Law Office Daniel Lauber

Law Office of Daniel Lauber

River Forest, Illinois 60305 708/366-5200

Email: dan@lauber.law http://www.grouphomes.law

Author Daniel Lauber can be reached at the Law Office of Daniel Lauber and Planning/Communications

708/366–5200

CAUTION:
To survive a court challenge, before adopting the zoning approach this article recommends, a jurisdiction ***must*** first conduct a proper study to factually document the basis for regulating community residences in the manner suggested by this article.

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A REAL LULU: ZONING FOR GROUP HOMES AND HALFWAY HOUSES UNDER THE FAIR HOUSING AMENDMENTS ACT OF 1988

Daniel Lauber

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Websites:
http://lauber.law
http://grouphomes.law
http://planningcommunications.com

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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

* Mr. Lauber is President of Planning/Communications in River Forest, Illinois. A certified planner as well as an attorney, Mr. Lauber specializes in zoning for community residences. He is a past president of the American Planning Association and the American Institute of Certified Planners and a former chairperson of the American Bar Association's Subcommittee on Group Homes and Congregate Living. He received a B.A. in sociology from the University of Chicago in 1970, a Masters of Urban and Regional Planning from the University of Illinois-Urbana in 1972 and a J.D. from Northwestern University School of Law in 1985.

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-

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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

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:
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> (A) is attributable to a mental or physical impairment or combination of mental and physical impairments;
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> (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 REVIEW 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

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

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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-

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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

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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.

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.

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-

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

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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

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."

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

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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

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-

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

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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.

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.