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FIGHTING MUNICIPAL "TAG-TEAM": THE FEDERAL FAIR HOUSING AMENDMENTS ACT AND ITS USE IN OBTAINING ACCESS TO HOUSING FOR PERSONS WITH DISABILITIES

Robert L. Schonfeld† and Seth P. Stein‡

Introduction

Following urban unrest in the 1960s, Congress enacted the Fair Housing Act as Title VIII of the Civil Rights Act of 1968 to prohibit housing discrimination against individuals based upon race, color, religion, or national origin.¹ Recognizing a similar need to combat housing discrimination against persons with disabilities, Congress amended the Fair Housing Act in 1988 to enjoin housing discrimination against such persons.² In amending the Fair Housing Act, Congress mandated that persons with disabilities "be considered as individuals"³ and prohibited the use of local laws and ordinances that made housing unavailable to persons with disabilities because of their disabilities.⁴

While the reasons posited by municipalities and homeowners to justify discrimination on the basis of handicap have been similar to those expressed by parties attempting to justify discrimination on

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1. H.R. Rep. No. 711, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 2173, 2176 [hereinafter House Report].

2. *Id.* at 2179.

3. *Id.*

4. *Id.* at 2185.

the basis of race,⁵ the issues that have arisen in litigation under the Fair Housing Amendments Act ("the Amendments" or "the FHAA") have differed from those presented in earlier Fair Housing Act cases. Whether an individual is eligible for protection under the definition of "handicap" and whether a particular residence is covered under the FHAA have been litigated on several occasions,⁶ while it is unlikely that a person's race, religion, color, or national origin would be a contested issue.

Similarly, the zoning issues arising under the FHAA are different from those presented prior to the Amendments. Earlier, zoning litigation usually challenged local ordinances prohibiting the construction of multiple-family dwellings, on the ground that such ordinances had the impact of perpetuating racial discrimination.⁷ Under the FHAA, the zoning issues in litigation generally pertain to the denial of special-use permits, the validity of "facially-neutral" zoning classifications that do not specifically apply to persons with handicaps but have a discriminatory impact on those persons, and laws and ordinances that single out persons with handicaps for special treatment.

The Amendments contain a new "reasonable accommodation" provision, which requires municipalities to make a reasonable accommodation to permit persons with handicaps to reside in the dwelling of their choice.⁸ However, the Amendments exclude from coverage certain local laws and ordinances that may preclude persons with disabilities from obtaining housing;⁹ those laws have been the subject of considerable litigation. Moreover, because so many of the issues pertaining to handicap discrimination involve

5. For example, *compare* *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 940 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (town sought to bar housing for minorities on grounds that housing would violate zoning laws and create traffic and parking problems) *with* *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1183 (E.D.N.Y. 1993) (town alleged zoning laws precluded housing for former alcoholics and substance abusers); *United States v. City of Taylor*, 798 F. Supp. 442, 447 (E.D. Mich. 1992) (city opposed residence for persons with handicaps because residence would violate zoning law and create parking problems), *rev'd sub nom.* *Smith & Lee Assoc., Inc. v. City of Taylor*, — F.3d — (6th Cir. 1993).

6. *See infra* notes 55-74 and accompanying text.

7. *See, e.g.*, *Metro Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (village could not establish zoning policies that foreclosed construction of low-income housing within village), *cert. denied*, 434 U.S. 1025 (1978); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974) (challenge to zoning ordinance prohibiting construction of any new multiple family dwellings as being racially discriminatory), *cert. denied*, 422 U.S. 1042 (1975).

8. 42 U.S.C. § 3604(f)(3)(B) (Supp. 1993).

9. *Id.* § 3607(b)(1).

zoning classifications, special-use permits, and the potential for litigation in local zoning courts, issues of federal-court abstention and the Federal Anti-Injunction Act have been thoroughly litigated in handicap housing discrimination cases.

This Article examines the impact of the FHAA on prohibiting housing discrimination against persons on the basis of their disabilities, and analyzes the court decisions interpreting the FHAA on questions of land use to determine whether they are consistent with the stated intentions of the drafters of the Amendments. Part I traces the legislative intent behind the FHAA and, specifically, the sections of the Amendments enjoining housing discrimination against persons with handicaps. Part I also analyzes the court decisions interpreting the Amendments' requirements as to what facts must be demonstrated to prove discrimination. This Part of the Article considers judicial treatment of the question of whether certain handicapped persons meet the statute's definition of "handicap" and whether certain residences qualify for coverage under the Amendments.

Thereafter, this Article examines the land use issues that recur frequently in handicap housing discrimination cases. Part II discusses decisions in which courts have found that actions of municipalities constituted intentional discrimination against persons with handicaps. Part III analyzes court interpretations of both "facially-neutral" laws and ordinances, and laws and ordinances that provide for special treatment of persons with handicaps, to determine if those interpretations comport with the intentions of the drafters of the Amendments. Part IV considers the impact of the reasonable accommodation portion of the Amendments on handicap housing discrimination and the section of the Amendments exempting certain "reasonable" local laws and ordinances from coverage. Part V discusses the doctrine of federal abstention and the Anti-Injunction Act and their application to the goals of the Fair Housing Act Amendments. Finally, Part VI recommends an approach to cases under the FHAA that would be consistent with the intentions of its drafters.

I. The Fair Housing Amendments Act

In recognition of the existence of housing discrimination against individuals on the basis of their disabilities,¹⁰ Congress enacted the FHAA to prohibit housing discrimination on the basis of handi-

10. House Report, *supra* note 1, at 2179.

cap.¹¹ The FHAA defines “handicap”¹² and “discrimination” for the purpose of the statute.¹³ In addition, the statute provides for both administrative procedures and judicial remedies that may be used to fight housing discrimination against persons with handicaps.¹⁴

This Part first examines the report of the Judiciary Committee of the House of Representatives (“the House Report”), which states the goals of the FHAA. Next, it analyzes the statutory definitions of “handicap” and “discrimination,” along with the remedies to combat discrimination. Finally, it examines the facts that must be demonstrated to prove a claim under the FHAA.

A. Report of the Judiciary Committee of the House of Representatives

The House Report clearly delineates two major goals of the FHAA.¹⁵ These goals can be summarized as requiring that persons with disabilities (1) be treated “as individuals” and (2) have equal access to housing enabling them to reside in a dwelling of their choice.¹⁶ With regard to the first goal, the House Report unequivocally states that “[t]he Fair Housing Amendments Act . . . repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals.”¹⁷

In addition, the House Report expounds that the second goal shall be a “national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream.”¹⁸ To that end, the FHAA bars the use of state and local land-use and health and safety laws, regulations, or practices that discriminate

11. 42 U.S.C. §§ 3602-3631 (Supp. 1993). Several articles have been written discussing the FHAA. They include: Michael P. Seng, *Disabilities Against Families and Handicapped Persons Under the 1988 Amendments to the Fair Housing Act*, 22 J. MARSHALL L. REV. 541 (1989); Bonnie Milstein et al., *Fair Housing Amendments of 1988, What It Means For Persons With Mental Disabilities*, 23 CLEARINGHOUSE REV. 128 (June 1989); C. Ulrich, *The Fair Housing Amendments Act of 1988 - New Litigation Tools for Housing Advocates*, 46 BUS. LAW. 333 (Nov. 1990); M.J. Kotkin, *The Fair Housing Amendments Act of 1988 - New Strategies for New Procedures*, 17 N.Y.U. REV. L. & SOC. CHANGE 755 (1990).

12. 42 U.S.C. § 3602(h) (Supp. 1993).

13. *Id.* § 3604(f)(1)-(3).

14. *Id.* §§ 3610, 3612, 3613.

15. House Report, *supra* note 1, at 2185.

16. *Id.* The Amendments also prohibit discrimination based on “familial status” or, as defined by the Amendments, discrimination against families with children under the age of 18. *See id.* at 2180-82; 42 U.S.C. § 3604(a)-(e) (Supp. 1993).

17. House Report, *supra* note 1, at 2179.

18. *Id.*

against individuals with disabilities.¹⁹ For example, the FHAA prohibits housing requirements placed upon groups of unrelated persons with disabilities that are not imposed upon families or other groups of unrelated persons of a similar size, because they discriminate against persons with handicaps.²⁰ According to the House Report, the Amendments were intended to prohibit the imposition of special requirements through land-use regulations and conditional or special-use permits that have the effect of limiting the ability of persons with disabilities to reside in the residence of their choice.²¹ Moreover, the FHAA prohibits the enforcement of otherwise neutral rules and regulations that result from false or over-protective assumptions or unfounded fears about persons with disabilities.²²

Finally, the House Report notes that it is illegal to refuse to make a reasonable accommodation to permit persons with handicaps to reside in dwellings of their choice.²³ It states that changes must be made in traditional rules to permit a person with a handicap to reside in a dwelling of choice.²⁴ While the House Report notes that the FHAA does not prohibit local and state restrictions on the maximum number of occupants permitted to occupy a residence, it also recognizes that those restrictions cannot operate to discriminate on the basis of handicap and must be applicable to all persons, related and unrelated.²⁵

As a whole, the House Report strongly expresses a policy requiring the treatment of persons with handicaps as individuals and prohibiting legal barriers that would inhibit persons with disabilities from residing in dwellings of their choice.²⁶ It contemplates that, barring proof that housing for persons with handicaps will have a substantial detrimental impact on a neighborhood or that a government imposed hindrance is necessary for safety, persons

19. *Id.* at 2185.

20. *Id.* Prior to the Amendments, many of these requirements would likely have been barred under the Equal Protection Clause of the United States Constitution. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Supreme Court held that an ordinance which treated a residence for persons with mental retardation differently from residences for other groups of unrelated persons and apartment buildings was unconstitutional under the Equal Protection Clause because the municipality failed to demonstrate that the ordinance had a rational basis.

21. House Report, *supra* note 1, at 2185.

22. *Id.*

23. *Id.* at 2186.

24. *Id.*

25. *Id.* at 2192.

26. *Id.* at 2179-86.

with disabilities should have the same right to live in the residence and neighborhood of their choice as any non-handicapped person.²⁷ Accordingly, in the absence of either of the above conditions, the FHAA should be construed liberally in favor of housing for persons with handicaps.

B. Definitions and Procedures of the Fair Housing Amendments Act

The FHAA extends coverage of the Fair Housing Act to persons with a "handicap."²⁸ The Amendments define "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.²⁹

The Amendments specifically exclude persons who are currently addicted to or engaging in the illegal use of a controlled substance,³⁰ persons who have been convicted of the illegal manufacture or distribution of a controlled substance,³¹ and persons whose occupancy of premises would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.³²

27. *Id.* at 2185.

28. 42 U.S.C. §§ 3602(h), 3604(f)(1)-(3) (Supp. 1993).

29. *Id.* § 3602(h).

30. *Id.* The Amendments utilize the definition of "controlled substance" found in 21 U.S.C. § 802(6) (1981), which refers to substances listed in 21 U.S.C. § 812 (1981). The term "controlled substance" does not include distilled spirits, wine, malt beverages, or tobacco as those terms are defined in the Internal Revenue Code. I.R.C. § 802(6) (1981).

31. 42 U.S.C. § 3607(b)(4) (Supp. 1993).

32. *Id.* § 3604(f)(9). While the language of the statute appears to treat persons who are a "direct threat" to others as an exclusion, the legislative history seems to indicate the contrary. See House Report, *supra* note 1, at 2187-88. The Congressional report stated that the "direct threat" language in the FHAA was not intended to be an exclusion but was added "to allay the fears of those who believe that the non-discrimination provisions of this Act could force landlords and owners to rent or sell to individuals whose tenancies could pose such a risk." The Congressional report added that any "direct threat" would have to be established on the basis of a history of overt acts or current conduct. *Id.* The report, however, also noted that a landlord could not ask questions on this topic of potential tenants different from those asked other potential tenants; see *Roe v. Sugar Mill Assocs.*, 820 F. Supp. 636, 639-40 (D.N.H. 1993) (persons whose occupancy may constitute a threat to other persons cannot be excluded unless housing provider demonstrates that it cannot make a reasonable accommodation to person with handicap to alleviate threats to other persons).

The Amendments' definition of "handicap" is substantially similar to that contained in the Rehabilitation Act of 1973³³—a statute that bars discrimination in federally assisted activities against persons who are handicapped.³⁴ On its surface, the definition of handicapped appears to be fair. However, the practical application of this definition in determining which persons and residences are eligible for coverage under the Amendments is troublesome and will be explored further in Part I.C.³⁵

The Amendments' definition of "discrimination" also appears to be unequivocal, fair, and in accord with the intentions of the drafters of the Amendments. The FHAA prohibits a person or a municipality from (a) making a dwelling unavailable to a person because of the person's handicap³⁶ and (b) discriminating in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities connected to such dwelling because of the person's handicap.³⁷ Moreover, the Amendments provide a person with a disability with the benefits of the earlier Fair Housing Act provisions that make it unlawful to "coerce, intimidate, threaten or interfere with" any person in the exercise of a right under the Fair Housing Act.³⁸

33. Compare 42 U.S.C. § 3602(h) (Supp. 1993) with 29 U.S.C. § 706(7)(B) (1985); see House Report, *supra* note 1, at 2182.

34. 29 U.S.C. § 794 (1985).

35. See *infra* notes 55-74 and accompanying text.

36. 42 U.S.C. § 3604(f)(1) (Supp. 1993). Besides prohibiting discriminatory zoning practices, this section has been used to prohibit private actions aimed at making housing unavailable for persons with handicaps. See *United States v. Scott*, 788 F. Supp. 1555, 1561-62 (D. Kan. 1992) (attempt to enforce restrictive covenant against residence for persons with handicaps and threatening and filing lawsuit against residence violates FHAA); *Martin v. Constance*, No. 4:90CV00833 (E.D. Mo. Feb. 10, 1994) (unpublished opinion on file with the *Fordham Urban Law Journal* (same)); *Rhodes v. Palmetto Pathway Homes, Inc.*, 400 S.E.2d 484 (S.C. 1991) (same). But see *Michigan Protection & Advocacy Servs. v. Babin*, 799 F. Supp. 695, 726-27, 728-42 (E.D. Mich. 1992) (neighbors' purchase of house for sole purpose of blocking community residence for persons with mental disabilities did not violate the Amendments and Fair Housing Act could not constitutionally apply to private transactions); *Hotel St. George v. Morgenstern*, 819 F. Supp. 310, 318 (S.D.N.Y. 1993) (Fair Housing Act claim could not be brought by provider of housing for homeless persons with handicaps against persons lobbying to block housing for such persons). The decisions in *Scott* and *Rhodes* comport with the intentions of the drafters of the Amendments to bar private attempts to interfere with the rights of persons with handicaps to housing. See House Report, *supra* note 1, at 2184.

37. 42 U.S.C. § 3604(f)(2) (Supp. 1993). The Amendments also require that multi-family dwellings constructed for first occupancy after March 13, 1991 be designed and constructed to accommodate persons with handicaps. *Id.* § 3604(f)(3)(C).

38. *Id.* § 3617.

Finally, the FHAA makes it unlawful for a person or a municipality to refuse to make a reasonable accommodation in rules, policies, practices, or services when such accommodation is necessary to afford a person the opportunity to reside in a dwelling.³⁹ However, the FHAA exempts from coverage "reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."⁴⁰ The determination of what constitutes a reasonable accommodation has been the subject of considerable litigation and will be discussed further in Part IV.⁴¹

Under the FHAA, an aggrieved person may commence an action in either federal or state court within two years of the alleged discriminatory housing practice.⁴² A complaint may also be filed within one year with the Secretary of the United States Department of Housing and Urban Development⁴³ ("HUD"), and HUD has the right to file a complaint on its own initiative.⁴⁴

If a complaint is filed with HUD's Secretary, HUD must initiate an investigation and attempt to mediate the complaint.⁴⁵ If HUD believes that reasonable cause exists to find that a discriminatory housing practice has occurred,⁴⁶ or is about to occur through threats from the discriminating party, HUD can issue a "charge" against the party who has engaged in the discriminatory housing practice.⁴⁷ After HUD issues a charge it must hold an administrative hearing⁴⁸ unless the complainant elects to have the charge

39. 42 U.S.C. § 3604(f)(3)(B) (Supp. 1993). The Rehabilitation Act of 1973 also requires that a "reasonable accommodation" be made for persons with handicaps. *See, e.g.,* Alexander v. Choate, 469 U.S. 287 (1985). The Amendments also provide that discrimination also includes a refusal on the part of a party to permit a person with a handicap to make a modification in premises, at the handicapped persons' expense, to afford the person with the handicap full enjoyment of the premises. 42 U.S.C. § 3604(f)(3)(A) (Supp. 1993).

40. 42 U.S.C. § 3607(b)(1) (Supp. 1993).

41. *See infra* notes 208-45 and accompanying text.

42. 42 U.S.C. § 3613(a)(1)(A) (Supp. 1993). An aggrieved party may file a complaint in court simultaneously with filing a complaint with HUD. *Id.* § 3613(a)(2). However, if a complaint is in the process of being heard by a HUD administrative law judge, a complaint cannot be filed in court. *Id.* § 3613(a)(3).

43. *Id.* § 3610(a)(1)(A)(i).

44. *Id.*

45. *Id.* §§ 3610(a)(1)(B), 3610(b).

46. 42 U.S.C. §§ 3610(g)(2)(A), (B) (Supp. 1993). If a charge is filed, an aggrieved person may elect to have the claims asserted in the charge decided in a civil action filed in court by the United States Attorney General. *Id.* §§ 3612(a), (o)(1).

47. *See* 42 U.S.C. § 3617 (1977) (threats, coercion, intimidation and interference constitute violations of the Fair Housing Act)

48. *Id.* § 3612(g).

heard in federal court.⁴⁹ If, after an administrative hearing, a municipality is found to have committed a discriminatory act, injunctive and monetary relief as well as civil penalties may be issued against the municipality.⁵⁰

If an aggrieved person files a complaint with HUD charging illegality with regard to any state or local zoning or other land-use law or ordinance, HUD's Secretary must refer the matter to the United States Attorney General ("the Attorney General").⁵¹ HUD's Secretary may also refer a matter to the Attorney General where prompt judicial action is necessary to carry out the purposes of the Fair Housing Act.⁵² Moreover, the Attorney General may intervene in lawsuits filed by private parties.⁵³

In court actions, courts may issue injunctive relief and actual and punitive damages against a municipality found to have committed a discriminatory act.⁵⁴

C. Establishing a Fair Housing Amendments Act Case

Establishing a handicap discrimination case under the FHAA is substantially the same as establishing a race discrimination case. However, in a handicap discrimination case the person alleging discrimination must establish that the person or persons to live in the residence in question is or are "handicapped" as defined in the FHAA.⁵⁵ Courts have used three different approaches to determine whether persons and residences are eligible for coverage under the Amendments.⁵⁶ None of these approaches have been totally satisfactory.

The most common approach has been to assume that if a residence is being established to house persons falling within a particu-

49. *Id.* § 3612(a).

50. *Id.* § 3612(g)(3). The municipality would have the right to judicial review of the administrative law judge's decision. *Id.* § 3612(i). In addition, attorneys' fees are available to the prevailing party of an administrative hearing. *Id.* § 3612(p).

51. 42 U.S.C. § 3610(g)(2)(C) (Supp. 1993). The Attorney General also has the right to commence actions in a United States district court where there is reasonable cause to believe that persons are engaged in a pattern or practice of resistance to the enjoyment of the rights granted under the Amendments. *Id.* § 3614(a).

52. 42 U.S.C. § 3610(e)(1) (Supp. 1993).

53. *Id.* § 3614(e).

54. 42 U.S.C. § 3613(c)(1) (Supp. 1993). Attorneys' fees are also recoverable by the prevailing party under the Amendments. *Id.* § 3613(c).

55. *See, e.g.,* Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 458-60 (D.N.J. 1992) (prospective residents of group home for recovering drug addicts); Baxter v. City of Belleville, 720 F. Supp. 720, 728-30 (S.D. Ill. 1989) (residence for AIDS sufferers).

56. *See infra* notes 57-73 and accompanying text.

lar category—for example, persons with a mental illness—the residence is automatically covered under the statute. This approach has been utilized even where the actual individuals to reside in the house have not yet been specifically selected.⁵⁷ For example, in *Oxford House-Evergreen v. City of Plainfield*,⁵⁸ the court found that because a residence was intended to house recovering alcoholics and addicts, the residence was automatically covered under the FHAA.⁵⁹ Similarly, in *Baxter v. City of Belleville*,⁶⁰

57. See *Easter Seal Soc'y v. Township of North Bergen*, 798 F. Supp. 228, 237 (D.N.J. 1992) (residence for persons with mental illness covered under FHAA even though actual residents had not been chosen).

58. 769 F. Supp. 1329 (D.N.J. 1991).

59. *Id.* at 1342. The *Oxford House-Evergreen* court cited the House Report, *supra* note 1, at 2182, and *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 182 (3d Cir.), *cert. denied*, 484 U.S. 849 (1987), for the proposition that recovering alcoholics and addicts were meant to be included in the definition of “persons with handicaps.” In *Sullivan*, the court found that recovering alcoholics and addicts were “persons with handicaps” under the similar definition of “handicap” utilized in the Rehabilitation Act of 1973. The *Oxford House-Evergreen* court, however, failed to recognize that neither the House Report nor the *Sullivan* court stated that all recovering alcoholics and addicts fall into the category of “persons with handicaps” but rather that recovering alcoholics and addicts could be “persons with handicaps.” In addition, the *Oxford House-Evergreen* court found that the former alcoholics and substance abusers did not constitute a direct threat to the community and declined to apply the exception to the Amendments contained at 42 U.S.C. § 3604(f)(9). *Oxford House-Evergreen*, 769 F. Supp. at 1342.

60. 720 F. Supp. 720 (S.D. Ill. 1989). The *Baxter* court found that even though the plaintiff was not a person with a handicap, he had standing to sue because the municipality’s discriminatory action of denying the plaintiff a use permit caused him to suffer economic injury—the loss of income from tenants. Courts have found that other organizations who were not themselves persons with handicaps had standing to commence actions under the FHAA. See *Stewart B. McKinney Foundation v. Town Plan and Zoning Comm’n*, 790 F. Supp. 1197, 1208-09 (D. Conn. 1992) (not-for-profit foundation establishing residence for persons with HIV had standing, as its goals of providing services to persons with disabilities were thwarted by municipality even though future tenants had not been chosen by foundation); *Horizon House Dev. Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 692-93 (E.D. Pa. 1992), *aff’d*, 995 F.2d 217 (3d Cir. 1993) (organization seeking to provide residential services for persons with mental retardation had standing to challenge zoning ordinance preventing it from establishing residence); *Easter Seal Soc’y*, 798 F. Supp. at 237 (organization providing residential services to persons with mental disabilities had standing to challenge municipal actions even though actual residents had not been chosen). *But see* *Hotel St. George v. Morgenstern*, 819 F. Supp. 310, 318 (S.D.N.Y. 1993) (provider of housing for persons with disabilities did not have standing to challenge actions of community opponents to housing).

The municipality in *Baxter* claimed that the residence in question was not a “dwelling” covered under the FHAA. 720 F. Supp. at 731; *see also* 42 U.S.C. § 3602(b) (Supp. 1993) (defining “dwelling” in the Fair Housing Act). The *Baxter* court held that although the length of residence for the proposed residents with HIV-positive would vary, the persons to live in the residence would not be living there as mere transients; thus, the residence was covered under the Fair Housing Act. *See also*

the court held that because a residence was intended for persons who were HIV-positive, that residence was *per se* covered under the FHAA.⁶¹

It may well be that the vast majority of recovering alcoholics, addicts, and persons who are HIV-positive are persons with handicaps as defined by the FHAA.⁶² However, because the Amendments mandate that persons be treated as individuals,⁶³ simply belonging to a particular class should not mean that a person's condition automatically comports with the statutory definition of handicapped.

Equally troublesome is the fact that both *Oxford House-Evergreen* and *Baxter* involved residences for which not all of the residents had been selected.⁶⁴ It is difficult to perceive how one can label persons who have not even been selected as "handicapped." However, if a municipality's illegal activities are the cause for particular persons not being selected—both *Oxford House-Evergreen* and *Baxter* involved municipalities that had wrongfully blocked the

United States v. Columbus Country Club, 915 F.2d 877 (3d Cir. 1990) (summer homes maintained by country club were deemed to be "dwellings" for the purpose of the Fair Housing Act).

61. 720 F. Supp. at 729-31. The court cited the House Report, *supra* note 1, at 2179, for the position that persons with AIDS and HIV-positive were "persons with handicaps" under the Amendments. See also Support Ministries For Persons With AIDS, Inc. v. Village of Waterford, 808 F. Supp. 120, 130-32 (N.D.N.Y. 1992) (citing the House Report, a congressional transcript indicating that a proposal to exclude persons with HIV from the amendments was defeated in the House of Representatives, and case law interpreting a similar definition of "handicap" in the Rehabilitation Act of 1973); Stewart B. McKinney Found., Inc. v. Town Plan and Zoning Comm'n, 790 F. Supp. 1197, 1209-10 (D. Conn. 1992) (finding that persons with AIDS or HIV-positive were "persons with handicaps" under the Amendments); Ass'n of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Administracion de Reglamentos, 740 F. Supp. 95, 102-103 (D.P.R. 1990). However, the House Report does not say that all persons with AIDS or who are HIV-positive fall into the category of "persons with handicaps" but rather that these persons could be "persons with handicaps."

The courts in *Baxter*, *Support Ministries*, and *A.F.A.P.S.* also concluded that persons with AIDS or who are HIV-positive do not represent a danger to other persons and that the Amendments' exception under 42 U.S.C. section 3604(f)(9) was inapplicable. *Baxter*, 720 F. Supp. at 733; *Support Ministries*, 808 F. Supp. at 136-37; *A.F.A.P.S.*, 740 F. Supp. at 103.

62. See *infra* notes 77 and 79.

63. House Report, *supra* note 1, at 2179.

64. See *Oxford House-Evergreen*, 769 F. Supp. at 1329, 1331-32. (municipality had precluded house from adding three additional persons and "John Does" are named as plaintiffs); *Baxter*, 720 F. Supp. at 722, 730 (residence proposed for up to seven persons, but proposed operator only knew of three persons who could move into residence).

full establishment of the involved residences⁶⁵—then requiring prior selection of residents as a prerequisite to standing under the FHAA might result in reduced access to the courts in the case of illegal municipal activities. This reduction in access to the courts might lead to a reduction in housing for persons with disabilities, which would conflict with a major goal of the FHAA—*i.e.*, to assure persons with handicaps equal access to housing.⁶⁶

A second approach, used by the Fourth Circuit in *United States v. Southern Management Corp.*,⁶⁷ has been labelled by one court as a “bootstrap argument.”⁶⁸ In *Southern Management*, the court concluded that because a group of recovering alcoholics and addicts had been denied housing on the basis of their status as such, they were automatically deemed to be “handicapped” and entitled to coverage under the Amendments.⁶⁹ In effect, the *Southern Management* court decided the merits of the case before it decided the threshold issue of standing. This approach is obviously in conflict with the normal manner in which courts reach decisions.

Both of these approaches were rejected by the court in *Oxford House, Inc. v. Township of Cherry Hill*,⁷⁰ which used a third approach. In *Township of Cherry Hill*, the court granted a preliminary injunction against a municipality seeking to interfere with the establishment of a residence for former alcoholics and substance abusers.⁷¹ The court found, for the purposes of the preliminary injunction motion, that the plaintiffs were persons with “handicaps.” The court based its decision upon expert testimony regarding the general limitations in major life activities that are faced by recovering alcoholics and addicts and upon the testimony of a current resident of the home as to the specific limitations which that resident suffered.⁷²

The court’s decision in *Township of Cherry Hill* appears to require a more individualized examination of each person when the case is at the summary judgment or trial stage.⁷³ While this approach meets the Amendments’ aim of treating persons with

65. See *Oxford House-Evergreen*, 769 F. Supp. at 1343-46; *Baxter*, 720 F. Supp. at 730-33 (actions of municipality to block residence violated FHAA).

66. House Report, *supra* note 1, at 2179, 2185.

67. 955 F.2d 914 (4th Cir. 1992).

68. *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 459-60 n.21 (D.N.J. 1992).

69. 955 F.2d at 917-23.

70. 799 F. Supp. 450.

71. *Id.* at 465.

72. *Id.* at 458-60.

73. *Id.*

handicaps as individuals, it would be impractical in a case where the persons to reside in a residence have not been selected because of a municipality's illegal blockage of the residence. Additionally, if the individualized approach used by the *Township of Cherry Hill* court were utilized, and if it were determined that some of the residents of a home met the definition of "handicap" while other residents did not, it would be difficult for a court to determine whether a particular residence was covered under the Amendments.

It is difficult, therefore, to reconcile the two main goals of the FHAA in determining which residences are covered under the statute. On the one hand, treating all individuals within a certain category as being "handicapped," and thus covered under the Amendments, may assure access to housing, but it also results in persons with disabilities not being treated as individuals. On the other hand, treating persons with disabilities as individuals may restrict access to the FHAA and thus may impede access to housing.

Accordingly, a combination of the approaches may best serve both the goals of individualization and access. In *Township of Cherry Hill*, the court was satisfied at the preliminary injunction stage with a combination of expert testimony showing that recovering alcoholics, and substance abusers in general, face limitations in major life activities and testimony from a resident of the house in issue.⁷⁴ The court noted that it would have required more evidence on a motion for summary judgment or at trial.⁷⁵ However, the evidence proffered in *Township of Cherry Hill* should be enough to prevail on a motion for summary judgment or at trial. A combination of both expert testimony plus individualized testimony from a resident or a potential resident, where possible, should be sufficient to satisfy the Amendments' twin goals of individualization and access. The evidence must demonstrate that there is a nexus between the person's disability and the person's need to reside in a special therapeutic environment.

A person who demonstrates that he or she is handicapped, as defined under the FHAA, may prevail on a housing discrimination claim by showing that (1) the person has been intentionally dis-

74. *Id.* As to whether a residence would be covered if it contained some persons with handicaps and some non-handicapped persons, it could be argued that non-handicapped persons are necessary to provide support to the persons with handicaps. *Cf.* *Crossroads Apartments Assocs. v. LeBoo*, 578 N.Y.S.2d 1004 (City Ct. of Rochester 1991) (reasonable accommodation to person with mental disabilities would have to be made to permit person to keep a cat in his apartment if he could demonstrate that the cat was necessary to assist him in coping with his mental illness).

75. 799 F. Supp. at 458-60.

criminated against because of the person's handicap, (2) a law or practice has had a disparate impact on the person because of the person's handicap, or (3) the defendant has refused to make reasonable accommodations in policies or practices so as to accommodate the person with a handicap.⁷⁶

Intentional discrimination generally involves a showing of intent on the part of the alleged discriminating party.⁷⁷ In determining intent, courts examine the discriminatory impact of the party's actions, the historical background of the decision in question, the sequence of events leading up to the challenged decision, departures from normal procedural sequences, and departures from normal substantive criteria.⁷⁸ Courts particularly examine zoning changes enacted in reaction to a proposal of housing for persons with disabilities.⁷⁹

In the case of a disparate impact claim, several of the federal circuit courts have created formulas that are substantially similar in practice although differing somewhat in language.⁸⁰ A disparate

76. See, e.g., *Stewart B. McKinney Foundation v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1210-11 (D. Conn. 1992); *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1343, 1329 (D.N.J. 1991); *Baxter v. City of Belleville*, 720 F. Supp. 720, 732 (S.D. Ill. 1989).

77. See, e.g., *McKinney Foundation*, 790 F. Supp. at 1211 (analyzing intent as well as disparate impact).

78. *Id.*; see also *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1221 (2d Cir. 1987) (finding that minutes of municipal meetings constituted evidence demonstrating discriminatory intent on part of the municipality).

79. See *Support Ministries*, 808 F. Supp. at 133-34.

80. Compare *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir.), *aff'd*, 488 U.S. 15 (1988); *Metro. Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) with *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). The standards set forth in *Town of Huntington* are discussed *infra* at notes 75-79 and accompanying text. In *Arlington Heights*, the Seventh Circuit established a four prong test for evaluating whether municipal conduct had a discriminatory impact. The prongs include: 1) the strength of the plaintiff's showing of discriminatory effect; 2) whether there is some evidence of discriminatory intent; 3) the municipality's professed interest in taking the action complained of; and 4) whether the plaintiff seeks to compel the defendant to affirmatively provide housing for members of a protected class or merely to restrain the defendant from interfering with individual property owners wishing to provide housing. *Arlington Heights*, 558 F.2d at 1290. In *City of Black Jack*, the Eighth Circuit held that a governmental defendant could prevail if it demonstrated "a compelling governmental interest commensurate with the level of scrutiny afforded the class of people affected by the law under the equal protection clause." *City of Black Jack*, 508 F.2d at 1185 n.4. The Supreme Court, in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985), posited the level of scrutiny required when the Court held that municipal ordinances would be examined to determine if they are rationally related to a legitimate governmental purpose. See *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91, 94 (8th Cir.

impact formula that has been increasingly adopted by district courts throughout the country is that espoused by the Second Circuit in *Huntington Branch, NAACP v. Town of Huntington*,⁸¹ a case involving discrimination on the basis of race. In *Town of Huntington*, the Second Circuit held that a *prima facie* disparate impact case is established by showing that the challenged practice “actually or predictably results in discrimination; in other words that it has a discriminatory effect.”⁸² This means that the conduct of the alleged discriminatory party is more harshly felt on people with handicaps than those without. The *Town of Huntington* court held that a person covered by the Fair Housing Act need not show that the practice complained of was made with discriminatory intent,⁸³ although if evidence of such intent were present, that evidence would weigh “heavily” in proving the case.⁸⁴

Once a *prima facie* disparate impact case has been established, the court said that the defendant must prove that its actions furthered, in theory and in practice, a legitimate *bona fide* governmental interest and that no alternative would serve that interest with less discriminatory effect.⁸⁵ Under the *Town of Huntington* standard, a court may also consider whether the plaintiff is suing to compel a governmental defendant to build housing or only to require a governmental defendant to eliminate some obstacle to housing.⁸⁶ A municipality must show more justification for its action if the plaintiff is suing to eliminate a barrier to housing.⁸⁷

As the Second Circuit noted, “clever men may easily conceal their motivations.”⁸⁸ Because municipal officials do not often explicitly express their animus to housing for persons with handicaps,

1991) (court used *Cleburne* standard in holding municipal ordinance to be rationally related to a legitimate governmental purpose and thus not violative of the FHAA).

81. 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988). Other courts outside of the Second Circuit that have applied the *Town of Huntington* test in Fair Housing Act cases include *Harden v. Peach Bottom Township*, No. 1:CV-92-1750, slip op. at 6 (M.D. Pa. Sept. 13, 1993) (unpublished opinion on file with the *Fordham Urban Law Journal*); *Township of Cherry Hill*, 799 F. Supp. at 461; *Oxford House-Evergreen*, 769 F. Supp. at 1344; *Association of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Administracion de Reglamentos*, 740 F. Supp. 95, 101 (D.P.R. 1990).

82. *Town of Huntington*, 844 F.2d at 934.

83. *Id.*

84. *Id.* at 936.

85. *Id.* at 939. This is similar to the standard used previously by the Third Circuit in *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148-49 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

86. *Town of Huntington*, 844 F.2d at 936.

87. *Id.*

88. *Id.* at 935.

numerous handicap discrimination cases brought under the FHAA have involved claims that a particular law or practice has a disparate impact on persons with disabilities.⁸⁹ These cases have presented the most interesting legal questions and, they will be analyzed later in this Article.⁹⁰

Although the *Town of Huntington* decision was issued in a race discrimination case, its principles have equal application to handicap discrimination cases. Indeed, the municipality's reasons for excluding housing for minorities—inconsistency with zoning laws, and traffic and parking problems—are identical to some of the reasons given by municipalities for excluding housing for persons with disabilities.⁹¹ Just as the Second Circuit found such municipality excuses unjustifiable for excluding housing for minorities, courts have found similar municipal explanations unjustifiable for excluding housing for persons with handicaps.⁹²

Finally, a person with handicaps could prevail on a housing discrimination claim by showing that the defendant refused to make reasonable accommodations in policies or practices so as to give the plaintiff an opportunity to reside in a residence of choice.⁹³ To prevail on a "reasonable accommodation claim," a person with a handicap must demonstrate that (1) a request for an accommodation was made, (2) such request was either ignored or denied, (3) the accommodation was necessary to enable the person to use and enjoy the dwelling of that person's choice, and (4) the accommodation was reasonable.⁹⁴

In determining whether to order a municipality to make a reasonable accommodation in its laws, rules, or practices to permit the establishment of a residence for handicapped persons, courts have examined whether the residence would impose any administrative or financial burdens on a municipality,⁹⁵ whether the residence would create a fundamental or substantial change in a neighborhood,⁹⁶ or whether the accommodation would undermine the basic

89. See *infra* notes 142-229 and accompanying text.

90. See *infra* notes 142-229 and accompanying text.

91. See *supra* note 5 and accompanying text.

92. See *infra* notes 116-53, 187-95, 216-29 and accompanying text.

93. 42 U.S.C. § 3604(f)(3)(B) (Supp. 1993).

94. *Id.*

95. See, e.g., *Oxford House-Evergreen*, 769 F. Supp. at 1344-45; *Township of Cherry Hill*, 799 F. Supp. at 461.

96. *Oxford House-Evergreen*, 769 F. Supp. at 1344-45; *Township of Cherry Hill*, 799 F. Supp. at 461; see also *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1183-84 (E.D.N.Y. 1993).

purpose of an ordinance or practice.⁹⁷ If there is no evidence of any of the above criteria, a reasonable accommodation must be made to permit the establishment of housing for persons with disabilities.⁹⁸

II. Discriminatory Intent

This Part of the Article will analyze court interpretations of the Amendments. Specifically, it will examine land-use cases to determine if they are consistent with the drafters' intentions of treating persons with disabilities on an individual basis and of permitting persons with handicaps to reside in the dwellings of their choice.

Cases where municipalities have been found to have demonstrated discriminatory intent with regard to housing for persons with disabilities can generally be classified into four categories: (a) denial of special-use permits; (b) requirements for special-use permits not placed upon non-handicapped persons; (c) prosecution of residences for persons with disabilities on the grounds that the residences were in noncompliance with a zoning classification; and (d) a municipality's passage of local laws and ordinances to prevent the establishment of a residence for persons with handicaps. In all of these cases, statements from municipal officials in support of local opposition to residences, coupled with municipal departures from usual procedure, have formed the basis for court decisions finding discriminatory intent on the part of municipalities.

In several instances, courts have ordered municipalities to grant special-use permits to residences for handicapped persons.⁹⁹ For example, in *Baxter v. City of Belleville*,¹⁰⁰ the court enjoined a municipality from denying a special-use permit for a residence for persons infected with HIV.¹⁰¹ The court held that the municipality acted with discriminatory intent in denying the permit based upon unjustified fears about persons with HIV.¹⁰² More specifically, the

97. *United States v. Village of Marshall*, 787 F. Supp. 872, 878-79 (W.D. Wis. 1992).

98. *Id.*; see also *supra* note 112.

99. *Support Ministries for Persons With AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120 (N.D.N.Y. 1992); *Easter Seal Soc'y v. Township of North Bergen*, 798 F. Supp. 228 (D.N.J. 1992); *United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220 (D.P.R. 1991); *Association of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Administracion de Reglamentos*, 740 F. Supp. 95 (D.P.R. 1990); *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989).

100. 720 F. Supp. 720 (S.D. Ill. 1989).

101. *Id.* at 734-35.

102. *Id.* at 731-33. For example, one alderman testified that he voted against granting a special-use permit because of the residence's proximity to a junior high school

Baxter court noted that in denying a permit the municipal zoning board expressed fears about property values, the proximity of the residence to a school, and the potential spread of AIDS without any supporting documentation or evidence.¹⁰³

Similarly, in *Ass'n of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Administracion de Reglamentos*,¹⁰⁴ the court enjoined a municipal agency from refusing to issue a special-use permit for a hospice for persons with AIDS.¹⁰⁵ The court found that the municipality had intentionally discriminated against the residence in denying a permit based upon statements made by local decision-makers in response to local opposition to the residence and a showing of selective enforcement of regulations against the hospice.¹⁰⁶ The court specifically noted that one municipal decision maker stated that community opposition to the residence played a role in his decision to deny the permit and that the municipality's strict application of regulations was unprecedented.¹⁰⁷ Both the *Baxter* and *A.F.A.P.S.* decisions clearly comport with the aims of the FHAA in combatting blatant handicap discrimination.¹⁰⁸

In contrast, the persons seeking to establish a residence for persons with HIV in *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Commission*,¹⁰⁹ refused to apply for a special-use permit requested by the municipality on the ground that the residence was purportedly a "charitable institution" or a "chronic and convalescent nursing home."¹¹⁰ The *McKinney Foundation* court enjoined the municipality from requiring a special-use permit for the residence, holding that the municipality's requirement was based upon discriminatory intent.¹¹¹ The court found that no per-

and a grade school even though there was no evidence that the residents would be a danger to the school children. *Id.* at 723-26.

103. *Id.* at 731-33.

104. 740 F. Supp. 95 (D.P.R. 1990).

105. *Id.* at 107.

106. *Id.* at 104-06.

107. *Id.*

108. See House Report, *supra* note 1, at 2185.

109. 790 F. Supp. 1197 (D. Conn. 1992).

110. *Id.* at 1207. Often, municipalities require special-use permits on the grounds that unrelated persons with handicaps residing together do not comport with the definition of "family" under the local ordinance or are deemed a health-related facility under the local ordinance. See, e.g., *Stewart B. McKinney Found., Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197 (D. Conn. 1992) (residence for persons with AIDS deemed to be health related facility for purpose of local ordinance and not within local ordinance's definition of "family").

111. *Stewart B. McKinney Found., Inc.*, 790 F. Supp. at 1211-16.

mit was necessary because the residence would house fewer than the maximum number of unrelated persons permitted to live together as a legal housekeeping unit; thus, complying with the ordinance's definition of "family."¹¹² The court noted that the municipality's requirement of a permit resulted from organized and widespread opposition to the residence within the town,¹¹³ and found that the municipality's request for detailed information about the proposed residents constituted a substantial departure from normal procedure.¹¹⁴

Discriminatory intent has also been found where municipalities prosecuted residences for persons with handicaps on the grounds that the residences did not comply with zoning ordinances. A typical case is *United States v. Borough of Audubon*,¹¹⁵ In *Borough of Audubon*, a municipality attempted to enjoin the operation of a residence for former alcoholics and substance abusers by relying on selective enforcement of municipal ordinances.¹¹⁶ In response to complaints from local citizens, the municipality's mayor stated that he shared the sentiments of his constituents and "that there is nothing more that I would like to do than to just come in and just tell these people you have until noon to get out of town."¹¹⁷ In addition, another municipal official stated that he wanted to "oversee a conference of the police community . . . so that we tag-team the individual [owner of the residence] through the respective Borough officials."¹¹⁸

Based upon these statements and the selective enforcement of the ordinances against the residence, the court found that discriminatory animus was the motivation behind the municipality's attempts to enjoin the residence's operation.¹¹⁹ Accordingly, the

112. *Id.* at 1213.

113. *Id.* at 1211-16.

114. *Id.* at 1213-15.

115. 797 F. Supp. 353 (D.N.J. 1991), *aff'd*, 968 F.2d 14 (3d Cir. 1992).

116. *Id.* at 361.

117. *Id.* at 360.

118. *Id.*

119. *Id.* at 359-62. The court specifically noted: "Discriminatory intent may be established where animus towards a protected group is a significant factor in the community opposition to which the commissioners are responding . . . on several occasions, Audubon officials stated that they agreed with or were responding directly to community opposition which was clearly discriminatory . . ." *Id.* at 361 (citations omitted). Similarly, in *Oxford House-Evergreen*, 769 F. Supp. at 1346, the court enjoined a municipality from attempting to prosecute a zoning violation against a residence for former alcoholics and substance abusers. *Id.* There, the court found that the municipality had engaged in intentional discrimination, noting comments made by the mayor in response to neighborhood opposition and the fact that the zoning officer

court enjoined the municipality from taking any steps to prohibit the residence's operation.¹²⁰

Finally, courts have stricken laws and ordinances that were enacted to exclude housing for persons with handicaps, on the grounds that such enactments represented intentional discrimination.¹²¹ For example, in *Horizon House Development Services, Inc. v. Township of Upper Southampton*,¹²² the court struck down a local law and ordinance that imposed a distance requirement of 1,000 feet for group homes. The court found that the ordinance had been enacted to exclude a community residence for persons with mental retardation.¹²³

As stated in Part I, the aim of the FHAA was to treat persons with disabilities as individuals and to permit persons with handicaps to reside in the dwellings of their choice. Each of the cases discussed in Part II comport with those aims.

III. Discriminatory Impact

The "discriminatory impact" test has been applied to both facially-neutral laws and ordinances, and laws and ordinances that single out persons with handicaps for specialized treatment. This Part examines the judicial application of the discriminatory impact standard to facially-neutral ordinances and to those that single out persons with handicaps.

A. Facially-Neutral Ordinances

In housing discrimination cases, facially-neutral ordinances have generally been one of two types. Some zoning classifications define the term "single family dwelling" in a manner that is not in-

had reversed her view on the legality of the residence after a meeting at which much neighborhood opposition was expressed. *Id.* at 1343; *accord*, *Oxford House-C v. City of St. Louis*, No. 91-2402-C(7), slip. op. at 39-42 (E.D. Mo. Jan. 28, 1994) (unpublished opinion on file with the *Fordham Urban Law Journal*).

120. *Borough of Audubon*, 797 F. Supp. at 362.

121. *Support Ministries for Persons With AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120 (N.D.N.Y. 1992); *Easter Seal Soc'y v. Township of North Bergen*, 798 F. Supp. 228 (D.N.J. 1992).

122. 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993).

123. *Id.* at 695-97. Similarly, in *Support Ministries for Persons with AIDS*, 808 F. Supp. at 133-34, the court refused to apply a local ordinance limiting the number of rooms in a house on the ground that the ordinance had been enacted to exclude a residence for persons with AIDS. In *Easter Seal Soc'y*, 798 F. Supp. at 235, the court refused to enforce an ordinance requiring a residence for persons with mental disabilities to apply for a conditional-use permit on the ground that the ordinance was enacted for the purpose of impeding the development of the residence.

tended to exclude residences for persons with handicaps but has the effect of excluding such residences.¹²⁴ In addition, some ordinances require a group of unrelated persons desiring to live together to obtain a permit before residing in a community. These ordinances have the effect of either excluding persons with handicaps or hindering their ability to reside in a community.¹²⁵

1. *Limitations on Single-Family Dwellings*

*Oxford House, Inc. v. Town of Babylon*¹²⁶ is a classic example of a court's enjoining the enforcement of a "single-family dwelling" type zoning ordinance. In *Town of Babylon*, a group of recovering alcoholics and substance abusers sought to reside in a single-family residential district.¹²⁷ The municipality argued that this group of persons were unrelated "transients" and were thus prohibited by the zoning ordinance from residing in any single-family residential district.¹²⁸

The court found that recovering alcoholics and addicts required a group living arrangement for psychological and emotional support during the recovery process.¹²⁹ The court also found that they were more likely than persons without handicaps to live with unrelated individuals.¹³⁰ Furthermore, because the recovering alcoholics could leave at any time due to relapse or recovery, their length of stay at the residence could not be predicted.¹³¹ Thus, the court found that the municipality's zoning ordinance had a greater impact on persons with disabilities than it did on non-handicapped persons.¹³²

After finding the disparate impact on persons with disabilities, the court considered the municipality's interest in applying its zoning laws and found it to be weak.¹³³ While a town's interest in zoning requirements is substantial, the court found that the town had failed to prove that the residence had in any way altered the resi-

124. See, e.g., *McKinney Found.*, 790 F. Supp. at 1217 (discussing standards for evaluating "facially neutral" zoning provisions).

125. See *infra* notes 168-86 and accompanying text.

126. 819 F. Supp. 1179 (E.D.N.Y. 1993).

127. 819 F. Supp. at 1179.

128. *Id.* at 1184.

129. *Id.* at 1183.

130. *Id.* This conclusion was reached based on testimony from a founder of Oxford House. *Id.* at 1183 n.6.

131. *Id.* at 1183.

132. *Id.*

133. *Id.* at 1184.

dential character of the neighborhood.¹³⁴ Moreover, town officials had admitted that the residence was well-maintained and caused no problems for the community.¹³⁵ Thus, the *Town of Babylon* court concluded that the municipality's purpose for enforcing the ordinance in this case was weak.

134. *Id.* at 1183. The court noted that five municipal officials testified that the town had received no substantial complaints from neighbors in the past year and that the house was well-maintained. *Id.* The court also found evidence of intentional discrimination, noting that the town's supervisor had stated at a town board meeting that the town had "unfortunately" lost other fights to keep out residences for persons with handicaps and that another town official stated that he wished that he could go in and "yank them [the residents] out of their beds . . ." *Id.* at 1184.

135. *Id.* In *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992), the court reached a similar conclusion. In *Township of Cherry Hill*, a municipality attempted to prevent the establishment of a similar home for unrelated recovering alcoholics and substance abusers on the ground that the residence did not have "permanency and stability." *Id.* at 454-55, 457. Under a municipal ordinance, groups of unrelated persons could only reside in residential districts within the municipality if they could demonstrate "permanency and stability" upon filing an application for a certificate of occupancy. *Id.* at 455. The municipality did not have a similar requirement for persons related by blood or marriage. *Id.* at 455, 462. The court enjoined the municipality from taking any steps to interfere with the establishment of the residence. *Id.* at 465. The court found that because recovering alcoholics and substance abusers were more likely than other persons to require an environment where unrelated persons reside together for mutual support during the recovery process, the municipality's ordinance had a disproportionate impact on persons with handicaps. *Id.* at 461. The court then held that the municipality did not have a legitimate, nondiscriminatory reason for evicting the residents of the home. *Id.* at 462-63. The court found that because persons related by blood or marriage did not have to demonstrate permanency and stability to reside in a residential area, such requirements should not be imposed on unrelated persons. *Id.* at 462. In addition, the court noted that the residence at issue would enhance the residential character of the neighborhood, and that there was no record of any complaints from neighbors. *Id.* Similarly, in *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1345 n.21 (D.N.J. 1991), the court refused to enjoin a residence for recovering alcoholics and substance abusers on the ground that there was no showing on the record of any police actions brought against the residence. In enjoining the municipality from taking any actions to prevent the residence, the *Oxford House-Evergreen* court astutely noted that "[r]ecovering alcoholics and drug addicts may never be perceived as 'stable' and 'permanent' by communities that object to their presence. . . . [I]f the exclusionary effect of the City's actions were upheld, and were duplicated state-wide, no Oxford Houses could exist in New Jersey." *Id.* at 1344. See also *Federation of Orgs. for the Mentally Disabled, Inc. v. Town of Oyster Bay*, CV 93-2070, slip op. at 15-16 (E.D.N.Y. Jan. 15, 1994) (denial of building permit for housing for persons with mental disabilities had disparate impact on persons with disabilities in violation of the FHAA); *Oxford House-C v. City of St. Louis*, No. 91-2402-C(7), slip op. at 43-51 (E.D. Mo. Jan. 28, 1994) (unpublished opinion on file with the *Fordham Urban Law Journal*) (attempted enforcement of zoning ordinance had disparate impact on housing for recovering alcoholics and substance abusers).

In contrast, the Eleventh Circuit in *Elliott v. City of Athens*,¹³⁶ failed to properly consider the disparate impact of a facially-neutral ordinance on a residence for handicapped persons.¹³⁷ In *Elliott*, a municipality successfully enjoined the establishment of a residence for twelve unrelated recovering alcoholics and addicts.¹³⁸

The persons seeking to inhabit the residence demonstrated that they needed to live in a group-home setting during their recovery period¹³⁹ and that they could not operate an economically feasible group home under the ordinance's prohibition, which limited group homes to eight unrelated persons.¹⁴⁰ Furthermore, the municipality's planning department had determined that the residence would not place a burden on the provision of municipal services.¹⁴¹ Nonetheless, the *Elliott* court rejected the proposed residents' disparate impact argument, stating that "[t]here was no attempt to establish that the ordinance had a harsher effect on handicapped persons wanting to live in group homes than on college students or other non-handicapped persons desiring to live in group homes."¹⁴²

The *Elliott* court's interpretation of the disparate impact test was erroneous. The proper test was not whether the ordinance had a harsher effect on persons with handicaps desiring to live in group homes than other persons wanting to live in group homes but rather whether the ordinance had a harsher effect on persons with disabilities desiring to live in the neighborhood than *all* other per-

136. 960 F.2d 975 (11th Cir.), cert. denied, 113 S. Ct. 376 (1992).

137. *Id.* at 981-84. The residence in question was for men who had finished a drug rehabilitation program at a farm facility but were not yet ready to live on their own. *Id.* at 977.

138. *Id.* at 977, 984. The ordinance governing the residence at issue permitted only eight unrelated persons to live together. *Id.* at 976. Such ordinances may be violative of the due process clauses of several state constitutions. See *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240 (N.Y. 1985); *Charter Township v. Dinolfo*, 351 N.W.2d 831 (Mich. 1984); *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980); *State v. Baker*, 405 A.2d 368 (N.J. 1979). These courts held that ordinances limiting the number of unrelated persons who could reside in a single family dwelling were unconstitutional under the State due process clauses where there was no similar limitation on related persons. The language of the FHAA does not specifically sanction maximum occupancy ordinances, but merely states that they are exempt from coverage under the Act. 42 U.S.C. § 3607(b)(1) (Supp. 1993). The Fair Housing Act does not grant legality to ordinances that are illegal under the State due process clause, and, therefore, there is no federal-state comity issue involved.

139. *Elliott*, 960 F.2d at 977. The director of the group home apparently indicated that the intended residents "were not yet ready to live on their own." *Id.*

140. *Id.* at 981.

141. *Id.* at 977, 988.

142. *Id.* at 981.

sons.¹⁴³ The plaintiffs in *Elliott* proffered evidence demonstrating that the ordinance had a harsher effect on persons with handicaps desiring to reside in the neighborhood than non-handicapped persons.¹⁴⁴ The fact that the ordinance treated persons with handicaps the same as college students or other non-handicapped persons was irrelevant because neither college students nor other non-handicapped persons are covered under the FHAA.¹⁴⁵

The *Elliott* court also wrongfully failed to balance the interests of the recovering alcoholics and substance abusers with the interests of the municipality. The municipality's own planning department found that the proposed group home would not burden the provision of municipal services such as transportation, water, and sewage.¹⁴⁶ Yet, the *Elliott* court found that the municipality had a substantial interest in enforcing the facially-neutral ordinance to control the density, traffic, and noise caused by unrelated college students renting houses.¹⁴⁷ Because non-handicapped college students are not covered under the FHAA, their effect on a residential area should have been irrelevant to the *Elliott* court's consideration of the group home. The *Elliott* court should only have considered whether the proposed home would have a negative impact on the residential character of the area. Moreover, the *Elliott* court's rationalization that the residence could have been legally located in another district in the city also conflicts with the intent of the FHAA to permit housing for persons with disabilities in all areas.¹⁴⁸

143. See *Town of Huntington*, 844 F.2d at 934; *Town of Babylon*, 819 F. Supp. at 1183-84; *Township of Cherry Hill*, 799 F. Supp. at 461.

144. *Elliott*, 960 F.2d at 977, 983. The proponent of the residence established that (1) persons recovering from alcoholism or substance abuse needed a group home setting more than other persons, (2) only larger group homes were economically feasible, and (3) if the municipal ordinance were enforced it would preclude the proposed residents from living in the residence of their choice because it would permit only eight residents to live together rather than the twelve necessary to make the residence economically feasible. *Id.* at 977, 981, 983.

145. See *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296-97 n.9 (D. Md. 1993) (fact that requirement "may also incidentally catch in its net some group homes that serve individuals without handicaps does not vitiate the facial invalidity of the rule which clearly restricts the housing choices of people based upon their handicaps" (citation omitted)).

146. *Elliott*, 960 F.2d at 977, 988.

147. *Id.* at 982.

148. See, e.g., *Oxford House-Evergreen*, 769 F. Supp. at 1344 (rejecting municipality's defense that residence could be located in another zoning district of municipality and holding that Fair Housing Act was aimed at opening access for persons with disabilities to all areas of the municipality); *Harden v. Peach Bottom Township*, No. 1:CV-

By presuming that the proposed residence would negatively affect the community without considering the individual merits of the home, the *Elliott* court engaged in impermissible stereotyping of persons with disabilities in contravention of the FHAA. The *Elliott* court ignored the intent of the drafters of the Amendments to prohibit rules and regulations based upon "unfounded fears of difficulties about the problems that their [the handicapped] tenancies may pose."¹⁴⁹

2. Special Use Permits

Some municipalities have ordinances requiring that groups of unrelated persons obtain special-use permits.¹⁵⁰ Although these ordinances do not specifically refer to persons with handicaps, they contain broad language that could be used to require permits for group homes for persons with disabilities.¹⁵¹ As stated in the House Report, the drafters of the FHAA unequivocally intended to prohibit the imposition of special-use-permit requirements for housing for handicapped persons.¹⁵²

The court in *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Commission*,¹⁵³ enjoined a municipality from demanding a special-use permit for the establishment of a residence for persons who were HIV-positive.¹⁵⁴ The ordinance at issue required permits for all charitable institutions and nursing homes.¹⁵⁵ The *McKinney Foundation* court found that the requirement had a discriminatory impact "because it . . . [held] the future tenants up to public scrutiny in a way that seven unrelated non-HIV-infected persons would not be."¹⁵⁶ In addition, the court noted that the procedure for obtaining a special-use permit (1) had the potential of being burdensome,¹⁵⁷ (2) could be "quite controversial and un-

92-1750, slip op. at 12 (M.D. Pa. Sept. 13, 1993) (no defense that residence could be located in another area of municipality).

149. House Report, *supra* note 1, at 2185.

150. *See, e.g.*, *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992); *Stewart B. McKinney Found., Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197 (D. Conn. 1992).

151. *See, e.g.*, *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992); *Stewart B. McKinney Found., Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197 (D. Conn. 1992).

152. House Report, *supra* note 1, at 2185.

153. 790 F. Supp. 1197 (D. Conn. 1992).

154. *Id.* at 1222.

155. *Id.*

156. *Id.* at 1219.

157. *Id.* at 1220.

pleasant and further inflame public opposition,"¹⁵⁸ and (3) could be expensive for the organization seeking to establish the residence if the neighbors were to appeal a decision to grant the permit.¹⁵⁹

In contrast, the court in *Oxford House, Inc. v. City of Virginia Beach*¹⁶⁰ found that a municipal ordinance requiring a special-use permit for a residence for recovering alcoholics and substance abusers did not violate the FHAA.¹⁶¹ While the court conceded that the Amendments protected persons with handicaps from discrimination, the court held that the FHAA did not prohibit zoning authorities from making inquiries into housing for persons with handicaps.¹⁶²

The *City of Virginia Beach* decision is disingenuous and in conflict with the drafters' intentions of the FHAA. The court's holding allows municipalities to discourage persons with disabilities from residing in residential communities by applying permit requirements. Because of their handicaps, many persons cannot live in residential communities unless they reside in larger group homes. By their very nature, permit applications cause delays in access to housing.¹⁶³ Accordingly, homeowners may decline to sell or rent their houses to persons with handicaps if the sale or rental must await the outcome of the permit process. In addition, permit applications often subject the applicant to public scrutiny.¹⁶⁴ Consequently, persons with handicaps will undoubtedly avoid communities that require permits in favor of those communities that do not. The FHAA was aimed at removing barriers "that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community."¹⁶⁵ No matter how well-meaning or innocuous, permit requirements have the effect of limiting the ability of persons with handicaps to reside in the residence

158. *Id.*

159. *Id.*

160. 825 F. Supp. 1251 (E.D. Va. 1993).

161. *Id.* at 1261-64.

162. *Id.* at 1261-62; *see also* *Ardmore, Inc. v. City of Akron*, No. 90-CV-1083, slip op. at 17 (N.D. Ohio Apr. 7, 1992) (unpublished opinion on file with the *Fordham Urban Law Journal*) (finding that municipality could require community residence for persons with mental retardation to obtain a permit because ordinance also required similarly sized groups of non-related persons to obtain permits).

163. *See* *Horizon House Dev. Servs. v. Township of Upper Southampton*, 804 F. Supp. 683, 700 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993) (variance procedure is "lengthy, costly and burdensome"); *Stewart B. McKinney Found., Inc.*, 790 F. Supp. at 1220 (variance procedure "has the potential of being burdensome . . . [and] expensive").

164. *Id.*

165. House Report, *supra* note 1, at 2179, 2185.

of their choice and therefore do not comport with the intentions of the drafters of the FHAA.

B. Statutes and Rules Treating Persons With Handicaps Differently From Non-Handicapped Persons

States and municipalities frequently place requirements on housing for persons with disabilities that are not placed on housing for non-handicapped persons.¹⁶⁶ As the drafters of the FHAA noted, some laws are based upon "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."¹⁶⁷ Laws based on such assumptions or premises are violative of the FHAA.

1. Safety Requirements

The clearest discussion of these statutes and rules is the Sixth Circuit's decision in *Marbrunak, Inc. v. City of Stow*,¹⁶⁸ In *Marbrunak*, a municipality attempted to place safety requirements on a single-family residence for persons with mental retardation. These standards were different from those applicable to other single-family residences.¹⁶⁹ For example, normally the municipality only required a single family residence to have smoke alarms.¹⁷⁰ In this case, however, the municipality had required the residence to provide additional fire safety equipment, including (a) a sprinkler system with alarms, (b) fire retardant wall and floor coverings, (c) lighted exit signs above all doorways, (d) push bars on all doors, and (e) a fire extinguisher every thirty feet.¹⁷¹

The residence challenged the municipality's stricter safety standards, and the district court enjoined the enforcement of the ordi-

166. See, e.g., *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993) (neighbor notification requirement); *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43 (6th Cir. 1992) (extensive safety protections); *Horizon House Dev. Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992) (1,000 feet spacing requirement), *aff'd*, 995 F.2d 217 (3d Cir. 1993); *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991) (limitation on placement); *Bangerter v. Orem City Corp.*, 797 F. Supp. 918 (D. Utah 1991) (24 hour supervision); *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002 (W.D.N.Y. 1990) (requirement of proof of ability to live independently).

167. House Report, *supra* note 1, at 2185.

168. 974 F.2d 43 (6th Cir. 1992).

169. *Id.* at 45.

170. *Id.* at 45 n.1.

171. *Id.*

nance against the residence.¹⁷² The Sixth Circuit affirmed.¹⁷³ The circuit court noted that a municipality could impose higher safety standards on residences for persons with handicaps, but must demonstrate that the additional protection is warranted by the unique and specific needs and abilities of those handicapped persons.¹⁷⁴ The court refused to enforce the municipality's stricter safety standards because the ordinance made no attempt at individualizing its requirements to the needs or abilities of the persons it purportedly sought to protect.¹⁷⁵

Some municipalities may argue that stricter safety standards can only benefit persons with handicaps. However, if a community's standards are unnecessarily burdensome, they could discourage providers of housing for persons with disabilities from locating within that community. The effect would be fewer housing choices for persons with handicaps. This would be in conflict with the intention of the drafters of the FHAA to increase access to housing. Additionally, institutional safety requirements on persons with disabilities may stigmatize them and discourage them from overcoming their handicaps.

Although in contravention of the FHAA, some courts have upheld overprotective statutes that tend to stereotype persons with

172. *Id.* at 47-48.

173. *Id.*

174. *Id.* at 47.

175. *Id.* at 47-48. The court also found that the municipality's variance provisions did not sufficiently individualize the ordinance's safety requirements so as to save the ordinance from violating the FHAA. Likewise, in *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993), a court considered the validity of a local ordinance that excluded housing for persons who could not exit a home on their own. The ordinance did not consider the actual safety and health needs of individuals. In striking down the ordinance, the court found that it served no legitimate municipal purpose. *Id.* at 1299-1300. Even the municipality conceded that the ordinance did not serve the fire and safety purposes for which it was originally enacted, and the municipality failed to demonstrate how mobility and ability to independently exit a residence should *per se* exclude a person with a handicap from residing in a community residence. *Id.*

Similarly, the court in *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1008 (W.D.N.Y. 1990) struck down the municipal housing authority's policy to question only persons with handicaps about their medical histories and ability to live independently. The court ruled that the housing authority could have used less intrusive means, such as a request for landlord references, to determine whether a prospective tenant would pose a danger to other tenants. *Id.* The court noted that non-handicapped persons could similarly pose a risk to other tenants. *Id.* at 1008. Thus, the *Cason* court found that without objective evidence to demonstrate a need to treat persons with disabilities differently from non-handicapped persons, the housing authority could not ask persons with disabilities to provide more information than other persons regarding their medical histories and backgrounds. *Id.*

handicaps. In *Bangerter v. Orem City Corp.*,¹⁷⁶ an occupant of a community residence for persons with mental disabilities challenged a local ordinance that required group homes to provide twenty-four hour supervision.¹⁷⁷ The court upheld the ordinance as being rationally related to a legitimate governmental interest and, thus, not violative of the residents' rights under the FHAA.¹⁷⁸

The *Bangerter* court, however, did not examine whether all persons with handicaps residing in group homes needed twenty-four hour supervision or whether there were a less intrusive means for permitting persons with mental disabilities to reside in the community.¹⁷⁹ Under the FHAA's aim to void overprotective requirements, it cannot be presumed that all persons with mental disabilities need twenty-four hour supervision to reside in the community.¹⁸⁰

2. Minimum Distance Separation Zoning

Some state and municipal laws require that community residences for persons with mental disabilities cannot be placed less than a specified distance from a similar residence.¹⁸¹ Because these

176. 797 F. Supp. 918 (D. Utah 1992).

177. *Id.* at 920, 922.

178. *Id.* at 922-23.

179. See *supra* note 102 and accompanying text.

180. House Report, *supra* note 1, at 2185.

181. See ARIZ. REV. STAT. ANN. § 36-582(H) (1986) (1,200 feet between residences); COLO. REV. STAT. §§ 30-28-115(2)(b), 31-23-303(2)(b) (1977) (750 feet between residences); CONN. GEN. STAT. ANN. § 8-3f (West Supp. 1987) (1,000 feet between residences); DEL. CODE ANN. tit. 9, § 4923(c) (Supp. 1986) (5,000 feet between residences); IND. CODE ANN. § 16-13-21-12 (West Supp. 1986) (3,000 feet between residences); IOWA CODE ANN. § 358A.25(3) (West Supp. 1987) (1/4 mile between residences); LA. REV. STAT. ANN. § 28:478(B) (West Supp. 1987) (1,000 feet between residences); ME. REV. STAT. ANN. tit. 30, § 4962-A(4) (West Supp. 1987) (1,500 feet between residences and no "excessive concentration" of residences); MICH. COMP. LAWS ANN. §§ 125.216(a)(4), 125.583b (4) (West 1986) (1,500 feet between residences but 3,000 feet in cities with population over one million and no excessive concentration); NEB. REV. STAT. § 18-1746 (1983) (1,200 feet between residences); N.J. STAT. ANN. § 40:55D-66.1 (West Supp. 1986) (1,500 feet between residences); N.C. GEN. STAT. § 168-22 (1982) (1/2 mile between residences); TEX. REV. CIV. STAT. ANN. art 1011n, § 3(e) (Vernon Supp. 1988) (1/2 mile between residences); UTAH CODE ANN. § 10-9-2.5(2)(f) (supp. 1987) (3/4 mile between residences); VT. STAT. ANN. tit. 24, § 4409(d) (Supp. 1987) (1,000 feet between residences); W. VA. CODE § 27-17-2(a) (1986) (1,200 feet between residences outside of municipality); WIS. STAT. ANN. § 59.97(15)(a) (1988) (2,500 feet between residences). In New York, an over concentration of similar residences resulting in a substantial alteration of an area is prohibited. N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney 1988). In Missouri, municipalities may set "reasonable" density standards. MO. ANN. STAT. § 89.020(2) (Vernon Supp. 1988). Municipalities have also set distance limitations. See *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91,

statutes do not place distance limitations on residences for non-handicapped persons, they have been challenged as being violative of the FHAA. These challenges have met with conflicting results.¹⁸²

Some authorities theorize that distance limitations between residences prevent the segregation of persons with mental handicaps from the mainstream.¹⁸³ These authorities believe that the distance limitations are necessary to integrate persons with disabilities into the mainstream of society and that segregation into certain, usually less affluent, neighborhoods would result but for the distance requirements.¹⁸⁴ Such segregation, it is proffered, could be harmful to the well-being of persons with disabilities.¹⁸⁵

Other authorities postulate that because non-handicapped persons can live in neighborhoods with persons of their racial, religious, or ethnic group without governmental limitations, persons with disabilities should not be restricted from residing in the neighborhood of their choice, even if the neighborhood already contains a large number of other persons with handicaps.¹⁸⁶ These authorities theorize that there is no reason to believe that massing persons with handicaps into a neighborhood would be harmful.¹⁸⁷

In *Familystyle of St. Paul, Inc. v. City of St. Paul*,¹⁸⁸ the operator of a residence for persons with mental illness challenged a state statute and a local zoning ordinance that placed a spacing requirement of 1,320 feet between community residences.¹⁸⁹ Both the district court and the Eighth Circuit upheld the statute and ordinance, holding that the laws furthered the goal of integrating persons with

93 (8th Cir. 1991) (City of St. Paul has distance limitation of 1,320 feet between residences); *Horizon House Dev. Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 685 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993) (Township of Upper Southampton has distance limitation of 1,000 feet between residences).

182. Compare *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991) with *Horizon House Dev. Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993). It should be noted the state attorney generals of Delaware, Kansas, Maryland and North Carolina have opined that distance rules in their states are unlawful. *Horizon House Dev. Servs.*, 804 F. Supp. at 694 n.4.

183. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396, 1402-04 (D. Minn. 1990), *aff'd*, 923 F.2d 91, 94-95 (8th Cir. 1991).

184. *Id.*

185. *Id.*

186. *Horizon House Dev. Servs.*, 804 F. Supp. at 699.

187. *Id.* at 698.

188. 728 F. Supp. 1396 (D. Minn. 1990), *aff'd* 923 F.2d 91 (8th Cir. 1991).

189. *Id.* at 1398.

handicaps into the community.¹⁹⁰ The district court particularly noted that the law “prevents the clustering of homes which could lead the mentally ill to cloister themselves and not interact with the community mainstream.”¹⁹¹

The *Familystyle* decision is not consistent with the intention of the drafters of the FHAA. The court heard no evidence that would have demonstrated that persons with mental illness would not interact with the mainstream if they resided in houses fewer than 1,320 feet apart. Moreover, the court did not examine whether there were less intrusive limitations that could have achieved the same result.¹⁹² A primary purpose of the FHAA was to give persons with mental illness access to housing so that they could reside in a community of their choice.¹⁹³ Because persons who are not handicapped are permitted to “cloister themselves and not interact with the community mainstream,” persons who are handicapped should have the same right.

In contrast, the court in *Horizon House Development Services, Inc. v. Township of Upper Southampton*¹⁹⁴ invalidated an ordinance that placed a 1,000-foot distance limitation between group homes.¹⁹⁵ The court specifically found that there was no evidence establishing that persons with handicaps living close to one another is *per se* detrimental.¹⁹⁶ Based on this finding, the court held that the law violated the FHAA because there was no similar limit on the choice of residences placed upon biological families or other groups of non-handicapped persons.¹⁹⁷

Unlike the *Familystyle* decisions, *Horizon House* demonstrates an understanding of the goals of the FHAA. The *Horizon House* decision not only provides persons with handicaps with access to housing, it does so without assuming that persons with handicaps can only live in certain areas for their own well-being. The

190. See 728 F. Supp. at 1404; 923 F.2d at 94-95.

191. 728 F. Supp. at 1404.

192. See *id.* at 1405 (questioning itself whether less drastic alternatives could have sufficed or whether it was correct in placing limits on where persons with handicaps could reside).

193. House Report, *supra* note 1, at 2185.

194. 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993).

195. *Id.* at 685.

196. *Id.* at 698.

197. *Id.* at 699; see also, *Oxford House-C v. City of St. Louis*, No. 91-2402-C(7), slip op. at 43 (E.D. Mo. Jan. 24, 1994) (unpublished opinion on file with the *Fordham Urban Law Journal*) (holding that “the complaint of ‘no more in my back yard’ is just as unacceptable excuse for discrimination against the handicapped as the discriminatory cry of ‘not in my backyard.’”).

Familystyle decisions represent an overprotective view of persons with handicaps and ignore the FHAA's twin aims of treating persons with disabilities as individuals and of providing such persons with access to housing in the community of their choice.

3. Notice and Public-Hearing Requirements

In *Potomac Group Home Corp. v. Montgomery County*,¹⁹⁸ a local ordinance required a group home provider to give notice to neighbors before operation and to submit itself to a public hearing where community opposition was prevalent.¹⁹⁹ The court found that the ordinance served no legitimate municipal purpose and violated the FHAA.²⁰⁰ Like the court in *Horizon House*, the court in *Potomac Group Home* held that "integration" was not an adequate justification for an ordinance under the FHAA.²⁰¹ Moreover, the court found the "neighbor notification rule" offensive because it assumed that people with disabilities are different from other persons and need to take special steps "to become part of the community."²⁰² The court equated the "neighbor notification rule" with a hypothetical requirement that minority persons give notice before moving into a non-minority neighborhood and found that such notices "galvanize neighbors in their opposition to the homes."²⁰³

In addition, the court found that the public hearing requirement violated the FHAA²⁰⁴ because it singled out persons with disabilities for public scrutiny²⁰⁵ and because the hearings were dominated by community concerns and community prejudices.²⁰⁶ The court found that the municipality could obtain the same information

198. 823 F. Supp. 1285 (D. Md. 1993).

199. *Id.* at 1296-99 (requirement of neighbor notification prior to establishment of group homes and, in certain instances, public hearings). New York has a similar statute. N.Y. MENTAL HYG. LAW § 41.34 (McKinney 1988 & Supp. 1994) (requiring notification and hearings prior to establishment of residences for persons with mental disabilities). For more on the New York statute see Robert L. Schonfeld, "Not in My Neighborhood": *Legal Challenges to the Establishment of Community Residences for the Mentally Disabled in New York State*, 13 FORDHAM URB. L.J. 281 (1985).

200. *Potomac Group Home Corp.*, 823 F. Supp. at 1296-99.

201. *Id.* at 1296-97.

202. *Id.* The court cited a report from the American Planning Association concluding that a "low-profile sitting [sic] approach best facilitates integration into the community." *Id.* at 1296 n.10.

203. *Id.*

204. *Id.* at 1297-99.

205. *Id.*

206. *Id.* The court noted that although the municipality may not itself harbor prejudices, its design of procedures that facilitated the expression of prejudices and gave weight to such views in the process violated the Amendments. *Id.*

from community residence providers through less onerous non-public meetings where experts could consult and consider the provider's programs.²⁰⁷

Both the *Horizon House* and *Potomac Group Home* decisions correctly understand that the key aim of the FHAA is to provide access to housing for persons with disabilities and that any obstacles placed by municipalities in the path of access violate the intentions of the drafters of the FHAA.

IV. Reasonable Accommodation and the Maximum Occupancy Exemption

One of the strongest weapons that persons with handicaps can utilize to combat housing discrimination under the FHAA is the statutory requirement that municipalities make a reasonable accommodation in their rules and practices to permit persons with disabilities to reside in a residence of their choice. Some courts have applied the reasonable accommodation standard to enjoin discriminatory practices without considering whether there was any discriminatory intent or discriminatory impact.²⁰⁸ The FHAA's reasonable accommodation section generally has been interpreted liberally in favor of access to housing.²⁰⁹

207. *Id.* The court especially noted that the hearings were useless because the neighbors had no expertise with regard to group homes. *Id.*

208. *See, e.g., Elliott v. City of Athens*, 960 F.2d 975, 998 (11th Cir. 1992) (dissent considered only reasonable accommodation issue); *Parish of Jefferson v. Allied Health Care, Inc.*, Nos. 91-1199, 91-1200, 91-3959 (E.D. La. June 10, 1992) (unpublished opinion on file with the *Fordham Urban Law Journal*) (considering only reasonable accommodation issue); *United States v. Village of Marshall*, 787 F. Supp. 872, 878 (W.D. Wis. 1991) (considering only reasonable accommodation issue).

209. *See, e.g., Oxford House-C v. City of St. Louis*, No. 91-2402-C(7), slip op. at 52-56 (E.D. Mo. Jan. 28, 1994) (unpublished opinion on file with the *Fordham Urban Law Journal*); *U.S. v. City of Philadelphia*, 838 F. Supp. 223 (E.D. Pa. 1993); *North Shore-Chicago Rehabilitation, Inc. v. Village of Skokie*, 827 F. Supp. 497 (N.D. Ill. 1993); *Horizon House Dev. Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992); *United States v. City of Taylor*, 798 F. Supp. 442 (E.D. Mich. 1992), *rev'd sub. nom.*, *Smith & Lee Assoc., Inc. v. City of Taylor* — F.3d — (6th Cir. 1993); *Parish of Jefferson v. Allied Health Care, Inc.*, Nos. 91-1199 (E.D. La. June 10, 1992) (unpublished opinion on file with the *Fordham Urban Law Journal*); *United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220 (D.P.R. 1991); *United States v. Village of Marshall*, 787 F. Supp. 872 (W.D. Wis. 1991); *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991) (all courts required municipalities to make reasonable accommodations in their laws and ordinances to permit housing for persons with handicaps).

A. The Breadth of the "Reasonable Accommodation" Requirement

In *Parish of Jefferson v. Allied Health Care, Inc.*,²¹⁰ a provider of housing for persons with mental handicaps sought to convert two attached two-family duplex dwellings into two single family dwellings with an open internal passageway between them.²¹¹ Under the provider's plan, each single family dwelling would house six unrelated handicapped persons.²¹² The municipality's zoning ordinance, however, only permitted four unrelated persons to reside together in a single family residence.²¹³ Consequently, even though the homes as two-family dwellings could legally house eight unrelated persons at each residence,²¹⁴ the municipality argued that the provider's conversion plan violated the zoning ordinance and, it sought to block the conversion.²¹⁵

The court enjoined the municipality from thwarting the provider's conversion plan.²¹⁶ In rejecting the municipality's arguments concerning traffic congestion, drainage, and sewerage increases,²¹⁷ the court noted that if the residences remained as two-family dwellings, they could house more people than they would under the proposed plan.²¹⁸ Consequently, the court held that the municipality had to make a reasonable accommodation in its ordinance to permit the provider to renovate the residences into one-family dwellings.²¹⁹

Similarly, in *United States v. Village of Marshall*,²²⁰ a provider of housing for persons with mental disabilities sought to establish a dwelling less than 2,500 feet from another similar residence. The provider's plan contravened a state law prohibiting the establish-

210. *Parish of Jefferson*, Nos. 91-1199.

211. *Id.* at 2-3.

212. *Id.* at 3.

213. *Id.*

214. *Parish of Jefferson*, Nos. 91-1199 slip op. at 13. The *Parish of Jefferson* court cited as precedent cases decided under the Rehabilitation Act of 1973 because courts have interpreted that statute to require that municipalities receiving Federal funding to make a reasonable accommodation in rules and practices to permit access to persons with handicaps. *Id.* at 10-12. See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979); *Majors v. Housing Auth.*, 652 F.2d 454 (5th Cir. 1981) (interpreting what is a "reasonable accommodation" for the purpose of the Rehabilitation Act of 1973).

215. *Parish of Jefferson*, Nos. 91-1199 slip op. at 5.

216. *Id.* at 16.

217. *Id.* at 13.

218. *Id.*

219. *Id.* at 13-14.

220. 787 F. Supp. 872 (W.D. Wis. 1991).

ment of such residences less than 2,500 feet apart.²²¹ The court prohibited the municipality from enforcing the state law.²²² The court reasoned that because a river separated the two residences, the establishment of the proposed residence would not have any significant adverse impact on the state's goal of preventing the overconcentration of such residences in one area.²²³ Furthermore, the siting of the residence would not impose any undue hardship or burden upon the municipality.²²⁴ Thus, the court ordered the municipality to make a reasonable accommodation to permit the establishment of the residence.²²⁵

B. Attempts to Limit "Reasonable Accommodation"

Municipalities have proffered several arguments to limit the interpretation of "reasonable accommodation" for the purposes of the FHAA. First, they have argued that establishing a separate zone for housing for handicapped persons is a reasonable accommodation.²²⁶ They have also asserted, with limited success, that allowing persons to seek a variance from a municipal ordinance is a

221. *Id.* at 873.

222. *Id.* at 879.

223. *Id.*

224. *Id.*

225. *Id.* In both the *Parish of Jefferson* and *Village of Marshall* cases, the courts found in favor of the houses in issue on the ground that a reasonable accommodation was necessary to permit persons with disabilities to reside in residences of their choice. However, in *Smith & Lee Assoc., Inc. v. City of Taylor*, No. 92-1903 (6th Cir. Dec. 30, 1993) (unpublished opinion on file with the *Fordham Urban Law Journal*), the court found that even though a reasonable accommodation was necessary to permit a particular residence for persons with disabilities to be placed in a residential neighborhood, that fact was not sufficient to permit the establishment of the residence. The *Smith & Lee* court held that if it were found that the reasonable accommodation was only necessary to permit the profit-making provider of housing to make a profit, the court would not require the municipality to make a reasonable accommodation, regardless of whether the provision of the accommodation would harm the municipality.

As discussed previously and as stated by the dissent in *Smith & Lee*, the purpose of the FHAA is to permit persons with disabilities access to housing of their choice. Thus, under the FHAA, an accommodation would be required so long as it is reasonable, regardless of the profit motives of the housing provider. Because the *Smith & Lee* decision could result in housing being denied to persons with handicaps without demonstration of harm to the municipality, the *Smith & Lee* decision does not comport with the aims of the FHAA.

226. *Oxford House-Evergreen*, 769 F. Supp. at 1344 (fact that residence can be placed in other neighborhoods is irrelevant); *accord Harden v. Peach Bottom Township*, No. 1:CV-92-1750, slip op. at 12 (M.D. Pa. Sept. 13, 1993); *cf. Elliott*, 960 F.2d at 982-83 (municipality can legitimately set aside certain neighborhoods for housing for persons with handicaps).

reasonable accommodation.²²⁷ As discussed earlier, requiring special variances and permits discourages access to housing and is not sanctioned by the FHAA.

In *Oxford House-Evergreen v. City of Plainfield*,²²⁸ the court specifically rejected a municipality's argument that it could exclude a handicapped persons' home from a given area because it permitted housing for handicapped persons in other regions of the city. The court noted that "anti-discrimination laws are designed to prevent just such discriminatory segregation."²²⁹ In *Horizon House Development Services, Inc. v. Township of Upper Southampton*,²³⁰ the court rejected a municipality's claim that its variance procedure was a "reasonable accommodation," noting that the procedure was "lengthy, costly and burdensome."²³¹ However, in *Oxford House, Inc. v. City of Albany*,²³² the court found that use of a municipal variance procedure could constitute a "reasonable accommodation."²³³

C. FHAA's Exemption of Maximum Occupancy Regulations

The requirement to make a reasonable accommodation is not nullified by the Amendments' exemption of local and state restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Otherwise, the exemption provisions would be inconsistent with the stated intentions of the drafters of the Amendments.

In *Parish of Jefferson*, the court held that the Amendments' occupancy exemption had to be read consistently with the Amendments' "reasonable accommodation" clause.²³⁴ Accordingly, the court ruled that the municipality had to make a reasonable accommodation in an occupancy-limiting ordinance to permit the estab-

227. *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1261-64 (E.D. Va. 1993); *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1166, 1178 (N.D.N.Y. 1993); *Stewart B. McKinney Found., Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1221-22 (D. Conn. 1992); *Easter Seal Soc'y v. Township of N. Bergen*, 798 F. Supp. 228, 236 (D.N.J. 1992); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 463 (D.N.J. 1991).

228. 769 F. Supp. 1329 (D.N.J. 1991).

229. *Id.* at 1344.

230. 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993).

231. *Id.* at 700; *accord Stewart B. McKinney Found., Inc.*, 790 F. Supp. at 1221-22; *Township of Cherry Hill*, 799 F. Supp. at 463; *Easter Seal Soc'y*, 798 F. Supp. at 236; *cf. City of Albany*, 819 F. Supp. at 1178; *City of Virginia Beach*, 825 F. Supp. at 1261-64.

232. 819 F. Supp. 1166 (N.D.N.Y. 1993).

233. *Id.* at 1178.

234. *Parish of Jefferson*, No 91-1199, 91-1200, 91-3959 at 14-15.

ishment of a residence.²³⁵ In effect, the court held that the reasonable accommodation provisions took precedence over the exemption section.

Similarly, in *Elliott v. City of Athens*,²³⁶ a dissenting opinion argued that a municipality should be required to make a reasonable accommodation to permit a residence for recovering alcoholics and substance abusers, despite an occupancy-limiting ordinance.²³⁷ Unfortunately, in permitting the municipality to prohibit the residence, the majority did not consider the reasonable accommodation provisions of the statute.²³⁸ Rather, the court held that the Amendments' exemption clause precluded the applicability of the FHAA.²³⁹

Even if the FHAA did not contain a reasonable accommodation provision, the *Elliott* decision still conflicts with both the language of the exemption and the drafters' intention with regard to the exemption. The FHAA only permits "reasonable" local and state restrictions regarding the maximum number of occupants permitted to occupy a dwelling.²⁴⁰ In *Elliott*, because the municipality's planning board found that the residence at issue would not burden municipal services²⁴¹ and no evidence was presented that the residence would substantially alter the residential character of the neighborhood,²⁴² the *Elliott* court erred in finding that the municipality's restriction was reasonable.

Moreover, the drafters of the House Report stated that reasonable, occupancy-level restrictions would be permitted "as long as they were applied to all occupants and did not operate to discrimi-

235. *Id.*

236. 960 F.2d 975 (11th Cir. 1992).

237. *Id.* at 987-88.

238. *Id.* at 984 n.12.

239. *Id.* The court rejected the argument of the proponents of the residence that the exemption only applied to a limitation on the number of persons per square foot in a residence and did not apply because there was not a "maximum occupancy limitation" on the number of related persons residing together. *Id.* at 979-81. In *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1258-59 (E.D. Va. 1993), the court rejected the argument of the *Elliott* court, citing legislative history for the position that the "maximum occupancy limitation" exemption could only be applicable if it applied to all persons, related and unrelated. *Accord* *Harden v. Peach Bottom Township*, No. 1:CV-92-1750, slip op. at 14-15 (M.D. Pa. Sept. 13, 1993); *Oxford House-C v. City of St. Louis*, No. 91-2402-C(7), slip op. at 35 (E.D. Mo. Jan. 28, 1994) (unpublished opinion on file with the *Fordham Urban Law Journal*); see also House Report, *supra* note 1, at 2192.

240. 42 U.S.C. § 3607(b)(1) (Supp. 1993).

241. 960 F.2d at 977, 988.

242. *Id.*

nate on the basis of race, color, religion, sex, national origin, handicap or familial status."²⁴³ The court in *Oxford House, Inc. v. City of Virginia Beach*,²⁴⁴ relied upon the congressional report in holding that a local ordinance permitting only four or fewer unrelated persons to reside in a dwelling was not exempted from the Amendments because it applied only to unrelated persons and not to all persons.²⁴⁵

V. Abstention and the Anti-Injunction Act

Much of the litigation generated by the FHAA has involved the interpretation of zoning ordinances. While Fair Housing Act issues can be litigated in either state or federal courts,²⁴⁶ many housing advocates prefer to litigate in federal court. Housing advocates theorize that federal courts may be more familiar than state courts with the issues raised in discrimination cases²⁴⁷ and that municipalities may be less accustomed with federal court procedure than with state court procedure. Occasionally, municipalities have struck first by initiating lawsuits in local courts. Housing advocates have attempted to prevent those suits from proceeding by bringing federal actions. The municipalities have defended the federal actions by raising the doctrine of abstention and the Federal Anti-Injunction Act.²⁴⁸ The decisions have varied as to whether federal courts should abstain from FHAA issues where a previous proceeding was filed in state court²⁴⁹ and whether the Federal Anti-Injunction

243. House Report, *supra* note 1, at 2192.

244. 825 F. Supp. 1251, 1258-59 (E.D. Va. 1993).

245. *Id.*

246. 42 U.S.C. § 3613(a)(1) (Supp. 1993).

247. For example, jurisdiction only lies in the Federal courts for claims of employment discrimination brought under Title VII to the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(f)(3) (1981). In *Matthews v. Institute for Community Living*, No. CV92-4029, slip op. at 27 (E.D.N.Y. Nov. 29, 1993) (unpublished opinion on file with the *Fordham Urban Law Journal*), however, the district court, in abstaining from ruling on an issue in a lawsuit to block housing for homeless persons with mental disabilities, noted that "sometimes as a pragmatic matter, you're better off having these issues decided by elected state judges."

248. See, e.g., *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 752 F. Supp. 1152 (D.P.R. 1990), *rev'd*, 988 F.2d 252 (1st Cir. 1993); *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1166 (N.D.N.Y. 1993); *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991).

249. Compare *Oxford House v. City of Albany*, 819 F. Supp. at 1172 (*Younger* abstention doctrine inapplicable); *Oxford House-Evergreen*, 769 F. Supp. at 1333-38 (all abstention doctrines inapplicable) with *Casa Marie*, 988 F.2d at 262-64 (*Younger* abstention doctrine applicable).

One court has held that when the federal government intervenes in a Fair Housing Act case, the doctrine of abstention does not apply. In *United States v. Village of*

Act should apply to enjoin state proceedings during the pendency of a federal action.²⁵⁰

A. The Abstention Doctrine

Under the doctrine of abstention, which was set forth in the Supreme Court's decision in *Younger v. Harris*,²⁵¹ federal courts will abstain where there is an ongoing state proceeding, the proceeding implicates important state interests, and there is an opportunity in the state proceeding to raise the federal claims.²⁵² Federal courts should not apply the *Younger* abstention doctrine, however, where state officials exhibit bad faith or harassment.²⁵³ Further, the *Younger* abstention doctrine does not apply where it is demonstrated that immediate and irreparable harm will result absent federal court intervention.²⁵⁴

Two federal courts have declined to apply the *Younger* doctrine and have retained jurisdiction over FHAA claims in spite of ongoing state proceedings.²⁵⁵ In *Oxford House-Evergreen v. City of Plainfield*, the court found that the local officials' earlier state court proceeding to evict a residence for recovering alcoholics and substance abusers was brought to harass the residents²⁵⁶ and that the continuation of the state court proceeding would result in irreparable harm to the residents.²⁵⁷ Similarly, in *Oxford House, Inc. v. City of Albany*,²⁵⁸ the court found that the continuation of a state

Palatine, No. 93-C-2154, slip op. at 7-8 (N.D. Ill. May 12, 1993) (unpublished opinion on file with the *Fordham Urban Law Journal*), the court held that the doctrine of abstention would not be applied to dismiss a lawsuit brought by the federal government that followed on-going state proceedings commenced by a municipality. The court reasoned that because the interests of the federal government—the vindication of the public interest of providing for fair housing throughout the United States—were different from that of the handicapped persons involved in the lawsuit and because the remedies the federal government sought were not available in the state court proceeding, the abstention doctrine did not apply.

250. Compare *City of Albany*, 819 F. Supp. at 1171 (Anti-Injunction Act does not apply); *Oxford House-Evergreen*, 769 F. Supp. at 1341 (same) with *Casa Marie* 988 F.2d at 260-62 (Anti-Injunction Act does apply).

251. 401 U.S. 37 (1971).

252. *Id.* at 43-44.

253. *Id.* at 53.

254. *Id.* at 46.

255. *City of Albany*, 819 F. Supp. at 1172; *Oxford House-Evergreen*, 769 F. Supp. at 1333-38.

256. *Oxford House-Evergreen*, 769 F. Supp. at 1338-40.

257. *Id.* at 1333-39. The court also refused to apply any other doctrine of abstention. *Id.* at 1331-41.

258. 819 F. Supp. 1166 (N.D.N.Y. 1993).

court proceeding would result in irreparable harm to the residents.²⁵⁹

The First Circuit, in *Casa Marie, Inc. v. Superior Court of Puerto Rico*,²⁶⁰ reached the opposite result in applying the *Younger* abstention doctrine. There, an operator of a nursing home for persons with disabilities commenced an action in federal court during ongoing state court proceedings.²⁶¹ The *Casa Marie* court declined to exercise jurisdiction over the FHAA case, finding that the nursing home operator had failed to demonstrate that a "great and immediate harm" would occur if the state court proceedings continued without federal intervention.²⁶² The nursing home operator could have presented its FHAA claims in state court. However, the record indicates that the state court proceedings were commenced in response to neighborhood complaints and were based upon prejudices and fears about handicapped elderly people.²⁶³ Accordingly, the federal court should have exercised jurisdiction on the grounds that the local officials brought the state court suit to harass the nursing home operator.

B. Federal Anti-Injunction Act

The Federal Anti-Injunction Act provides that "a court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."²⁶⁴ In both *Oxford House-Evergreen* and *City of Albany*, the courts held that the Federal Anti-Injunction Act did not apply, on the ground that Congress had intended to enact a broad remedy to housing discrimination and that the "expressly authorized by Act of Congress" exception was satisfied by the FHAA.²⁶⁵ In contrast, the *Casa Marie* court held more persuasively that be-

259. *Id.* at 1172.

260. 988 F.2d 252 (1st Cir. 1993).

261. *Id.* at 266-70.

262. *Id.* at 263. The court was particularly disgusted with the nursing home operator because of its delay in instituting its federal court action. *Id.* at 263-64.

263. *Casa Marie*, 752 F. Supp. at 1168-69. The district court found that state court proceedings were commenced based upon prejudices and fears about handicapped elderly persons. The official actions were taken in response to neighbors who complained that the residence "might lower property values," that it would cause people to "think about death" at the sight of hearses and ambulances, and that it would "hinder the spontaneity of neighborhood children."

264. 28 U.S.C. § 2283 (1978).

265. *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1341 (D.N.J. 1991); *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168, 1171 (N.D.N.Y. 1993).

cause (a) the Fair Housing Act permitted aggrieved parties to bring proceedings in either federal or state court and (b) there was no legislative history demonstrating a distrust of state courts, the "expressly authorized by Act of Congress" exception did not apply.²⁶⁶ If it were impossible for the *Casa Marie* nursing home operator to litigate the Fair Housing Act issues in state court, the operator could have raised the "necessary in aid of its jurisdiction" exception to the Anti-Injunction Act.²⁶⁷

VI. Recommendations and Conclusion

The FHAA provides a powerful vehicle for combating housing discrimination against persons with handicaps. However, its effectiveness can only be judged by the manner in which courts apply it. The following are proposed recommendations for advocates and courts for the most effective use of the FHAA in accordance with the intentions of the statutes' drafters.

The FHAA mandates that persons with handicaps be treated as individuals. Thus, persons with disabilities should not be eligible for coverage under the FHAA simply because they fall within a particular category of affliction. Rather, advocates should present and courts should demand expert testimony demonstrating that persons within a certain category are substantially limited by their condition in one or more major life activities. In addition, a court should require testimony by the resident or prospective resident to demonstrate the substantial limitation of activities. Finally, testimony must also be provided that connects the limitation in life activity with a need for special housing arrangements.

Perhaps the strongest section of the FHAA is that which requires municipalities to make a reasonable accommodation to permit persons with handicaps to live in a residence of their choice. Therefore, the consideration of whether a municipality has made a reasonable accommodation should be at the center of every lawsuit filed under the Amendments and every decision rendered by the courts. This provision should overcome local maximum occupancy restrictions and all but the most reasonable ordinances.

266. *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 262 (1st Cir. 1993).

267. 42 U.S.C. § 3613(a)(1) (Supp. 1993). In cases involving great and immediate irreparable harm, federal courts need not refrain from exercising jurisdiction even where 28 U.S.C. section 2283 is applicable. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1982).

In a disparate impact case involving a facially-neutral zoning statute, an advocate should present evidence demonstrating that a person with a handicap should not have to meet the exact letter of the ordinance. Because the intentions of the Amendments included an increased access to housing for persons with handicaps, courts should be liberal in their consideration of whether a person cannot conform with the statute because of a disability. Therapeutic needs and financial inability caused by a person's disability should be considered as *bona fide* reasons for inability to comply with a zoning ordinance. Moreover, special-use permit requirements that subject persons with handicaps to public scrutiny and that create burdensome procedures should strongly be considered violative of the FHAA. That a municipality's ordinances may be applicable to some non-handicapped groups is absolutely irrelevant in any "disparate impact" case.

In disparate impact cases involving statutes that specifically apply to dwellings for persons with handicaps, the FHAA mandates that such housing be treated the same as other residential dwellings. However, an exception applies if a municipality can demonstrate that a requirement is absolutely necessary for the safe operation of the residence. If a municipality does have special requirements, they must be tailored to meet the needs of the specific house; general requirements applied to all persons with handicaps contravene the FHAA. Because distance limitations and notice requirements are not applied to housing for non-handicapped persons, imposing these limitations on residences for persons with disabilities clearly violates the FHAA. Accordingly, all distance limitation statutes and statutes requiring notification of communities should be stricken.

In discriminatory intent cases, advocates and courts should look closely at the timing between neighborhood opposition to a residence and action by a municipality. The closer in time a municipality's action is to a public meeting at which neighbors oppose a site, the more likely it is that a court will find that a municipality's action is tinged with discriminatory intent. Advocates should collect all newspaper articles and hearing transcripts on disputes over residences, and should conduct discovery to determine how a municipality has handled similar circumstances in the past.

In light of the First Circuit's decision in *Casa Marie*, it may be difficult to persuade a federal court to take jurisdiction of FHAA claims where there are ongoing proceedings in state court. Therefore, the race to the courthouse may be crucial in FHAA cases. An

advocate who desires to litigate an FHAA claim in federal court should file there as soon as it appears that a municipality may take action against a proposed or existing residence for persons with handicaps. However, if an advocate can demonstrate that the municipality commenced its action in state court in bad faith or to harass, the federal court should not abstain from asserting jurisdiction. In any event, an aggrieved party may file a complaint with HUD simultaneously with a federal complaint, and the Department of Justice can seek immediate relief if necessary. Thus aggrieved parties should take advantage of both administrative and judicial forums.²⁶⁸

Finally, the Federal Anti-Injunction Act may be used to ensure that a federal court retains jurisdiction over an FHAA complaint. An advocate should attempt to utilize the "aid of jurisdiction" clause found within the Federal Anti-Injunction Act by demonstrating that the state court cannot properly litigate the FHAA issues.

The drafters of the FHAA clearly envisioned that it would bar municipalities from depriving persons with disabilities of their right to reside in dwellings of their choice. Accordingly, the Amendments permit persons with disabilities to overcome almost all barriers placed in their path by municipalities. The only immovable obstacles are those ordinances necessary to prevent substantial burdens on the community or to prevent fundamental changes in the neighborhood. Most courts have properly applied the FHAA in accordance with the drafters' intentions. If all courts were to discard stereotypes, persons with disabilities will be able to use the Amendments to remove municipal barriers to housing.

268. An advocate may also attempt to remove a case from state court pursuant to 28 U.S.C. § 1443 (1973), which permits removal in certain civil rights cases. In *Sofarelli v. Pinellas County*, 931 F.2d 718, 724-25 (11th Cir. 1991), the Eleventh Circuit held that a state court action filed for the purpose of preventing a homeowner from moving into a neighborhood was itself a violation of the Fair Housing Act and could be removed to federal court pursuant to 28 U.S.C. § 1443 (1973).

