagrees. Granting a special use permit to allow two group homes to co-exist within 1,000 feet of one another undoubtedly results in an "alteration" of the City's Zoning Code. However, the issue in this litigation, as with every other request for an exemption from a spacing requirement, is and will be whether that alteration is "fundamental." There may be situations in which the distance between the homes is so little, where there is already more than one group home within 1,000 feet, or where the homes are so similar in nature or operation, under which a request for a special use permit would fundamentally alter the City's purpose of avoiding clustering and preserving the residential character of certain neighborhoods.

Here, allowing Thresholds to locate at its chosen location would not undermine the purposes

behind the City's 1972 Zoning Code. First, the undisputed evidence shows that granting the special use permit would not result in the sort of clustering that could prevent disabled persons from integrating into society at large. Second, the undisputed evidence also shows that Thresholds' presence would not change the residential character of the neighborhood in which it seeks to locate.

The Government presented extensive evidence that Thresholds' locating at its proposed location would not result in clustering. The existing home on 14th Place and Thresholds' proposed location are not on the same street, will function separately, and will serve clinically distinct populations who will have little opportunity to interact regardless of the physical distance between them. Thresholds' eight proposed residents have mental illnesses, and will be working, engaged in work training, and going to school. The existing home on 14th Place houses five persons with developmental disabilities who cannot even leave the home unattended. Two of the five residents are non-ambulatory, and four of the five suffer from severe or profound mental retardation. The Government's expert, Dr. Simpatico, found that the location of Thresholds would not create an institutional environment, and that the distance between the two homes "in no way compromises the treatment of either group." It cannot be said that allowing two group homes 500 feet apart but on separate streets, one of which houses only five persons who are generally too disabled to leave their residence, will "fundamentally" alter the City's Zoning Code.

In addition, courts have repeatedly rejected the "anti-clustering" justification for spacing requirements as incompatible with the FHAA, especially where, as here, the burden of the quota falls on the disadvantaged minority. See, e.g., Larkin v. State of Mich. Dept. of Social Servs., 89 F.3d 285, 291 (6th Cir. 1996); Oconomowac Residential Programs, Inc. v. City of Greenfield, 21 F. Supp. 2d 941, 954 (E.D. Wis. 1998) ("[B]enign intentions on the part of lawmakers cannot justify laws

which discriminate against protected groups."); Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1499 (W.D. Wash. 1997) ("Courts should be wary of justifications purporting to help members of the protected class; the court should assess whether the benefits of the requirement 'clearly' outweigh the burdens."). As the Sixth Circuit reasoned in Larkin, the FHAA protects the right of individuals to live in the residence of their choice in the community. If the state were allowed to impose quotas on the number of minorities who could move into a neighborhood in the name of integration, this right would be vitiated. Larkin, 89 F.3d at 291.

The one court which has upheld an anti-clustering justification of a spacing requirement is Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991), upon which the City relies heavily. In that case, the plaintiff attacked a anti-clustering ordinance on its face, arguing that it was invalid because it limited housing choices of the mentally handicapped and therefore conflicted with the language and purpose of the FHAA. Id. at 94. Here, the government does not challenge the City's spacing ordinance on its face, but rather how it is applied to Thresholds. Moreover, the plaintiff in Familystyle sought to add three new group homes to its eighteen existing group homes located on a single campus, yielding a total of twenty-one group homes housing 130 persons with mental illness within an area of one and one-half blocks. See id. at 92. The Eighth Circuit found that it had been given no reason to believe that the group home was incapable of dispersing its group homes and integrating its clients into the community, such that the goal of deinstitutionalization remained valid. Id. at 95. Here, there is no evidence that Thresholds' location would result in institutionalization, and the purpose of Thresholds' request is precisely to integrate into the community. Moreover, even if Familystyle's reasoning did apply here, it is of little weight. It was decided in 1991, shortly after the enactment of the FHAA. Subsequent decisions, including

two courts of appeal, have expressly rejected Familystyle's analysis. See Bangerter v. Orem City Corp., 46 F.3d 1491, 1503 (10th Cir. 1995); Larkin, 89 F.3d at 290.

In response to the Government's facts and law, the City presented no evidence that granting the special use permit would result in "clustering" -- i.e., that those burdened by the ordinance would actually benefit from it.[4] Instead, the City defends its decision on the idea that allowing this special use permit would create a precedent such that clustering would become a problem, and that a 50% reduction of the dispersal requirement (i.e., within less than 500 feet of another group home under a 1,000 foot spacing requirement) is, by definition, "fundamental." Both of the City's arguments are easily disposed of.

First, as noted, the only "precedent" set by this case is that the City must do what is required of it under the FHAA, including granting special use permits when such an action is reasonable. Whether future special use permits are reasonable and necessary will depend on the individual particular factual circumstances of the request. See e.g., Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3rd Cir. 1996) ("The reasonable accommodation inquiry is highly fact-specific, requiring a case-by-case determination."). Morever, strict adherence to a rule on the basis that otherwise the "foot will be in the door" to other group homes is not a sufficient basis upon which to deny a permit. See United States v. Village of Marshall, 787 F. Supp. 872, 879 (W.D. Wis. 1991) ("The public comments of the Board members concerning their concern that a subsequent additional community-based residential facility would be sought were not relevant to its determination of the

[4] Importantly, the City offered no such evidence either to this court in response to the Government's motion for summary judgment nor in the ZBA, Planning Commission, or City Council's decisions to deny the permit, despite being required by City law to make written factual findings of the reasons for the decision.

present facility."). In Village of Marshall, as here, there was no evidence presented that two relatively small group facilities would create the type of density which the legislature sought to avoid. Id. The court noted that the FHAA will require that changes be made to traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling. See id.

The City cites Hemisphere Bldg. Co., Inc. v. Village of Richton Park, 171 F.3d 437 (7th Cir. 1999) for the proposition that a municipality can be "chintzy" and demand strict adherence to its zoning ordinances. In that case, the Seventh Circuit held that a municipality is not required to step on to a "slippery slope" by allowing piecemeal rezoning is that paves the way for further requests for rezoning, until the land-use plan that generated the zoning is completely eroded. Id. at 439. However, as discussed above, Hemisphere involved a facially neutral ordinance, unlike the one involved here, and the Seventh Circuit noted that the density requirement had "nothing to do with hostility to handicapped people." Id. The law is clear that municipalities may not be so "chintzy" when dealing with facially discriminatory zoning laws.

Second, the size of the requested waiver alone cannot determine whether it would result in a "fundamental alteration" of a zoning code. The City has cited no case which suggests that the size of the requested variance has anything to do with whether granting the permit would result in a "fundamental alteration" of the zoning scheme, and none of the cases cited by either the City or the Government mention the size of the waiver in determining whether it would result in a "fundamental alteration." The courts' lack of focus on the size of the waiver makes sense, given that the test for reasonableness in the Seventh Circuit speaks to the fundamental alteration of the zoning program as a whole, not of one particular area.

The City also admitted that granting Thresholds' request would not alter the residential character of the neighborhood. The City's corporation counsel and Rule 30(b)(6) designee on the reasonable accommodation issue, August Anzelmo, admitted that granting Thresholds' request would not alter the residential character of the neighborhood. Instead, Anezelo admitted that the only burdens the City feared in rejecting the permit were administrative and financial. Those admissions are binding on the City

In sum, while granting Thresholds' permit request would result in some alteration of the City's zoning scheme, the alteration would not be fundamental. The FHAA attempts to strike a balance between municipalities' interests in proper zoning and disabled persons' ability to live where they choose by requiring municipalities to bend their rules, so long as the bending does not fundamentally alter the zoning scheme. The City has presented no evidence that allowing Thresholds to locate on its proposed location would undermine that balance by resulting in a fundamental alteration of its zoning scheme.

ii. Undue Financial and Administrative Burdens

In responding to the Government's motion for summary judgment, the City "combined" its response to the "fundamental alteration" argument and the "undue financial burden" argument. Anzelmo, the City's Rule 30(b)(6) designee on the reasonable accommodation issue, testified that the requested accommodation would not cause any of the specific problems identified in the City's Zoning Code as reasons for denying special use permits. Specifically, Anezelo testified that the requested accommodation would not pose any threat or danger to public health, would not interfere with the neighbors using and enjoying their property, would not substantially diminish or impair property values in the vicinity, would not impede development or surrounding properties, would not

pose problems of inadequate utilities, would not pose problems with respect to ingress, egress, or parking, and would not cause more vehicular traffic than a single family home.

In essence, the City argues that the precedent which would be created by granting Thresholds' special use permit would create financial and administrative burdens in the form of increased litigation costs stemming from other group home providers seeking special use permits. This argument is merely a restatement of the City's "slippery slope" or "impermissible precedent" argument which this court has already rejected. Because the City offers no evidence of other financial or administrative burdens, and because the City's Zoning Code plainly allows for special use permits for group homes to operate within 1,000 feet of another home, it cannot be said that granting Thresholds' request would result in any undue financial or administrative burdens. The cost of complying with the FHAA is not "undue."

c. Benefit vs. Burden of Requested Accommodation

For all the reasons outlined above, the cost to the City of granting Thresholds' proposed accommodation, if any, is negligible. The benefits to the proposed residents of Thresholds, on the other hand, are many. As demonstrated by the deposition testimony of Dr. Simpatico and as recognized by Seventh Circuit case law, the benefits of group homes to disabled persons are numerous. In addition, Thresholds purchased the property and invested time and effort in preparing to build a group home at its chosen site only after being informed by the City that the location was properly zoned for group homes. Granting a special use permit would ensure that the money Thresholds has already expended is not wasted, and that Thresholds need not incur additional costs

to secure a different site.[5] As such, the benefits of granting the special use permit to Thresholds and its residents far outweigh the costs to the City.

3. The City's Offer of Another Parcel of Land

The City contends that its offer to exchange Thresholds' 619 West 15th Street property for a parcel of land elsewhere in the City was per se a reasonable accommodation. This argument is a restatement of the City's argument that the Government has not shown that the 15th Street property was necessary vis-a-vis some other parcel of land. As stated above, however, the FHAA speaks to and protects disabled persons' equal opportunity to use and enjoy "a" dwelling. See Sec. II.A.2.a, infra; 42 U.S.C. § 3604(f)(3)(B). The legislative history of the Act supports the focus on disabled persons' right to live in particular dwellings, stating that the Act is intended to protect the ability of the disabled to live in "the residence of their choice." 1988 U.S.C.C.A.N. 2173, 2185. And again, as cited above, the Seventh Circuit has supported an interpretation that the FHAA protects disabled persons' right to live in the dwelling of their choice, not some property within the community. See Erdman v. City of Ft. Atkinson, 84 F.3d 960, 963 (7th Cir. 1996). The City offers no evidence that the alternate parcel of land would better serve Thresholds' residents or is otherwise more

[5]The City argues that the requested accommodation was somehow unreasonable because Thresholds did not present extensive evidence of the benefits of the home to the Zoning Board and the City Council. Thresholds did, however, present evidence of the benefits of the home to the ZBA and the Planning Commission, who nonetheless denied the permit without providing written reasons for the denial, as required by the City's own law. The City Council likewise acted on the ZBA and Planning Commission's advice despite not knowing the reasons for the ZBA and Planning Commission's recommendations and did not invite Thresholds to make a presentation to the City Council. Thresholds was informed by the City that the property was properly zoned for a group home and had no duty to inform the City that it intended to go forth with its project. Thresholds had no way of knowing that it might require a special use permit before being informed by the City that there was another group home within 1,000 feet of its proposed location. As such, Thresholds in no way "sat on its rights" such that its request was unreasonable.

"reasonable" or "necessary" than Thresholds' proposed location. In contrast, Thresholds presented evidence that a change of site would delay the opening of the home due to the HUD funding process, based on prior experience with a similar land swap in the City of Chicago. For these reasons, the City's offer of another piece of land does not constitute a reasonable accommodation under the undisputed facts.

4. Conclusion Regarding City's Refusal to Allow Thresholds to Locate at its Desired Location

For all the reasons stated, the City violated the FHAA by refusing to allow Thresholds to locate on its property at 619 West 15th Street. Thresholds is entitled to locate at 619 West 15th Street as a matter of right because there is no other "family community residence" within 1,000 feet of the proposed site. The residence alleged by the City to be a "family community residence" is actually a "family" within the meaning of the City's 1972 Zoning Code. Even if Thresholds is within 1,000 feet of an existing "family community residence," however, the City is required to make a reasonable accommodation in its zoning laws to allow Thresholds' proposed residents to locate in the dwelling of their choice. The City failed to make such a reasonable accommodation by refusing to grant Thresholds a special use permit to locate within 1,000 feet of the existing family community residence. The special use permit is both necessary to ameliorate Thresholds' proposed residents' disabilities and reasonable because it will not result in a fundamental alteration of the City's zoning scheme nor cause the City undue financial or administrative burdens. Based upon the undisputed facts, the Government's motion for summary judgment on its reasonable accommodation claim must be granted.

B. The City's 1998 Zoning Code

In addition to the Government's challenge to the City's refusal to allow Thresholds to locate at its desired location, the City also argues the City's 1998 Zoning Code, enacted on December 21, 1998, the same day the City Council voted to deny Thresholds' special use permit, violates the FHAA. The Government challenges the following provisions of the Zoning Code, which all apply only to the group homes of eight or fewer persons who require assistance or supervision in day-to-day living: (1) that group homes "occupy a detached single-family dwelling"; (2) that group homes "be operated by a government, religious or other non-profit entity"; (3) that group homes "occupancy shall not exceed one person per room"; and (4) that group homes undergo inspections not required of any other residential properties.

The City opposes this motion on the basis that the Government does not have standing to challenge the 1998 Zoning Code and that the ordinance "does not discriminate on its face against group homes." In so arguing, the City mis-states the law of Government standing under the FHAA, citing standards which apply to private plaintiff standing. While the City frames its argument in terms of standing, it is really arguing that the controversy with regard to the 1998 Zoning Ordinance is not ripe for adjudication because Thresholds has not approached the City to make an application under the 1998 Zoning Code and the Government has not shown that such an application would have been denied.[6]

Contrary to the City's argument, the Government does have explicit statutory standing to

[6]The 1998 Zoning Code, like the 1972 Zoning Code, restricts group homes from locating within 1,000 feet of one another. There is thus no reason to believe that Thresholds' application for a special use permit would have been granted under the 1998 Zoning Code.

challenge the 1998 Zoning Code. The FHAA provides: "(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter . . . the Attorney General may commence a civil action in any appropriate United States district court." 42 U.S.C. § 3614(a). The Attorney General may demonstrate the existence of a "pattern or practice" of discrimination by showing the existence of a discriminatory policy alone. United States v. City of Parma, 494 F. Supp. 1049, 1095 (N.D. Ohio 1980). Moreover, a plaintiff may have standing to challenge a zoning ordinance even if it has not yet been subject to the actual enforcement of that ordinance. See Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43, 46 (6th Cir. 1992). The Attorney General also has statutory standing to bring suit under the FHAA when he has reasonable cause to believe that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance. 42 U.S.C. § 3614(a).

Here, the Government has alleged and supported both types of statutory standing. Contrary to the City's assertion, the 1998 Ordinance is facially discriminatory. On the face of the Code, different standards apply to group homes than to families and other groups living together. As the Seventh Circuit has noted, there are many zoning procedures which are impermissible under the Act either as written or as applied. United States v. Village of Palatine, 37 F.3d 1230, 1234 (7th Cir. 1994) (citing Marbrunak, 974 F.2d at 46). Statutes that single out for regulation group homes for the handicapped are facially discriminatory. Larkin v. Mich. Dept. of Social Servs., 89 F.3d 285, 290 (6th Cir. 1996). As such, the Attorney General had reasonable cause to believe that the City was engaged in a "pattern or practice" of discrimination by virtue of enacting the 1998 Zoning Code alone. The Attorney General also had reasonable cause to believe that Thresholds' proposed

residents had been denied rights under the FHAA and that the denial, together with the enactment of the 1998 Zoning Code, raised an issue of general public importance.

Courts have differed in the level of scrutiny they apply to facially discriminatory statutes. The Eighth Circuit has ruled that statutes which discriminate on their face against disabled persons are subject to a rational basis scrutiny, i.e., they will be upheld if they are rationally related to a legitimate government objective. See Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 94 (8th Cir. 1991). The Sixth and Tenth Circuits have subjected such statutes to a higher form of scrutiny, reasoning that "in order for facially discriminatory statutes to survive a challenge under the FHAA, the defendant must demonstrate that they are warranted by the unique and specific needs and abilities of those handicapped persons to whom the regulations apply." Larkin, 89 F.3d at 290; see also Bangerter v. Orem City Corp., 46 F.3d 1491, 1503-04 (10th Cir. 1995). The Seventh Circuit has never articulated a standard under which to assess such statutes, but has stated that "a procedure may not be required only of the handicapped but not of other people." Village of Palatine, 37 F.3d at 1234. Given that admonition, this court believes that the Sixth and Tenth Circuits' tests for facially discriminatory laws are more in line with the language and purposes of the FHAA than the test employed by the Eighth Circuit. Accordingly, the challenged portions of the City's 1998 Zoning Code cannot survive unless they are warranted by the specific needs and abilities of those handicapped persons to whom they apply.

1. Challenged Portions of 1998 Zoning Code

The City placed its eggs almost entirely in the standing argument, and makes only a half-hearted attempt at defending the provisions of the 1998 Zoning Code challenged by the Government. In addressing each of the challenged provisions, the City did not put forth any evidence nor attempt

to argue that the provisions are somehow tailored to the needs of disabled persons. Instead, the City's response boils down to generalizations about disabled persons. In the end, the City does not raise a genuine dispute that any of the four challenged provisions are warranted by the specific needs and abilities of the persons to whom they apply.

a. Detached Single-Family Dwelling Requirement

The 1998 Zoning Code requires that group homes "occupy a detached single-family dwelling, which is consistent in type and general outward appearance with other residences in the area where it is located." Despite recognizing that group homes are the functional equivalents of families, the 1998 Zoning Code limits the type of structure that group homes, but not other families, may occupy. The provision also has the effect of excluding group homes from locating anywhere but in single-family areas of the City, because the single-family dwellings must be consistent in type and outward appearance to other residences in the area.

Under the 1998 Zoning Code, families and groups of non-disabled unrelated persons living in the City may occupy duplexes, town homes, and apartment buildings and are not restricted to single-family neighborhoods. The City has proffered no evidence to demonstrate that there is something unique about disabled persons that justifies limiting their choice of dwelling types or neighborhoods, and common sense shows that there is none. There is nothing about the outward appearance of a group home that is tailored to that home's ability to serve its clients' needs. The City's argument that "group homes" should be required to look like "homes" is ridiculous. "Homes" do not only "look like" single-family detached residences. They also look like apartments, town homes, duplexes, and other dwellings. As such, the detached single-family requirement violates the FHAA.

Cannot limit types of structures group homes can occupy

Cannot require that group home operator be a nonprofit

b. Non-Profit Provider Requirement

The 1998 Zoning Code also contains a requirement that "the facility shall be operated by a governmental, religious, or other non-profit agency." Under this section, for-profit providers are barred from locating group homes anywhere in the City as a permitted use. This limitation on ownership applies only to group homes. The Sixth Circuit rejected a law which limited the number of residents for-profit providers could house in a group home but did not limit the number of residents non-profit providers could house. See Smith & Lee Associates, Inc. v. City of Taylor, 102 F.3d 781, 796 (6th Cir. 1996) (finding that occupancy limit on for-profit group homes serving the elderly disabled guarantees a negligible or negative rate of return for investors, such that demand outstripped the existing supply of such homes and there would not be sufficient housing for the disabled residents in the city). Here, the City has enacted a far more restrictive complete ban on for-profit providers. In defense of that action, the City merely argues that "it is not a violation of the FHA[A] for the City to require that group home providers should not profit from the handicapped people they are attempting to serve." The FHAA does not require group home providers to give away their services, to operate at a loss, nor to declare a particular tax status. If it did, there would be far fewer residences for disabled persons than there presently are. The City points to no evidence that for-profit group home providers are any less adept at providing care for disabled individuals than their non-profit equivalents. As such, the City has failed to present a genuine dispute that the ban on for-profit providers is tailored to the specific needs of disabled individuals.

c. One Person Per Room Requirement

The 1998 Zoning Code provides that "occupancy shall not exceed one person per room." Nowhere in the Code is the one-person-per-room restriction applied to persons without disabilities.

Cannot limit occupancy just in group homes

In defense of this provision, the City states only that "there is nothing improper about not allowing group home operators to place their residents in cramped conditions." That may be true, but the 1998 Code does not speak to cramped conditions. Rather, for example, two disabled persons sharing a massive room would violate the 1998 Zoning Code, while eight siblings or five unrelated individuals sharing a tiny room would not. Common sense suggests that some disabled persons may even benefit from sharing a room with another disabled individual. The City points to no evidence of the specific needs of disabled individuals to support such a draconian facially discriminatory maximum density requirement.

d. Inspection Requirements

The 1998 Code requires "[a]n inspection by the code enforcement department ensures that existing building code requirements for residences are met prior to any occupancy or re-occupancy." The Code does not require this type of inspection for any other residential use. Cities are permitted to enact laws for the purpose of protecting health and safety of its residents. However, those types of laws are legitimate only in that they "ordinarily apply uniformly to all residents of all dwelling units." City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 732, 115 S.Ct. 1776, 1781 (1995). Here, the "health and safety" ordinance enacted by the City applies only to disabled persons, and is in no way tied to their particular needs. As noted by the Government, group homes are operated by providers who must be licensed, and are operated by non-disabled personnel whose function it is to protect the health and safety of the residents. The City has presented no evidence that disabled persons are more likely to move into unsafe dwellings, and thus is not tailored to the needs of disabled persons.

2. Variance Procedures

The City takes the position that, whatever flaws the 1998 Zoning Code may contain, group homes that do not meet its requirements can apply for a reasonable accommodations through the variance procedure in the 1998 Code. However, the express language of the FHAA states that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 24 U.S.C. § 3615. In Marbrunak, Inc. v. City of Stow, 974 F.2d 43 (6th Cir. 1992), the Sixth Circuit rejected a city's argument that an ordinance was not facially discriminatory because it could be tailored to the individual needs of the residents through the variance procedures. "[T]he variance procedure provided by the city's zoning code cannot be said to save the ordinance by satisfactorily individualizing its safety requirements to the needs and abilities of the residents of plaintiff's home." Id. at 48. Similarly, here the City has offered no guidelines by which a request for a variance would be granted, and the Code places the burden on disabled individuals to apply for variances under a facially discriminatory law. Regardless of the availability of variances, the four challenged provisions of the 1998 Zoning Code violate the FHAA on their face.

For all the reasons stated, the four challenged provisions of the City's 1998 Zoning Code violate the FHAA on their face, and therefore must be enjoined. The Government's motion for summary judgment on its claim that the 1998 Zoning Code violates the FHAA is granted. The City is therefore enjoined from enforcing the following provisions of the 1998 Zoning Code: (1) that group homes "occupy a detached single-family dwelling"; (2) that group homes "be operated by a government, religious or other non-profit entity"; (3) that group homes "occupancy shall not exceed one person per room"; and (4) that group homes undergo inspections not required of any other

residential properties.

III. The City's Motion for Summary Judgment on the Government's Intentional Discrimination Claim

The City filed a cross-motion for summary judgment on the Government's reasonable accommodation claim and the Government's challenge to the City's 1998 Zoning Code. However, for all the reasons stated above, this court is granting the Government's motion for summary judgment on those claims. Accordingly, the City's motion for summary judgment on those two claims is denied. The City also moved for summary judgment on the Government's intentional discrimination claim, arguing that the Government has presented no admissible evidence that the City's decision-makers were driven by a discriminatory motive.

Contrary to the City's argument, the Government has presented extensive evidence, both direct and circumstantial, that the City's decision-makers were driven by discriminatory motives in voting to deny Thresholds' special use permit. The Seventh Circuit has repeatedly held that, due to the difficulty of proving a subjective state of mind, cases involving motivation and intent are usually not appropriate for summary judgment. See Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 991 F.2d 1249, 1258 (7th Cir. 1993). In light of this standard, the Government has come forward with more than sufficient evidence to create a genuine dispute as to whether the City acted with discriminatory animus in voting to reject Thresholds' special use permit. The City's failure to make any written factual findings or statement of reasons for denying the permit, despite being required by its own law to do so, and the substantial community opposition voiced to the City alone are sufficient to raise a genuine dispute on this issue. Accordingly, the City's motion for summary judgment on the Government's intentional

discrimination claim must be denied.

CONCLUSION

For all the reasons stated, the City's motion to strike is DENIED. The Government's motion for partial summary judgment is GRANTED. The City's motion for summary judgment is DENIED in its entirety. Judgment is granted in favor of the Government on its reasonable accommodation claim and on its challenge to the City's 1998 Zoning Code. This court finds that the City violated the FHAA by failing to reasonably accommodate Thresholds, and the certain provisions of the 1998 Zoning Code violate the FHAA. The Government has conceded that a decision by this court that the City has unlawfully prevented Thresholds from building its group home obviates the need for a ruling on the United States' claim of intentional discrimination, and has requested that this court enjoin the City from enforcing the facially unlawful requirements for group homes in its1998 Zoning Code. The City is thus enjoined from enforcing those four provisions of the 1998 Zoning Code, as outlined in this courts order. The City is also permanently enjoined from forbidding Thresholds to build its group home at its desired location, 619 West 15th Street in the City of Chicago Heights. There being no just reason for delay, the clerk is directed to enter judgment in favor of plaintiff the United States of America and against the City of Chicago Heights on the Government's claims for injunctive and declaratory relief. This case is set for report on status on April 24, 2001 at 9:00 a.m.

ENTER:

James F. Holderman

JAMES F. HOLDERMAN
United States District Judge

DATE: March 20, 2001

Maximum Restrictions Local Zoning Can Place on Community Residences for People With Disabilities

People with substantial disabilities often need to live where they receive staff support to engage in the everyday life activities most of us take for granted. These sorts of living arrangements — group homes, halfway houses, and recovery communities — fall under the broad rubric "community residence." Their primary use is as a residence or a home like yours and mine, not a treatment center nor an institution.

One of the essential characteristics of community residences is that they seek to emulate a family. The residents with disabilities learn or re–learn the same life skills and social behaviors taught in every family.

Community residences seek to achieve "normalization" of their residents and incorporate them into the social fabric of the surrounding community (known as "community integration). Most are licensed by the State of Illinois to assure that residents receive proper support and care.

Guiding Principles

- Community residences are a residential use of land.
- As long as they are not clustered together on a block, community residences have no effect on the value of neighboring properties as found by more than 50 scientific studies.
- Community residences have no effect on neighborhood safety as found by every scientific study.
- Other studies have found that group homes and small halfway houses for persons with disabilities do not generate undue amounts of traffic, noise, parking demand, or any other adverse impacts.
- To achieve their goals of normalization and community integration, community residences should be scattered throughout *all* residential districts rather than concentrated in any single neighborhood or on a single block.
- The Fair Housing Amendments Act of 1988 requires local government to make a "reasonable accommodation" in their laws and policies to enable people with disabilities to live in the community of their choice — which means allowing community residences for those who need to live in one with minimal restrictions.

Maximum Zoning Restrictions on Community Residences

Zoning provisions can be less restrictive than those reported here. These provisions are the most restrictive that still comply with the Fair Housing Act.

Nearly every city, village, town, and county in Illinois has a zoning ordinance that defines a "family" or "household" that can occupy a dwelling unit. These definitions allow related people to occupy a home as well as a specified number of unrelated people, usually 3, 4, or 5 unrelated individuals.

When a proposed community residence for people with disabilities complies with a jurisdiction's definition of "family," it must be allowed as of right (a permitted use) in all residential districts under the definition of "family." So if the zoning definition of "family" allows up to 5 unrelated people to live together, then a community residence for up to 5 people with disabilities complies with that definition and must be allowed *without any additional zoning restrictions* everywhere a family can reside. Any additional zoning requirement placed on such a home would be discriminatory on its face.

If a zoning code does not define "family" or does not establish a cap on the number of unrelated individuals that constitute a family, the jurisdiction must treat community residences for people with disabilities the same as any other group of unrelated individuals — and cannot impose any additional requirements on community residences. To do otherwise would be discriminatory on its face.

The requirement to make a "reasonable accommodation" kicks in when a proposed community residence for people with disabilities would house more unrelated people than the zoning code's definition of "family" allows. So if an operator wished to open a group home for 7 people with disabilities when the definition of "family" caps the number of related residents at 5, the city would have to make a "reasonable accommodation" to allow this group home for 7 residents.

Collectively, court decisions suggest that any reasonable accommodation must meet three tests:

- The proposed zoning restriction must be *intended to achieve a legitimate government purpose*
- The proposed zoning restriction must *actually achieve that legitimate government purpose*
- The proposed zoning restriction must be the *least drastic means necessary to*

achieve that legitimate government purpose

The maximum zoning restrictions described below enable community residences to locate in all residential zoning districts through the least drastic regulation needed to accomplish the legitimate government interests of preventing clustering of several community residences on a block (which undermines the ability of community residences to achieve their purposes and function properly and can alter the residential character of a neighborhood), as well as protecting the residents of the community residences from improper or incompetent care and from abuse. They are narrowly tailored to the needs of the residents with disabilities to provide greater benefits than any burden that might be placed upon the residents with disabilities.

A proposed community residence that houses more unrelated people than allowed under a jurisdiction's definition of "family" should be allowed as a permitted use in all residential zoning districts if it:

- **Is located more than 660 linear feet from property line to property line or 660 linear feet along the shortest legal pedestrian path from the proposed home to an existing community residence, whichever is shortest, and**
- **Is eligible for or has received the appropriate license or certification from the state, the local county, local city, or federal government.**

If a proposed community residence would be located *within* this 660 linear foot spacing distance (the length of a typical block) or if a license or certification is *not* required for it, then the heightened scrutiny of a special or conditional use permit is warranted. Note that if a license or certification is denied, the proposed community residence is not allowed at all, even by special use permit.

It *may* be legal to require a special use permit in single–family districts for community residences that limit the length of residency, i,.e. small halfway houses. No jurisdiction, however, can treat community residences for people with certain disabilities differently than other disabilities.

Regulating the number of occupants of a community residence

According to a 1995 U.S. Supreme Court decision, the proper vehicle for regulating how many people can live in a community residence is through a village's building code or property maintenance code applicable to *all* residences. In its 1995 decision in *Edmonds v. Oxford House,* 514 U.S. 725, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995), the Court ruled that housing codes that "ordinarily apply uniformly to all residents of all dwelling units … to protect health and safety by preventing dwelling overcrowding" are legal and apply to all housing, including community residences for people with disabilities. It also found that zoning ordinance restrictions that focus on the "composition of households rather than on the total number of occupants living quarters can contain" are subject to the Fair Housing Act. Ibid. at 1782.

Consequently, the provisions of a town's building or property maintenance code that determine how many people can live in a dwelling apply to community residences, which by definition, are dwellings. Generally these codes regulate occupancy by the number of square feet in each bedroom based on health and safety standards applicable to all people. They usually require 70 square feet of liveable space for the first occupant of a bedroom and an additional 50 square feet for each additional occupant of a bedroom. So if two people share a bedroom, the bedroom must be at least 120 square feet in size, like 10 x 12 feet.

A zoning ordinance, however, can set a rational limit on the total number of people who live in a community residence based on emulating a family. Experts generally believe that a community residence with up to 12 residents can emulate a family. But it is very unlikely that the home with more than 12 residents can effectively emulate a family. It's pretty clear that a "home" for 16 or 20 people is a mini–institution and not a community residence.

Further reading

Visit http://www.grouphomes.law or http://www.planningcommunications.com to access a key law review article that explains these limitations on zoning, research on the impacts of community residences on the surrounding neighborhood, and a video workshop on zoning for community residences.

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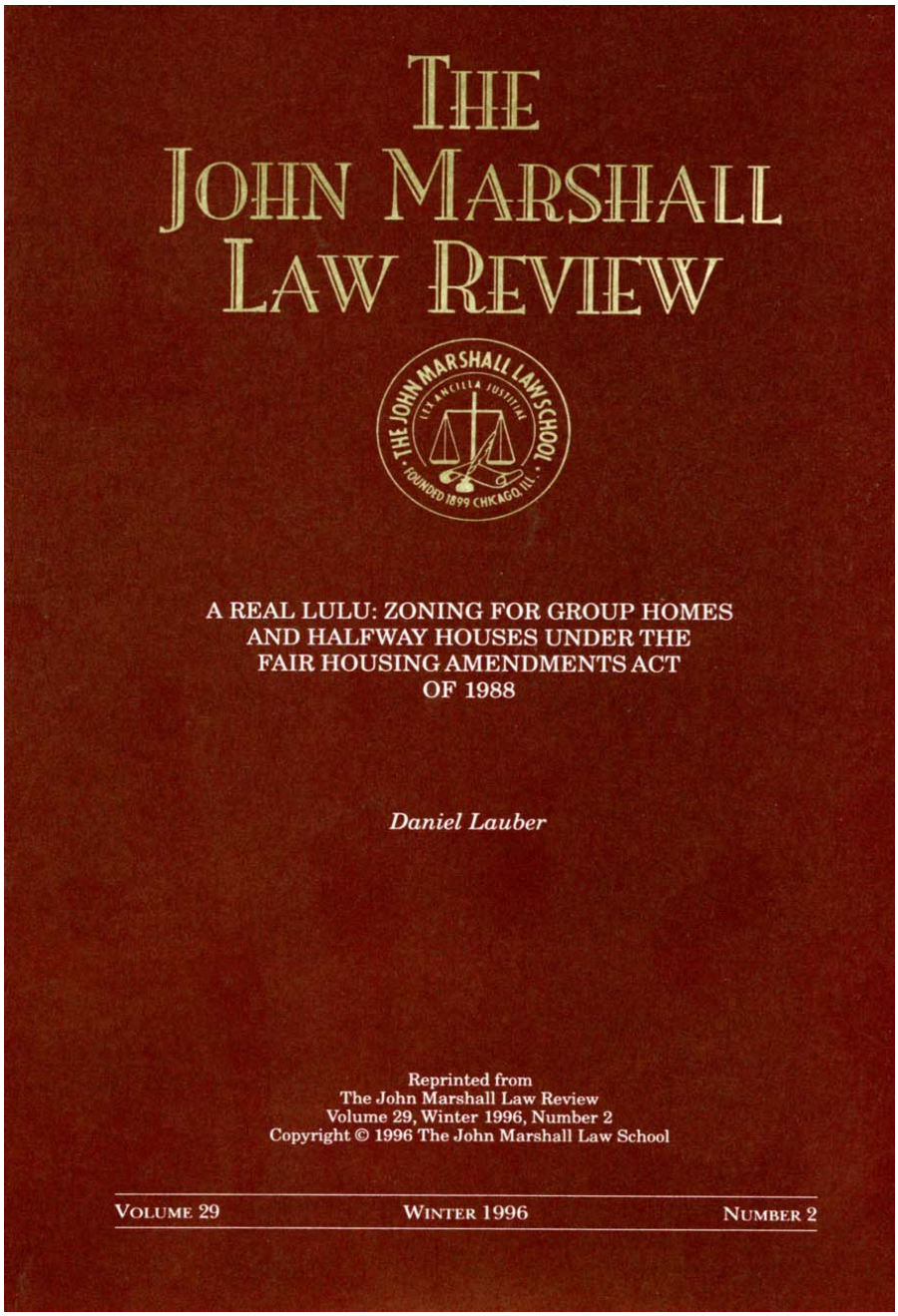
CAUTION:
To survive a court challenge, before adopting the zoning approach this article recommends, a city ***must*** first conduct a proper study to factually document the basis for regulating community residences in the manner suggested by this article.



Websites:
http://planningcommunications.com
http://lauber.law
http://grouphomes.law

A REAL LULU: ZONING FOR GROUP HOMES AND HALFWAY HOUSES UNDER THE FAIR HOUSING AMENDMENTS ACT OF 1988

DANIEL LAUBER, AICP*

INTRODUCTION

Group homes and halfway houses continue to be a real "LULU" — a Locally Unwanted Land Use[1] — despite an abundance of research showing that they generate no adverse impacts and despite the enactment of a federal law intended to prevent localities from excluding these community residences from single-family zoning districts.[2] Forty states have adopted statewide zoning for some group homes, usually only for people with developmental disabilities or mental illness. Nearly every state has failed to extend this protection to community residences for people with drug or alcohol additions, HIV and other disabilities that also fall under the aegis of the Fair Housing Amendments Act of 1988 (FHAA). Ironically, the FHAA added a whole new section to the Fair Housing Act to make people with disabilities a protected class and sought to provide more housing options to such individuals within single-family zoning districts. Unfortunately, despite a long history of cases before the enactment of the FHAA, many municipalities continue to exclude group homes from the single-family zoning districts in which they belong.[3]

This Article does not advocate community residences, the broad term that includes group homes, halfway houses, hospices, shelters and other group living arrangements primarily for people

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1. Insightful planning professor Frank Popper of Rutgers University coined this term in the 1980s.

2. 42 U.S.C. §3604(f)(1) (1988).

3. See NORMAN WILLIAMS, AMERICAN LAND PLANNING LAW §§ 12, 17, 25 (1988 & Supp. 1994), for examples of exclusionary zoning ordinances.

with disabilities. Rather, this Article advocates a sound, rational zoning treatment for community residences based on commonly accepted zoning and planning principles and the true impacts of these uses.[4] This position is, however, a middle of the road view, somewhere between the advocates who argue, often quite persuasively, that local zoning cannot regulate community residences, and a handful of municipal attorneys who contend, not very convincingly, that the FHAA does not apply to zoning. In May 1995, the U.S. Supreme Court essentially rejected this latter view.[5]

A thorough understanding of community residences and their impacts is essential before analyzing their proper zoning treatment. Accordingly, Part I of this Article examines the origin of community residences. Part II briefly examines the more common disabilities that dictate people's need for community residence housing rather than institutional housing. Part III discusses the concept of "normalization," which constitutes the basis of community residences. In Part IV, this Article explores how group homes, the most common type of community residence, function. Part V identifies the known impacts of community residences on the surrounding neighborhood. Part VI suggests that normalization requires dispersed community residences rather than residences concentrated on a single block. Part VII then examines common zoning practices used to exclude community residences from single-family and even multiple-family zoning districts. Part VIII illustrates why Congress and President Reagan sought to prohibit these exclusionary zoning practices by enacting the Fair Housing Amendments Act of 1988. This Part also examines the provisions of the FHAA and its legislative history. Part IX discusses and reconciles various FHAA cases by classifying the decisions on the basis of the definition of "family" in the zoning ordinances at issue. Consequently, this Part demonstrates a clear trend which can guide drafters of zoning regulations for community residences. Finally, Part X proposes two model zoning treatments for community residences that emerge from this trend.

I. THE ORIGINS OF COMMUNITY RESIDENCES

Until the late 1960s, people with handicaps, particularly developmental disabilities and mental illness, were denied the treatment and care they needed to become more independent members of society. Up until this time, most people with develop-

4. I have advocated for more appropriate zoning for group homes and halfway houses beginning with a 1974 monograph. *See* Daniel Lauber & Frank S. Bangs, Jr., *Zoning for Family and Group Care Facilities*, AM. PLAN. ASSOC. PLAN. ADVISORY SERV. REP. NO. 300 (1974).

5. City of Edmonds v. Oxford House, Inc., 115 S. Ct. 1776, 1782-83 (1995).

mental disabilities, such as mental retardation and autism, were committed to caretaker institutions or lived with parents who often lacked the resources necessary to help these individuals develop the skills they needed to function independently in the community. However, society gradually began to understand the capabilities and needs of these individuals with disabilities and developed new ideologies towards these individuals. The first group homes were designed to enable people with developmental disabilities to live in the community rather than in an institution and to attain the highest possible level of functioning. The concept was next applied to people with mental illness and later to individuals with other disabilities. By the 1980s, every state had established an array of increasingly independent living arrangements as alternatives to institutions and living with one's parents.

In his address to the 1904 National Conference of Charities and Correction, Walter Fernald, a leading expert on persons with mental retardation, expressed the predominant view of people with mental retardation at the time:

> No method of training or discipline can fit them [people with mental retardation] to become safe or desirable members of society. They cannot be placed out without great moral risk to innocent people. These cases should be recognized at an early age before they have acquired facility in actual crime and be permanently taken out of the community. . . . Feeble-minded women [mentally retarded] are almost invariably immoral and if at large, usually become carriers of venereal disease or give birth to children who are as defective as themselves.[6]

Less than twenty years later, after conducting the first study of individuals with mental retardation who lived with their parents or on their own in the community, Fernald discovered that the long-held "social menace" image was unfounded. He found low levels of delinquency and very few illegitimate children.[7] Fernald's subsequent study of more than 5000 school children with mental retardation found that less than eight percent exhibited signs of antisocial or troublesome behavior.[8] Fernald's research marked the beginning of the end of the indictment of persons with developmental disabilities. By the 1920s, experts learned that mentally retarded individuals could adjust to living

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6. 6 RUTH FREEDMAN ET AL., STUDY OF COMMUNITY ADJUSTMENT OF DEINSTITUTIONALIZED MENTALLY RETARDED PERSONS 2 (Prepared for Bureau of Education for the Handicapped, U.S. Office of Education, Dec. 1976).

7. 6 *Id.* at 1.

8. Walter Fernald, *Thirty Years' Progress in the Care of the Feeble-minded*, 29 PSYCHO-ASTHENICS 206, 209 (1924). Despite studies by Fernald and his colleagues that showed no criminal inclination on the part of the mentally retarded, their social menace image has persisted.

in the community and found that despite previous misunderstandings, these individuals were not menaces to society.

It took another fifty years, however, before the professionals who worked with people with developmental disabilities (*i.e.*, psychologists, psychiatrists, social workers, teachers) could largely overcome their old prejudices. As these professionals gained a better understanding of the nature of developmental disabilities, parents and other advocates of people with disabilities organized into strong lobbying groups in the 1950s. Together these two groups developed an ideology they felt was appropriate to the dignity of people with disabilities. Consequently, this ideology has spawned today's trend toward community residential care and the normalization theory underlying it: regardless of any inconvenience to the surrounding society, people with "handicaps" are morally and legally entitled to normal cultural opportunities, surroundings, experiences, risks and associations.[9]

Reflecting this new ideology, professionals and advocacy groups entered the 1960s mounting an ever-increasing attack on large institutions. Additionally, the mass media simultaneously reported horror stories of abuse in large institutions.[10] These factors combined to develop a new national attitude that recognized the right of developmentally disabled people to decent treatment and care.

During the late sixties and early seventies, parents of people with disabilities filed a number of lawsuits seeking alternatives to institutions. Many courts required states to consider placing disabled people in settings that were less restrictive than institutions and more appropriate to the disabled person's individual needs.[11]

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9. *See* CENTER ON HUMAN POLICY, SYRACUSE UNIVERSITY, THE COMMUNITY IMPERATIVE: A REFUTATION OF ALL ARGUMENTS IN SUPPORT OF INSTITUTIONALIZING ANYBODY BECAUSE OF MENTAL RETARDATION 12-14 (1979) [hereinafter CENTER ON HUMAN POLICY] (unpublished manuscript on file with author) (refuting the theories for housing the mentally retarded in institutions).

10. Human abuses included forcing retarded persons to live in isolation cells, showers and barren dayrooms, washing them down with hoses like cattle, tying them to benches and chairs or constraining them in straight jackets. CENTER ON HUMAN POLICY, *supra* note 9, at 6. Unclothed persons were burned by floor detergent and overheated radiators, some were intentionally burned by their supervisors' cigarettes, children were locked in "therapeutic cages," patients lived in large rooms crowded with a sea of beds from wall to wall. *Id.*

Scientific researchers observing treatment in these institutions also reported widespread instances of abuse. *See* BURTON BLATT ET AL., THE FAMILY PAPERS: A RETURN TO PURGATORY (1979); S. TAYLOR, THE CUSTODIANS: ATTENDANTS AND THEIR WORK AT STATE INSTITUTIONS FOR THE MENTALLY RETARDED (1977).

11. Shelton v. Tucker, 364 U.S. 479 (1960); Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Haw. 1976) (considering placement in the least restrictive environment before commitment to an institution); Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974), *vacated on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd and remanded*, 430 U.S. 322 (1977); Welsh v. Likins, 373 F. Supp. 487 (D. Minn. 1974),

This judicial pressure led to significantly increased federal and state spending for the developmentally disabled, heightened levels of community awareness, better staffing of facilities, renovated physical environments and a significant expansion of community residential services.[12] These endeavors led to the establishment of an active Presidential commission,[13] federal legislation intended to ensure people with disabilities the right to individualized treatment in the least restrictive setting and state legislation that expressed a policy of offering people with disabilities informed choices of where and how to live.

In response to these influences, states have rapidly shifted the care of people with developmental disabilities from institutions to community residential programs during the last twenty years.[14] One of the most frequently used community residential options is the group home where typically four to eight individuals reside in a house or apartment with a live-in or shift staff that provides training in the fundamentals of daily living. The rate of change has been substantial. Between 1972 and 1982, the number of persons with mental retardation in state institutions across the country fell from 190,000 to 130,000. The number of group homes for this group grew from 611 in 1972 to over 6300 in 1982, a 900% growth rate.[15] In 1982, more than 58,000 citizens with develop-

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aff'd in part, vacated and remanded in part, 550 F.2d 1122 (8th Cir. 1977); New York State Assoc. for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

At least thirty-eight "right to habilitation" lawsuits were filed in twenty-seven states and the District of Columbia between 1971 and 1980. David Braddock, *Deinstitutionalization of the Retarded: Trends in Public Policy*, 32 HOSP. & COMMUNITY PSYCHIATRY 607, 609 (1981).

12. Braddock, *supra* note 11, at 610.

13. The Developmental Disabilities Act provided:

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> . . . (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in a setting that is least restrictive of the person's personal liberty.

42 U.S.C. § 6010(2) (1976).

14. For example, New Jersey's Developmentally Disabled Rights Act, N.J. Stat. Ann. § 30:60-1 to -12 (West 1995), requires services for the mentally retarded "in a setting and manner which is least restrictive of each person's personal liberty." *Id.* at § 30:60-9. To implement this legal right, the state must "provide a spectrum of possible settings within which to provide [the necessary] services." New Jersey Ass'n for Retarded Citizens, Inc. v. Department of Human Services, 445 A.2d 704, 712 (N.J. 1982). For other examples of state statutes implementing the least restrictive requirement, see Colo. Rev. Stat. § 27-10.5-101 to -123 (Supp. 1976); Fla. Stat. Ann. § 393.13 (West Supp. 1978); Neb. Rev. Stat. § 83-1, 141 (1976).

15. Janicki et al., Report on the Availability of Group Homes for Persons with Mental Retardation in the United States 1, 4-6 (Nov. 1982) (on file with author).

mental disabilities lived in these group homes while nearly half of the 117,000 persons with developmental disabilities still institutionalized in 1982[16] qualified for community living arrangements like group homes. To ensure that disabled persons are placed in the proper environment, society in general must understand what it means to have a disability.

II. WHAT DOES IT MEAN TO HAVE A DISABILITY?

The FHAA's definition of "disability" is the same broad definition used by the Rehabilitation Act of 1973.[17] The FHAA defines "handicap" as:

> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
>
> (2) a record of having such an impairment, or
>
> (3) being regarded as having such an impairment, . . . but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).[18]

This definition covers people with developmental disabilities, mental illness, physical disabilities, contagious diseases like tuberculosis or HIV and drug or alcohol addictions as long as the individuals are not currently using any illegal substance. The FHAA does, however, exempt from its coverage any "individual whose tenancy would constitute a direct threat to the health or safety of other individuals."[19] This Article will explain that no evidence exists to support the conception that people with any of these disabilities who dwell in community residences pose such dangers.

Most people with disabilities, however, need not be restricted to community residences. Over eighty percent of people with developmental disabilities live with their families or on their own with some support services.[20] Due to a variety of physical, men-

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Some states moved even the severely and profoundly retarded into group homes while others have felt that these persons are unlikely to benefit from community living and can be best cared for in an institutional setting.

16. Lisa L. Rotegard et al., *State Operated Residential Facilities for People with Mental Retardation*, 22 MENTAL RETARDATION 69, 71 (1984).

17. 29 U.S.C. § 701(a)(3). *See also* H.R. REP. NO. 711, 100th Cong., 2d Sess. 311 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173.

18. 42 U.S.C. § 3602(h) (1988).

19. 42 U.S.C. § 3604(f)(9) (1988).

20. DAVID BRADDOCK ET AL., THE STATE OF THE STATES IN DEVELOPMENTAL DISABILITIES 8 (4th ed. 1994). *See also* Developmental Disabilities Assistance and

tal and emotional conditions, about twenty percent of the nation's population has a disability according to the 1990 census. Half of these Americans, twenty-four million, have a "severe" disability.[21] Of these, fifteen million have difficulty with a functional activity like lifting and carrying as little as ten pounds, climbing a flight of stairs, seeing, speaking or hearing. These minor disabilities are not the sort of severe conditions that warrant living in a community residence. Rather, only 3.9 million Americans have disabilities so severe that they warrant living in a community residence. These more severe disabilities may include conditions that prevent an individual from working or doing housework, conditions that justify personal assistance with daily tasks (*i.e.*, getting in and out of bed, dressing, bathing, shopping, doing light housework), or other developmental disabilities, Alzheimer's disease or senility.[22]

A. Developmental Disabilities

The Federal Developmental Disabilities Act of 1984, as amended through 1987, uses a functional rather than categorical definition of "developmental disability"[23] that better reflects current practice:

> The term "developmental disability" means a severe, chronic disability of a person which:
>
> (A) is attributable to a mental or physical impairment or combination of mental and physical impairments;
>
> (B) is manifested before the person attains age twenty-two;
>
> (C) is likely to continue indefinitely;
>
> (D) results in *substantial* functional limitations in three or more of the following areas of major life activity:
>
> (i) self-care;

Bill of Rights Act, 42 U.S.C. § 6000(a)(6) (1995) (finding that a substantial portion of individuals with developmental disabilities and their families do not have adequate access to support services).

21. Bureau of Census, U.S. Dep't. of Com. Statistical Br. SB/94-1 1 (1994).

22. *Id.* at 1-2.

23. 42 U.S.C. § 6001(8) (1987). Under one previous categorical definition, the federal government defined people who are developmentally disabled as individuals with any one or more of a series of conditions which manifests itself before age 18, is expected to continue indefinitely and constitutes a substantial handicap to the individual's ability to function normally in society. Developmental Disabilities Act, 42 U.S.C. § 6001 (1976). These conditions include: mental retardation, cerebral palsy, epilepsy, autism, other neurological conditions which are closely related to mental retardation and require similar treatment (like Down's Syndrome) and dyslexia which can result from any of the above-mentioned conditions.

(ii) receptive and expressive language;

(iii) learning;

(iv) mobility;

(v) self-direction;

(vi) capacity for independent living; and

(vii) economic self-sufficiency; and,

(E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.[24]

The operative word in state and federal definitions is "substantial" disability. Many persons suffer from a number of conditions which, taken individually, would not seriously affect their ability to function in society. For example, dyslexia is a learning disability that may require special classroom treatment, but certainly does not warrant institutionalization or special living arrangements. However, a combination of dyslexia with even mild mental retardation can substantially or greatly impair an individual's ability to function in society. Consequently, persons with at least a mild intellectual deficit and cerebral palsy, epilepsy, autism or dyslexia, are usually classified as developmentally disabled where the cumulative effect of these conditions substantially or greatly impairs functioning.

A developmental disability is not a contagious disease. Programs for people with developmental disabilities are referred to as "habilitation" programs. These programs focus principally on training and development of needed skills for daily life, the same skills parents teach their children every day. In addition to persons with developmental disabilities, persons with mental illnesses require assistance to function normally in society.

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24. Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C.A. § 6001(8) (West 1987) (emphasis added). This kind of functional definition gives state programs great flexibility. Some states have even classified chronic schizophrenics as developmentally disabled when the individual's condition meets the criteria just described. Again, the key is that the individual be *substantially* impaired. So, for example, states do not classify persons with just dyslexia as developmentally disabled. They require that the dyslexic condition combine with other disabilities to substantially impair the individual's functioning. Telephone interview with David Braddock, Director of Evaluation and Public Policy Program, Institute for the Study of Developmental Disabilities, University of Illinois at Chicago (Mar. 22, 1985).

B. Mental Illness

The group home concept was soon applied to people with mental illnesses as well as individuals with developmental disabilities. Virtually everybody experiences some discrete episode of mental illness, such as anxiety or depression.[25] Mental illness, however, becomes a disability when it is so chronic that it disrupts a person's ability to function in society. Persons with mental illness usually have normal intelligence, but may have difficulty performing at a normal level due to their mental illness.[26] Specifically, mental illness is a term used to describe a group of disorders that cause severe disturbances in thinking, feeling and relating that can result in a substantially diminished capacity for coping with the ordinary demands of life. Forms of mental illness include schizophrenia,[27] major depression and bipolar disorder commonly known as manic depression. The causes of mental illness are not fully understood. Biological factors, like heredity and brain disease, may contribute to mental illness. Stress is also believed to play a major role.

Despite popular misconceptions that television and the print media foster, the overwhelming majority of people with mental illness are neither violent nor criminally prone. Thorough research has revealed that the stereotype that a person with mental illness is dangerous, and therefore more prone to commit a crime, is simply unfounded in fact.[28] On the contrary, like persons with

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25. From personal observation, this author would suggest that most law students often experience these disorders, particularly in the days and weeks prior to final exams and the bar exam. I experienced these disorders when I sat down to write this article.

26. Some people with developmental disabilities may have a mental illness as well.

27. Persons with schizophrenia occupy one-fourth of the nation's hospital beds. Schizophrenia is not a split personality. It is a disease of the brain characterized by delusions, impairment in thinking, changes in emotion, hallucinations and changes in behavior. Like all mental illnesses, it is not contagious. One percent of the nation's population has schizophrenia. Seventy-five percent of the people who have schizophrenia develop it between the ages of 16 and 25. Jennifer Roblez, *Where will they go? The Plight of the Mentally Ill, After Hospitalization, Patients Still Need Care*, THE BEACON-NEWS (Aurora, Ill.), May 4, 1987, at A8.

28. Linda A. Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception* 142:5 AM. J. OF PSYCHIATRY 593, 593 (1985). For further research on the misconception that disabled individuals are prone to commit criminal acts, see J. Monahan & Henry Steadman, *Crime and Mental Disorder: An Epidemiological Approach*, *in* CRIME AND JUSTICE: AN ANNUAL RFVIEW OF RESEARCH (N. Morris & M. Tonry eds., 1983) and Henry J. Steadman & Richard B. Felson, *Self-reports of violence: ex-mental patients, ex-offenders, and the general population*, 22 CRIMINOLOGY 321 (1984).

developmental or physical disabilities, people with mental illness constitute a vulnerable population much more likely to be the victim of a crime than the perpetrator.

While no cure is known for mental illness, drug and psychosocial therapies have been effective. For example, antidepressant and antimanic drugs, coupled with psychotherapy, can provide a normal life for eighty percent of the people with depression or manic "affective" disorders.[29] Consequently, once a person with a mental illness is released from a hospital, the major concern is getting the individual to continue taking her medication.[30]

Group homes are particularly valuable for deinstitutionalized people who have a mental illness because the social structure of group homes greatly increases the likelihood that residents will take their medication.[31] The number of state hospital residents with mental illness decreased by seventy-five percent between 1962 and 1987.[32] In 1987, there were approximately two million persons with serious mental illness in the United States. Of these, 800,000 still live with their families, 300,000 live in nursing homes, 200,000 are in inpatient facilities, 150,000 are homeless, and 26,000 are in jail or prison. Nursing homes and board-and-care homes constitute institutionalized care settings. Unlike group homes, they are not integrated into the community.[33]

C. Physical Disabilities

A head injury, severe arthritis, a stroke, muscular dystrophy, multiple sclerosis, a spinal cord injury or any other severe trauma can cause physical disabilities. However, people with physical disabilities often have no mental impairment. Yet, like some developmental disabilities, physical disabilities can substantially limit an individual's capacity to function in society. Accordingly, for some people, a community residence offers the best opportunity to live in the community rather than in institution.

For a substantial number of people who have a physical disability, most houses, apartments and public places are simply physically inaccessible. The 1988 amendments to the Federal Fair

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29. *Research Progress on the Major Disorders*, 142 AM. J. PSYCHIATRY 7, 15 (July Supp. 1985).

30. Paul S. Appelbaum, *Outpatient Commitment: The Problems and the Promise*, 143 AM. J. PSYCHIATRY 1270, 1270-71 (1986).

31. *Id.* at 1271.

32. H. Richard Lamb, *Deinstitutionalization and the Homeless Mentally Ill*, *in* THE HOMELESS MENTALLY ILL 55, 62 (H. Richard Lamb ed., 1984).

33. ANDREA PATERSON & ELLEN RHUBRIGHT, HOUSING FOR THE MENTALLY ILL: A PLACE TO CALL HOME 8 (1987).

Housing Act attempt to remedy this situation by requiring all new multi-family construction of more than three units to meet certain accessibility requirements in both the common areas and individual units to enable physically disabled people to occupy them.[34] The act also requires landlords to allow a person with a disability to make reasonable modifications of an existing rental property, at the prospective tenant's expense, that are necessary for the individual with a disability to fully enjoy the dwelling unit.[35]

D. Drug and Alcohol Addictions

There is no question that the FHAA covers people who are addicted to drugs or alcohol as long as they are not currently using an illegal drug.[36] An individual with a drug or alcohol addiction is usually an addict for life. The key for them is to learn to abstain completely from using drugs or alcohol. Treatment usually consists of an initial withdrawal period followed by intensive counselling and support both through treatment programs and through residential living arrangements. People with drug or alcohol addictions often need to live in what is called a halfway house or recovery community as a transitional living arrangement before they can live more independently in the community or return to their homes. Such community residences are based on the group home model, with some significant differences that have implications for proper zoning regulation.

The halfway house or recovery community helps people with drug or alcohol addictions readjust to a "normal" life before moving out on their own. A person with an addiction is admitted only after completing detoxification. The halfway house staff helps residents adjust to a drug-free lifestyle, learn how to take control of their lives and learn how to live without drugs. Nearly all halfway houses place a limit on how long someone can live there, usually measured in months. Unlike a group home, the halfway house aims to place all its residents into independent living situations upon "graduation." For both therapeutic and financial reasons, most halfway houses need ten to fifteen residents to be successful. Because the number of residents in a halfway house is greater than in a group home, and their length of tenancy shorter, halfway houses more closely resemble multiple-family housing

34. 42 U.S.C. § 3604(f)(3)(C) (1988).

35. *Id.* at § 3604(f)(3)(A) (1988).

36. 42 U.S.C. § 3602(h); 3604(f)(9); H.R. REP. NO. 711, 100th Cong., 2d Sess. 311 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173. This point is so well established that parties routinely stipulate to it. *See, e.g.*, Elliott v. City of Athens, Ga., 960 F.2d 975, 977 n.2 (11th Cir. 1992) (stipulating that the FHAA applies to addicts not currently using an illegal drug).

than single-family residences, although, like group homes, they work best in single-family neighborhoods.[37]

Persons in each of the categories discussed are considered disabled under the FHAA. However, the classification itself does not mean that these persons are any less entitled to live in our society. They do not deserve or desire to exist in an institution. Individuals who have disabilities want the opportunity to be "normal" members of society.

III. THE ESSENCE OF COMMUNITY RESIDENCES: NORMALIZATION

Living in an institution causes two impacts on people with disabilities.[38] First, considerable evidence indicates that institutionalization has a detrimental effect on motor and learning skills and general social competency of persons at all levels of developmental disabilities.[39] The ability to communicate apparently declines during institutionalization.[40] In fact, the only time an institution appears to offer a relatively positive experience is when this relatively poor environment is better than a more miserable home life.[41]

Second, living in an institution teaches a person how to live in an institution rather than in a community, as so graphically portrayed in Ken Kesey's *One Flew Over the Cuckoo's Nest*.[42] The institutionalized individual adapts to the subculture of his institu-

37. Oxford House, which has been the subject of so much FHAA litigation, falls somewhere between the group home and halfway house. Unlike the halfway house, Oxford House places no limit on the length of stay. Unlike a group home, or even halfway house, Oxford House has no staff. The residence is run by its officers who are elected periodically from among its residents. Unlike a group home, an Oxford House needs ten to fifteen residents to successfully function, both therapeutically and financially. The courts have generally construed Oxford House to be a group home.

38. This discussion concerns people with developmental disabilities for whom the community residence was first created. Readers can extend these concepts to other groups of people characterized as handicapped or disabled.

39. *See generally* FABER, MENTAL RETARDATION, ITS SOCIAL CONTEXT AND SOCIAL CONSEQUENCES (1968); TIZARD, COMMUNITY SERVICES FOR THE MENTALLY RETARDED (1964); Woloshin et al., *The Institutionalization of Mentally Retarded Men Through the Use of a Halfway House*, J. MENTAL RETARDATION 21 (June 1966); Dentler & Mackler, *The Socialization of Institutional Retarded Children*, 2(4) J. HEALTH HUMAN BEHAVIOR 243 (1961).

40. Jerri Linn Phillips & Earl E. Balthazar, *Some Correlates of Language Deterioration in Severely and Profoundly Retarded Long-Term Institutionalized Residents*, 83 AM. J. MENTAL DEFICIENCY 402, 402-08 (1979).

41. Edward Zigler & D. Balla, *Motivational Factors in the Performance of the Retarded*, *in* THE MENTALLY RETARDED CHILD AND HIS FAMILY: A MULTI-DISCIPLINARY HANDBOOK (R. Koch & J. G. Dobson eds., 2nd ed. 1976).

42. KEN KESEY, ONE FLEW OVER THE CUCKOO'S NEST (1962).

tion. He learns to live in a world where every minute of every day is programmed for him "where, often, a guard must unlock and open every door for him . . . [where his] dependency on . . . the 'total institution' [increases so much that he is placed] in a state of dependency without opportunity for decision making [where] the thread relating [him] to reality deteriorates enormously."[43]

For those persons with disabilities who will eventually live on their own, whether after living in an institution or with parents, the community residence or group home eases the transition into the community and independent living. It offers individuals the opportunity to participate in community activities. Additionally, group homes are often the only feasible living arrangement for living in the community.

In addition to assuming that total institutionalization adversely affects people with disabilities, two other assumptions underlie the move towards community living. First, an environment providing "normal social contact" and the potential for "normal social interaction" has a positive "normalizing" effect on persons with disabilities.[44] Second, by providing a relatively "normal" environment, community residences have a normalizing effect on disabled people which results in an increase in their competence.[45]

In essence, normalization is the principle of providing the "patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of life of society."[46] According to this principle, people with disabilities

43. Lauber & Bangs, *supra* note 4, at 10.

44. E. Butler & A. Bjaanes, *Activities and the Use of Time by Retarded Persons in Community Care Facilities*, *in* OBSERVING BEHAVIOR: THEORY AND APPLICATIONS IN MENTAL RETARDATION 379, 380 (G. Sackett ed., 1978). A number of studies support this assumption. Several special programs have shown that if the environment is significantly different from that of the larger total institution, normalization can occur and social and intellectual competence can increase. EDGERTON, THE CLOAK OF COMPETENCE (1967); KENNEDY, SOCIAL ADJUSTMENT OF MORONS IN A CONNECTICUT CITY (1948); McKay, *Study of IQ Changes in a Group of Girls Paroled from a State School for Mental Defectives*, 46 AM. J. MENTAL DEFICIENCY 496 (1942); Mundy, *Environmental Influence on Intellectual Function as Measured by Intelligence Tests*, 30 BRIT. J. MED. PSYCHOL. 194 (1957); Skeels & Dye, *Study of the Effects of Differential Stimulation on Mentally Retarded Children*, 44 PROC. AM. ASS'N MENTAL DEFICIENCY 114 (1939).

45. Butler & Bjaanes, *supra* note 44, at 380.

46. Bengt Nirje, *The Normalization Principle*, *in* CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 231, 231 (1976). Six years earlier Nirje defined normalization as "making available to the mentally subnormal patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society." Bengt Nirje, *Symposium on Normalization: The Normalization Principle — Implications and Comments*, 16 BRIT. J. MENTAL SUBNORMALITY 62 (1970).

who are unable to live with their families should live in homes of normal size, located in normal neighborhoods, that offer opportunities for normal societal integration and interaction. The normalization theory further holds that such community living enables people with disabilities to achieve their human potential and become contributing members of society.

In practice, normalization means placing dependent persons in an environment that as closely as possible resembles life in normal society in order to provide opportunities for interaction with, and integration into, society.[47] Living in an institution generally isolates the individual from the community and rarely gives him the chance to achieve his maximum intellectual or physical potential. On the other hand, living in the community breaks down the social and economic walls that isolate persons with disabilities from meaningful experience and learning. It exposes them to the facets of everyday life: associating with different people, shopping, using public transportation and community services, obtaining an education, working, participating in active and passive recreation, managing personal affairs and money, cleaning dishes and laundry and preparing meals. The objective is making all community resources available for people with impairments to use to the extent of their needs and capabilities. Normalization, therefore, is founded on treating each individual in all possible respects as though he falls within the normal range and is necessarily based on the premise that normalization can occur only in a relatively typical community environment.

If we are to avoid repeating history, it is crucial to remember that normalization does not mean turning the people with disabilities into perfectly "normal" citizens. We should not expect community living to "cure" developmental disabilities, mental illness, physical disabilities or drug or alcohol addictions. When successful, normalization teaches people with impairments how to adapt to their disabilities and manage the demands of everyday community life. It enables them to fully participate in community living to their maximum productivity, integrate into the community and

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Wolf Wolfensberger's classic definition of normalization is the "utilization of means which are as culturally normative as possible in order to establish and/or maintain personal behaviors and characteristics which are as culturally normative as possible." WOLF WOLFENSBERGER, THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES 28 (1972). "Culturally normative" refers to compliance with the mainstream of the community's cultural standards. *Id.*

47. J. Benjamin Gailey, *Group Homes and Single Family Zoning*, 4 ZONING & PLAN. L. REP. 97, 97 (1981). Without exposure to the community, normalization is unlikely to occur. Community living facilities that are geographically and socially isolated from the surrounding community result in less independent behavior and development of social competency than facilities in which residents are geographically or socially isolated. Butler & Bjaanes, *supra* note 44, at 438-39.

achieve independence. This point is crucial to avoid a tragic repetition of history. In the 1850s, the first institutions for "feebleminded" children were founded on the premise that they could make the "deviant" less deviant, namely teach them the skills necessary to function at least minimally in society. However, the public and many professionals shared a higher expectation that these institutions would reverse retardation in children and cure them. When these institutions failed to "cure" retardation, most professionals and the public regarded them as failures. In response to this "failure," a reactionary period evolved over nearly eighty years in which people with disabilities were consigned to large institutions where the disabled were considered out of sight and out of mind. Our society is only beginning to recognize that people with disabilities need a family environment and is starting to provide such environments within communities.

IV. GROUP HOMES PROVIDE A FAMILY ENVIRONMENT FOR PEOPLE WITH DISABILITIES

A group home functions like a family unit. It is composed of individuals who have disabilities plus support staff. Support is furnished in accord with the needs of the residents and can vary considerably. Staff members can be present around the clock, or for much shorter periods of time, and may live in the dwelling or work in shifts. The amount of staff supervision depends on the needs of the residents.

The group home constitutes a family, a single housekeeping unit where residents share responsibilities, meals and recreational activities as in any family. The intention is that group home residents, like members of a natural family, will develop ties in the community. Like people without disabilities, these individuals attend schools, work and may receive other support services in the community. The group home staff is often specially trained to help the residents achieve the goals of independence, productivity and integration into the community. Together, the staff and residents constitute a functional family.[48] The group home's staff teaches residents the same life activities taught in conventional homes. Residents learn how to maintain their own personal hygiene, shop, clean, do laundry, enjoy recreation, maintain their personal finances and use public transportation and other community facilities. In short, group home residents learn how to live as a family in a home that fosters the very same family values which our most exclusive residential zoning districts advance.

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48. Gailey, *supra* note 47, at 97-98.

Like their "able-bodied" neighbors, group home residents spend weekdays at work, either in a conventional job, at a sheltered workshop or at school. After work or school, their routine parallels that of other families in the neighborhood: relaxing, preparing dinner, handling household chores, exercising and shopping. Thus, the group home functions in many ways like any other household. It is not a clinic where treatment is the principal or essential service provided. The daily routine of persons with disabilities may incorporate a treatment regime wherever they may live, whether with their families, in an institution or in a group home. So, just like the person with a disability who lives with her family, the group home resident may have a daily habilitation regime to follow. Significantly, however, this treatment is only incidental to the group home's primary purpose.[49]

State licensing requirements, regulations and standards usually govern the operation of community residences, including physical safety and fire safety protections. These rules almost always exclude persons who are dangerous to themselves or others. However, many states do not require state licensing or certification for certain types of community residences for certain populations.

A single-family residential district is the most appropriate zoning district for most group homes, although some may also be appropriately located in a multiple-family district. Group home operators seek to establish group homes in the same sort of pleasant, safe neighborhoods most people seek. Unfortunately, group homes are often excluded from appropriate locations in communities, frequently because of misperceived negative impacts. Before addressing the proper zoning treatment for group homes, an understanding of the actual impacts of group homes on surrounding land uses is necessary.

V. COMMUNITY RESIDENCES HAVE MINIMAL IMPACT ON SURROUNDING LAND USES

More is known about the impacts of community residences on the surrounding neighborhood than any other small land use. More than fifty studies have examined their impact on property values. All of them, despite differing methodologies, have discovered that group homes and halfway houses have no effect on property values, even for houses adjacent to community residences.

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49. *See* H. RUTHERFORD TURNBULL, III, COMMUNITY-BASED RESIDENCES FOR MENTALLY HANDICAPPED PEOPLE 1-2 (1980) (stating that some courts have found this distinction to be crucial when determining that group homes function as families and are residential uses allowable in residential zoning districts).

Conversely, studies have shown that community residences are often the best maintained properties on the block. Moreover, these studies have illustrated that these community residences function so much like a conventional family that most neighbors within one to two blocks of the home do not even know that a group home or halfway house is nearby.[50]

A handful of studies have also looked at whether community residences compromise neighborhood safety. The most thorough study, conducted for the State of Illinois, concluded that the residents of group homes are much less likely to commit any crime than the average resident of Illinois. Specifically, it revealed a crime rate of eighteen per 1000 people living in group homes compared to 112 per 1000 for the general population.[51] Other studies have found that group homes for persons with disabilities do not generate undue amounts of traffic, noise, parking or any other adverse impacts.[52] Despite these findings, a high concentration of group homes within a neighborhood is not desirable.

VI. THE NEED FOR DISPERSING COMMUNITY RESIDENCES

For a group home to enable its residents to achieve normalization and integration into the community, it should be located in a "normal" residential neighborhood. Locating group homes next to one another, or clustering several on the same block would undermine the group home's ability to advance its residents' normalization. Such clustering would create a de facto social service district, recreating many facets of an institutional atmosphere. Normalization and community integration require that the neighborhood's social structure absorb people with disabilities. The existing social structure of a neighborhood can accommodate no more than one or two group homes on a single block. The number of group homes should not exceed a neighborhood's limited

50. For a comprehensive compilation of descriptions of over fifty of these studies, see COUNCIL OF PLANNING LIBRARIANS, "THERE GOES THE NEIGHBORHOOD . . . " A SUMMARY OF STUDIES ADDRESSING THE MOST OFTEN EXPRESSED FEARS ABOUT THE EFFECTS OF GROUP HOMES ON NEIGHBORHOODS IN WHICH THEY ARE PLACED (BIBLIOGRAPHY NO. 259) (Apr. 1990); Martin Jaffe & Thomas P. Smith, *Siting Group Homes for Developmentally Disabled Persons*, AM. PLAN. ASSOC. PLAN. ADVISORY SERV. REP. NO. 397 (1986). For an example of a study finding no negative impacts on selling price of houses near or adjacent to halfway houses for people with alcohol addictions, adult ex-offenders and juvenile ex-offenders, see CITY OF LANSING PLANNING DEPARTMENT, THE INFLUENCE OF HALFWAY HOUSES AND FOSTER CARE FACILITIES UPON PROPERTY VALUES (1976) (unpublished manuscript, on file with author).

51. DANIEL LAUBER, IMPACTS ON THE SURROUNDING NEIGHBORHOOD OF GROUP HOMES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES 15 (1986).

52. Lauber & Bangs, *supra* note 4, at 10.

absorption capacity for people who are service dependent.[53] Social scientists note that this level exists, but they cannot quite put their finger on the exact level. Writing about service-dependent populations in general, Jennifer Wolch notes, "At some level of concentration, a community may become saturated by services and populations and evolve into a service-dependent ghetto."[54]

According to one leading planning study:

> While it is difficult to precisely identify or explain, "saturation" is the point at which a community's existing social structure is unable to properly support additional residential care facilities [group homes]. Overconcentration is not a constant but varies according to a community's population density, socio-economic level, quantity and quality of municipal services and other characteristics. [T]here are no universally accepted criteria to determine how many residences are appropriate for any given area. . . .[55]

Nobody knows the precise absorption levels of different neighborhoods. However, the research of Wehbring, Wolch and Hettinger strongly suggests that as the density of a neighborhood increases, so does its capacity to absorb people with disabilities and people who are service dependent into its social structure.[56] Higher density neighborhoods presumably have a higher absorption level that could permit group homes to locate closer to one another than in lower density neighborhoods that have a lower absorption level.[57] Therefore, this research strongly suggests a legitimate government interest in avoiding clusters of group homes.

While the research on the impact of group homes clearly indicates that separating group homes a block or more apart produces no negative impacts, it also suggests that clustering several group homes on a single block produces serious concerns. Such clusters can generate adverse impacts on both the surrounding neighborhood and on the ability of the group homes to facilitate the normalization of their residents, which is, after all, their raison d'être. Despite the findings that isolated group homes do not adversely affect their surrounding neighborhoods, cities still attempt

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53. Kurt J. Wehbring, Alternative Residential Facilities for the Mentally Retarded and Mentally Ill 14 (no date) (unpublished manuscript, on file with author).

54. Jennifer Wolch, *Residential Location of the Service-Dependent Poor*, 70 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 330, 332 (1980).

55. S. HETTINGER, A PLACE THEY CALL HOME: PLANNING FOR RESIDENTIAL CARE FACILITIES, REP. OF THE WESTCHESTER COUNTY DEPARTMENT OF PLANNING 43 (1983); *see also* Lauber & Bangs, *supra* note 4, at 25.

56. See *supra* notes 53-55 for citations to these individuals' research.

57. Lauber & Bangs, *supra* note 4, at 25.

to exclude group homes through restrictive zoning.

VII. Excluding Community Residences Through Zoning

Despite all that is known about the impacts of community residences and how they function, cities continue to exclude them from the single-family districts which most need to function successfully and in which they belong. Cities have excluded community residences from single-family districts, and even multiple-family zones, through a variety of exclusionary techniques.

One of the most common exclusionary tools is to simply not mention community residences at all in the zoning ordinance and then prevent the development of proposed community residences by enforcing a restrictive definition of "family." Decades ago most zoning ordinances allowed any number of unrelated people to live together as long as they functioned as a single housekeeping unit. Reacting to the "threat" of communes in the sixties and seventies, most municipalities changed their zoning definition of "family" to place a cap on the number of unrelated people in a dwelling unit. Most set the limit at three, four or five unrelated individuals. Some prohibited any unrelated people, including even roommates, from living together.[58] The U.S. Supreme Court upheld these restrictive definitions in *Village of Belle Terre v. Borass*.[59] Since most community residences need six or more residents to succeed therapeutically and financially, this restriction effectively blocked them from locating in the residential areas where they need to locate.

A second common exclusionary technique is to require a special use permit to establish a community residence in residential districts.[60] At the requisite public hearing, cities require the applicants to demonstrate that its proposed land use meets the criteria for granting a special use permit. In the case of community residences, however, these hearings often turn into public lynchings of the group home operators. City officials quite often yield to objections by neighbors and reject the application of the community residence even when the applicant demonstrates that it meets the criteria for awarding the special use permit. This was

58. Daniel Lauber, *Group Think*, PLANNING, Oct. 1995, at 12.

59. 416 U.S. 1, 7-8 (1974).

60. Also known as a conditional use permit, the special use permit was designed to provide municipalities extra scrutiny in reviewing proposed land uses that belong in a zoning district, but that may generate adverse impacts unless certain conditions are imposed as a stipulation of approval. Robert Leary, *Zoning*, *in* PRINCIPLES AND PRACTICES OF URBAN PLANNING 403, 439 (William I. Goodman & Eric C. Freund eds., International City Managers' Association 1968).

the scenario that led to the U.S. Supreme Court's 1985 decision in *City of Cleburne v. Cleburne Living Center*.[61] In that case, the Court ruled the city had illegally based its denial of a special use permit on the neighbors' unfounded fears and myths about the group home and its residents.[62]

Special use permits are also an extremely effective way to limit the housing opportunities of people with disabilities. When cities require a special use permit, buyers usually include a clause in the purchase and sale agreement that makes the sale contingent on receiving the special use permit. While these clauses are quite common in commercial property sales, they are extremely rare in sales of owner-occupied residential property since few homeowners can afford to sell their houses subject such a contingency clause. Most homeowners need the proceeds from the sale of their current house to buy a new one. Consequently, few homeowners are willing to sell to a group home operator who insists on this kind of contingency clause and few group home operators can afford to take the risk that the city will deny their special use permit application, leaving them stuck with a house that they cannot use as a group home.

Twenty-three years ago, the American Society of Planning Officials surveyed 400 United States cities and found that the zoning ordinances of fewer than one-fourth specifically provided for community residences. Of the cities that mentioned group homes or halfway houses, the vast majority either prohibited them from single-family districts or required special use approval in residential zones.[63] Ten years later, the zoning picture for community residences remained grim. The General Accounting Office found that 65.5% of the time, local zoning ordinances or practices still prevented or impeded group home operators from locating in the single-family districts preferred by their operators.[64]

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61. 473 U.S. 432 (1985).

62. *Id.* at 447-50.

63. Lauber & Bangs, *supra* note 4, at 9.

64. GENERAL ACCOUNTING OFFICE, AN ANALYSIS OF ZONING AND OTHER PROBLEMS AFFECTING THE ESTABLISHMENT OF GROUP HOMES FOR THE MENTALLY DISABLED 61 (1983). Several regional studies have also found that few municipal zoning ordinances provide for community residences. In 1983, only four of the thirty-one municipalities in the Seattle, Washington area defined the term "group home" and only three allowed them as a permitted use in a residential district; eighteen allowed them by special use permit in at least one zoning district, not necessarily residential, and thirteen did not provide for them at all. MARSHA BROWN RITZDORF-BROZOVSKY, THE IMPACT OF FAMILY DEFINITIONS IN AMERICAN MUNICIPAL ZONING ORDINANCES 119, 214-15 (1983) (unpublished dissertation, on file at the University of Washington). A California study found that no municipality in suburban San Francisco allowed group homes for more than five residents as a permitted use in residential districts; only one allowed group homes for five or less residents as a

Subsequent research leading up to Congress' adoption of the Fair Housing Amendments Act of 1988 revealed that little had changed.[65]

VIII. THE LEGISLATIVE HISTORY, INTENT AND IMPACT OF THE FHAA OF 1988

Rather than simply add people with disabilities to the list of protected classes under the Fair Housing Act, Congress added a new section to the act which declares that 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."[66] As discussed below, much of the litigation surrounding the FHAA has revolved around the issue of "reasonable accommodation." Given this statutory language, it is hard to understand how anybody can contend that the FHAA requires cities to treat community residences as single-family residences. Specifically, the FHAA only requires cities to make reasonable accommodations in their zoning ordinances to provide people with disabilities an equal opportunity to use and enjoy a dwelling. This does not mean that people with disabilities have a right to dwellings they cannot afford to buy or rent. It also does not mean that a city must change its zoning to allow communes, boarding houses or fraternities in its most exclusive single-family districts. However, this provision does require a city to bend its zoning rules to enable *members of the protected class*, many of whom need a community residence living arrangement to live outside of an institution, to establish residences in single-family and multiple-family zoning districts. It also prevents a city from creating additional barriers for community residences. This "reasonable accommodation" language has important practical consequences for zoning regulation of group homes and halfway houses, the two most common forms of community residences.

The FHAA's "reasonable accommodation" provision does not provide much guidance as to zoning treatment of community resi-

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permitted use in all residential districts; two allowed them as a permitted use in some residential districts; nine allowed them as special uses in some residential districts; and, seven did not allow group homes at all. BAY AREA SOCIAL PLANNING COUNCIL, EFFECT OF ZONING REGULATIONS ON RESIDENTIAL CARE FACILITIES IN SAN MATEO COUNTY: REPORT AND RECOMMENDATIONS OF THE STUDY COMMITTEE, C-7 (Mar. 1970). In 1986, in New York's suburban Westchester County, only one of thirty-three localities allowed group homes as of right in residential districts. HETTINGER, *supra* note 55, at 33.

65. Jaffe & Smith, *supra* note 50, at 13-20.

66. 42 U.S.C. § 3604(f)(3)(B) (1988).

dences. In fact, it does not even mention zoning or community residences. However, the legislative history clearly shows that Congress intended for the FHAA to eliminate the zoning obstacles cities impose on community residences locating in residential districts, particularly single-family zones:

> These new subsections would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.
>
> The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.[67]

At a minimum, this legislative history appears to spell the death knell for the exclusionary practice of requiring a special use permit for group homes in single-family districts. At least one respected advocacy organization and several state attorney generals contend that this language was intended to absolutely prohibit any zoning provisions that treat group homes even the slightest bit differently than other residential land uses. These individuals make an impassioned argument that the statutory language even disallows the rationally-based requirements for spacing between group homes, for licensing and for the use of administrative occupancy permits.[68] Contrary to this position, however, cities may have valid reasons for imposing these spacing, licensing and permit requirements. Moreover, the legislative history suggests that such regulations based on fact, not fiction, may be legal. The paragraph that follows from the House Committee Report suggests

67. H.R. REP. NO. 711, 100th Cong., 2d Sess. 311 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173.

68. *See* BONNIE MILSTEIN ET AL., THE FAIR HOUSING AMENDMENTS ACT OF 1988: WHAT IT MEANS FOR PEOPLE WITH MENTAL DISABILITIES (Mental Health Law Project 1989) (arguing against rationally-based spacing requirements).

that municipalities can impose rationally-based zoning regulations on community residences:

> Another method of making housing unavailable has been the application or enforcement of otherwise neutral rules and regulations on health, safety, and land-use in a manner which discriminates against people with disabilities. Such discrimination *often results from false or over-protective assumptions* about the needs of handicapped people, as well as *unfounded fears of difficulties* about the problems that their tenancies may pose. These and similar practices would be prohibited.[69]

The next section of this Article examines and attempts to reconcile the various ways courts have interpreted the FHAA's legislative history and statutory language.

IX. FHAA CASE LAW

In 1995, the Supreme Court issued an opinion in *Edmonds v. Washington State Building Code Council*[70] that appears to ameliorate the exclusionary impacts of localities defining "family" in zoning ordinances in such a way as to cap the number of unrelated people who can dwell together.[71] Edmonds, Washington, a Seattle suburb, sought to evict an Oxford House community residence that had located in a single-family district. An Oxford House serves as a home to ten to twelve same-sex adults recovering from drug or alcohol addictions. Unlike a halfway house, Oxford House does not limit how long someone can live there. Residents run the house themselves in a family-like manner without staff. Each Oxford House needs ten to twelve residents for financial and therapeutic reasons.

Edmonds' zoning ordinance did not allow community residences of any kind. To force out Oxford House, the city sought to enforce its definition of "family," which allows no more than five unrelated people to occupy a dwelling unit in single-family districts, but allows any number of related persons to dwell together. The city contended that its zoning definition of "family" was exempt from the FHAA based on an FHAA provision that states "[n]othing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[72] The city claimed that the House Judiciary Committee's report on the

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69. H.R. REP. NO. 711, 100th Cong. 2d Sess. 335 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173 (emphasis added).

70. 115 S. Ct. 1776 (1995).

71. *Id.* at 1778-83.

72. 42 U.S.C. § 3607(b)(1) (1988).

Fair Housing Amendments Act intended this provision to exempt local zoning laws from the act:

> These provisions are not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by government would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap, or familial status.[73]

The Committee apparently was writing about housing codes, not zoning ordinances. But that fact did not preclude the City of Edmonds from trying to confound its zoning code's definition of "family" and its housing code provisions that limit the maximum number of occupants allowed in a dwelling based on floor area. Only two courts had accepted this argument, most notably the Eleventh Circuit in *Elliott v. City of Athens*.[74]

Prior to the Supreme Court's resolution of the case, the Court of Appeals for the Ninth Circuit rejected the City's arguments and held in favor of Oxford House.[75] Specifically, the Court of Appeals found that courts should construe exemptions to the Fair Housing Act narrowly and, further, that the plain language of the act is generally controlling.[76] The Court concluded that exempting Edmonds' zoning provisions from the Fair Housing Act would "contravene the [House Judiciary Committee] report's directive that exempted restrictions apply to all occupants."[77] The court did conclude that the city's housing code requirement that sleeping rooms have at least seventy square feet of floor area is a valid exception to the Fair Housing Act since it applied to all dwellings.[78]

The Ninth Circuit looked further at the House Judiciary Committee's report and recognized its directive that the Fair Housing Act applies to zoning restrictions which may have the effect of discriminating against people with handicaps. The act places an "affirmative duty" on jurisdictions to "reasonably accom-

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73. H.R. REP. NO. 711, 100th Cong., 2d Sess. 374 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2192.

74. 960 F.2d 975 (11th Cir.), *cert denied*, 113 S. Ct. 376 (1992).

75. City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 806 (9th Cir. 1994).

76. *Id.* at 804.

77. *Id.* at 805.

78. *Id.*

modate handicapped persons."[79] To exempt Edmonds' zoning as an occupancy restriction would undermine the purposes of the Fair Housing Amendments Act. Many cities in this country have adopted similar use restrictions.[80] Applying the exemption would insulate these single-family residential zones from the FHAA protections. Courts must ask whether a city's zoning satisfies the FHAA standards, or whether a city has to alter neutral zoning policies to reasonably accommodate and integrate handicapped persons. The answers will vary depending on the facts of a given case. However, we must pose these questions to avoid frustrating the policies of the FHAA.[81]

In *Edmonds*, the Ninth Circuit rejected the reasoning in *Elliott v. City of Athens*.[82] In *Elliott*, the Eleventh Circuit incorrectly tried to decide whether the city's ordinance could withstand a constitutional challenge similar to the challenge brought by unrelated persons in *Belle Terre v. Borass*.[83] According to the Ninth Circuit, the pertinent issue is:

> . . . [w]hether Congress intended to apply the substantive standards of the FHAA to the ordinance. The legislative history and purposes of the FHAA demonstrate that Congress intended city zoning policies to reasonably accommodate handicapped persons. This can require something more than the enactment of a minimally constitutional and facially neutral zoning ordinance. Edmonds must satisfy the FHAA standards. Accordingly, we conclude that Edmonds' single-family use restriction in not exempted. Section 3607(b)(1) only exempts occupancy restrictions that apply to all occupants, whether related or not.[84]

The United States Supreme Court, in its resolution of the case, clarified the issue: "[t]he sole question before the Court is whether Edmonds' family composition rule qualifies as 'a restriction regarding the maximum number of occupants permitted to occupy a dwelling' within the meaning of the FHA's absolute exemption."[85] Writing for the six-justice majority, Justice Ginsburg explained that, in accord with precedent, the Court would read any exemption to the Fair Housing Act narrowly. As she emphasizes, the

79. *Id.* at 806.

80. See Moore v. East Cleveland, 431 U.S. 494, 495-96 (1977), and *Elliott*, 960 F.2d at 980, for examples these type of use restrictions.

81. *Edmonds*, 18 F.3d at 806.

82. *See id.* (rejecting the Eleventh Circuit's opinion in *Elliot*, 960 F.2d at 980).

83. *Elliot*, 960 F.2d at 980 (examining Village of Belle Terre v. Borass, 416 U.S. 1, 9 (1974)).

84. *Edmonds*, 18 F.3d at 806-07.

85. City of Edmonds v. Oxford House, 115 S. Ct. 1776, 1780 (1995).

Court is deciding only a "threshold" question.[86] The Court held that "rules that cap the total number of occupants . . . fall within § 3607(b)(1)'s absolute exemption from the FHA's governance. . . ."[87] Thus, the Court held that the FHA does not exempt prescriptions designed to foster the family character of a neighborhood.[88]

The Court recognized that Oxford House needs "8 to 12 residents to be financially and therapeutically viable."[89] The Court noted that Congress enacted § 3607(b)(1) of the FHA "against the backdrop of an evident distinction between municipal land use restrictions and maximum occupancy standards."[90] Justice Ginsburg distinguished between occupancy restrictions and land use restrictions. According to Justice Ginsburg, occupancy restrictions include housing codes that "ordinarily apply uniformly to *all* residents of *all* dwelling units . . . to protect health and safety by preventing dwelling overcrowding."[91] Edmonds' definition of "family" is a family composition rule typically tied to land use restrictions — most certainly not a restriction regarding "the maximum number of occupants permitted to occupy a dwelling."[92] The Court held:

> In sum, rules that cap the total number of occupants in order to prevent overcrowding of a dwelling "plainly and unmistakably," see A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945), fall within §3607(b)(1)'s absolute exemption from the FHA's governance; rules designed to preserve the family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants living quarters can contain, do not.[93]

The Court found that Edmonds' definition of "family" did not address the question of the maximum number of occupants permitted in a house. As long as the occupants were related by marriage, genetics or adoption, any number of people could live in a house without offending Edmonds' family composition rule. Family living, not living space per occupant, is what Edmonds' definition of "family" describes.[94] However, the Court stressed that *Edmonds* dealt with a "threshold issue" and that the lower courts

86. *Id.* at 1783.
87. *Id.* at 1782.
88. *Id.*
89. *Id.* at 1779.
90. *Id.* at 1780.
91. *Id.* at 1781 (emphasis added).
92. *Id.* at 1782.
93. *Id.*
94. *See id.* (comparing regulations intended to address family living with those limiting living space per occupant).

must determine whether Edmonds' actions against Oxford House violated the FHA's prohibitions against discrimination. A scenario in which the district court could rule otherwise is hard to imagine.

The Court emphasized that the sole issue in *Edmonds* was whether the zoning ordinance's "family composition" rule was exempt from the FHAA. However, the rationale the Court employed to arrived at its decision will have consequences for those charged with writing zoning provisions for community residences and for courts that interpret them. Despite intense arguments by the City of Edmonds and its amici to keep the Court from ever considering the act's legislative history, the Court turned to the FHAA's legislative history to interpret the act. Consequently, people drafting zoning provisions for community residences should pay close attention to the FHAA's legislative history.

A. Case law prior to enactment of the FHAA

A brief review of the case law on community residences for people with disabilities prior to enactment of the FHAA in 1988 sheds further light on FHAA congressional intent. Those who have sought to exclude community residences from single-family zoning districts often rely on the United States Supreme Court's decision in *Village of Belle Terre v. Borass*,[95] to justify their exclusion from the neighborhoods in which community residences must locate to achieve their main goals: normalization and community integration. In *Belle Terre*, the Court upheld a resort community's zoning definition of "family" that allowed no more than two unrelated persons to live together.[96] The Court expressed a valid concern that the specter of "boarding houses, fraternity houses, and the like" would pose a threat to establishing "[a] quiet place where yards are wide, people few, and motor vehicles restricted. . . ."[97] The Court added that these goals "are legitimate guidelines in a land-use project addressed to family needs."[98] However, unlike *Belle Terre*, where six sociology students rented a house on Long Island for summer vacation, a community residence emulates a family, is not a home for transients and is very much the antithesis of an institution. In fact, community residences for people with disabilities foster the same goals that zoning ordinances and courts attribute to single-family zoning districts.

The *Belle Terre* Court certainly left the door open for allowing

95. 416 U.S. 1 (1974).
96. *Id.* at 7-9.
97. *Id.* at 9.
98. *Id.*

community residences in single-family districts. In dictum, *Belle Terre* suggests that a restrictive ordinance may not ban a proposed use where the use will not "work any injury, inconvenience or annoyance to the community, the district or to any person."[99] All the factual research on community residences clearly indicate that they generate no adverse impacts on the community, at least as long as they are licensed and not clustered together on the same block.[100] Consequently, community residences for persons with disabilities fit within the Court's dictum in *Belle Terre*.

Since 1974, the lower courts have recognized this point. When *Belle Terre* was decided, community residences were a new concept and few municipal zoning ordinances allowed or even specifically addressed group homes. As the majority of lower courts have consistently found in the twenty-two years since *Belle Terre*, community residences for people with disabilities function as "families," advance the aims of single-family zoning districts and should be allowed in single-family zoning districts despite zoning restrictions on the number of unrelated individuals per dwelling unit.

One of the first community residence cases to distinguish *Belle Terre* also clearly explained the difference between community residences and other group living arrangements. In *City of White Plains v. Ferraioli*,[101] New York's highest court refused to enforce a definition of "family" that limited occupancy of single-family dwellings to related individuals against a community residence for abandoned and neglected children.[102] The court found that: "[i]t is significant that the group home is structured as a single housekeeping unit and is, to all outward appearances, a relatively normal, stable, and permanent family unit. . . ."[103] Moreover, the court found that:

> The group home is not, for purposes of a zoning ordinance, a temporary living arrangement as would be a group of college students sharing a house and commuting to a nearby school. Every year or so, different college students would come to take the place of those before them. There would be none of the permanency of community that characterizes a residential neighborhood of private homes. Nor is it like the so-called "commune" style of living. The group home is a permanent arrangement and akin to the traditional family, which

99. *Id.* at 7 (citing State ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928)). *See also* 2 RATHKOPF, THE LAW OF ZONING AND PLANNING § 17A-60 (1994) (discussing the validity of restrictive ordinances).

100. See *supra* notes 50-51 and accompanying text (describing the actual impacts of community residences on the surrounding neighborhood).

101. 313 N.E.2d 756 (N.Y. 1974).

102. *Id.* at 758-59.

103. *Id.* at 758.

> also may be sundered by death, divorce, or emancipation of the young. . . . The purpose is to emulate the traditional family and not to introduce a different "life style."[104]

The New York Court of Appeals went on to explain that the group home does not conflict with the character of the single-family neighborhood that *Belle Terre* sought to protect "and, indeed, is deliberately designed to conform with it."[105]

In *Moore v. City of East Cleveland*,[106] Justice Stevens favorably cited *White Plains* in his concurring opinion.[107] He specifically referred to the New York Court of Appeals' language:

> Zoning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings. . . . So long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance. . . .[108]

Justice Stevens' focus on *White Plains* echoes the sentiments of New York Chief Justice Breitel who concluded in *White Plains* that "the purpose of the group home is to be quite the contrary of an institution and to be a home like other homes."[109]

Since 1974, the majority of state and federal courts have followed the lead of *White Plains* and have treated community residences as "functional families" that localities should allow in single-family zoning districts despite zoning ordinance definitions of "family" that restrict the number of unrelated residents in a dwelling unit.[110] In a sense, the FHAA essentially codifies the majority judicial treatment of *Edmonds*-style zoning ordinance definitions of "family."

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104. *Id.* (citation omitted).
105. *Id.*
106. 431 U.S. 494 (1977).
107. *Id.* at 517 n.9.
108. *Id.*
109. *White Plains*, 313 N.E.2d at 758.
110. Norman Williams has kept a running tally of these cases in his treatise, 2 NORMAN WILLIAMS, AMERICAN LAND PLANNING LAW § 52.12 (1987 & Supp. 1994). Over 90 judicial decisions involving community residences for people with disabilities and definitions of "family" and other zoning restrictions are cited therein. Pre-1988 decisions run three to one in favor of allowing community residences for people with disabilities in single-family districts despite restrictive definitions of "family" or requirements for a special use permit. This figure includes only those cases that involved community residences for people with disabilities, not other populations not subsequently covered by the 1988 amendments to the Fair Housing Act.

B. Reconciling Contradictory FHAA Case Law

Decisions about zoning for community residences under the FHAA are extremely fact specific. Taken individually, few of them offer any real guidance to people responsible for drafting zoning regulations for group homes and halfway houses. Many seem contradictory. Some courts have invalidated spacing distances and licensing requirements; other courts have required cities to treat community residences the same as residences occupied by biological families. Others have approved local requirements for licensing and spacing distances between community residences. Some have invalidated requirements for special use permits while others have upheld such requirements.

Some sense of these seemingly contradictory decisions appears if you classify the cases based on whether the jurisdiction's zoning definition of "family" imposes a "cap" on the number of unrelated people allowed to occupy a dwelling unit. They make even more sense when placed within the historical perspective of the body of zoning law prior to enactment of the FHAA.

1. Case Law Under the FHAA: "Capless" Family Zoning

Decades ago, most zoning ordinances allowed any number of unrelated people to live together as long as they functioned as a single housekeeping unit. Reacting to the "threat" of communes in the sixties and seventies, most municipalities changed their zoning definition of "family" to cap the number of unrelated people in a dwelling unit at five, four or even no unrelated people. As noted earlier, the United States Supreme Court upheld these restrictive definitions in *Belle Terre*.[111]

A good number of "capless" zoning ordinances remain. In these jurisdictions, any number of unrelated people can live together. Consequently, community residences should be treated as permitted uses in all residential districts simply because they comply with such definitions of "family". Imposing additional zoning requirements on a group of unrelated people who live together as a single housekeeping unit, unlike a boarding house or sorority, simply because they have a disability, amounts to a blatant violation of the FHAA. Therefore, when capless jurisdictions have sought to require a special use permit,[112] impose spacing or

111. 416 U.S. at 8-10.

112. *See* Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1341-46 (D.N.J. 1991) (invalidating the City's attempt to preclude an Oxford House from

licensing requirements[113] or impose additional requirements on groups of people with handicaps living together,[114] the courts have almost invariably invalidated these requirements as violative of the FHAA.

At least one unambiguous conclusion has emerged from FHAA decisions. When a community residence complies with the jurisdiction's definition of "family," the municipality *cannot* impose additional zoning or housing code requirements. Therefore, not surprisingly, court decisions in "capless" jurisdictions have invalidated spacing distances between community residences, requirements for a special use permit, outright prohibitions of community residences and other zoning requirements that are not imposed on *all* families.

2. *Case Law Under the FHAA: "Capped" Family Zoning*

Generally, professional city planners know that most local governments in the United States have imposed caps on the number of unrelated people that may live together in the same dwelling unit. Even under the FHAA, no court decision has required a city to give up its capped family zoning. However, a growing number of lower court decisions mandate tipping the cap a bit to enable community residences for people with disabilities to locate in the single-family zones where they belong. Although these decisions are fact specific, a few principles emerge that should guide courts and future zoning decisions.

As noted earlier, the FHAA requires cities to make a reasonable accommodation in its practices and rules to enable people with disabilities to have an equal opportunity to dwell in a home of their choice. This does not mean, however, that people with disabilities are entitled to a home in any type of structure in all

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a single-family district); Support Ministries for Persons with AIDS v. Village of Waterford, 808 F. Supp. 120, 136-38 (N.D.N.Y. 1992) (requiring city to issue the permits sought to establish home for persons with AIDS under definition of "family" as opposed to boarding house).

113. Merritt v. City of Dayton, No. C-3-91-448 (S.D. Ohio Apr. 7, 1994) (rejecting a 3000-foot spacing requirement where home met definition of "family").

114. Marbrunak, Inc. v. City of Stow, 974 F.2d 43 (6th Cir. 1992). This case involved parents of four grown women with developmental disabilities who established a "family consortium" house as a permanent residence for their daughters with support staff in a single-family district. *Id.* at 44-45. The city tried to require a special use permit as a boarding house and tried to impose additional safety code requirements because the residents had developmental disabilities. *Id.* at 45. The court ruled that the home complied with the city's capless definition of "family" and, since no state license was required to operate it, the house must be treated the same as other residences. *Id.* at 47-48.

locations. But, if they can afford a house or apartment, a city cannot deny them an equal opportunity to buy or rent. For people with disabilities, this means that a jurisdiction must sufficiently bend its zoning rules and regulations to allow the establishment of enough community residences to accommodate the many people with severe disabilities who need to live in the community rather than in an institution or other less desirable environment. This does not mean cities must abandon their single-family zoning or capped definitions of "family." It only requires a "tip of the cap."

The majority of opinions hold that a city can reasonably accommodate community residences by simply not enforcing its definition of "family" or other prohibitions on community residences.[115] The courts agree that "a 'reasonable accommodation' is one which would not impose an undue hardship or burden upon the entity making the accommodation and would not undermine the basic purpose which the requirement seeks to achieve."[116] As explained earlier, more than fifty studies have shown that community residences do not produce any adverse impacts on the surrounding neighborhood and do not burden municipal or utility services more than a biological family of the same size. Hence, they pose no additional burden for the municipality.

Requiring a special use permit to locate in single-family districts does *not* constitute a reasonable accommodation. Except for an unusual decision by the Seventh Circuit in *United States v. Village of Palatine*,[117] a decision that is limited to the narrow circumstances of the case, courts have examined FHAA legislative history and recognized that the FHAA prohibits special use permits as the threshold means of regulating community residences for people with disabilities.[118] In other instances, courts have resolved cases by mandating the issuance of special use permits or other types of permits.[119] It is important to remember, however,

115. *See, e.g.*, Oxford House v. City of Virginia Beach, 825 F. Supp. 1251, 1264 (E.D. Va. 1993); Oxford House v. Township of Cherry Hill, 799 F. Supp. 450, 462 n. 25 (D.N.J. 1992); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D.N.J. 1991). *See also* North Shore-Chicago Rehabilitation, Inc. v. Village of Skokie, 827 F. Supp. 497 (N.D. Ill. 1993). Although this decision was subsequently vacated after the court learned the proposed use was a commercial treatment center and not a group home, the opinion is well-reasoned and worth noting.

116. United States v. Village of Marshall, 787 F.Supp. 872, 878 (W.D. Wis. 1991).

117. United States v. Village of Palatine, 37 F.3d 1230 (7th. Cir 1994).

118. Oxford House-C v. City of St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994); Easter Seal Soc. of New Jersey, Inc. v. Township of North Bergen, 798 F. Supp. 228 (D.N.J. 1992); Stewart B. McKinney Found., Inc. v. Town Plan and Zoning Comm'n of the Town of Fairfield, 790 F. Supp. 1197 (D. Conn. 1992).

119. In the first two cases noted here, the courts order that special use permits must be issued even though the proposed community residences would be located closer than the minimum spacing distances required between community residenc-

that these cases are very fact specific. Courts have decided several of them without addressing the question of whether cities may validly impose special use permits on community residences.

Some cases have upheld local and state requirements that community residences be licensed and located a minimum distance from any existing community residence to prevent clustering which would hinder normalization.[120] Unlike capless communities, capped jurisdictions can still regulate group homes. Court decisions strongly suggest that zoning restrictions on community residences are legal if the answer to all three of the following questions is "yes": (1) Is the proposed zoning restriction intended to achieve a legitimate government purpose? (2) Does the proposed zoning restriction actually achieve that legitimate government purpose? and, (3) Is the proposed zoning restriction the least drastic means necessary to achieve that legitimate government purpose? In *Bangerter v. Orem City Corporation*,[121] the Tenth Circuit articulated these questions a bit differently. The court stated that "[r]estrictions that are narrowly tailored to the particular individuals affected could be acceptable under the FHAA if the benefits to the handicapped in their housing opportunities clearly outweigh whatever burden may result to them."[122]

C. *Principles Governing Future Zoning Related to Community Residences*

1. *Capless Definitions of Family*

Based on the case law so far, the FHAA appears to prohibit imposing additional zoning requirements on community residences for people with disabilities when a community's definition of "fam-

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es under state law. *Village of Marshall*, 787 F. Supp. at 877; "K" Care, Inc. v. Town of Lac du Flambeau, 510 N.W.2d 697, 702 (Wis. Ct. App. 1993). *See also* United States v. City of Philadelphia, 838 F. Supp. 223, 227 (E.D. Pa. 1993) (holding that the city must issue the required yard variance for an apartment building to house homeless people who have mental illness), *aff'd mem.*, 30 F.3d 1488 (3rd Cir. 1994); Support Ministries for Persons with AIDS v. Village of Waterford, New York, 808 F. Supp. 120, 129 (N.D.N.Y. 1992) (holding city must issue the permits sought); Baxter v. City of Belleville, 720 F. Supp. 720, 729 (S.D. Ill. 1989) (holding that the city must issue the required special use permit for a hospice for people with HIV).

120. Familystyle v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991); United States v. Village of Marshall, 787 F. Supp. 872 (W.D. Wis. 1991); Charter Township of Plymouth v. Department of Soc. Services & Midwest Dev. Serv., 501 N.W.2d 186 (Mich. Ct. App. 1993); "K" Care, Inc. v. Town of Lac du Flambeau, 510 N.W.2d 697 (Wis. Ct. App. 1993).

121. 46 F.3d 1491 (10th Cir. 1995).

122. *Id.* at 1504.

ily" is capless. A capless zoning ordinance permits any number of unrelated persons to dwell together, limited only by the housing code. This principle applies to group homes as well as halfway houses and other forms of community residences.

2. Capped Definitions of Family

However, when a jurisdiction employs a capped zoning definition of "family," one that limits the number of unrelated people who may dwell together, then the city may impose rationally and factually-based zoning provisions on community residences for people protected by the FHAA. The three element test described above, coupled with what is known about the impacts of community residences, suggest that cities should employ different zoning approaches for group homes and for halfway houses, the two most common types of community residences.

Before recommending zoning treatments, it is necessary to recap six important points about community residences. First, over fifty studies establish that community residences do not generate adverse impacts on the surrounding community. As long as they are not clustered together on a block, they have no effect on property values or the rate of property turnover. They do not pose a threat to neighborhood safety nor do they affect a neighborhood any differently than a house occupied by a biological family of the same size.[123]

Second, a community residence functions like a family.[124] Its very essence is to emulate a family. The habilitation activities that occur in the home are the same activities that take place in all homes. Their goal is to achieve normalization and community integration for their residents. Consequently, a community residence, particularly for zoning purposes, performs like any other home in the neighborhood. Community residences do not have neon signs on their front lawns with an arrows pointing at the houses and flashing "Group Home."

Third, clustering community residences close to each other can hinder their ability to achieve normalization and community integration. If a community residence locates within a few lots of an existing community residence, then the role models for the people living in each group home will not be the "abled-bodied" people in the neighborhood, but other people with disabilities who

123. The parties stipulated to this fact in City of Edmonds v. Oxford House, 115 S. Ct. 1776 (1995).

124. There are some slight differences between the different types of community residences which this Article will explain subsequently.

live very nearby. Such clustering can lead to the development of an institutional atmosphere where those living in the community residences are limited to socialization primarily with people from other nearby community residences. If too many community residences cluster in a neighborhood, it becomes a *de facto* social service district, thus defeating the whole purpose of community residences.[125]

Additionally, the adverse impact of clustering may increase depending on the density of the neighborhood since a neighborhood's capacity to absorb service dependent people into its social fabric is inversely proportional to its density. Low density neighborhoods have a lower capacity to integrate service dependent individuals into their social structures. Conversely, higher density neighborhoods can absorb more service dependent people into their social structures.[126]

Fourth, people with disabilities constitute a vulnerable population subject to abuse, neglect and mistreatment. State licensing laws help assure that housing and residential programs for such individuals meet minimum standards that protect their health and safety. These goals are undoubtedly legitimate government interests.

Fifth, the FHAA requires a government to make a "reasonable accommodation" in its zoning regulations and practices for community residences. However, community residences do not have carte blanche to locate anywhere they wish. Rather, cities must employ some flexibility in administering zoning ordinances and, thus, permit community residences to locate in the residential districts in which they belong.

Sixth, cities must intend its restrictions on community residences to achieve a legitimate government interest, cities must actually achieve that interest and cities must use the least restrictive means for achieving that interest.

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125. This is exactly what happened in St. Paul, Minnesota, where the "group home" operator opened homes in 18 properties on two blocks – an extreme case, but not an isolated one. Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991).

126. Kurt Wehbring, *Alternative Residential Facilities for the Mentally Retarded and Mentally Ill* 14 (no date) (mimeographed).

X. Recommended Zoning Treatments for Community Residences

A. Zoning for Group Homes

The case law suggests that in jurisdictions where a city's definition of "family" is capped, the city must allow group homes for people with disabilities as a permitted use, as of right, in all residential districts. The city can, at most, subject the group home to the following two requirements: (1) that the proposed group home or its operator is licensed or certified by the appropriate state or federal authority; and (2) that the proposed group home is located at least one block from any existing community residence.

However, a proposed group home that fails to meet either benchmark should be eligible to seek a special use permit. If the state does not require a license for a group home, the group home should still be able to seek a special use permit. However, if the state requires a license to operate a particular type of community residence and denies the required license, then the operator should be prohibited from even applying for a special use permit.

Licensing ensures that the operator is qualified to furnish the requisite care and support services the group home residents need. Licensing also assures that the staff is qualified and properly trained and sets a minimum standard of care. The welfare of the residents of a community residence constitutes a legitimate government interest, narrowly tailored to the individuals who live in a group home, and whose benefits clearly outweigh whatever burden may result to the group home operator.

Community residences that locate too close to one another undermine their ability to achieve normalization and community integration. Clustering community residences on a block can create a *de facto* social service district and create an institutional atmosphere. A rationally-based spacing requirement benefits the protected class: people with disabilities. However, to survive a court challenge, any community that imposes a spacing or licensing requirement should first hear expert testimony that establishes a rational basis for these restrictions. In fact, courts suggest that jurisdictions that establish a strong legislative history for their restrictions on community residences have a better chance to survive challenges.

This zoning approach is the least drastic means to enable group homes for people with disabilities to locate in the single-family districts in which they belong *and* to achieve the legitimate government objectives of assuring proper care and services in the

community residence and enabling normalization and community integration to occur. The special use permit backup provision allows a city to apply the extra scrutiny that is warranted if the state does not require a license or certification, or a community residence seeks to locate close to an existing community residence. It is hard to conceive of the circumstances under which a special use permit could be legally denied unless the proposed group home would be located within a few lots of an existing community residence or the operator is found to pose a threat to the residents of the proposed home.

B. Zoning for Halfway Houses

From a zoning perspective, halfway houses perform more like multiple-family housing than single-family housing. Unlike group homes, halfway houses do not emulate a family, they billet many more people and they limit the length of residency. Consequently, cities should allow halfway houses as of right in all multiple-family zones subject to the same licensing and spacing criteria as described above for group homes, with a special use permit backup. Cities should allow halfway houses in all single-family zones by special use permit since their multiple-family characteristics warrant the extra scrutiny that the special use permit process provides.

C. Restricting the Number of Occupants

One of the thorny issues in regulating community residences is the question of how many people may occupy the dwelling. Six years ago, I wrongly advocated allowing localities to divide community residences into two classifications based on the number of residents:[127] group homes for up to eight individuals would be allowed as of right in single-family districts, while homes for nine to sixteen persons would be allowed as of right in multiple-family zones and by special use permit in single-family districts. This recommended zoning treatment was wrong.

Based on the direction suggested in *Edmonds* and other cases, plus the principles of sound land-use regulation, the proper vehicle for regulating the number of residents in community residences is the housing code, not the zoning ordinance. Arbitrary limits on the number of people living in a group home in a single-

127. DANIEL LAUBER, COMMUNITY RESIDENCE LOCATION PLANNING ACT COMPLIANCE GUIDEBOOK 39 (Ill. Planning Council on Developmental Disabilities May 1990).

family zone would place a restriction on group homes that goes beyond the general housing code applicable to all dwellings. No legitimate government interest is served by such a restriction. What possible legitimate government interest is served by prohibiting ten people with disabilities from living in a house in which ten people without disabilities are allowed to live?

However, in the real world, many elected officials feel compelled to impose some limit on the number of people who can live in a community residence. If they cannot control this impulse, they should set the ceiling somewhere between twelve and fifteen individuals, probably in the zoning ordinance definition of "community residence." Once you go beyond that range, it can be argued with considerable force that the setting shifts from residential to institutional. The precise point at which this shift occurs is uncertain. However, licensing regulations used throughout the country suggest that the upper limit falls somewhere between twelve and fifteen. In arriving at their rulings in FHAA community residence cases, the courts have generally taken into account the number of residents needed for a community residence to succeed therapeutically and financially. As the Supreme Court found in *Edmonds*, some community residences need twelve residents to succeed financially and therapeutically.[128] Remember, however, that the jurisdiction's housing code will restrict the permissible number of occupants in a community residence regardless of how many residents the zoning ordinance allows.

CONCLUSION

Community residences provide an important housing option for people with disabilities. As the care of people with disabilities continues to shift from institutional to residential settings, the need for community residences will continue to grow. The mandates of the Fair Housing Amendments Act of 1988 require local and state governments to make reasonable accommodations in their zoning codes to enable community residences to locate in the residential districts where they belong.

A decade ago I wrote that the United States Supreme Court's decision in *City of Cleburne v. Cleburne Living Center*[129] would change the way cities zone for community residences.[130] I underestimated the local resistance to community living arrangements for people with disabilities spawned by ignorance, prejudice and a

128. City of Edmonds v. Oxford House, 115 S. Ct. 1776, 1779 (1995).
129. 105 S. Ct. 3249 (1985).
130. Daniel Lauber, *Mainstreaming Group Homes*, *in* PLANNING 14 (Dec. 1985).

misunderstanding of the purposes of zoning.

It is not wise to get into the habit of making predictions every ten years. However, it would be prudent for our local governments to stop yielding to unfounded fears and myths about community residences and to stop implementing exclusionary zoning practices that discriminate against persons with disabilities who seek housing through community residences. Hopefully, there will be no need for articles like this come the year 2006.