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# FEDERAL FAIR HOUSING ACT

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**Karen A. Aviles**

**Technical Services Report No. 7  
Rocky Mountain Land Use Institute**



**College of Law  
University of Denver**

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## ***Federal Fair Housing Act, Local Zoning and the Siting of Group Homes***

**Karen A. Aviles  
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## FEDERAL FAIR HOUSING ACT, LOCAL ZONING AND THE SITING OF GROUP HOMES

In 1988 Congress passed the Fair Housing Amendments Act (the "FHAA" or "Act"), extending the protection of Title VIII of the Civil Rights Act of 1968 to prohibit discrimination in housing based on handicap or familial status. In addressing many of the substantive issues raised by the FHAA the courts are divided. This split among the courts often raises more questions about the application of the Act than are answered and makes the impact of the Act difficult to gauge. However, two things are clear: the FHAA affects a wide range of persons including service providers, handicapped individuals, zoning officials, local legislators, neighborhood activists, realtors and individual home owners; and the FHAA has affected, and will continue to affect, local zoning as it relates to the siting of non-traditional housing such as group homes, homeless shelters, and housing for the elderly.

This report will first review the language, intent and procedures of the FHAA itself. Next is a discussion of the three methods proving a violation of the Act: discriminatory intent, discriminatory effect, and failure to make reasonable accommodations. Finally, this report examines the current and future impacts of the FHAA on traditional local zoning laws including permit requirements and conditions, notice and hearing requirements, spacing requirements, and limits on the number of unrelated persons.

### A REVIEW OF THE FAIR HOUSING AMENDMENTS ACT

The Fair Housing Act, originally enacted as Title VIII of the Civil Rights Act of 1968, was adopted to ensure "the removal of artificial, arbitrary and unnecessary barriers [that] . . . operate invidiously to discriminate on the basis of racial or other impermissible classification[.]"<sup>1</sup> This goal was enlarged in 1988 with the passage of the Fair Housing Amendments Act, which expanded the federal government's enforcement powers and extended the Act's coverage to two new classes: the handicapped and families with children.

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<sup>1</sup> United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430-431 (1971)).

### ***The Fair Housing Act Amendments***

The Fair Housing Amendments Act,<sup>2</sup> was designed to increase housing opportunities for the handicapped and families with children by prohibiting discriminatory housing practices. A person with a handicap is defined as a person who has a physical or mental impairment which substantially limits one or more of the major life activities of such person; or a person who has a record of such impairment; or a person who is regarded as having such an impairment.<sup>3</sup> The term does not include a current illegal use of, or addiction to, a controlled substance.<sup>4</sup> However, "recovering" alcoholics and addicts of controlled substances are handicapped under the FHAA, as are the elderly.<sup>5</sup>

### ***Prohibitions***

The core of the FHAA is found at 42 U.S.C. § 3604, which generally prohibits discrimination in the sale or rental of housing, or discrimination against a person in housing on the basis of race, color, religion, sex, familial status, national origin or handicap. The most far reaching provision of this part of the FHAA is 42 U.S.C. § 3604(f)(1), which makes it unlawful:

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable, or deny, a dwelling to any buyer or renter because of a handicap of—

- (A) that buyer or renter,
- (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
- (C) any person associated with that buyer or renter (emphasis added).

Local zoning laws are most often challenged under this subsection. Many typical zoning requirements for non-traditional housing arrangements for the

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<sup>2</sup> 42 U.S.C. §§ 3601-3631.

<sup>3</sup> 42 U.S.C. § 3602(h).

<sup>4</sup> United States v. Southern Management Corp., 955 F.2d 914, 922-923 (4th Cir. 1992).

<sup>5</sup> See Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252 (1st Cir. 1993); Cherry Hills Township v. Oxford House, Inc., 621 A.2d 952, 965-966 (N.J. Super. A.D. 1993); Potomac Group Home Corp. v. Montgomery County, Md., 823 F. Supp. 1285, 1294 (D. Md. 1993); United States v. City of Philadelphia, Pa., 838 F. Supp. 223 (E.D. Pa. 1993) aff'd, 30 F.3d 1488 (3rd Cir. 1994).



handicapped, such as special permits, spacing requirements and limits on the number of unrelated persons to occupy a house in certain zone districts, may run afoul of this FHAA provision if those requirements operate to deny, or make unavailable, housing to the handicapped. The impact of the Act on these local zoning techniques is discussed in Part III of this report.

Local zoning laws are also being challenged under section 3604(f)(3)(B), which makes it illegal to refuse to make "reasonable accommodations" in order to facilitate a handicapped person's use and enjoyment of a dwelling. Issues involving reasonable accommodations are discussed in Part III of this report.

The FHAA also prohibits discrimination in residential real estate transactions<sup>6</sup> and in the provision of brokerage services.<sup>7</sup>

### ***Exemptions***

There are several exemptions from the FHAA. First, the sale or rental of a single-family house by an owner, provided the owner does not own more than three such single-family houses, and the sale or rental of units in a multi-family dwelling involving a building of four or less units, provided the owner lives in one of the units, are exempt from the Act.<sup>8</sup> This provision exempts many private real estate transactions.

Second, the Act does not require that housing be made available to an individual whose tenancy would constitute a direct threat to the health or safety of others or whose tenancy would result in substantial physical damage to the property of others.<sup>9</sup> Some screening of tenants or buyers for legitimate health and safety reasons, such as history of criminal activity seems to be allowed,<sup>10</sup> although the issue has not been fully addressed by the courts.

Third, nothing in the Act limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling, nor does any provision regarding familial status apply with respect to housing for the elderly.<sup>11</sup> This exemption was recently tested in City of Edmonds

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<sup>6</sup> 42 U.S.C. § 3605(a)

<sup>7</sup> 42 U.S.C. § 3606

<sup>8</sup> 42 U.S.C. § 3603.

<sup>9</sup> 42 U.S.C. § 3604(f)(9). See also Bangerter v. Orem City Corp., 46 F.2d 1491, 1503 (10th Cir. 1995).

<sup>10</sup> Talley v. Lane, 13 F.3d 1031, 1034 (7th Cir. 1994).

<sup>11</sup> 42 U.S.C. § 3607(b)(1).

v. Oxford House, Inc..<sup>12</sup> Narrowly construing the exemption in order to give full effect to the language and intent of the Act,<sup>13</sup> the Supreme Court held that this section of the FHAA does not exempt a zoning limit on the number of unrelated persons who may live in a single-family residence. The Court remanded the case to determine if such zoning provision violated the FHAA. As discussed in Part III below, although the Supreme Court's decision was narrow, the issues on remand could affect the traditional concept of the single-family zone district.

### ***Congressional Intent***

In enacting the FHAA, Congress clearly intended to affect local zoning laws and practices. The intended effect of the Act on state and local laws is set forth in 42 U.S.C. § 3615.<sup>14</sup> Congress, in passing the Act, intended to prohibit zoning practices and policies based on misconceptions, ignorance, unsubstantiated fears and outright prejudices against the handicapped.<sup>15</sup> Both the language of the FHAA itself and the statements made in the House Report demonstrate that local zoning laws and practices fall within the purview of the FHAA.

### ***Enforcement of the Act***

The 1988 amendments to the Fair Housing Act enlarged the enforcement

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<sup>12</sup> \_\_\_ U.S. \_\_\_, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995).

<sup>13</sup> See also Elliott v. City of Athens, Ga., 960 F.2d 975, 978 (11th Cir. 1992); United States v. Columbia Country Club, 915 F.2d 877, 883 (3rd Cir. 1990); Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1574 (E.D. Mo. 1994).

<sup>14</sup> H. Rep. No. 100-711, 100th Cong. 2d Sess., reprinted in 1988 U.S. Code Congressional and Admin. News 2173, 2184-85 ("House Report")

Nothing in this subchapter shall be constructed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

<sup>15</sup> 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 individuals to live in the residence of their choice in the community. . . .

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 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 people with disabilities.

powers of the Federal government. The FHAA provides that any aggrieved person<sup>16</sup> may enforce the Act through two different mechanisms. The first mechanism is private enforcement where an aggrieved person commences an action in federal or state court within two years after the alleged discrimination.<sup>17</sup>

The second mechanism is administrative enforcement through the Department of Housing and Urban Development ("HUD") and the Department of Justice. Pursuant to 42 U.S.C. §§ 3610 and 3612, an aggrieved person or HUD may file a complaint with the Secretary of HUD. In most cases, HUD investigates and attempts to conciliate the complaint. If conciliation is not successful, HUD makes a "Determination of Reasonable Cause and Charge of Discrimination", or a "Determination of No Reasonable Cause". If a Charge is issued, the parties may elect to have the case heard before a HUD Administrative Law Judge or by the Federal District Court.

If the matter being investigated involves the legality of any State or local land use law, HUD refers the matter to the Attorney General for appropriate action rather than making a Determination and issuing a Charge. Upon referral from HUD, the Attorney General may file an action in federal court seeking injunctive and other relief, including invalidation of the law, monetary damages to the aggrieved party, attorney's fees, costs, and a civil penalty in order to vindicate the public interest.<sup>18</sup> Actions involving land use laws must be filed in Federal court within eighteen months of the alleged discrimination.<sup>19</sup>

Standing to bring a claim under the FHAA is as broad as allowed under Article III of the United States Constitution.<sup>20</sup> In order to bring a claim, the plaintiff need only show: (1) the plaintiff has suffered a direct or imminent injury in fact; (2) there is a causal connection between the injury and the defendant's conduct; and (3) there is a likelihood that the injury will be redressed by a favorable decision.<sup>21</sup> Although standing is broad, interesting standing issues continue to arise, especially where

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<sup>16</sup> 42 U.S.C. § 3602(i) defines "aggrieved person" as (1) any person who claims to have been injured by a discriminatory housing practice, or (2) any person who believes such person will be injured by a discriminatory housing practice about to occur.

<sup>17</sup> 42 U.S.C. § 3613.

<sup>18</sup> 42 U.S.C. § 3614.

<sup>19</sup> 42 U.S.C. § 3610(g)(2)(c).

<sup>20</sup> See Bangerter v. Orem City Corp., 46 F.3d 1491, 1497 (10th Cir. 1995); Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1537 (11th Cir. 1994).

<sup>21</sup> DeBolt v. Espy, 47 F.3d 777, 779 (6th Cir. 1995).

someone, other than the handicapped individual, brings an action under the FHAA.

### ***Proving a Violation Under the FHAA***

There are three different methods for proving a violation of the FHAA: discriminatory intent, discriminatory effect, and failure to make reasonable accommodations.<sup>22</sup>

#### ***Discriminatory Intent***

A violation of the FHAA may be proved by demonstrating that the defendant intentionally treated protected persons in an unfavorable manner. If a statement, policy, ordinance or other activity of the defendant, on its face, treats persons differently, discriminatory intent may be found.<sup>23</sup> Intentional discrimination may include actions motivated by stereotypes, unfounded fears, misconceptions and archaic attitudes, as well as simple prejudices about people with disabilities.<sup>24</sup> Further, the plaintiff need only show that discriminatory animus was a motivating factor. There is no requirement that such intent be the sole basis for the official action.<sup>25</sup>

Intentional discrimination may also be found when public officials act in reliance on discriminatory view points of private parties.<sup>26</sup> This line of cases may

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<sup>22</sup> See generally Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995); Mountain Side Mobile Estates v. Secretary of HUD, 56 F.3d 1243, 1250 (10th Cir. 1995); Doe v. City of Butler, Pa., 892 F.2d 315, 323 (3rd Cir. 1989); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934-35 (2nd Cir.1988), aff'd, 488 U.S. 15, (1988); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-47 (3rd Cir. 1977), cert. denied, 435 U.S. 908, (1978); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); United States v. City of Black Jack, Mo., 508 F.2d 1179, 1184-85 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

<sup>23</sup> Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995).

<sup>24</sup> See United States v. City of Taylor, 872 F. Supp. 423, 432 (E.D. Mich. 1995); Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1575-76 (E.D. Missouri 1994).

<sup>25</sup> See United States v. City of Parma, 661 F.2d 562, 575 (6th Cir. 1981) cert. denied, 456 U.S. 926 (1982); United States v. City of Taylor, 872 F. Supp. 423, 429 (E.D. Mich. 1995) (on remand); Potomac Group Home Corp. v. Montgomery County, Md., 823 F. Supp. 1285, 1295 (D. Md. 1993); Stewart B. McKinney Foundation, Inc. v. Town Plan. and Zoning Com'n of Town of Fairfield, 790 F. Supp. 1197, 1211 (D. Conn. 1992).

<sup>26</sup> Casa Marie Inc. v. Superior Court of Puerto Rico, 988 F.2d 252, 269 (1st Cir. 1993); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 150 (3rd Cir. 1977), cert. denied, 435 U.S. 908 (1978); Stewart B. McKinney Foundation, Inc. v. Town Plan. and Zoning Com'n of Town of Fairfield, 790 F. Supp. 1197, 1212 (D. Conn. 1992); Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, N.Y., 808 F. Supp. 120, 134 (N. D. N.Y. 1992); United States v. Borough of Audubon, N.J., 797 F. Supp. 353, 361 (D. N.J. 1991), aff'd, 968 F.2d 14 (3rd Cir. 1992); United States v. Yonkers Board of Ed., 624 F. Supp. 1276, 1307 (S.D. N.Y. 1985), aff'd, 837 F.2d 1181 (2nd Cir. 1987), cert. denied, 486 U.S. 1055 (1988).

have significant impact on local governments where, although the public officials themselves made no discriminatory statements, the record at zoning and other public hearings is replete with discriminatory comments by the general public. While such comments cannot be controlled, they may serve as a basis to invalidate the official action and may lead to the imposition of a civil penalty.

Even where direct evidence of discrimination is absent, discriminatory intent may be inferred. Courts will examine such factors as the historical and legislative background of the action, the sequence of events leading up to the action, departure from normal procedural or substantive criteria, and the degree of discriminatory effect to determine if discriminatory intent may be inferred.<sup>27</sup> Based on the totality of facts and events, intentional discrimination may be found and the action invalidated under the FHAA.

### ***Discriminatory Effect***

#### **(a) Test**

A violation of the FHAA may be established if a policy had a significant disparate effect on a protected group, despite the lack of a showing of intentional discrimination.<sup>28</sup> However, not every action that produces a discriminatory effect is illegal. The courts have developed a test for determining whether conduct which produces a discriminatory effect, but which did not have a discriminatory intent, violates the FHAA.<sup>29</sup>

- (1) how strong is the plaintiff's showing of discriminatory effect; and
- (2) is there some evidence of discriminatory intent; and
- (3) what is the defendant's interest in taking the action complained of; and
- (4) does plaintiff seek to compel the defendant to affirmatively provide housing or merely to restrain the defendant from interfering with private provision of housing.

The four part test articulated by the Seventh Circuit in Arlington II has been

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<sup>27</sup> United States v. City of Taylor, 872 F. Supp. 423, 429 (E.D. Mich. 1995).

<sup>28</sup> Mountain Side Mobile Estates v. Secretary of HUD, 56 F.3d 1243, 1250 (10th Cir. 1995); Arthur v. City of Toledo, Ohio, 782 F.2d 565, 574 (6th Cir. 1986).

<sup>29</sup> Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978) ("Arlington II").

adopted by the Fourth Circuit.<sup>30</sup> The Sixth and Tenth Circuits use a three-part test, declining to adopt the second Arlington II factor concerning some evidence of discriminatory intent.<sup>31</sup>

Once the plaintiff has made a prima facie showing of discriminatory effect, the burden shifts to the defendant to justify the discriminatory effect that resulted from its challenged action.<sup>32</sup> If the defendant fails to justify its action, a violation of the FHAA will be found.

(b) Burden of Proof and Level of Scrutiny.

There is a split among the Circuit Courts as to what constitutes a valid justification for the disputed action and the level of scrutiny to give the defendant's justification, especially when there is a governmental defendant. Congress indicated that the FHAA allows reasonable governmental limitations so long as the limits are imposed on all groups and do not discriminate on the basis of handicap.<sup>33</sup> In considering a defendant's justification, the Eighth Circuit requires that the governmental conduct was necessary to promote a governmental interest commensurate with the level of scrutiny afforded the class of people affected by the law under the equal protection clause.<sup>34</sup> In Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.,<sup>35</sup> the Eighth Circuit held that the appropriate level of scrutiny in FHAA cases involving handicapped individuals was announced in City of Cleburne v. Cleburne Living Center.<sup>36</sup> The Supreme Court in Cleburne held that persons suffering from mental retardation do not constitute a suspect class and therefore the governmental defendant need only show that the action is rationally related to a legitimate governmental purpose. The Eighth Circuit has adopted this equal protection analysis for FHAA claims.

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<sup>30</sup> Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982). See also, Baxter v. City of Belleville, Ill., 720 F. Supp. 720 (S.D. Ill. 1989).

<sup>31</sup> Mountain Side Mobile Estates v. Secretary of HUD, 56 F.3d 1243, 1252 (10th Cir. 1995); Arthur v. City of Toledo Ohio, 782 F.2d 565, 575 (6th Cir. 1986).

<sup>32</sup> Mountain Side Mobile Estates v. Secretary of HUD, 56 F.3d 1243, 1252 (10th Cir. 1995); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 (3rd Cir. 1977), cert. denied 435 U.S. 908 (1978); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1182 (E.D. N.Y. 1993).

<sup>33</sup> House Report at 2184-85.

<sup>34</sup> United States v. City of Black Jack, 508 F.2d 1179, 1185 n.4 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

<sup>35</sup> 923 F.2d 91, 94 (8th Cir. 1991).

<sup>36</sup> 473 U.S. 432, 446, 105 S.Ct. 3249, 3257 87 L.Ed.2d 313 (1985).

The Third Circuit, on the other hand, declines to apply an equal protection analysis to the FHAA.<sup>37</sup> The current Third Circuit test is that "a justification must serve, in theory and in practice, a legitimate, bona fide interest of the Title VIII [FHAA] defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."<sup>38</sup> The Second Circuit generally follows the Third Circuit test.<sup>39</sup>

The Tenth Circuit also rejects the equal protection analysis in FHAA cases.<sup>40</sup> The Bangerter court analyzed the proffered justifications to determine if they were justified by legitimate public safety concerns, were not based on stereotypes, and were narrowly tailored so that the benefits outweigh any burden which may result.<sup>41</sup>

When a non-governmental defendant is involved, courts require such private defendant simply to produce evidence of a genuine or legitimate business reason for the challenged action.<sup>42</sup> Once the non-governmental defendant has met this burden, the plaintiff must show that there are other less discriminatory policies to serve the defendant's legitimate interest.<sup>43</sup>

### ***Failure to Make Reasonable Accommodations***

A third method of proving a FHAA violation is to establish that the defendant refused to make a reasonable accommodation. Applying only to discrimination against the handicapped, 42 U.S.C. § 3604(f)(3)(B) defines a violation of the Act to include "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." To establish a violation of the reasonable accommodation provision, a plaintiff must demonstrate that the proposed accommodation is reasonable and that the accommodation is necessary to ensure an

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<sup>37</sup> Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 (3rd Cir. 1977), cert. denied, 435 U.S. 908 (1978).

<sup>38</sup> Id. at 149 (footnotes omitted). See also Ass'n for Advancement of the Mentally Handicapped v. City of Elizabeth, N.J., 876 F. Supp. 614, 622-623 (D. N.J. 1994); The Devereux Foundation v. O'Donnell, 1991 U.S. Dist. LEXIS 3188 (E.D. Pa. 1991).

<sup>39</sup> Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936-939 (2nd Cir. 1988).

<sup>40</sup> Bangerter v. Orem City Corp., 46 F.3d 1491, 1503-1504 (10th Cir. 1995).

<sup>41</sup> Id.

<sup>42</sup> Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971); Mountain Side Mobile Estates v. Secretary of HUD, 56 F.3d 1243, 1254 (10th Cir. 1995).

<sup>43</sup> Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998, 108 S.Ct. 2777, 2790, 101 L.Ed.2d 827 (1988); Mountain Side Mobile Estates v. Secretary of HUD, 56 F.3d 1243, 1254 (10th Cir. 1995).

equal housing opportunity.<sup>44</sup> In determining the reasonableness of the accommodation, courts will look at whether such accommodation would have a significant adverse impact on legislative goals or impose fiscal or administrative burdens on the governmental defendant.<sup>45</sup> This analysis must be made in light of the affirmative duty imposed by the FHAA to make reasonable accommodations.<sup>46</sup>

The Fair Housing Act and the 1988 Amendments have greatly expanded the reach of the Civil Rights Act of 1968. Although the procedures under the Act have been delineated in most Circuits, the courts are just beginning to address many of the substantive issues raised by the Act. The known and potential impacts of the Act on traditional zoning techniques used in conjunction with non-traditional housing arrangements are discussed in Part III below.

### NEIGHBORHOOD PROSPECTIVE

The preceding part of this paper reviewed the language, requirements and intent of the FHAA. Complying with the Act at the local level, however, is extremely difficult in light of the pressures placed on local public officials by neighborhoods and their voting constituents. Neighborhoods have numerous concerns over the siting of group homes and other non-traditional housing. Their concerns range from the outrageous to the legitimate; from "not in my back yard", to concerns of safety for the clients and the neighborhood, traffic impact, loss of the single-family nature of the neighborhood, businesses being run in residential areas, maintenance of the house and yard, and the adequacy of the care given.<sup>47</sup>

Neighborhood concerns fall into three general categories.<sup>48</sup> First, the over-saturation of group homes and other non-traditional housing, like the over-concentration of any use, in one area impacts the neighborhood and the clients themselves. Second, neighbors demand participation in land-use decisions which often necessitates notice and some form of public participation prior to the opening of a facility. "Sneaking" into a neighborhood is sure to raise the ire of neighbors. Third, neighbors desire to ensure that the house is well operated and maintained so

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<sup>44</sup> United States v. City of Taylor, Mich., 872 F. Supp. 423, 437 (E.D. Mich. 1995).

<sup>45</sup> Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1581 (E.D. Mo. 1994); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1186 (E.D. N.Y. 1993); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 461 (D. N.J. 1992); United States v. Village of Marshall, Wisc., 787 F. Supp. 872, 879 (W.D. Wisc. 1991).

<sup>46</sup> United States v. City of Taylor, Mich., 872 F. Supp. 423, 436 (E.D. Mich. 1995).

<sup>47</sup> See 1995 Zoning and Planning Law Handbook 398 (Alan M. Forrest ed.).

<sup>48</sup> L. Michael Henry, Esq., 1995 Rocky Mountain Land Use Institute Seminar.



as not to become a blight in the neighborhood.

Local officials must balance the requirements of the FHAA with the needs and desires of their voting public. The various zoning techniques discussed below are used to try to achieve that balance, with mixed results.

## THE IMPACT OF THE ACT ON LOCAL ZONING LAWS

### *Special Permit*

One method used by local governments to address the neighborhood concerns outlined above is requiring group homes to obtain a special permit through a process that gives neighbors notice of the proposed home and an opportunity for participation in the siting and operation of the facility. The courts are divided over whether requiring a group home to obtain a special permit violates the FHAA. Some courts have held that the FHAA does not *per se* ban special permits as long as the permit process is applied to all residences occupied by a certain number of unrelated persons, not merely the handicapped.<sup>49</sup> Other courts have held that merely having a special process constitutes discriminatory treatment and thus violates the FHAA.<sup>50</sup>

However, a careful reading of these cases could lead to a conclusion that the permit process was struck down because it only applied to group homes and not to all residences with a certain number of unrelated persons. Based on this distinction, a special permit process may be allowed if it is narrowly tailored and if it is uniformly applied to others beside the handicapped.

The special permit process also raises issues of reasonable accommodation. For example, may a special permit ever be denied or is such a denial a failure to make a reasonable accommodation? The court in Thornton v. City of Allegan,<sup>51</sup> held that the city was not required to grant a special permit as a reasonable

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<sup>49</sup> See Bangerter v. City of Orem, Corp., 46 F.3d 1491, 1499 (10th Cir. 1995); United States v. Village of Palatine, Ill., 37 F.3d 1230, 1234 (7th Cir. 1994); Thornton v. City of Allegan, 863 F. Supp. 504, 510 (W.D. Mich. 1993); Oxford House, Inc. v. City of Virginia Beach, Va., 825 F. Supp. 1251, 1263 (E.D. Va. 1993); G.H. Assoc., Inc. v. Board of Adjustment of Town of Millshore, 1991 WL 53448, 1991 Del. Super. LEXIS 127 (Del. Super. 1991).

<sup>50</sup> See Ass'n for Advancement of the Mentally Handicapped v. City of Elizabeth, N.J., 876 F. Supp. 614, 621 (D. N.J. 1994); Steward B. McKinney Foundation, Inc. v. Town Plan. and Zoning Com'n of Town of Fairfield, 790 F. Supp. 1197, 1209 (D. Conn. 1992); United States v. Schuykill Township, 1990 U.S. Dist. LEXIS 15555, 1990 WL 180980 (E.D. Pa. 1990); Ardmore v. City of Akron, 1990 WL 385236 (N.D. Ohio 1990). See also City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (although decided under Equal Protection Clause, not FHAA; the ordinance requiring special use permit for group home for mentally ill held invalid as there was no rational basis for believing that the home would pose any threat to legitimate governmental interest and ungrounded fears and biases do not create legitimate interests).

<sup>51</sup> 863 F. Supp. 504 (W.D. Mich. 1993).

accommodation.<sup>52</sup> Other courts, however have held that, although a special permit process is allowed, a city must make some reasonable accommodation as part of that process in order to comply with the FHAA.<sup>53</sup>

A question also arises as to whether a variance process constitutes a reasonable accommodation. As with most issues under the FHAA, the courts are divided. In Oxford House, Inc. v. City of Albany,<sup>54</sup> the court held that residents must apply for a variance under the city's procedures because the possibility exists that they may be reasonably accommodated through the variance process. Other courts have held that a variance process does not constitute a reasonable accommodation.<sup>55</sup> However, in many of these cases the variance process was declared insufficient because the process was too long, costly, and burdensome, and not because a variance itself would not be a reasonable accommodation. Therefore, it should be possible to devise a variance process that is a reasonable accommodation while still allowing a local government some control and neighbors some involvement in the process.

### ***Notice and Hearing Requirements***

As discussed in Part III above, neighbors want to be involved in siting group homes and in their operation. In response, local zoning laws often require that notice be given to neighbors surrounding the proposed facility and that a public hearing be held prior to opening the facility. These zoning requirements may run afoul of the FHAA.

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<sup>52</sup> Id. at 510. See also Oxford House, Inc. v. City of Virginia Beach, Va., 825 F. Supp. 1251, 1264 (E.D. Va. 1993); City of St. Joseph v. Preferred Family Healthcare, Inc., 859 S.W.2d 723, 727 (Mo. App. W.D. 1993) (allowing large group homes in some zone districts is a reasonable accommodation).

<sup>53</sup> See United States v. Village of Palatine, Ill., 37 F.3d 1230, 1234 (7th Cir. 1994) (as long as following special permit process would not be manifestly futile, the plaintiff must go through permit process and allow the Village the opportunity to make a reasonable accommodation); United States v. City of Philadelphia, Pa., 838 F. Supp. 223, 228-229 (E.D. Pa. 1993) aff'd, 30 F.3d 1488 (3rd Cir. 1994) (city violated FHAA by failing to make a reasonable accommodation of allowing side yard to satisfy rear yard requirement); United States v. City of Taylor, 872 F. Supp. 423-443 (E.D. Mich. 1995) (city failed to make a reasonable accommodation by refusing to permit a house with up to twelve residents to be located in a single family zone).

<sup>54</sup> 819 F. Supp. 1168, 1177-1179 (N.D. N.Y. 1993).

<sup>55</sup> See Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43, 46-48 (6th Cir. 1992) (city's variance procedure allowing overly broad safety requirements to be modified does not constitute a reasonable accommodation); Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1581-1582 (E.D. Mo. 1994) (variance and conditional use permit process not a reasonable accommodation as posting and public hearing stigmatized residents); Horizon House Dev. Services, Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 692-700 (E.D. Pa. 1992), aff'd 995 F.2d 217 (3rd Cir. 1993) (ability to engage in variance procedure to avoid spacing restrictions on group homes is not a reasonable accommodation).

For example, some courts have held that a mandatory notice requirement violates the FHAA on the grounds that it stigmatizes potential clients and galvanizes opposition.<sup>56</sup> Requiring a public hearing prior to issuing a permit also violates the FHAA,<sup>57</sup> although it is not clear whether a meeting or open house requirement, instead of a public hearing would be permissible. An open house would allow neighbors an opportunity to meet the operators and learn about the home without giving the neighbors a veto over the home and without stigmatizing the residents. Courts have yet to address this particular option to the public hearing requirement.

### ***Permit Conditions***

Another concern neighbors have is that the proposed home be well operated and maintained. The most common method of controlling the operation of group homes is through a licensing process. Licenses are usually issued with certain minimum requirements relating to size and staffing. However, most neighbors find that the licensing process does not sufficiently provide for their input. Further, minimum licensing requirements do not satisfy all their operational concerns. Therefore, neighbors turn to the zoning process to give them more input about the location of, and control over, the group home. The most common zoning technique used to satisfy neighborhood concerns is imposing conditions on the group home's permit. As with most other zoning provisions involving group homes, this technique has been challenged under the FHAA.

The most recent case to address the permissibility of conditions on a permit under the FHAA is Bangerter v. Orem City Corp.,<sup>58</sup> In that case, Orem imposed two conditions on a group home: twenty-four hour supervision and establishment of a community advisory board. The Tenth Circuit analyzed the conditions as part of its examination of the city's justification for the disputed action. The court found Section 3604(f)(9) authorized conditions rooted in public safety concerns by allowing housing to be denied to a tenant if the tenancy would constitute a direct threat to the public health or safety. Therefore, conditions based on public health and safety concerns appear to be allowed under the Act.<sup>59</sup>

The Bangerter Court, however, went on to caution that "[r]estrictions predicated

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<sup>56</sup> Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1581-1582 (E.D. Mo. 1994); Potomac Group Home Corp. v. Montgomery County, Md., 823 F. Supp. 1285, 1296-1297 (D. Md. 1993); Larkin v. Michigan, 883 F. Supp. 172, 176 (E.D. Mich. 1994).

<sup>57</sup> Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1581-1582 (E.D. Mo. 1994); Potomac Group Home Corp. v. Montgomery County, Md., 823 F. Supp. 1285, 1297 (D. Md. 1993).

<sup>58</sup> 46 F.3d 1491 (10th Cir. 1995).

<sup>59</sup> *Id.* at 1503.

on public safety cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents."<sup>60</sup> Generalized perceptions about disabilities and unfounded speculations about threats to safety are not sufficient.<sup>61</sup> Instead, any conditions imposed must be based on the actual needs or abilities of the individual clients.<sup>62</sup> Conditions are allowed, but they must be based on legitimate public health and safety concerns and narrowly tailored to address those concerns.

### ***Spacing Requirements***

In order to address neighborhood concerns of over-saturation of non-traditional housing arrangements in any given area, many communities have adopted "spacing" provisions. These provisions require homes to be located a certain distance apart or prohibit more than a certain number of group homes within a given radius. There are two diametrically opposed reasons for adopting spacing requirements. One reason is to keep group homes completely out of the city by making the spacing so large that very few group homes would be allowed. The other reason for spacing is to prevent over-concentration in one area and force other areas to accept group homes because the spacing requirement can be met in those areas. The first reason clearly violates the FHAA as it has both a discriminatory intent and a discriminatory effect. The second reason appears to be a legitimate justification for spacing, but may have a discriminatory effect and, therefore, may violate the FHAA.

The courts are divided over whether spacing requirements are facially invalid. The leading case to uphold spacing is Familystyle of St. Paul v. City of St. Paul.<sup>63</sup> The Familystyle court held that spacing was a justifiable means of "deinstitutionalizing" the mentally ill and integrating them into the mainstream of society.<sup>64</sup> The district court in Plymouth Charter Township v. Dept. of Soc. Services<sup>65</sup> followed Familystyle and upheld spacing requirements. Other courts, however, have

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<sup>60</sup> Id.

<sup>61</sup> House Report at 2179.

<sup>62</sup> Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43, 47 (6th Cir. 1992).

<sup>63</sup> 923 F.2d 91 (8th Cir. 1991).

<sup>64</sup> Id. at 94.

<sup>65</sup> 501 N.W.2d 186 (Mich. App.) appeal denied, 503 N.W.2d 449 (Mich. 1993),

rejected the Familystyle analysis, finding spacing requirements to be facially invalid.<sup>66</sup>

Although spacing has been upheld, even the courts following Familystyle would declare it invalid if it had the effect of preventing group homes from being located anywhere at all within the local jurisdiction.<sup>67</sup> This must be kept in mind when drafting spacing requirements and may require periodic review of those laws to ensure that sites remain within the city that meet the spacing requirements.

Spacing raises the issue of whether failing to waive such a requirement constitutes a failure to make a reasonable accommodation. Some courts have held that denying an exception to the spacing requirement constitutes a failure to make a reasonable accommodation.<sup>68</sup> On the other hand, the district court in United States v. Village of Marshall, Wisc.,<sup>69</sup> held that an exception to the spacing requirement need not be granted if the closer location would have a significant adverse impact on legitimate legislative goals or would impose an expense or burden on the locality. Courts seem willing to apply the reasonable accommodation analysis on a case-by-case basis to determine if an exception to the spacing requirement must be granted as a reasonable accommodation.

### ***Limits on Number of Unrelated Residents***

As discussed throughout this report, the FHAA has potentially far-reaching impacts on traditional zoning techniques. The furthest reaching impact may be on the traditional zoning practice of limiting the number of unrelated persons that may live in a single unit dwelling in certain zone districts.

Many zoning ordinances have some type of family occupancy restriction in certain zone districts in order to further the legitimate governmental interest of preserving the residential character of single family zone districts.<sup>70</sup> The traditional method involves limiting the occupancy of dwelling units to families or to a certain

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<sup>66</sup> See New Horizons, Inc. v. Metropolitan Gov't of Nashville and Davidson County, Fair Housing - Fair Lending ¶ 15, 637 (6th Cir. 1990); Larkin v. Michigan, 883 F. Supp. 172, 177 (E.D. Mich. 1994); Ass'n for Advancement of the Mentally Handicapped v. City of Elizabeth, N.J., 876 F. Supp. 614, 621 (D. N.J. 1994); Horizon House Dev. Services, Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 694 (E.D. Pa. 1992), aff'd 995 F.2d 217 (3rd Cir. 1993).

<sup>67</sup> See e.g., Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1291 (7th Cir. 1997), cert. denied, 434 U.S. 1025 (1978).

<sup>68</sup> "K" Care, Inc. v. Town of Lac Du Flambeau, 510 N.W.2d 697, 702 (Wis. App. 1993). See also Horizon House Dev. Services, Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 699-700 (E.D. Pa. 1992) aff'd 995 F.2d 217 (3rd Cir. 1993).

<sup>69</sup> 787 F. Supp. 872, 879 (W.D. Wisc. 1991).

<sup>70</sup> See Village of Belle Terre v. Boraas, 416 U.S. 1, 9, 94 S.Ct. 1536, 1541 (1974); Mark S. Dennison, "Occupancy Restrictions and the Fair Housing Act", Zoning News, July 1995 ("Zoning News").

number of unrelated persons.<sup>71</sup> This zoning practice of limiting occupancy in single family zone districts was approved by the United States Supreme Court in Village of Belle Terre.<sup>72</sup> The Court upheld an ordinance that limited occupancy to a family of "one or more persons related by blood, adoption or marriage", or up to two unrelated persons "living together as a single housekeeping unit". Unreasonable definitions of family have been held invalid,<sup>73</sup> but courts have generally left undisturbed definitions of family and limits on the number of unrelated persons who may live in single family zone districts when the definition is reasonably related to maintaining the residential character of the district.<sup>74</sup>

Relying on Village of Belle Terre, many communities imposed occupancy restrictions to effectively exclude non-traditional family groups, such as group homes, from single family areas.<sup>75</sup> However, this traditional zoning technique is being challenged on the grounds that limiting occupancy in single family zone districts to families, or to a certain number of unrelated persons, has a discriminatory effect on persons protected by the FHAA, especially the handicapped.

The United States Supreme Court had the opportunity to review such a restriction in City of Edmonds v. Oxford House, Inc.<sup>76</sup> Oxford House leased a dwelling in a single family zone district in Edmonds, Washington to 10 to 12 recovering substance abusers. The city issued citations for violating the zoning ordinance which only allows a family, or a group of five or fewer unrelated persons, to live in the single family zone district. It declined to grant a variance to Oxford House as a reasonable accommodation under the FHAA and filed a declaratory judgment action to determine if the zoning provision violated the FHAA. The federal district court granted summary judgment in favor of the city, ruling that the zoning provision was exempt from the FHAA as a restriction regarding the maximum number of occupants permitted to occupy a dwelling under 42 U.S.C. § 3607(b)(1). This

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<sup>71</sup> See generally, 1995 Zoning and Planning Law Handbook at § 11.04 (Alan M. Forrest ed.); Zoning News, *supra*.

<sup>72</sup> Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536 (1974).

<sup>73</sup> See Moore v. City of East Cleveland, 431 U.S. 494, 499-500, 97 S.Ct. 1932, 1936 (1977).

<sup>74</sup> See, e.g., Smith & Lee Assoc. v. City of Taylor, Mich., 13 F.3d 920, 925 (6th Cir. 1993); Baer v. Town of Brookhaven, 537 N.E.2d 619 (N.Y. 1989); Hayward v. Gaston, 542 A.2d 760 (Del. Super. 1988); Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning & Zoning Com'n, 314 S.E.2d 218 (Ga. 1984), *cert denied*, 469 U.S. 802 (1987); City of Ladue v. Horn, 720 S.W.2d 745 (Mo. App. E.D. 1986).

<sup>75</sup> Zoning News, *supra*, note 71.

<sup>76</sup> \_\_\_ U.S. \_\_\_ 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995).

decision was consistent with Elliott v. City of Athens, Ga.<sup>77</sup> The Ninth Circuit, however, reversed the district court, holding the exemption did not apply to the Edmonds zoning provision.<sup>78</sup> The Ninth Circuit's rejection of the Elliott reasoning was consistent with several lower courts.<sup>79</sup>

The United States Supreme Court granted certiorari to reconcile the split in the Circuits.<sup>80</sup> The sole question before the Court was whether the FHAA exempted zoning restrictions on the number of unrelated persons occupying a single family dwelling.<sup>81</sup> In a 6-3 decision, the Court upheld the Ninth Circuit, finding that the FHAA exemption did not apply. The majority distinguished between exempt maximum occupancy restrictions and other land-use restrictions:

In sum, rules that cap the total number of occupants in order to prevent overcrowding of a dwelling "plainly and unmistakably" [cite omitted], 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.<sup>82</sup>

In the dissent, Justice Thomas argued that the majority failed to give effect to the plain language of Section 3607(b)(1). The exemption "sweeps broadly to exempt any restrictions regarding such maximum number" and therefore is broad enough to encompass the Edmonds zoning ordinance.<sup>83</sup>

Since the ordinance was not exempt from the FHAA, the case was remanded for further proceedings to determine whether the City of Edmonds violated the FHAA by failing to make a reasonable accommodation.

The Supreme Court's holding in City of Edmonds was narrow. While zoning restrictions on the number of unrelated persons in a single-family zone district are not

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<sup>77</sup> 960 F.2d 975 (11th Cir.), cert. denied, 113 S.Ct. 376 (U.S. 1992).

<sup>78</sup> City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994).

<sup>79</sup> See Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1574 (E.D. Mo. 1994); Oxford House, Inc. v. City of Virginia Beach, Va., 825 F. Supp. 1251, 1259 (E.D. Va. 1993); Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168, 1177 (N.D. N.Y. 1993).

<sup>80</sup> City of Edmonds v. Oxford House, Inc., 115 S.Ct. 1776, 1783 (1995).

<sup>81</sup> City of Edmonds, 115 S.Ct. at 1780.

<sup>82</sup> City of Edmonds, 115 S.Ct. at 1782.

<sup>83</sup> City of Edmonds, 115 S.Ct. at 1784 (Thomas, J. dissenting) (emphasis in original).

automatically exempt from the FHAA, the Court did not hold that such restrictions are invalid *per se*. The Court essentially found that such provisions are subject to the standard FHAA analysis. Therefore, the real impact of the City of Edmonds challenge to the traditional zoning restriction on unrelated persons occupying a single family dwelling may become clearer on remand.

Several lower courts have analyzed similar zoning restrictions under the FHAA, and as with most analyses of the FHAA, the courts are divided. Some courts have found that the restriction on number of unrelated persons does not violate the FHAA where such restriction applies to all unrelated persons, not just the handicapped.<sup>84</sup> Other courts have found that even facially neutral zoning restrictions violate the FHAA if they so severely limit housing opportunities as to have a discriminatory effect.<sup>85</sup> The City of Edmonds case on remand may help clarify this issue. In the meantime, local governments should at least review their zoning laws to ensure that any restriction on the maximum number of persons to occupy a dwelling applies to all unrelated persons, not just the handicapped or other protected groups.

In addition, Congress may pass legislation to overturn the City of Edmonds decision. Senate Bill 1132 was introduced in 1995 to clarify that local governments may continue to zone areas as single family neighborhoods by limiting the number of unrelated occupants living together. This bill has been referred to the Senate Committee on Banking, Housing and Urban Affairs.<sup>86</sup> If passed, such a law would enable municipalities to continue to regulate nontraditional living arrangements by limiting the number of unrelated persons allowed to live in a dwelling. On the other hand, such legislation could gut the FHAA by exempting such zoning restrictions regardless of the impact on housing opportunities for the protected classes.<sup>87</sup>

## CONCLUSION

The Fair Housing Act and its 1988 Amendments seem simple enough on their face. However, as local governments and the courts are discovering, looks can be deceiving. Courts have addressed many procedural aspects of the Act. However,

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<sup>84</sup> See Smith & Lee Assoc. v. City of Taylor, Mich., 13 F.3d 920, 925 (6th Cir. 1993); City of St. Joseph v. Preferred Family Healthcare, Inc., 859 S.W.2d 723, 727 (Mo. App. W.D. 1993); G. H. Assoc., Inc. v. Board of Adjustment of Town of Millsboro, 1991 WL 53448, 1991 Del. Super. LEXIS 127 (Del. 1991).

<sup>85</sup> See Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1578 (E.D. Mo. 1994); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1183 (E.D. N.Y. 1993).

<sup>86</sup> S. 1132, 1995 WL 470078.

<sup>87</sup> See Matthew J. Cholewa and Dwight H. Merriam, "City of Edmonds v. Oxford House, Inc.: A Supreme Court Victory for Group Homes for the Handicapped," Zoning and Planning Law Report, July/August 1995, at 56.



because many substantive issues raised by the Act are just now being considered by the courts, because the courts are often divided on the issues that have been addressed, and because the decisions often turn on narrow factual findings, there is a lack of guidance on many aspects of the Act. The full impact of the Act on local zoning will remain uncertain until these substantive issues are more thoroughly and uniformly addressed by the courts.

## Bibliography of Cases

### A. Discriminatory Intent

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (decided under Equal Protection Clause, not FHA; city ordinance requiring special use permit for group home for mentally ill held invalid as there was no rational basis for believing that the home would pose any threat to legitimate governmental interests; ungrounded fears and biases do not create legitimate interests; mental retardation is not a quasi-suspect class and so heightened scrutiny is not required).

Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995) (in reversing district court's dismissal of the action (797 F. Supp. 918) and remanding the case, court of appeals held that conditions of permit for 24-hour supervision and neighborhood advisory committee for home for mentally ill violate FHAA unless based on public safety need that is tailored to particularized concerns about individual residents or amount to affirmative action favoring the handicapped; rejecting rational basis test used by district court and by 8th Circuit in Familystyle v. St. Paul. Discrimination may occur either by disparate treatment or disparate impact).

Jackson v. Okaloosa County, Fla., 21 F.3d 1531 (11th Cir. 1994) (reversed dismissals of plaintiffs' claims under FHAA and §§ 1981 and 1982, where public housing residents in impacted area and public housing applicant opposed siting of additional public housing in an impacted area and county had adopted policy making it more difficult to located public housing in non-impacted area; described further under "Reasonable Accommodation," infra).

Smith & Lee Associates, Inc. v. City of Taylor, Mich., 13 F.3d 920 (6th Cir. 1993) (adult foster care facility (AFC) sued city for intentional discrimination and failure to make reasonable accommodation in denying permit to operate twelve-person home in single-family zone; case remanded for determination of whether alleged history of discrimination and unequal application of ordinance constituted intentional discrimination and whether reasonable accommodation required city to spot zone or to amend facility zoning law to allow the AFC); on remand, United States v. City of Taylor, Mich., 872 F. Supp. 423 (E.D. Mich. 1995) (city intentionally discriminated against the AFC, as evidenced by city's reliance on stereotypical assumptions, its disparate application of the ordinance and discriminatory statements by city officials, despite city's previous agreement to rezone another such facility; damages and civil penalty awarded and injunction issued requiring city to amend the zoning ordinance to allow the home; described further under "Reasonable Accommodation," infra).

Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43 (6th Cir. 1992) (city violated FHAA by imposing safety requirements on group homes for developmentally disabled; FHAA allows cities to impose special safety standards on homes for the handicapped only if the protection is demonstrated to be warranted by the "unique and specific needs and abilities" of the residents; variance procedure that allows requirements to be modified does not help because procedure is overly burdensome).

Arthur v. City of Toledo, Ohio, 782 F.2d 565 (6th Cir. 1986) (referendum denying sewer extension to two low income housing projects did not violate FHA as measure was facially neutral and court will not examine voter motivation unless discrimination is the only possible motivation for the result. Adopted three part test for discriminatory effect: (1) strength of plaintiff's showing of discriminatory effect; (2) defendant's interest in taking the challenged action; (3) is defendant being compelled to provide housing or merely restrained from interfering with private owners).

United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981) cert. denied, 456 U.S. 926 (1982) (city is a person under the FHA and applying FHA to the city does not violate the 10th Amendment; city engaged in disparate treatment and violated FHA by rejecting low-income housing on basis that building permit requirements were not strictly followed when it did not require strict compliance by others and by adopting land use ordinance imposing height limits for buildings and requiring voter referenda for public or subsidized housing; described further under "Discriminatory Effect," infra).

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Larkin v. Michigan, 883 F. Supp. 172 (E.D. Mich. 1994) (state spacing and notice requirements violated the FHAA and Equal Protection and such state laws were preempted by the FHAA).

Ass'n for Advancement of the Mentally Handicapped v. City of Elizabeth, N.J., 876 F. Supp. 614 (D. N.J. 1994) (court granted partial summary judgment to plaintiffs and permanently enjoined enforcement of three facially invalid restrictions that required denial of a conditional use permit to homes for the developmentally disabled: (1) if the proposed residence is located within 1500 feet of an existing such residence, (2) if existing community residences or shelters within the township exceed the greater of 50 persons or 0.5% of the population, and (3) if proposed residence is within 1500 feet of a school or day care center; case oddly imposes burdens of disparate impact case onto disparate treatment case).

Oxford House-C v. City of St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994) (limit on number of unrelated persons is not a law on maximum occupancy so is not exempt from FHAA; by severely limiting housing opportunities for recovering addicts, intentional discrimination and disparate impact were found; described further under "Reasonable Accommodation," *infra*).

Martin v. Constance, 843 F. Supp. 1321 (E.D. Mo. 1994) (injunction granted to develop-mentally disabled adults residing in group home to enjoin enforcement of restrictive covenant that would prevent continued operation of the home; defendants' failure to put forward evidence to support their asserted fear that the property would not be maintained and their continued opposition to the home after assurances were provided that it would be maintained are evidence that defendants' opposition to the home was motivated, at least in part, by plaintiffs' handicapped status).

Oxford House, Inc. v. City of Virginia Beach, Va., 825 F. Supp. 1251 (E.D. Va. 1993) (provider contended that conditional use permit process applicable to all residences with five unrelated persons was applied to them in a discriminatory manner; court disagreed, holding that provider's claim was not ripe because it had not applied for the permit and might well get one, that the FHAA does not *per se* ban conditional use permits for group homes merely because of the public nature of the process, and that City was not required to grant a conditional use permit; described further under "Reasonable Accommodation," *infra*).

Pulcinella v. Ridley Township, 822 F. Supp. 204 (E.D. Pa. 1993) opinion vacated 7/26/93 (homeowner and handicapped tenant challenged denial of variance to side yard requirement to allow addition to house; injunction denied as side yard requirement applied to all, regardless of handicap, so not discriminatory; no variance required as a reasonable accommodation since dwelling is exempt from FHAA because owner only owns one such dwelling and thus is not covered by the FHAA).

Support Ministries For Persons with AIDS, Inc. v. Village of Waterford, N.Y., 808 F. Supp. 120 (N.D. N.Y. 1992) (denial of permit for residence for the homeless with HIV overturned; discriminatory intent shown as city council allowed illegal prejudices of constituents to influence its decision making; discussed further under "Discriminatory Effect," *infra*).

Horizon House Dev. Services, Inc. v. Township of Upper Southampton, 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3rd Cir. 1993) (spacing requirement for group homes struck down; provider has standing to challenge ordinance and can sue prior to seeking variance; spacing requirement is facially invalid (rejecting *Familystyle* rationale), has a discriminatory impact, and is over broad; FHAA requirements cannot be avoided by claim that city already has its "fair share" of group homes; described further under "Reasonable Accommodation," *infra*).

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Ass'n of Relatives and Friends of AIDs Patients v. Regulations and Permits Admin., 740 F. Supp. 95 (D. P.R. 1990) (Permits Administration intentionally discriminated against promoters of AIDs hospice by denying it a special permit to operate in an agricultural zone, the permit regulations were selectively enforced, there was considerable community opposition to the hospice based on illegal prejudices, and the purported reason for the denial (the A-1 zoning) arose only at the last minute).

Baxter v. City of Belleville, Ill., 720 F. Supp. 720 (S.D. Ill. 1989) (denial of special use permit for AIDS hospice violated FHAA as both discriminatory intent and effect were shown; providers have standing to bring action under FHAA).

United States v. Yonkers Board of Ed., 624 F.Supp. 1276 (S.D. N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988) (found that schools and housing were intentionally segregated by race; factors in determining discriminatory intent set forth; if citizen opposition is based on race and if city follows such opposition, then city violates FHA).

Cherry Hills Township v. Oxford House, 621 A.2d 952 (N.J. Super. A.D. 1993) (township's request for injunction to prevent the operation of homes for recovering substance abusers until they obtain variance from the zoning code's definition of a family denied based on state constitution and FHAA).

City of St. Joseph v. Preferred Family Healthcare, Inc., 859 S.W.2d 723 (Mo. App. W.D. 1993) (limit of five unrelated persons in a single family residence does not violate FHAA as restriction is applied to all persons, not just handicapped persons; reasoning explicitly rejected by Oxford House-C, 843 F. Supp. at 1580-81 n.23); discussed further under "Reasonable Accommodation," *infra*).

Plymouth Charter Township v. Department of Soc. Services, 501 N.W.2d 186 (Mich. App. 1993), appeal denied, 503 N.W.2d 449 (Mich. 1993) (following Familystyle, state court upheld spacing and other licensing requirements for commercial adult foster care facility against FHAA challenge on grounds that they regulated commercial enterprises and made no attempt to prohibit handicapped individuals).

G.H. Assoc., Inc. v. Board of Adjustment of Town of Millsboro, 1991 WL 53448, 1991 Del. Super. LEXIS 127 (Del. Super. 1991) (zoning limiting single family dwellings to three unrelated persons upheld, even though it prevents some group home arrangements, because it treated all unrelated persons the same, regardless of handicap).

## **B. Discriminatory Effect**

Mountain Side Mobile Estates v. Secretary of HUD, 56 F.3d 1243 (10th Cir. 1995)(aggrieved person with standing under FHAA includes persons who are not themselves members of the protected class. To establish disparate impact discrimination, plaintiff must show that a specific policy caused a significant disparate effect on a protected group. Effect may be proven by use of national statistics; but the farther removed the statistics are from the local area, the weaker the evidence. Once plaintiff makes prima facie case of disparate effect, defendants must justify the discriminatory effect. 10th Cir. adopts 6th Cir. three-part test for disparate effect: (1) strength of plaintiff's showing of discriminatory effect; (2) interest of defendant in the action complained of—when a defendant has valid non-pretextual reasons for the challenged act, the court should not be over zealous to find discrimination; and (3) nature of relief sought—courts are more reluctant to compel defendants to provide housing than to enjoin defendants from interfering with private construction of such housing).

Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252 (1st Cir. 1993) (where plaintiffs seek to require defendants to take an affirmative action, plaintiff must make a greater showing of discriminatory effect; however, if only seeking to enjoin defendants, a lesser showing of discriminatory effect would suffice).

United States v. Badgett, 976 F.2d 1176 (8th Cir. 1992) (private apartment owner's policy limiting occupancy of one bedroom apartments to one person violates FHAA as policy has a discriminatory impact on a protected class (familial status)).

Familystyle of St. Paul v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991) (although city's 1/4 mile spacing requirement may have a disparate "effect" on the mentally handicapped, it does not violate the FHAA because it is justified as a means to integrate the mentally ill into the mainstream of society; adopts sliding scale of scrutiny for different protected classes under the FHAA based on the degree of scrutiny required under the Equal Protection Clause).

Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988), aff'd., 488 U.S. 15 (1988) (town's failure to amend zoning – which restricted multi-family housing projects to largely minority area – to allow such construction in a white neighborhood, violated FHA; no need to find discriminatory intent if have disparate impact; may have prima facie case of disparate impact without all Arlington Heights factors; although governmental interest in zoning is substantial, it cannot automatically outweigh disparate effects).

Smith v. Town of Clarkton, N.C., 682 F.2d 1055 (4th Cir. 1982) (follows Arlington II test for discriminatory effect, bias of public attributable to public officials).

United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981) cert. denied, 456 U.S. 926 (1982) (ordinance requiring 2-1/2 parking spaces per unit and voter referenda in order to effect zoning changes had a disparate impact on minorities and thereby violated the FHA; described further under "Discriminatory Intent," supra).

Resident Advisory Board v. Rizzo, 564 F.2d 126 (3rd Cir. 1977), cert. denied, 435 U.S. 908 (1978) (Philadelphia's failure to permit construction of a low-income housing project in virtually all white neighborhood and certain of its activities in clearing the site for the project violated the FHA because the actions had a disparate impact on Blacks; threat of violence at the site if construction were resumed did not excuse city's violation of civil rights).

Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978) (failure to rezone to allow low-cost housing within city limits was racially discriminatory; factors in determining discriminatory effect are: (1) strength of plaintiff's showing of discriminatory effect; (2) evidence of discriminatory intent although not enough to satisfy an equal protection claim; (3) defendant's interest in taking the action complained of; and (4) does plaintiff seek to compel defendant to act or merely enjoin defendant).

Arthur v. City of Toledo, Ohio, 782 F.2d 565 (6th Cir. 1986) (6th Cir. adopts three of the four parts of discriminatory effect test announced in Arlington Heights, declining to require any evidence of discriminatory intent).

United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422

U.S. 1042 (1975) (city denied housing on the basis of race in violation of the FHA by adopting a zoning ordinance prohibiting the construction of any new multi-family dwellings; ordinance had a discriminatory effect and thus could only be justified by a showing of a compelling governmental interest furthered by the law).

Oxford House-C v. City of St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994) (described under "discriminatory intent," supra).

Thornton v. City of Allegan, 863 F. Supp. 504 (W.D. Mich. 1993) (provider of adult foster care facilities for up to 12 handicapped persons failed to show discriminatory effect under Arlington Heights factors; described further under "Reasonable Accommodation," infra).

North Shore-Chicago Rehab., Inc. v. Village of Skokie, 827 F. Supp. 497 (N.D. Ill. 1993) (operator of facility for traumatically brain-injured adults granted injunction preventing village from denying permit based on failure of residents to live at facility on a "permanent basis" as such requirement had a discriminatory effect on handicapped persons).

United States v. City of Philadelphia, Pa., 838 F. Supp. 223 (E.D. Pa. 1993), aff'd, 30F.3d 1488 (3rd Cir. 1994) (transitional homes for homeless recovering drug and alcohol users are protected by FHAA).

Potomac Group Home Corp. v. Montgomery County, Md., 823 F. Supp. 1285 (D. Md. 1993) (provider of disabled elderly housing challenged neighborhood notice and review board licensing requirements; notice requirement struck down as no legitimate governmental interest served; integration of residents into neighborhood is not sufficient basis for requiring the notice and notice has actually caused great harm by galvanizing opposition; review by board at a public hearing also struck down as hearings are biased, the legitimate interest in public review is minimal, and the process is clearly not the least discriminatory alternative to achieve that interest; fact that the requirements apply to groups of disadvantaged youth as well as to the handicapped does not make them valid as the vast majority of group homes to which they apply provide housing for the disabled).

Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179 (E.D. N.Y. 1993) (town enjoined from enforcing against group home for recovering alcoholics law limiting number of unrelated persons under disparate impact test; to show disparate impact, Plaintiff must show action actually or predictably results in discrimination; town must then show its actions further, in theory and in practice a legitimate governmental interest and that there is no less discriminatory alternative; described further under "Reasonable Accommodation," infra).



Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, N.Y., 808 F. Supp. 120 (N.D. N.Y. 1992) (discriminatory impact found in denial of permit for residence for HIV-infected homeless persons under Arlington Heights factors; described further under "Discriminatory Intent," supra).

Horizon House Dev. Services, Inc. v. Township of Upper Southampton, 804 F. Supp. 683 (E.D. Pa. 1992), aff'd, 995 F.2d 217 (3rd Cir. 1993) (described under "Discriminatory Intent," supra).

Oxford House, Inc. v. Township of Cherry Hill, 799 F.Supp. 450 (D. N.J. 1992) (refusal to issue certificate of occupancy to group home for recovering substance abusers overturned; provider showed action had greater impact on protected group than others and city failed to show it could not make a reasonable accommodation or that there were no less discriminatory alternatives available).

Johnson v. Dixon, 786 F. Supp. 1 (D. D.C. 1991) (homeless shelter run with public funds could be closed even though there may be some disparate impact on the mentally ill; Arlington Heights factors applied).

Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D. N.J. 1991) (described under "Discriminatory Intent," supra).

Cason v. Rochester Housing Authority, 748 F. Supp. 1002 (W.D. N.Y. 1990) (Housing Authority's tenant selection criterion requiring applicants to show their ability to live independently violates FHAA, as it has a discriminatory impact on the handicapped).

United States v. Schuylkill Township, Pa., 1990 U.S. Dist. LEXIS 15555, 1990 WL 180980 (E.D. Pa. 1990) (special permit requirement for group homes struck down on summary judgment because, in requiring all groups of persons who are related by a "unity of social life" that include permanent intervention or oversight by a "non-family member" to seek a special use permit in order to reside in a residential zone, the provision had disparate effect on handicapped, and township failed to offer evidence to show that there were no less discriminatory alternatives; standard of review under FHAA is higher than for equal protection non-suspect class).

The Devereux Foundation v. O'Donnell, 1991 U.S. Dist. LEXIS 3188 (E.D. Pa. 1991) (the Third Circuit rejected the equal protection analysis, instead requiring a governmental defendant to show that the action serves a legitimate, bona fide interest and that there are no less discriminatory alternatives).

Ardmore v. City of Akron, 1990 WL 385236 (N.D. Ohio August 2, 1990) (preliminary injunction issued in favor of group home for five mentally retarded adults; city's

requirement that group homes of non-family style group residences (for handicapped and non-handicapped) secure conditional use permits in order to be located in single-family neighborhoods had discriminatory impact on the handicapped).

Baxter v. City of Belleville, Ill., 720 F.Supp. 720 (S.D. Ill. 1989) (described under "Discriminatory Intent," supra).

Adams County Assoc. for Retarded Citizens, Inc. v. City of Westminster, 580 P.2d 1246 (Colo. 1978) (provider of group home for mentally retarded persons sues over city's denial of a special use permit; Court remanded case back to city council for reconsideration based on appropriate criteria; reliance upon adverse effects of group home on the single family character of neighborhood, and peace and quiet of neighborhood hostility were inappropriate and violated the intent of C.R.S. §§ 31-23-301 and 303; decided under state law).

### **C. Reasonable Accommodation**

United States v. Village of Palatine, Ill., 37 F.3d 1230 (7th Cir. 1994) (provider of home for recovering substance abusers claims that Village failed to make reasonable accommodations by requiring it to comply with special use permit procedures; Court of Appeals held that the procedures were not in themselves a failure to accommodate because they were required for all special uses not just those involving the handicapped and the evidence did not establish that following process would be manifestly futile, so plaintiff must go through permit process and allow village opportunity to make a reasonable accommodation before case for failure to accommodate is ripe; no allegation of disparate impact or intentional discrimination).

Jackson v. Okaloosa County, Fla., 21 F.3d 1531 (11th Cir. 1994) (race discrimination; plaintiffs were not required to complete the process for approval by county in order for their claim to be ripe, because if hurdle to location of public housing were interposed with discriminatory purpose or impact, the hurdle is illegal in itself, whether or not it is surmountable).

Smith & Lee Associates, Inc. v. City of Taylor, 13 F.3d 920 (6th Cir. 1993), on remand, 872 F. Supp. 423 (E.D. Mich. 1995) (city failed to reasonably accommodate AFC by refusing to permit it to house up to 12 residents to be located in a single-family zone; described under "Discriminatory Intent," supra).

Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43 (6th Cir. 1992) (city's variance procedure that allow overly broad safety requirements to be modified does not constitute a reasonable accommodation; described under "Discriminatory Intent," supra).

New Horizons, Inc. v. Metropolitan Government of Nashville and Davidson County, Fair Housing - Fair Lending ¶ 15,637 (6th Cir. 1990) (Court of Appeals affirmed permanent injunction prohibiting city from enforcing against home for up to eight developmentally disabled persons an ordinance prohibiting the placement of more than one family care or group care community on a single residential blocks or on blocks facing each other in residential zone; state law required that homes for the mentally retarded be treated as single-family residences).

Thornton v. City of Allegan, 863 F. Supp. 504 (W.D. Mich. 1993) (city accommodated provider by assisting it in finding and rezoning another site; city was not required to grant special use permit as a reasonable accommodation; described further under "Discriminatory Effect," supra).

Oxford House-C v. City of St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994) (variance and conditional use permit process not a reasonable accommodation as posting and public hearing stigmatized residents; described under "Discriminatory Effect", supra).

United States v. City of Philadelphia, Pa., 838 F. Supp. 223 (E.D. Pa. 1993), aff'd, 30 F.3d 1488 (3rd Cir. 1994) (city violated FHAA by failing to make a reasonable accommodation of allowing side yard to satisfy rear yard requirement).

Oxford House, Inc. v. City of Virginia Beach, Va., 825 F. Supp. 1251 (E.D. Va. 1993) (conditional use permit process constitutes a reasonable accommodation; described under "Discriminatory Intent," supra).

Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179 (E.D. N.Y. 1993) (town must change its definition of family as a reasonable accommodation to allow group home; described under "Discriminatory Effect", supra).

Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168 (N.D. N.Y. 1993) (conditional preliminary injunction issued in favor of residents and provider who challenged zoning law prohibiting more than three unrelated persons from living together unless they are the functional equivalent of a family, but residents and provider must apply for a variance under the city's procedures because the possibility exists that they may be reasonably accommodated through these procedures).

Oxford House, Inc. v. Township of Cherry Hill, 799 F.Supp. 450 (D. N.J. 1992) (described under "Discriminatory Effect," supra).

Horizon House Dev. Services, Inc. v. Township of Upper Southampton, 804 F. Supp. 683 (E.D. Pa. 1992), aff'd, (ability to engage in variance procedure to avoid spacing restrictions on group homes is not a reasonable accommodation).

Easter Seal Society of N.J., Inc. v. Township of North Bergen, 798 F. Supp. 228 (D. N.J. 1992) (described under "Discriminatory Intent," supra).

United States v. Village of Marshall, Wisc., 787 F. Supp. 872 (W.D. Wisc. 1991) (failure to grant exception to the spacing requirement for group homes violates FHAA as the exception was a reasonable accommodation; city must make reasonable accommodation unless such accommodation would have significant adverse impact on legislative goals, or impose expense or burden on city).

Parish of Jefferson v. Allied Health Care, Inc., 1992 WL 142574, 1992 U.S. Dist. LEXIS 9124 (E.D. La. 1992) (allowing internal passageway in duplex used as group home for mentally ill was a reasonable accommodation even though total number of persons in dwelling unit exceeded maximum allowed under ordinance).

"K" Care, Inc. v. Town of Lac du Flambeau, 510 N.W.2d 697 (Wis. App. 1993), (by denying exception to spacing requirement for second elderly handicapped facility, town failed to make reasonable accommodation; granting exception was a reasonable accommodation as it would not impose undue burden on town and would not have an adverse impact on legislative goals of preserving neighborhood character and preventing reinstitutionalization of residents).

City of St. Joseph v. Preferred Family Healthcare, Inc., 859 S.W.2d 723 (Mo. App. W.D. 1993) (allowing large group homes in some zone districts is a reasonable accommodation; discussed further under "Discriminatory Intent," supra).

Verland C.L.A., Inc. v. Zoning Hearing Bd of Township of Moon, 556 A.2d 4 (Pa. Cmwlth. 1989) (not decided under FHAA; denial of variance from spacing requirements upheld as not being unreasonable or arbitrary and township has fair share of such homes).

#### **D. Exemptions**

##### 1. Maximum Occupancy Restrictions under 42 U.S.C. § 3607(b)(1)

City of Edmunds v. Oxford House, \_\_\_ U.S. \_\_\_, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995) (city's zoning restriction defining a "family" that may live in a single-family residential district as any number of persons related by blood or marriage but no more than five unrelated persons is not exempt from the FHA pursuant to § 3607(b)(1); case remanded to determine whether reasonable accommodation required city to allow Oxford House to maintain home for 8 - 12 residents in single-family zone).

Elliott v. City of Athens, Ga., 960 F.2d 975 (11th Cir. 1992) (cert. denied) 113 S.Ct.

376 (1992) (city's ordinance setting maximum number of unrelated persons that occupy a single unit dwelling falls within exception to FHAA for laws setting maximum occupancy limits; overruled by City of Edmunds, *supra*).

Oxford House-C v. City of St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994) (rejected reasoning of Elliott v. City of Athens).

Oxford House, Inc. v. City of Virginia Beach, 825 F. Supp.1251 (E.D. Va. 1993) (rejected reasoning of Elliott v. City of Athens).

Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168 (N.D. N.Y. 1993) (rejected reasoning of Elliott v. City of Athens)

## 2. Direct threat/safety restrictions

Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995) (restrictions based on potential threat to public safety must be narrowly tailored to the residents; described further under "Discriminatory Intent," *supra*).

Talley v. Lane, 13 F.3d 1031 (7th Cir. 1994) (rejection of prospective tenant in a disabled housing program because of past criminal conduct does not violate the FHAA as the Act does not require rental to persons who would constitute a direct threat to the health and safety of other tenants).

Ass'n of Relatives and Friends of AIDs Patients v. Regulations and Permits Admin., 740 F. Supp. 95 (D. P.R. 1990) (exemption for housing persons who would constitute a direct threat to the health and safety of others not applicable to excuse Administrator's refusal to allow AIDs hospice in A-1 area where "the uncontested scientific and medical evidence establishes that HIV is not readily transmittable through flood, mosquitoes or casual contact, and that the presence of the hospice poses no risk to the community at large").

## E. Miscellaneous

### 1. Definitions

Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252 (1st Cir. 1993) (elderly are handicapped for FHAA purposes).

United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992) ("handicap" includes person participating in rehabilitation program coupled with current non-use; recovering addicts are handicapped as they have an impairment that substantially limits major life activities as a result of the attitude of others toward such

impairment).

U.S. v. City of Philadelphia, Pa., 838 F. Supp. 223 (E.D. Pa. 1993) aff'd, 30 F.3d 1488 (3rd Cir. 1994) (transitional housing for homeless recovering drug and alcohol users are protected under FHAA).

Potomac Group Home Corp. v. Montgomery County, Md., 823 F. Supp. 1285 (D. Md. 1993) (elderly group home residents are clearly handicapped under the FHAA).

Cherry Hills Township v. Oxford House, Inc., 621 A.2d 952 (N.J. Super A.D. 1993) (recovering addicts and alcoholics are "handicapped" under the FHAA).

## 2. Abstention doctrine

Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252 (1st Cir. 1993) (Owner and residents of elder-care facility sued in federal court to enjoin enforcement of state court order to close facility because of violations of zoning and covenants. Held district court should not have interfered with ongoing state proceeding under Anti-Injunction Act and Younger abstention doctrine).

United States v. Village of Palatine, Ill., 845 F. Supp. 540 (N.D. Ill. 1993), vacated and remanded 37 F.3d 1230 (7th Cir. 1994) (Anti-Injunction Act and Younger abstention doctrine do not preclude federal court review even though state court action is pending).

Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168 (N.D. N.Y. 1993) (Younger abstention doctrine did not apply and Anti-Injunction Act did not bar relief).

## 3. Standing

DeBolt v. Espy, 47 F.3d 777 (6th Cir. 1995) (in order to bring claim under the FHAA, plaintiff need only to fulfill Article III standing requirements).

Jackson v. Okaloosa County, Fla., 21 F.3d 1531 (11th Cir. 1994) (Article III standing requirements apply to FHAA).