

# The Fair Housing Act, Oxford House, and the Limits of Local Control Over the Regulation of Group Homes for Recovering Addicts

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## NOTES

### THE FAIR HOUSING ACT, OXFORD HOUSE, AND THE LIMITS OF LOCAL CONTROL OVER THE REGULATION OF GROUP HOMES FOR RECOVERING ADDICTS

When group home operators, Oxford House, Inc., challenged a zoning ordinance in the Chicago suburb of Palatine, Illinois, in March 1993, Mayor Rita Mullins thought her town was being singled out as a test case. During a summer trip to a meeting of the United States Conference of Mayors, however, Mullins found Palatine was not alone.<sup>1</sup> Many of her counterparts noted similar experiences with Oxford Houses in their own jurisdictions.<sup>2</sup>

The Palatine ordinance at issue limited the number of unrelated people in a single-family residence to three and required "group homes"<sup>3</sup> to have around-the-clock professional staffing.<sup>4</sup>

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1. Karen C. Krause, *Group Home Dispute Expands: Palatine Not the Only Target of Housing Complaints*, CHI. TRIB., Aug. 11, 1993, at 1.

2. *Id.* ("I found in that one room at least one third of them had problems with this one particular agency.") (quoting Mullins); Joyce Price, *HUD Investigations Questioned: Agency Goes to Bat for Rehab Centers That Challenge Zoning Laws*, WASH. TIMES, Aug. 22, 1994, at A3. With more than 500 homes in 36 states, Oxford House has been involved in 80 disputes with local officials across the country. *Id.*

3. The term "group home" describes a diverse range of facilities for the care and treatment of a special population in a residential or normalized setting. See PETER W. SALSICH, JR., *LAND USE REGULATION* § 7.07 (1991). Disparities in staffing, regulation, and services among homes for the many different populations that can benefit from such residential treatment account for many of the problems inherent in their regulation. This Note is concerned primarily with loosely structured recovery homes, which facilitate drug and alcohol rehabilitation with no professional staff and minimal regulatory supervision.

4. *United States v. Village of Palatine*, 845 F. Supp. 540 (N.D. Ill. 1993) (denying village motion to dismiss). The Palatine litigation is variously reported as follows: *United States v. Village of Palatine*, 3 Am. Disabilities Dec. (Law. Co-op) 271 (N.D. Ill. 1993) (magistrate judge's recommended findings of fact and conclusions of law), *adopted*, No. 93-C-2154, 1993 WL 462848 (N.D. Ill. Nov. 9, 1993) (adopting magistrate's recommendation and grant of Oxford House request for preliminary

The recovery home established by Oxford House required twelve recovering addicts to pay the rent, and its charter required the residents to be self-sufficient in their pursuit of a sober lifestyle, thus precluding the use of paid staff.<sup>5</sup>

Oxford House, Inc. is an umbrella organization for a network of independent Oxford Houses around the country. Its home in Palatine, like the hundreds of others it has helped start, is not a treatment facility but a group residence for recovering alcoholics and drug addicts.<sup>6</sup> The self-governing, unsupervised homes enforce a strict alcohol- and drug-free lifestyle to support the residents in their recovery.<sup>7</sup>

Boosted by the inclusion of substance abusers as a protected class under the Fair Housing Act<sup>8</sup> (FHA) and federally mandated start-up grants under the Anti-Drug Abuse Act of 1988,<sup>9</sup> Oxford House helped create nearly 500 group homes for recovering addicts and alcoholics between 1988 and 1994.<sup>10</sup> The concept, however, has spawned imitations, particularly in California where many such homes are little more than flophouses run by welfare profiteers.<sup>11</sup> Although group homes chartered by Oxford House generally have been well managed, government start-up loans are available to any person or group who seeks to estab-

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injunction), *vacated*, 37 F.3d 1230 (7th Cir. 1994).

5. *Palatine*, 845 F. Supp. at 541; see *infra* notes 58-63 and accompanying text.

6. Carey Q. Gelernter, *Oxford House*, SEATTLE TIMES, Apr. 17, 1994, at M1.

7. *Oxford House: A Success Story*, WASH. POST, May 15, 1993, at A24.

8. 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993). The Act was amended by the Fair Housing Amendments Act of 1988 to add handicapped people as a protected class. See *infra* notes 43-54 and accompanying text.

9. Pub. L. No. 100-690, § 2036, 102 Stat. 4181, 4202 (current version at 42 U.S.C. § 300x-25 (Supp. V 1993)). The provision was reauthorized in the ADAMHA Reorganization Act, Pub. L. No. 102-321, § 1925, 106 Stat. 323, 393-94 (codified at 42 U.S.C. § 300x-25 (Supp. V 1993)). It requires states to establish revolving loan funds of at least \$100,000 to help start homes in the Oxford House model. *Id.*; see *infra* note 65 and accompanying text.

10. See Gelernter, *supra* note 6, at M1. A thorough review of the Oxford House history is available in detailed findings of fact accompanying Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1562-64 (E.D. Mo. 1994).

11. Pamela Warrick & Claire Spiegel, *Paying a Price to Stay Sober*, L.A. TIMES, Oct. 21, 1992, at A1. Spiegel and Warrick describe horrendous conditions in some of California's so-called "sober-living homes" started with state money under the federally mandated revolving loan program created by the Anti-Drug Abuse Act of 1988. *Id.*; see *infra* notes 239-40.

lish an unsupervised home.<sup>12</sup> Moreover, the precedents being set through aggressive litigation<sup>13</sup> in the federal courts will apply to unsupervised recovery homes with or without Oxford House guidance.

This Note will assess the impact of the amended Fair Housing Act, and its interpretation by the federal courts, on local control over the regulation and site selection for these unsupervised recovery homes. In particular it will examine the conflict between the federal policy of endorsing the concept of unsupervised residential treatment and municipalities' interest in preserving the residential character of single-family neighborhoods. Unlike foster homes or group homes for the mentally disabled, unsupervised recovery homes can present problems not based on unfounded fears and prejudices, but on the realities of drug and alcohol recovery and the legitimate concerns of residents forced to bear the burden of a potentially detrimental land use.<sup>14</sup>

This Note first will review the nature of single-family zoning, the development and legislative history of the FHA, and the corresponding rise in popularity of residential treatment under the Oxford House model.<sup>15</sup> The Note then will review the language of the amended FHA and the principal cases that have thus far defined the federal statute's limits on control of group homes through local zoning. Oxford House and similar groups

12. J. PAUL MOLLOY, SELF-RUN, SELF-SUPPORTED HOUSES FOR MORE EFFECTIVE RECOVERY FROM ALCOHOL AND DRUG ADDICTION 13 (1990).

13. See, e.g., *United States v. Village of Palatine*, 37 F.3d 1230 (7th Cir. 1994); *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802 (9th Cir.), cert. granted, 115 S. Ct. 417 (1994); *St. Louis*, 843 F. Supp. 1556; *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168 (N.D.N.Y. 1993); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993); *Oxford House, Inc. v. City of Va. Beach*, 825 F. Supp. 1251 (E.D. Va. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992); *Oxford House—Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991).

14. Ordinarily group homes are distinguished from typical residential housing by three characteristics: (1) residents are unrelated, (2) supervision by live-in caretakers or professional staff, and (3) on-site support services. SALSICH, *supra* note 3, § 7.07. This Note focuses on the narrower, but rapidly growing, field of unsupervised recovery homes that provide neither staffing nor professional support services. The cases discussed mostly involve homes for recovering substance abusers. Many were brought by Oxford House, Inc. or by the Justice Department on behalf of a local Oxford House.

15. See *infra* notes 19-74 and accompanying text.

have attacked a central principle of local ordinances aimed at preserving single-family neighborhoods—limits on the number of unrelated people that constitutes a “single family.”<sup>16</sup>

Finally, the Note analyzes the conflicting policy arguments: a policy favoring residential treatment as an effective and economical aid to the recovery of reformed addicts versus a locality's interest in maintaining reasonable restrictions in residential districts.<sup>17</sup> The Note concludes with recommendations for appropriate local regulation designed to permit structured group homes as of-right uses without eviscerating local zoning codes directed at promoting the single-family character of neighborhoods.<sup>18</sup>

## BACKGROUND

### *Single-Family Zoning*

Since the advent of zoning, one of its principal purposes has been the preservation of the single-family neighborhood as one of the highest uses of land.<sup>19</sup> A frequently-quoted passage from Justice Douglas describes the virtues of the single-family neighborhood:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.<sup>20</sup>

The first single-family restrictions were aimed mainly at limiting the proliferation of apartments and other multi-family dwellings. Indeed, early zoning definitions of family frequently

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16. See *infra* notes 75-210 and accompanying text.

17. See *infra* notes 211-58 and accompanying text.

18. See *infra* notes 259-311 and accompanying text.

19. *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926). Justice Sutherland wrote that the crux of zoning legislation was the “creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.” *Id.* at 390.

20. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

did not require kinship or other association.<sup>21</sup> Instead the focus was on occupants living as a single housekeeping unit.<sup>22</sup> As lifestyles changed, however, an increasing number of localities sought to limit the definition by excluding or restricting the number of unrelated people who could constitute a family.<sup>23</sup> The Supreme Court upheld such restrictive definitions in *Village of Belle Terre v. Boraas*,<sup>24</sup> finding the distinction between related and unrelated people rationally related to the government's proffered objective of maintaining the single-family character of a neighborhood. Later, in *Moore v. City of East Cleveland*,<sup>25</sup> the Court struck a restrictive definition of family which purported to limit the types of relations that constituted a "family" under the local ordinance.<sup>26</sup> The plaintiff had been prosecuted for housing an illegal occupant—her grandson.<sup>27</sup> The plurality opinion found that such restrictions cut too deeply into the sanctity of the family and did little to further the community objectives of preventing overcrowding and congestion.<sup>28</sup>

With this distinction in place, localities crafted definitions of family comporting with the Supreme Court's holding.<sup>29</sup> Al-

21. 2 ROBERT M. ANDERSON, *AMERICAN LAW OF ZONING* § 9.30 (2d ed. 1976).

22. *Id.*

23. *Id.* A typical ordinance limits the family to "one or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers or sisters of the owner or tenant." *Id.* (citing *White Plains v. Ferraioli*, 34 N.Y.2d 300 (1974)).

24. *Belle Terre*, 416 U.S. at 9. The ordinance approved in *Belle Terre* limited the number of unrelated people who could constitute a family to two. *Id.* at 2. The Court reviewed the ordinance under the rational basis test and found it to be rationally related to the goal of preserving the single-family character of the neighborhood. *Id.* at 8-9.

25. 431 U.S. 494 (1977).

26. *Id.* at 496 n.2.

27. *Id.* at 497.

28. *Id.* at 499-500.

29. The distinction is typically codified in a municipality's zoning code. For example, in Virginia Beach, Virginia, a family is defined as:

(a) An individual living alone in a dwelling unit; or

(b) Any of the following groups of persons, living together and sharing living areas in a dwelling unit:

(1) Two (2) or more persons related by blood, marriage, adoption, or approved foster care;

(2) A group of not more than four (4) persons (including servants) who need not be related by blood, marriage, adoption or approved foster care.

though restrictions on family relationships violated fundamental rights, the Court clearly supported the use of zoning to exclude congregate living arrangements that were deemed detrimental to the single-family character of neighborhoods.<sup>30</sup>

More restrictive statutes limit the impact of communal living arrangements among college students and younger people sharing homes in resort areas.<sup>31</sup> They also promote permanency and stability, enhancing the residential character of single family neighborhoods.<sup>32</sup> Unfortunately, localities also use restrictive ordinances to exclude a variety of beneficial uses, including group homes for the disabled.<sup>33</sup> In response to this exclusionary pressure, advocates for the disabled began to lobby Congress to amend the FHA to add the handicapped as a protected class.<sup>34</sup>

Before Congress could act, the Supreme Court decided *City of Cleburne v. Cleburne Living Center, Inc.*<sup>35</sup> The case involved the denial of a use permit to operate a group home for mentally retarded adults.<sup>36</sup> The Fifth Circuit had invalidated the use

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VIRGINIA BEACH, VA., CODE app. A § 111 (1994); see also *Oxford House—C v. City of St. Louis*, 843 F. Supp. 1556, 1568 (E.D. Mo. 1994) (citing ST. LOUIS, MO., CODE § 26.08.160 (1992)).

30. The Court reaffirmed its support for an unrelated persons restriction in 1984, dismissing an appeal by group home operators for want of a federal question in *Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and Zoning Comm'n*, 469 U.S. 802, *dismissing appeal from* 314 S.E.2d 218 (Ga. 1984). The Macon home, designed to house four unrelated mentally disabled residents, was found not to constitute a single-family use by the lower court.

31. 2 ANDERSON, *supra* note 21, § 9.30.

32. *St. Louis*, 843 F. Supp. at 1579 (“[S]ingle-family-zoning districts in particular, promote the legitimate governmental interest of maintaining the residential character of a neighborhood and segregating single families from rooming houses, multi-family apartments, and commercial or industrial uses in that same area.”); see also Harold A. Ellis, Comment, *Neighborhood Opposition and the Permissible Purposes of Zoning*, 7 J. LAND USE & ENVTL. L. 275 (1992) (observing that zoning disputes often center on maintaining neighborhood “character”).

33. Lester D. Steinman, *The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study*, 19 URB. LAW. 1, 2 (1987).

34. In 1980, the House of Representatives passed the first amendment to propose adding the handicapped as a protected class under the FHA. The bill failed in the Senate, however, and languished for nearly a decade until passed by the 100th Congress in 1988. H.R. REP. NO. 711, 100th Cong., 2d Sess. 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2175.

35. 473 U.S. 432 (1985).

36. *Id.* at 435.

permit restriction, finding that the mentally retarded were a "quasi-suspect" class<sup>37</sup> and thus entitled to an intermediate level of judicial scrutiny.<sup>38</sup> The Supreme Court affirmed the decision, but refused to find the classification suspect. Instead, the majority's rigorous application of rational basis review rejected all seven proffered justifications for the use permit denial.<sup>39</sup>

Although clearly committed to the plight of the mentally disabled, and to overcoming the "irrational prejudice" that denied them housing, the Court's decision in *Cleburne* created confusion over the proper standard to be applied in equal protection challenges.<sup>40</sup> The deliberate finding that the disabled were not a "suspect class" deprived them of heightened scrutiny,<sup>41</sup> but the searching analysis of the city's motives gave new teeth to the rational basis standard.<sup>42</sup> As a result of this confusion, pressure for congressional action increased, and legislators responded with the Fair Housing Amendments Act of 1988.

### *The Fair Housing Act*

The Fair Housing Act was originally passed as Title VIII of the Civil Rights Act of 1968.<sup>43</sup> It provided protection from discrimination in housing on the basis of race, color, religion, gender, or national origin.<sup>44</sup> The Act was amended in 1988 to extend protection to the handicapped.<sup>45</sup> The amended FHA makes it unlawful

37. *Cleburne Living Center, Inc. v. City of Cleburne*, 726 F.2d 191, 198 (5th Cir. 1984).

38. *Id.*

39. *Cleburne*, 473 U.S. at 447-50.

40. Patrick T. Bergin, Note, *Exclusionary Zoning Laws: Irrationally-Based Barriers to Normalization of Mentally Retarded Citizens*, 3 J. LAND USE & ENVTL. L. 237, 255 (1987).

41. *Cleburne*, 473 U.S. at 446; Bergin, *supra* note 40, at 255.

42. Bergin, *supra* note 40, at 255-56; David O. Stewart, *A Growing Equal Protection Clause?*, A.B.A. J., Oct. 1985, at 108, 109-12.

43. 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993).

44. Gender was added as a protected class by the 1974 Amendments to the Fair Housing Act, Pub. L. No. 93-383, § 808(b)(1)-(3), 88 Stat. 729 (1974) (amending 42 U.S.C. §§ 3604-3606 (1988)).

45. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (current version at 42 U.S.C. §§ 3601-3631 (1988 & Supp. V 1993)).

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

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or

(C) any person associated with that buyer or renter.<sup>46</sup>

The statutory definition of discrimination includes "a refusal to make reasonable accommodations in *rules, policies, practices*, or services when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . ."<sup>47</sup> Both the language of the prohibition and the definition of discrimination indicate an intention that the law apply to local zoning decisions.<sup>48</sup>

In drafting the amendments, Congress relied heavily on the Rehabilitation Act of 1973.<sup>49</sup> It also expressed an intent for courts to apply the two statutes consistently.<sup>50</sup> Not surprisingly, the courts subsequently extended the coverage of the FHA to include recovering substance abusers as a protected class.<sup>51</sup> In addition to case law, the legislative history explicitly supports the FHA's application to recovering drug addicts and alcoholics.<sup>52</sup>

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46. 42 U.S.C. § 3604(f)(1)-(2) (1988) (emphasis added).

47. *Id.* § 3604(f)(3)(B) (emphasis added).

48. If the language were not plain enough, the report of the House Judiciary Committee was unequivocal: "The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices." H.R. REP. NO. 711, *supra* note 34, at 24, *reprinted in* 1988 U.S.C.C.A.N. at 2185.

49. 29 U.S.C. § 701 (1988 & Sapp. V 1993).

50. H.R. REP. NO. 711, *supra* note 34, at 22, *reprinted in* 1988 U.S.C.C.A.N. at 2183 ("The Committee intends that the definition be interpreted consistent with regulations clarifying the meaning of the similar provision found in Section 504 of the Rehabilitation Act.") (footnote omitted).

51. *United States v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992); *Oxford House—Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1342; *see infra* notes 101-17 and accompanying text.

52. The House Report specifically stated that the definition of handicap included "individuals who have recovered from an addition [sic] or are participating in a treatment program or self-help group such as Narcotics Anonymous. . . . Depriving such individuals housing, or evicting them, would constitute irrational discrimination that may seriously jeopardize their continued recovery." H.R. REP. NO. 711, *supra* note 34, at 22, *reprinted in* 1988 U.S.C.C.A.N. at 2183.

The passage of the amendments gave group-home operators a potent new weapon in their fight against restrictive zoning statutes.<sup>53</sup> It also capped a movement toward the mainstreaming of the disabled that began decades earlier and proved instrumental in the implementation of a legislative policy specifically directed at providing low-cost group housing as a partial solution to the country's growing substance abuse problem.<sup>54</sup>

### *The Oxford House Experiment*

Deinstitutionalization, or normalization, of the disabled has been accepted policy since the 1950s.<sup>55</sup> According to this theory, disabled people who cannot live with their families should live together in a household unit of normal size that provides opportunities for social interaction in a setting that closely approximates that of a typical household.<sup>56</sup>

Such community-based living arrangements have been part of the effort to treat recovering substance abusers since 1958.<sup>57</sup> Such homes have several advantages over traditional in-patient treatment facilities. The residential setting, usually in quiet neighborhoods, reduces the temptation to relapse by removing the addicts from areas of drug trafficking.<sup>58</sup> In addition, the

53. See William Graham, Comment, *There Goes the Neighborhood: The Evolution of "Family" in Local Zoning Ordinances*, 9 *TOURO L. REV.* 699, 715-18 (1993) (discussing the increased use of FHA remedies by group home advocates in New York courts).

54. *Id.*

55. Peter W. Salsich, Jr., *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 *REAL PROP. PROB. TR. J.* 413, 416 n.17 (1986).

56. Cindy L. Soper, Note, *The Fair Housing Act Amendments of 1988: New Zoning Rules for Group Homes for the Handicapped*, 37 *ST. LOUIS U. L.J.* 1033, 1040-41 (1993).

57. See LEWIS YABLONSKY, *THE THERAPEUTIC COMMUNITY* 17 (1989). The first therapeutic community, or TC, called Synanon, was established in a Santa Monica, California, beach house. Like modern recovery homes, it relied on the ability of recovering addicts to help themselves through group therapy and a peer-to-peer structure which gave the patients responsibility for the operation and maintenance of the home. *Id.* at 17-26. Unfortunately, the Synanon movement itself was discredited widely in the 1970s for the cult-like practices of its leader and allegedly exploitative commercial ventures. See *Synanon Church v. United States*, 579 F. Supp. 967, 970-71 (D.C. Cir. 1984) (upholding the revocation of the group's tax-exempt status).

58. MOLLOY, *supra* note 12, at 16 n.12.

social structure of the home fosters the interdependence that is a large factor in the successful recovery programs of Alcoholics Anonymous and Narcotics Anonymous.<sup>59</sup>

Oxford House is the country's largest developer of unsupervised recovery homes. It was founded in 1975 by Paul Molloy, a lawyer and recovering alcoholic.<sup>60</sup> Molloy started the first Oxford House out of necessity. After the half-way house facilitating his own recovery was threatened with closure for lack of funds, the residents decided to take over the home themselves.<sup>61</sup> They established two simple rules: No resident could drink or take drugs, and each had to work and pay rent to stay.<sup>62</sup> There were no curfews, no mandatory meetings, no treatment regimen, and no staff.<sup>63</sup>

Despite their success, the growth of group homes under the Oxford House model was limited mainly to the suburbs around Washington, D.C., with fewer than twenty homes established in the first fifteen years after Oxford House's founding.<sup>64</sup> Then, in 1988, Molloy, with the help of friends in Congress, succeeded in getting federal block grants made contingent on state support for self-governing group homes patterned after the Oxford House model.<sup>65</sup>

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59. Both groups follow the "twelve-step" method of recovery, involving admitting powerlessness over drugs and alcohol and committing to total abstinence. The main instrument of their success is the weekly AA or NA meeting, at which recovering addicts support one another in the recovery process. ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., ALCOHOLICS ANONYMOUS 59 (3d ed. 1976).

60. *The Oxford House Experiment*, WASH. POST, Nov. 12, 1989, (Magazine), at W15.

61. *Id.*

62. *Id.* The basic tenets of Oxford House are remarkably unchanged. The main principles are self-governance, absolute prohibition of alcohol and drugs, and self-sufficiency. See OXFORD HOUSE MANUAL 8-14, reprinted in MOLLOY, *supra* note 12, at app. C.

63. The fewer the rules, the more likely it will be that a house will be successful. . . . In many alcoholic rehabilitation units, there are rules covering . . . curfew hours; clean-up details; mandatory attendance at AA meetings; and other rules almost inherent in institutional living. Oxford House is not an institution. It is more analogous to a family situation or a college fraternity or sorority.

OXFORD HOUSE MANUAL, *supra* note 62, at 13.

64. MOLLOY, *supra* note 12, at 3-4.

65. 42 U.S.C. § 300x-25 (Supp. V 1993). The act provides that block grants under

With the support of state start-up grants, and the recent inclusion of the handicapped as a protected class under the FHA, Oxford House experienced tremendous growth and expansion between 1988 and 1994. More than 500 unsupervised group homes were established in thirty-five states.<sup>66</sup> As the network grew, so too did the disputes over the proper location of recovery homes under local zoning codes.

Residents opposed to the facilities have used restrictive family definitions and safety-related use permit requirements in local zoning codes to exclude group homes from their neighborhoods.<sup>67</sup> Molloy, who runs the national organization, contends that the definitions should not operate against local Oxford Houses. In a "Technical Manual" written to help individuals and organizations interested in starting a recovery home, he claims that a recovery home is "no different from a biological family."<sup>68</sup> "Family" he argues, "is the proper characterization of an Oxford House. The members . . . behave just like a family and should be treated as such by every jurisdiction."<sup>69</sup> As a result, the new homes "[a]s a matter of practice, . . . do[] not seek prior approval of zoning regulations before moving into a residential neighborhood."<sup>70</sup>

the Anti Drug Abuse Act are given only to those states that establish a \$100,000 revolving loan fund for the establishment of group homes made to private, non-profit entities where

(A) the use of alcohol or any illegal drug in the housing program provided by the program will be prohibited;

(B) any resident of the housing who violates such prohibition will be expelled from the housing;

(C) the costs of the housing, including fees for rent and utilities, will be paid by the residents of the housing; and

(D) the residents of the housing will, through a majority vote of the residents, otherwise establish policies governing residence in the housing, including the manner in which applications for residence in the housing are approved.

*Id.* § 300x-25(a)(6). The fund must provide loans of up to \$4000 per home and the loans must be repaid within two years. *Id.* § 300x-25(a)(4).

66. Gelernter, *supra* note 6, at M1.

67. *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994); *Oxford House—C v. City of St. Louis*, 843 F. Supp. 1556 (E.D. Mo. 1994); *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168 (N.D.N.Y. 1993); *Oxford House, Inc. v. City of Va. Beach*, 825 F. Supp. 1251 (E.D. Va. 1993).

68. MOLLOY, *supra* note 12, at 30.

69. *Id.*

70. *Id.*; see *United States v. Village of Palatine*, 37 F.3d 1230, 1234 (7th Cir.

Not surprisingly, residents in prospective Oxford House neighborhoods view the situation differently.<sup>71</sup> Although some have objected on clearly improper grounds,<sup>72</sup> others raise legitimate objections based on the character of the recovery home use and the surreptitious procedure by which the homes locate.<sup>73</sup> Notwithstanding the mandate of the amended FHA, these localities argue that recovery home operators do not have a blanket exemption from local regulation.<sup>74</sup> The following discussion considers the limits on that local regulation through an analysis of the language and interpretation of the relevant provisions of the FHA.

### THE LIMITS OF LOCAL CONTROL

In the recent past, arguments about what constitutes a single-family use, and how sites for group homes ought to be selected, have moved from local city council and zoning board meetings into the federal courts. Prior to the inclusion of the handicapped as a protected class under the FHA, group home operators who were defeated at the local level had to challenge restrictive zoning ordinances on constitutional grounds.<sup>75</sup> Because zoning ordinances traditionally are accorded a very deferential review by

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1994) (Manion, J. concurring).

71. See, e.g., Tom Kennedy, *West University and Drug Rehab*, HOUS. POST, June 12, 1994, at C1; Sara Talalay, *Town Says Oxford House Doesn't Obey Zoning Rules*, CHI. TRIB., Apr. 19, 1994, at 3; *Group Homes Spark Debate over Locations*, ST. LOUIS POST DISPATCH, Mar. 17, 1994, at 1A; *Home Stands Alone: House for Recovering Addicts Is Opposed by Neighbors, Officials*, NEWSDAY, Oct. 6, 1991, at 1; *Audobon Residents Oppose Home for Recovering Alcoholics, Addicts*, PHILA. INQUIRER, Sept. 19, 1990, at B5.

72. See *infra* notes 127-33 and accompanying text (citing cases).

73. *Palatine*, 37 F.3d at 1235 (Manion, J., concurring) (recognizing localities' legitimate interests in safety, property rights, and the rights of other group home residents); *Oxford House, Inc. v. City of Va. Beach*, 825 F. Supp. 1251, 1262 n.4 (E.D. Va. 1993); see also Kennedy, *supra* note 71, at C1 (describing neighbor's surprise at learning of a local Oxford House by observing a resident who had relapsed running naked down the street).

74. *Palatine*, 37 F.3d at 1233-34.

75. Graham, *supra* note 53, at 700. Most cases were brought on either due process or equal protection grounds. *Id.*

the courts, these early challenges were difficult to win.<sup>76</sup> With the expansion of FHA protection, Oxford House and other home operators have proceeded directly to the federal courts for temporary and permanent injunctive relief and, in some cases, damages.<sup>77</sup>

This section of the Note will review the impact of the amended FHA on local control of recovery home regulation. After a review of the statutory language itself, it will discuss judicial interpretations of the FHA by the federal courts. The early interpretations of lower courts have resolved some of the ambiguity in the FHA and clarified the limits of local zoning power to control recovery home expansion.

### *The Statutory Language*

Group home operators viewed the amended FHA as a useful tool to combat exclusionary zoning of group homes.<sup>78</sup> In fact, Congress clearly stated its intention that the statute prohibit special restrictions and criteria that localities apply to exclude group homes.<sup>79</sup>

What is less clear is the extent to which the FHA prohibits the application of neutral laws that have the effect of making it difficult for recovery homes to operate.<sup>80</sup> One area of confusion

76. *Id.* The Supreme Court, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), held that zoning regulations did not violate the Due Process Clause unless they were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Id.* at 395.

77. Until the Supreme Court's decision in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), and the amendments to the Fair Housing Act, control over the location of group homes was almost exclusively a local and state question. See SALSICH, *supra* note 3, § 7.07; see also *supra* notes 33-45 and accompanying text.

78. See William D. McElyea, *The Fair Housing Act Amendments of 1988: Potential Impact on Zoning Practices Regarding Group Homes for the Handicapped*, in 1990 ZONING AND PLANNING LAW HANDBOOK 359 (Mark S. Dennison ed., 1990); Keith Aoki, *Recent Developments—Fair Housing Amendments Act of 1988*, 24 HARV. C.R.-C.L. L. REV. 249 (1989).

79. H.R. REP. NO. 711, *supra* note 34, at 23, reprinted in 1988 U.S.C.C.A.N. at 2184 (stating that the Committee "intend[s] to prohibit special . . . terms or conditions, or denials of service because of an individual's handicap and which have the effect of excluding, for example, congregate living arrangements for persons with handicaps").

80. McElyea, *supra* note 78, at 363.

involves the interpretation of the statute's numerous exemptions.<sup>81</sup> A few of these exemptions have been asserted in attempts to deny FHA protection to recovery home residents.<sup>82</sup> For example, the statute excludes from the definition of handicap the "current, illegal use of or addiction to a controlled substance."<sup>83</sup> It also exempts from coverage persons who have been convicted of the illegal manufacture or distribution of a controlled substance.<sup>84</sup> These exemptions have been asserted by localities seeking to restrict recovery home access to residential neighborhoods by denying the residents protected status.<sup>85</sup>

The exemption that has been relied upon most frequently by local officials permits "reasonable . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling."<sup>86</sup> The meaning of that exemption, however, is subject to disagreement. The Eleventh Circuit concluded that the exemption applied to family definitions that limited the number of unrelated people who could occupy a dwelling.<sup>87</sup> But the Ninth Circuit disagreed,<sup>88</sup> and the Eleventh Circuit's decision has been distinguished<sup>89</sup> and criticized<sup>90</sup> in district court cases

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81. 42 U.S.C. § 3607 (1988). This statute exempts certain housing provided by religious groups and private clubs, *id.* § 3607(a), allows restrictions based on maximum occupancy, *id.* § 3607(b)(1), and excludes from coverage persons who "have been convicted . . . of the illegal manufacture or distribution of a controlled substance," *id.* § 3607(4).

82. *United States v. Southern Management Corp.*, 955 F.2d 914, 918 (4th Cir. 1992); *Oxford House—Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1342 (D.N.J. 1991).

83. 42 U.S.C. § 3602(h).

84. *Id.* § 3607(4).

85. See *infra* notes 105-20 and accompanying text.

86. 42 U.S.C. § 3607(b).

87. *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir. 1992); see *infra* notes 193-98 and accompanying text.

88. *City of Edmonds v. Washington St. Bldg. Code Council*, 18 F.3d 802 (9th Cir.), *cert. granted*, 115 S. Ct. 417 (1994); see *infra* notes 204-08 and accompanying text.

89. *Oxford House v. Town of Babylon*, 819 F. Supp. 1179, 1182 n.4 (E.D.N.Y. 1993) (finding *Elliott* "inapposite" because the family definition did not use a numerical limit but required a showing of "a relatively permanent household, not a framework for transients or transient living").

90. *Oxford House, Inc. v. City of Va. Beach*, 825 F. Supp. 1251, 1259 & n.3 (E.D. Va. 1993) (finding the "reasoning of *Elliott* unpersuasive" and agreeing with the *Elliott* dissent that "it is not possible to interpret the maximum occupancy limitation provision to cover unrelated persons restrictions"); see *Oxford House—C v. City of St.*

with very similar facts. The Supreme Court agreed to resolve the dispute in its current term.<sup>91</sup>

In addition to confusion over the purpose of the exemptions, the language of the statute is also ambiguous as to the showing required to prove discrimination. Republican lawmakers, anticipating the statute's impact on local zoning, attempted to amend it in committee to require a showing of discriminatory intent to invalidate a zoning ordinance.<sup>92</sup> The amendment was defeated, however, and the Act went into effect with no specified standard.<sup>93</sup> As a consequence, three different tests have emerged.<sup>94</sup> Most courts hold that a showing of either discriminatory intent or discriminatory impact will suffice to prove discrimination.<sup>95</sup> A third standard, borrowed from the Rehabilitation Act and applicable only to the handicapped, is "reasonable accommodation."<sup>96</sup>

Louis, 843 F. Supp. 1556 (E.D. Mo. 1994).

91. *City of Edmonds v. Washington State Bldg. Code Council*, 115 S. Ct. 417 (1994); see *Arguments Before the Court*, 63 U.S.L.W. 3679 (Mar. 21, 1995) (noting oral argument in the *Edmonds* case was presented on Mar. 1, 1995).

92. H.R. REP. NO. 711, *supra* note 34, at 89, *reprinted in* 1988 U.S.C.C.A.N. at 2224 (additional views of Rep. Swindall et al.: "I vote against H.R. 1158 [because] in its present form, the bill may be used by advocacy groups, federal judges or bureaucrats to bust local zoning."). President Reagan also voiced his support for the discriminatory intent standard in remarks made during the signing of the legislation.

[T]his bill does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [FHA] violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent. [The FHA] speaks only to intentional discrimination.

Remarks on signing the Fair Housing Amendments Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1140, 1141 (Sept. 13, 1988).

93. The language of the Act is silent with regard to the standard of proof required to show discrimination. The provisions relating to the handicapped, however, require a "reasonable accommodation" to promote access to housing. 42 U.S.C. § 3604 (1988).

94. *St. Louis*, 843 F. Supp. at 1575; see ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW & LITIGATION § 11.5(3)(c) (1994).

95. *Doe v. City of Butler*, 892 F.2d 315, 323 (3d Cir. 1989); *Oxford House—Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1343 (D.N.J. 1991); *Baxter v. City of Belleville*, 720 F. Supp. 720, 732 (S.D. Ill. 1989). The standard is a familiar one from actions under Title VII of the Civil Rights Act. See, e.g., *Keith v. Volpe*, 858 F.2d 467, 482-84 (9th Cir. 1988); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-37 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988). It had been applied under the FHA in cases of racial discrimination and is thus compatible with congressional intent that the statute be interpreted consistently with earlier statutes.

96. Reasonable accommodation has a well-developed history in the case law and

The lack of clarity regarding the applicable standard, coupled with the ambiguous language of the exception provisions,<sup>97</sup> has made the area of zoning for group homes one of the most frequently litigated aspects of the expanded coverage for the handicapped under the FHA.<sup>98</sup> The drafters' decision to delegate enforcement responsibility for zoning and land-use cases to the Justice Department, rather than the Department of Housing and Urban Development (HUD), further clouds the interpretation.<sup>99</sup> Because HUD regulations issued to cover the implementation of the rest of the FHA deliberately excluded zoning challenges, the need for judicial interpretation is particularly acute.<sup>100</sup>

### *The Oxford House Cases*

Litigation to interpret the limits that the amended FHA places on unsupervised recovery homes has addressed three basic questions with varying degrees of clarity. The first question is whether the residents are handicapped within the meaning of the FHA. Although courts generally agree that the Act protects recovering addicts, the exemptions and exclusions related to current and former drug problems raise questions about the extent of drug-related disabilities.

Next, courts have considered the required showing to support a finding of discrimination under the amended FHA. This analysis involves a review of challenged zoning practices under the discriminatory intent, discriminatory impact, and reasonable

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the journals. See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Wynne v. Tufts Univ. Sch. of Medicine*, 932 F.2d 19 (1st Cir. 1991); Denny Chin, *Discrimination Against the Handicapped: The Duty of Reasonable Accommodation* [sic], in *PROCEEDINGS OF NEW YORK UNIVERSITY, FORTY-SECOND ANNUAL NATIONAL CONFERENCE ON LABOR* §§ 14.01-05 (Bruno Stein ed., 1989); Andrew Waugh, Case Comment, 25 *SUFFOLK U. L. REV.* 186 (1991).

97. See *supra* note 81 and accompanying text.

98. SCHWEMM, *supra* note 94, § 11.5(3)(c).

99. 42 U.S.C. § 3610(g)(2)(c) (requiring the Secretary of HUD to refer land-use and zoning matters directly to the Attorney General for investigation and prosecution).

100. SCHWEMM, *supra* note 94, § 11.5(3)(c) n.287 (noting that the statute's provision for Justice Department prosecution of land-use cases rendered HUD regulations inappropriate for this area).

accommodation tests. Finally, courts are divided over the interpretation of the statute's exemption for maximum occupancy restrictions. Because restrictive definitions of family are an important obstacle for recovery homes seeking unrestricted access to single-family districts, the interpretation of this exemption is critical to a proper application of the statute.

*Recovering Alcoholics and Addicts Are a Protected Class*

The federal courts have little difficulty finding that recovery home residents are a protected class under the amended FHA.<sup>101</sup> This interpretation is consistent with the clear intent of Congress, both by specific reference in the report of the House Judiciary Committee<sup>102</sup> and by the provision that the Act be interpreted consistently with the Rehabilitation Act.<sup>103</sup> Courts also apply the definition of handicap in the statute to find recovering alcoholics "substantially limit[ed in] one or more of such person's major life activities."<sup>104</sup> Parties seeking to limit the Act's application, however, argue that recovery home residents are not protected because of current or former drug problems. To date, courts have not been receptive to this argument.

In *United States v. Southern Management Corp.*,<sup>105</sup> for example, after finding residents of a recovery home "handicapped" within the meaning of the statute,<sup>106</sup> the Fourth Circuit con-

101. *United States v. Southern Management Corp.*, 955 F.2d 914, 918 (4th Cir. 1992); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 459 (D.N.J. 1991); *United States v. Borough of Audobon*, 797 F. Supp. 353, 358 (D.N.J. 1991).

102. H.R. REP. NO. 711, *supra* note 34, at 22, reprinted in 1988 U.S.C.A.N. at 2183 ("[I]ndividuals who have a record of drug use or addiction but who do not currently use illegal drugs would continue to be protected . . .").

103. The Rehabilitation Act had been extended to cover recovering substance abusers before the FHA was amended. *See, e.g., Rodgers v. Lehman*, 869 F.2d 253, 258 (4th Cir. 1989); *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 182 (3d Cir. 1987); *Creve v. United States Office of Personnel Management*, 834 F.2d 140, 141-42 (8th Cir. 1987).

104. 42 U.S.C. § 3602(h)(1) (1988).

105. 955 F.2d 914 (4th Cir. 1992).

106. A bootstrapping argument succeeded in *Southern Management*. The court held that recovery home residents were handicapped because they were denied housing as a result of their status. The denial of housing that formed the basis of the suit constituted a "substantial impairment" of their ability to care for themselves. *Id.* at 918; cf. *United States v. Borough of Audobon*, 797 F. Supp. 353 (D.N.J. 1991) (find-

ducted an analysis of the Act's legislative history to determine that the exception for current use or addiction to illegal drugs did not apply to recovering addicts not currently using drugs.<sup>107</sup> In addition to the House Committee Report filed with the legislation,<sup>108</sup> the court relied on Congress' definition of handicap in the more recently passed Americans with Disabilities Act (ADA) to conclude that the exemption did not apply to people currently recovering from addiction as long as they were not using illegal drugs presently.<sup>109</sup>

In *Oxford House—Evergreen v. City of Plainfield*,<sup>110</sup> the city also argued that the plaintiffs were not handicapped within the meaning of the statute because they fell into one of the statutory exemptions in the law. The exemptions deny protection to anyone who is a current user of illegal drugs,<sup>111</sup> has a prior conviction for the sale or distribution of drugs,<sup>112</sup> or constitutes a direct threat to the health or safety of the neighborhood or property of others.<sup>113</sup> The city pointed out that thirteen of the twenty residents in Oxford House—Evergreen had left in the past year, nine as a result of relapse.<sup>114</sup> The court found the prior relapses by residents who were subsequently forced out, per Oxford House policy, proved nothing with regard to the current and prospective residents of the recovery home. It then dismissed all

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ing Oxford House residents handicapped because they are unable to live independently).

107. *Southern Management*, 955 F.2d at 922-23.

108. The House Report emphasized that "the amendment [was] intended to exclude current abusers and current addicts of illegal drugs from protection . . . . The Committee does not intend to exclude individuals who have recovered from an addiction [sic] or are participating in a treatment program or a self-help group." *Id.* at 921 (quoting H.R. REP. NO. 711, *supra* note 34, at 22, *reprinted in* 1988 U.S.C.C.A.N. at 2183).

109. *Id.* at 922 (citing 29 U.S.C. § 706(8)(c) (1991)). In the ADA, Congress made explicit the only definition of drug dependence disabilities that is consistent with the legislative history and plain language of the FHA by specifically protecting sober addicts who are participating in a recovery program. *Id.*

110. 769 F. Supp. 1329 (D.N.J. 1991).

111. *Id.* at 1342 (citing 42 U.S.C. § 3602(h) (1988)).

112. *Id.* (citing 42 U.S.C. § 3607(b)(4) (1988)); *see also id.* at 1343 (finding the city's speculation with regard to the likelihood of prior convictions insufficient to establish that residents are not handicapped under the Act).

113. *Id.* at 1342 (citing 42 U.S.C. § 3604(f)(9) (1988)).

114. *Id.*

three of the city's arguments and suggested the accusations themselves could be evidence of discriminatory intent.<sup>115</sup>

These cases indicate the courts' reluctance to apply the exemptions to defeat sincere attempts at recovery by former drug and alcohol abusers. Although this result is understandable, perhaps even laudable, it presents issues of interpretation that complicate the regulation of recovery homes. For example, because the statute exempts from coverage those with prior convictions for the sale or manufacture of illegal drugs, should a locality be permitted to inquire into such convictions among proposed recovery home residents?<sup>116</sup>

In addition, because addiction is not as readily identifiable as other handicaps, does a locality have an interest in documenting the extent of prior treatment?<sup>117</sup> A related and more difficult issue is raised when a disabled recovery home resident makes the transition out of protected status. As one court has observed, "[w]hether former addiction to drugs or alcohol qualifies as a handicap is not open to as easy a determination as [Oxford House] would have this court believe."<sup>118</sup> By extension of the Fourth Circuit's reasoning in *Southern Management*, it may be that as long as a resident derives benefit from a group living arrangement, she will remain handicapped within the meaning of the Act. Moreover, because the Act protects those who are merely "regarded as having"<sup>119</sup> a disability, defining who is entitled to its protection (and for how long) presents even more difficult challenges for local regulators. Later decisions accept that the FHA covers recovering addicts and alcoholics.<sup>120</sup> Un-

115. *Id.* at 1343 n.16.

116. See *United States v. Southern Management Corp.*, 955 F.2d 914, 917 (4th Cir. 1992). The district court in *Southern Management* authorized discovery on this issue but limited the inquiry to the convictions specified in the exemption and redacted individual names to foreclose independent investigation by the defendant.

117. The ADA definition of drug-related disability relied upon by the Fourth Circuit in *Southern Management* provides that addicts who currently are not using drugs are part of a protected class if (1) they have completed a rehabilitation program, (2) they are enrolled in a rehabilitation program, or (3) they are erroneously regarded as continuing to use drugs. *Id.* at 922 (citing 29 U.S.C. § 706(8)(c) (Supp. III 1991)).

118. *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168, 1175 n.5 (N.D.N.Y. 1993).

119. 42 U.S.C. § 3602(h)(3) (1988).

120. See, e.g., *Oxford House, Inc. v. City of Va. Beach*, 825 F. Supp. 1251, 1257

fortunately, the courts have provided little guidance in defining the limits of the disability.

### *Proving Discrimination under the FHA*

Because recovering drug addicts and alcoholics are newly protected classes under the amended FHA, their ability to win zoning challenges has increased dramatically. Instead of showing that the regulation in question is not rationally related to a legitimate state interest,<sup>121</sup> recovery home residents need only show that it discriminates against them as a result of their status. This section of the Note considers how such discrimination is measured. The statutory language is ambiguous with regard to the specific showing required to prove discrimination,<sup>122</sup> and courts have applied any of three tests to scrutinize local regulations: discriminatory intent, discriminatory impact, and failure to make reasonable accommodation.

### *Discriminatory Intent*

Statutes passed or enforced solely for the purpose of excluding individuals based on their handicap violate the FHA.<sup>123</sup> "Intentional discrimination can include actions motivated by stereotypes, unfounded fears, misperceptions, and 'archaic attitudes,' as well as simple prejudice about people with disabilities."<sup>124</sup>

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(E.D. Va. 1993) ("In light of [*Southern Management's*] holding that recovering former alcohol and drug abusers who were denied housing opportunities qualified as 'handicapped' under the Fair Housing Act, the parties do not dispute that the Fair Housing Act applies to plaintiffs and the members of the group homes they operate."); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993) ("It is well established that individuals recovering from drug or alcohol addiction are handicapped under the FHA.") (citations omitted).

121. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985). Although the Court in *Cleburne* struck the ordinance, as applied to restrict a group home for the mentally ill, they refused to grant protected class status to the disabled. *Id.* at 439-46. Instead they subjected the ordinance to rigorous application of the rational basis test. *Id.* at 448-50; see also *supra* notes 35-42 and accompanying text.

122. See *supra* notes 92-96 and accompanying text.

123. 42 U.S.C. § 3615 (1988) ("[A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.").

124. *Oxford House—C v. City of St. Louis*, 843 F. Supp. 1556, 1575-76 (E.D. Mo.

Discriminatory intent is alleged most frequently when local officials selectively enforce use permit requirements to exclude groups of handicapped individuals.<sup>125</sup> Denial of those permits based, even partially, on discriminatory motives violates the statute.<sup>126</sup>

Sometimes recovery homes face blatant discrimination, evidenced by comments of officials during public hearings or meetings or indicated by public enforcement action taken solely in response to local opposition arising from unfounded fears or prejudice. In a New Jersey case brought by the operator of a proposed home for mentally ill chemical abusers,<sup>127</sup> after the plaintiff's appeal of the zoning denial was deferred, the mayor of the township was quoted as saying: "The war continues. An adjournment like this is a victory. Just like last month when they didn't get their papers in on time. Every month that we last and that doesn't proceed we're ahead."<sup>128</sup> The Town newsletter was even more explicit:

The Township is supporting the efforts of more than 300 area residents who have joined forces to stop the State of New Jersey and Easter Seal from opening a half-way house for mentally ill drug addicts. . . . Neighbors and town officials believe it is morally wrong and have vowed to stop this half-way house from opening.<sup>129</sup>

1994) (citing *School Bd. v. Arline*, 480 U.S. 273, 279 (1987)).

125. See, e.g., *Oxford House—Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991). Most of the litigation involves permits that are required for all similar uses by unrelated people (boarding houses, group homes, fraternities, sororities, and other congregate living arrangements). The plain language of the statute indicates that a permit requirement focused solely on the protected status would be invalid. See also H.R. REP. NO. 711, *supra* note 34, at 24, *reprinted in* 1988 U.S.C.C.A.N. at 2185 ("Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety, and land-use in a manner which discriminates against people with disabilities. . . . [T]hese and similar practices would be prohibited.").

126. *St. Louis*, 843 F. Supp. at 1576 ("[I]t is not necessary that plaintiffs prove that defendant's actions were motivated by a malicious desire to discriminate. It is enough that the actions were motivated by or based on consideration of the protected status itself."); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1184-85 (E.D.N.Y. 1993); *Plainfield*, 769 F. Supp. at 1343.

127. *Easter Seal Soc'y v. Township of N. Bergen*, 798 F. Supp. 228 (D.N.J. 1992).

128. *Id.* at 232.

129. *Id.*

Cases like this are easy for the federal courts enforcing the FHA. Unfortunately, they are not uncommon.<sup>130</sup>

Discriminatory intent also is alleged when group homes are denied use permits as a result of community protest. In *Oxford House—C v. City of St. Louis*,<sup>131</sup> for example, the court found the city's enforcement actions were carried out "in response to neighborhood and community fears and concerns about 'some sort of drug rehab' house . . ."<sup>132</sup> Despite testimony from city officials sympathetic to the recovery home mission, the court concluded the city's enforcement was discriminatory, holding specifically: "Intentional discrimination does not require personal animosity or ill will—it is sufficient that defendant treated plaintiffs unfavorably because of their handicap."<sup>133</sup>

This broad interpretation of discriminatory intent poses special problems for local zoning officials in light of the Oxford House policy of evading local restrictions. Because the new home operators are encouraged to locate facilities without regard to local zoning restrictions,<sup>134</sup> neighbors understandably complain and notify government officials. Subsequent enforcement efforts are branded discriminatory based on the motivation of complaining neighbors, despite the fact that local authorities were preempted from appropriate regulation by the surreptitious location of the facility.<sup>135</sup>

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130. See, e.g., *Plainfield*, 769 F. Supp. at 1343 (zoning officer first permitted home, then reversed determination after citizen complaints at council meeting); *United States v. Borough of Audobon*, 797 F. Supp. 353, 360 (D.N.J. 1991) (quoting the mayor: "[T]here 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."); *Babylon*, 819 F. Supp. at 1184 (quoting a citizen of East Farmingdale: "I don't want [my son] subjected to irrational, unpredicted [sic] behavior from people.").

131. 843 F. Supp. 1556 (E.D. Mo. 1994).

132. *Id.* at 1576.

133. *Id.* at 1577.

134. MOLLOY, *supra* note 12, at 30; see also *United States v. Village of Palatine*, 37 F.3d 1230, 1234-35 (7th Cir. 1994) (Manion, J., concurring).

135. *Palatine*, 37 F.3d at 1235.

*Discriminatory Impact*

The second standard applied by courts for proof of discrimination under the Act involves facially-neutral<sup>136</sup> ordinances that are enforced uniformly but are alleged to violate the FHA by having a discriminatory effect on a protected class. In order to prevail on a discriminatory impact theory, the party challenging the ordinance first must show a discriminatory impact on the protected class. The burden then shifts to the locality to show that the impact is necessary to meet a legitimate state interest.<sup>137</sup>

Many local zoning restrictions place disparate burdens on congregate living arrangements, most commonly in the form of restrictive family definitions<sup>138</sup> and building codes that impose special burdens on group-living arrangements regardless of handicap status.<sup>139</sup> These restrictions have been invalidated widely by federal courts interpreting the FHA in the recovery home context.

In Albany, New York, the city's so called Grouper Law limits to three the number of unrelated people who can constitute a family.<sup>140</sup> In a suit for a preliminary injunction prohibiting its enforcement against a local Oxford House, the district judge, without deciding the issue, found sufficient evidence of discrimi-

136. Occasionally, statutes are found facially discriminatory. See *Horizon House Developmental Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992). In *Horizon House*, the challenged ordinance imposed a 1000 foot separation requirement between group homes where "permanent care or professional supervision" was present. *Id.* at 694. The court found that this requirement created an explicit classification because only disabled people would require such special care. As a result the statute was facially discriminatory. The court also rejected the city's justification for the ordinance—the avoidance of group home "clustering"—as not rationally related to any legitimate interest. *Id.* at 694-95. *But see* *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991) (upholding a similar spacing requirement).

137. *Oxford House—C v. City of St. Louis*, 843 F. Supp. 1556, 1577 (E.D. Mo. 1994).

138. See *supra* notes 21-32 and accompanying text.

139. *E.g.*, *United States v. Village of Palatine*, 3 Am. Disabilities Dec. (Law. Co-op) 271 (N.D. Ill. 1993), *adopted*, No. 93-C-2154, 1993 WL 462848 (N.D. Ill. Nov. 9, 1993), *vacated*, 37 F.3d 1230 (7th Cir. 1994).

140. *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168, 1176 (N.D.N.Y. 1993).

natory impact to award relief "on this ground alone."<sup>141</sup> The city had argued that the limit did not have a disparate impact because the residents could live next door or in a multi-family dwelling to achieve the six persons necessary for an Oxford House charter.<sup>142</sup> Beyond that, their need to live in larger groups was asserted to be financial and unrelated to their handicap.<sup>143</sup>

In *Oxford House—C v. City of St. Louis*<sup>144</sup> the court easily found the city's three-person limit on unrelated householders had a disparate impact on Oxford House residents.<sup>145</sup> There, however, the city had recently passed a group home exception to the zoning ordinance permitting group homes of up to eight to operate as of-right uses.<sup>146</sup> The court found the new law did not cure the discrimination "[b]ecause Oxford Houses typically require more than eight residents . . . to operate viably from both a financial and therapeutic viewpoint."<sup>147</sup> After concluding that the St. Louis ordinances at issue did have a disparate impact, and that the city had a legitimate interest in preserving "the residential character of [the] neighborhood,"<sup>148</sup> the court nonetheless found both ordinances discriminatory because they were not "necessary" to meet the goal of preserving residential character.<sup>149</sup> Specifically, the court found that alternative means for meeting the goal would have had a less discriminatory effect. It suggested a dispersion requirement and the creation of a conditional use for homes exceeding the city's eight-person limit.<sup>150</sup>

Non-numerical, "functional" definitions of family also have been challenged under a disparate impact theory. In *Oxford*

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141. *Id.*

142. *Id.* at 1170.

143. *Id.* at 1171; see also *Palatine*, 3 Am. Disabilities Dec. at 298 (finding six to eight residents sufficient to fulfill Oxford House's therapeutic mission).

144. 843 F. Supp. 1556 (E.D. Mo. 1994).

145. *Id.* at 1578.

146. *Id.* at 1578-79.

147. *Id.*

148. *Id.* at 1579.

149. *Id.* at 1579-80.

150. *Id.* Both suggestions are incorporated in this Note's proposed recovery home licensing scheme. See *infra* notes 263-311 and accompanying text.

*House—Evergreen v. City of Plainfield*,<sup>151</sup> for example, the family definition required unrelated people to meet a “functional equivalent” definition of family that focused on permanency and stability.<sup>152</sup> In addition to evidence of intentional discrimination in its enforcement, the district court found it had a disparate impact because recovering alcoholics and addicts may “never be perceived as ‘stable’ or ‘permanent’ by communities that object to their presence.”<sup>153</sup> In a footnote, the court questioned whether furthering “permanence” was a legitimate goal for zoning ordinances to further.<sup>154</sup> Likewise, in *Oxford House, Inc. v. Township of Cherry Hill*,<sup>155</sup> the court found discriminatory a definition of family that required unrelated groups to apply for a Certificate of Occupancy and defend their “permanency and stability.”<sup>156</sup> Both courts concluded the localities failed to establish that their enforcement actions were based on legitimate, non-discriminatory reasons.<sup>157</sup>

In *United States v. Village of Palatine*,<sup>158</sup> the village maintained restrictions for group homes that required them to meet certain heightened, building-safety guidelines including self-clos-

151. 769 F. Supp. 1329 (D.N.J. 1991).

152. *Id.* at 1333. The Plainfield ordinance described a family as:

One (1) or more persons living together as a single non-profit housekeeping unit whose relationship is of a permanent and domestic character, as distinguished from fraternities, sororities, societies, clubs, associations . . . All commercial residences, non-familial institutional uses, boarding homes and other such occupancies shall be excluded from one-family zones.

*Id.* (citing PLAINFIELD, N.J., ZONING CODE § 17.3-1(17)).

153. *Id.* at 1344.

154. *Id.* at 1336 n.6.

155. 799 F. Supp. 450 (D.N.J. 1992); see also *Cherry Hill Township v. Oxford House, Inc.*, 621 A.2d 952 (N.J. Super. Ct. App. Div. 1993) (reaching a similar result).

156. *Cherry Hill*, 799 F. Supp. at 462.

157. The cases were both brought in New Jersey, where the Supreme Court of New Jersey has specifically approved the concept of permanency and stability as a legitimate goal for zoning. *Berger v. State*, 364 A.2d 993 (N.J. 1976). In these cases, however, the courts concluded that the local process implementing that policy was impermissible. *Plainfield*, 769 F. Supp. at 1344 (finding permanence a “pretext” for underlying discrimination); *Cherry Hill*, 799 F. Supp. at 462 (finding family definition discriminatorily applied).

158. 3 Am. Disabilities Dec. (Law. Co-op) 271 (N.D. Ill. 1993), *adopted*, No. 93-C-2154, 1993 WL 462848 (N.D. Ill. Nov. 9, 1993), *vacated*, 37 F.2d 1230 (7th Cir. 1994).

ing doors, deadbolt locks, and fire-safety enhancements.<sup>159</sup> The district court<sup>160</sup> found that, as applied to Oxford House, the rules had a discriminatory impact because Oxford House residents were required to live in group arrangements to facilitate their recovery.<sup>161</sup> The court went on to conclude that the village had not met its burden of showing the restrictions were necessary to meet the legitimate safety interests that justified the statutes.<sup>162</sup> According to the court, the code requirements were not necessary in Oxford House's case because the residents "share a great deal more responsibility for one another than do typical rooming house residents. Similarly, because the residents . . . make and enforce house rules, concerns about such matters . . . might be addressed short of treating the residence as a rooming house for fire code purposes."<sup>163</sup>

These cases illustrate the broad sweep of the amended FHA in recovery home cases. Although courts do not question the legitimacy of governmental interests in neighborhood character<sup>164</sup> and residential safety,<sup>165</sup> the means chosen to achieve those goals will be scrutinized carefully. In the recovery home context, rules designed for traditional group homes or other congregate living arrangements frequently do not advance governmental interests. Local regulators seeking to regain some measure of control must establish a framework for regulation consistent with the population being regulated or find themselves without an enforcement vehicle.

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159. *Id.* at 287.

160. Although the district court opinion was vacated by the Seventh Circuit, *Palatine*, 37 F.3d 1230, the detailed findings of fact accompanying the lower court's grant of a preliminary injunction are still useful for an analysis of the special problems posed by building code requirements created for other congregate living arrangements, see *Palatine*, 3 Am. Disabilities Dec. at 274-89.

161. *Palatine*, 3 Am. Disabilities Dec. at 294.

162. *Id.* at 299. The village pointed out that such regulations were imposed on group living arrangements where the residents were likely to be less familiar with the building. But the court relied on the Oxford House structure and testimony at trial that indicated the recovery home residents were not likely to view their safety responsibilities any less seriously than the nuclear family.

163. *Id.* at 296.

164. *Oxford House—C v. City of St. Louis*, 843 F. Supp. 1556, 1579 (E.D. Mo. 1994).

165. *Palatine*, 3 Am. Disabilities Dec. at 295-96.

*Reasonable Accommodation*

The third aspect of the recovery home argument for protection under the FHA is unique to the protected class of the handicapped. The FHA requires a "reasonable accommodation" if such is necessary to afford an equal opportunity to use and enjoy a dwelling.<sup>166</sup> The phrase "reasonable accommodation" is frequently invoked by Oxford House. When faced with a local zoning challenge, instead of applying for a use permit or variance, it requests a "reasonable accommodation" in the local ordinance to permit them to continue to operate.<sup>167</sup>

Reasonable accommodation is the strongest of the three standards, as it purports to grant to the handicapped not only equal protection but a preferred status in housing discrimination claims.<sup>168</sup> The district court in *Oxford House—C v. City of St. Louis*<sup>169</sup> held that an accommodation is reasonable if it would not require a fundamental alteration in the nature of a program and would not impose undue financial or administrative burdens on a municipality.<sup>170</sup>

In those decisions that have addressed reasonable accommodation, the grant of a use permit or variance to allow a group home to operate is usually the objective.<sup>171</sup> In *St. Louis*, for example, the court found that Oxford House residents could not "lawfully be required to attempt those procedures."<sup>172</sup> The hearing process associated with variance and conditional use applications required notice and an opportunity for public comment that, according to the court, "stigmatizes [residents], perpetuates their self-contempt, and increases the stress which can

166. 42 U.S.C. § 3604(f)(3)(B) (1988).

167. See *Oxford House v. City of Va. Beach*, 825 F. Supp. 1251, 1256 (E.D. Va. 1993); *Oxford House v. Township of Babylon*, 819 F. Supp. 1179, 1185 (E.D.N.Y. 1993); *Oxford House v. City of Albany*, 819 F. Supp. 1168, 1171 (N.D.N.Y. 1993).

168. See *Elliott v. City of Athens*, 960 F.2d 975, 987 (11th Cir. 1992) (Kravitch, J., dissenting); SCHWEMM, *supra* note 94, § 11.5(3)(c).

169. 843 F. Supp. 1556 (E.D. Mo. 1994).

170. *Id.* at 1581 (citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)).

171. See *United States v. Village of Palatine*, 37 F.3d 1230 (7th Cir. 1994); *Virginia Beach*, 825 F. Supp. at 1254; *St. Louis*, 843 F. Supp. at 1581.

172. *St. Louis*, 843 F. Supp. at 1581.

so easily trigger relapse."<sup>173</sup>

A similar result was reached on identical facts by the district court in *United States v. Village of Palatine*.<sup>174</sup> In *Palatine*, the trial court reluctantly found the enforcement of the village's application procedure was potentially futile, and its refusal to waive the process was sufficient to warrant a preliminary injunction.<sup>175</sup> On appeal, however, the Seventh Circuit vacated the preliminary injunction granted by the lower court and ordered the case dismissed.<sup>176</sup> The circuit court agreed with village officials that the special use permit process was not, in itself, a failure to make reasonable accommodation.<sup>177</sup> It noted the finding of the magistrate judge below that there was no requirement that residents actually attend the hearing.<sup>178</sup> More importantly, the court recognized that "[p]ublic input is an important aspect of municipal decision making,"<sup>179</sup> and the FHA did not require courts to impose a "blanket requirement that cities waive their public notice and hearing requirements in all cases involving the handicapped."<sup>180</sup>

The Seventh Circuit relied, in part, on precedent from an Oxford House case in the eastern district of Virginia. There the district court refused to consider Oxford House's claims because of lack of ripeness.<sup>181</sup> Oxford House had alleged that the city's use permit requirement, which was imposed on all groups of unrelated people larger than four,<sup>182</sup> should be waived as a reasonable accommodation under the Act. It argued that the mere requirement of applying for such a permit would subject

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173. *Id.* at 1582 (citations omitted).

174. 3 Am. Disabilities Dec. (Law. Co-op) 271, 297 (N.D. Ill. 1993).

175. *Id.* at 299-300.

176. *United States v. Village of Palatine*, 37 F.3d 1230, 1234 (7th Cir. 1994).

177. *Id.*

178. *Id.* at 1233.

179. *Id.* at 1234.

180. *Id.* In a concurring opinion, Judge Manion chastised Oxford House for its "high handed" policy of ignoring local zoning requirements. *Id.* at 1235 (Manion, J., concurring).

181. *Oxford House v. City of Va. Beach*, 825 F. Supp. 1251, 1253 (E.D. Va. 1993).

182. The Virginia Beach zoning ordinance, like others in Virginia, contained an exception for group homes of eight or fewer residents that were licensed by the state. VIRGINIA BEACH, VA., CODE § 111 app. A (1994).

residents to public humiliation detrimental to their recovery.<sup>183</sup> The court disagreed. As in *Palatine*, the case was dismissed without prejudice until the city was given the opportunity to rule on a permit application.<sup>184</sup>

District Judge Payne elaborated on the concept of reasonable accommodation:

[I]nherent in the concept of "reasonable accommodation," . . . is that the interest of, and benefit to, handicapped individuals in securing equal access to housing must be balanced against the interest of, and burden to, municipalities in making the requested accommodation . . . . In requiring reasonable accommodation, therefore, Congress surely did not mandate a blanket waiver of all facially neutral zoning policies and rules. . . . Moreover, the need for such balancing is evident in the context of land use and zoning ordinances, where cities have important interests in regulating traffic, population density and services to ensure the safety and comfort of all citizens . . . .<sup>185</sup>

The courts in *Palatine* and *Virginia Beach* correctly concluded that the requested "accommodation" is not the summary admission of a group home, which may or may not be required by the FHA, but, rather, a fundamental alteration of the notice and comment decision making which has characterized zoning procedure for decades.<sup>186</sup> Both decisions recognize localities' legitimate interest in accountability. Whether or not a jurisdiction may restrict the placement of a recovery home, it should be allowed to impose some level of regulation to ensure that recovery home residents are entitled to their special status and to protect the legitimate interests of the surrounding community.

### *The Meaning of "Maximum Occupancy"*

The final important judicial interpretation concerns the meaning of an FHA statutory exemption for "maximum occupancy" restrictions. The first federal appellate court to interpret the

183. *Virginia Beach*, 825 F. Supp. at 1262.

184. *Id.* at 1265.

185. *Id.* at 1261.

186. DANIEL R. MANDELKER, *LAND USE LAW* § 6.69 (3d ed. 1993).

rule concluded it would apply to sustain restrictive family definitions in zoning codes that prohibited unrelated individuals from sharing a single-family home.<sup>187</sup> The Ninth Circuit, however, has reached the opposite conclusion, and other district court decisions exploring the legislative history of the act agree.<sup>188</sup> The Supreme Court agreed to resolve the issue in its Spring 1995 Term.<sup>189</sup>

The dispute centers on the meaning of section 3607(b)(1) of the FHA, which provides that the statute shall not limit "the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."<sup>190</sup> The legislative history is not specific with regard to the meaning of this exemption,<sup>191</sup> and two contrary interpretations have been proposed. The question is important because much of the legitimate dispute over the regulation of recovery homes centers around the intensive use made by residents. The typical Oxford House, for example, has ten or more adult residents, sleeping two to a room.<sup>192</sup>

The Eleventh Circuit was the first appellate court to interpret

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187. *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir. 1992).

188. See *infra* text accompanying notes 200-08.

189. The Court accepted the *Edmonds* case for review in October, 1994. *City of Edmonds v. Washington State Bldg. Code Council*, 115 S. Ct. 417 (1994). Oral argument was presented on March 1, 1995. See *Arguments Before the Court*, 63 U.S.L.W. 3679 (Mar. 21, 1995).

190. 42 U.S.C. § 3607(b)(1) (1988).

191. The House Report states: "*Section 6(d)* amends Section 807 to make additional exemptions relating to the familial status provisions. These provisions are not intended to limit the applicability of any reasonable local, State or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit." H.R. REP. NO. 711, *supra* note 34, at 31, reprinted in 1988 U.S.C.A.N. at 2192 (second emphasis added). This is almost exactly how the statute reads. The report continues:

A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.

*Id.*

192. See *Oxford House—C v. City of St. Louis*, 843 F. Supp. 1556, 1563-64 (E.D. Mo. 1994). Although the average number is ten, over 80% of the Oxford Houses contain more than eight residents, and some have as many as 20 residents. See MOLLOY, *supra* note 12, at 13.

the maximum occupancy exemption. In *Elliott v. City of Athens*,<sup>193</sup> the court upheld a local ordinance that limited the number of unrelated people constituting a single family to four.<sup>194</sup> The case involved an application by a recovery-home operator, Potter's House, to run a home for twelve recovering addicts.<sup>195</sup> The majority found the local ordinance, which was passed to reduce overcrowding in the college town, a "reasonable" maximum occupancy regulation exempt from the statute.<sup>196</sup>

The majority opinion relied on the distinction drawn by the Supreme Court in *Belle Terre* and *Moore*,<sup>197</sup> between restrictions on occupancy by unrelated people and those on related families. It concluded that Congress could not have intended to invalidate the numerous ordinances that included such restrictions in their zoning code as a legitimate means of controlling density.<sup>198</sup>

The court in *Elliott*, however, has not been followed, and lower courts in other circuits have criticized its rationale.<sup>199</sup> In Virginia Beach, Virginia, when Oxford House tried to establish four recovery homes in violation of the city's unrelated persons restriction, the court, in dicta, dismissed the reasoning of *Elliott* as unpersuasive.<sup>200</sup> It cited the *Elliott* dissent of Judge Kravitch as the more compelling interpretation.<sup>201</sup>

Whether restrictions on the number of unrelated persons are constitutional does not control whether such restrictions constitute maximum occupancy limitations under the Fair Housing Act. Moreover, in discussing the relevant legislative history, the majority in *Elliott* ignores the unambiguous statement that maximum occupancy limitations are permissible if "applied to *all* occupants," without qualification.<sup>202</sup>

193. 960 F.2d 975 (11th Cir. 1992).

194. *Id.* at 983.

195. *Id.* at 977.

196. *Id.* at 984.

197. *Id.* at 980; see *supra* notes 24-30 and accompanying text.

198. *Elliott*, 960 F.2d at 980.

199. *Oxford House—C v. City of St. Louis*, 843 F. Supp. 1556, 1574 (E.D. Mo. 1994); *Oxford House v. City of Va. Beach*, 825 F. Supp. 1251, 1259 (E.D. Va. 1993).

200. *Virginia Beach*, 825 F. Supp. at 1259.

201. *Id.* at 1259 n.3.

202. *Id.* at 1259 (emphasis added) (citations omitted).

The case ultimately was dismissed without prejudice because the Oxford House claim was not ripe for adjudication as a result of its failure to apply for special use permits, which, if granted, would allow the homes to operate.<sup>203</sup>

The Ninth Circuit also refused to follow the *Elliott* opinion. In *City of Edmonds v. Washington State Building Code Council*,<sup>204</sup> Oxford House successfully challenged the city's limit of five unrelated persons in single-family districts. The district court had applied the exemption to uphold the city's zoning enforcement,<sup>205</sup> but on appeal, the circuit court concluded that the restriction must be interpreted to include only those restrictions that apply to all occupants, regardless of their family status.<sup>206</sup> In effect, the Ninth Circuit reached precisely the opposite conclusion from the court in *Elliott*, although both purported to rely on congressional intent. In *Elliott*, the court concluded that Congress could not have intended to invalidate the hundreds of family definitions that restricted unrelated householders.<sup>207</sup> In *Edmonds*, the court found legislators could not possibly have intended to exempt such a pervasive restriction on the ability of the disabled to share congregate living arrangements.<sup>208</sup>

The *Edmonds* interpretation is probably correct. In *Elliott*, the court placed too much emphasis on the Supreme Court's distinction in *Belle Terre* between related and unrelated householders. Although the opinion persuasively concludes that Congress, within the bounds of the Constitution, could have exempted restrictions on unrelated householders, it offers scant evidence that they did.

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203. *Id.* at 1261-62.

204. 18 F.3d 802 (9th Cir. 1994).

205. *Id.* at 803.

206. *Id.* at 805.

207. [I]n light of the prevalence of zoning regulations which limit unrelated persons without a simultaneous limitation upon related persons . . . . [w]e do not believe that Congress intended that the maximum occupancy limitation exemption would apply only to a limitation on the maximum number of persons per square foot of dwelling space.

*Elliott*, 960 F.2d at 980.

208. *Edmonds*, 18 F.3d at 806 ("Many cities in this country have adopted similar use restrictions. . . . Applying the exemption would insulate these single-family residential zones from the sweep of [FHA] requirements.") (citations omitted).

The Legislative history clearly supports the narrower reading. In fact, the prefatory language to the oft-cited discussion of the exemption indicates that it was intended to exempt restrictions related to the family-status protection provided by the Act.<sup>209</sup> The inclusion of this discussion negates any argument that the exemptions would apply to unrelated occupants.

Given the explicit congressional references to accommodating group-living arrangements and the widespread use of restrictive family definitions, the exemption likely applies only to square footage limits. This view also appears to be the majority position among the district courts that have faced the issue.<sup>210</sup>

If the Supreme Court adopts this view, such numerical restrictions will be subject to the same three pronged anti-discrimination attack as other local regulation under the statute. Absent legislative relief in the form of an amendment including unrelated-persons restrictions in the exemption, localities seeking to regulate recovery homes will need to focus on solutions that can withstand disparate impact and reasonable accommodation attacks under the anti-discrimination provisions of the FHA.

#### COMPETING INTERESTS OF MUNICIPALITIES AND RECOVERY HOME ADVOCATES

The remainder of this Note is devoted to identifying the legitimate, competing concerns of recovery home advocates and municipalities and devising a proposed definition of recovery home as a new use category in an attempt to provide a solution. Such a definition, combined with a licensing procedure for recovery home operators, offers a means of maintaining local control without squelching the development of an effective treatment

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209. H.R. REP. NO. 711, *supra* note 34, at 31, *reprinted in* 1988 U.S.C.C.A.N. at 2192. ("Section 6(d) amends Section 807 to make additional exceptions *relating to the familial status provisions.*") (second emphasis added).

210. See *Oxford House—C v. City of St. Louis*, 843 F. Supp. 1556 (E.D. Mo. 1994); *Oxford House v. City of Va. Beach*, 825 F. Supp. 1251 (E.D. Va. 1993); *Parish of Jefferson v. Allied Health Care*, No. 91-1199, 1992 U.S. Dist. LEXIS 9124 (E.D. La. June 10, 1992). For an opinion following the *Elliott* position, see *City of St. Joseph v. Preferred Family Healthcare, Inc.*, 859 S.W.2d 723 (Mo. Ct. App. 1993). The district court in *St. Louis* acknowledged the contrary authority and disagreed with the Missouri appellate court.

model. It is a small step towards reconciling the disparate interests of local planners and recovery home advocates.

### *Policy Conflict*

As the cases indicate, the dispute between recovery home operators and neighborhood opponents often is portrayed as the classic case of the "Not In My Back Yard" (NIMBY) syndrome.<sup>211</sup> The issues are actually much more far reaching. In fact, the inclusion of the handicapped as a protected class, and the broad definition of discriminatory intent under the FHA, has made the cases of simple neighborhood discrimination easy for the federal courts.<sup>212</sup> The more complicated issues involve the basic division of regulatory power between the federal government and municipalities seeking to maintain control over a quintessentially local function.

Federal support of recovery homes is evidenced by their inclusion in the FHA and the Anti-Drug Abuse Act of 1988.<sup>213</sup> Many states have announced similar policies through state legislation attempting to curtail local, exclusionary-zoning practices.<sup>214</sup> Yet municipalities, whose interests lie in preserving the "blessings of quiet seclusion"<sup>215</sup> continue to resist attempts to usurp their control over the regulation of recovery homes. Both sides have legitimate objectives, which are explored in this section of the Note.

### *The Efficacy and Economy of Recovery Homes*

Abuse of drugs and alcohol is one of the most critical problems facing the nation. In fiscal year 1990, more than 800,000 Americans were treated for drug or alcohol abuse<sup>216</sup>—more than

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211. For a thorough discussion of NIMBY, see Ellis, *supra* note 32; Salsich, *supra* note 55.

212. See *supra* notes 123-65 and accompanying text.

213. See *supra* notes 43-54, 65 and accompanying text.

214. See Steinman, *supra* note 33, at 18-24 (summarizing state legislation on the subject). Though state laws vary widely, nearly all were established to support "an overriding state policy [favoring deinstitutionalization]." *Id.* at 17-18.

215. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

216. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1993, at 136.

200,000 had both problems.<sup>217</sup> Estimates of the number of Americans who abuse drugs or alcohol without treatment run into the tens of millions.<sup>218</sup> The combined cost of treatment in government-funded facilities alone was nearly three billion dollars.<sup>219</sup> But that amount is a pittance compared with the overall cost to society in lost productivity, increased crime, and the tragic price paid by families whose loved ones are victims of drug- or alcohol-related violence. Though estimates of such costs vary, reliable figures place the societal cost of alcohol abuse alone at roughly \$100 billion.<sup>220</sup> The bill for both drug and alcohol problems has been calculated at \$273 billion.<sup>221</sup>

Recovery homes, like those established by Oxford House, serve an important function in combatting drug and alcohol abuse: the avoidance of relapse.<sup>222</sup> Therapist Milton Trachtenberg described the challenges facing the newly sober in his book on treating addicted persons:

[I]n the early phases of recovery, the addicted person is most susceptible to relapse . . . .

[U]nderlying values and attitudes that have been built up over a period of years do not just depart with the removal of the abused substance.

. . . .

[T]he system in which the individual is functioning . . . is often in a subtle conspiracy to regain the prior status quo.

217. *Id.*

218. In a 1991 survey, 12.6 million Americans reported using illegal drugs in the prior month, and 2.4 million reported using cocaine or crack. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, DRUGS, CRIME, AND THE JUSTICE SYSTEM 26 (1992).

219. U.S. DEPT OF HEALTH & HUMAN SERVICES, STATE RESOURCES RELATED TO ALCOHOL & OTHER DRUG ABUSE PROBLEMS: FISCAL YEAR 1990, at 6.

220. U. S. DEPT OF HEALTH & HUMAN SERVICES, EIGHTH SPECIAL REPORT TO THE UNITED STATES CONGRESS ON ALCOHOL AND HEALTH 11-3 (1993).

221. DOROTHY P. RICE ET AL., THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS: 1985, at 2.

222. For a survey of studies on relapse rates among recovering addicts and alcoholics, see TREATING THE CHEMICALLY DEPENDENT AND THEIR FAMILIES 131-33 (Dennis C. Daley & Miriam S. Raskin eds., 1992) [hereinafter TREATING THE CHEMICALLY DEPENDENT]. Daley and Raskin cite studies indicating relapse rates from 60% to 90%. They caution, however, that these rates may slightly overstate the problem by failing to measure the cumulative result of many attempts at recovery, of which only the last is fully successful. *Id.* at 132.

The significant others in the life of an addicted individual have learned to cope with the addiction, and often they have reached a point . . . where the addiction has become a necessary part of their behavioral repertoire.<sup>223</sup>

Fellowship, therefore, is an important element of relapse prevention.<sup>224</sup> The support gained from sharing experiences with other recovering addicts is only one benefit. In addition, group activities help addicts develop positive social and recreational activities that do not involve drinking or drugs.<sup>225</sup> The variation in seniority among group members provides models for the newly sober and incentives to stick with their recovery program.<sup>226</sup>

Many studies have documented the importance of these social support systems in reducing relapse rates.<sup>227</sup> Relapse frequently occurs when addicts who have completed a detoxification program are unable to get into effective out-patient treatment or a recovery-home setting due to overcrowding.<sup>228</sup> Although not studied widely, it appears that the Oxford House model is an effective solution to this problem.<sup>229</sup> The rapidly increasing number of Oxford House facilities in the years since government startup loans became available is testament to the need for expansion of such opportunities.<sup>230</sup>

Recovery homes also have an advantage over traditional in-patient forms of therapy from an economic standpoint. Part of the recovery model requires the homes to be self-sufficient.<sup>231</sup> Under the Oxford House plan, residents must be employed and

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223. MILTON TRACHTENBERG, *JOURNEYS TO RECOVERY: THERAPY WITH ADDICTED CLIENTS* 12 (1990).

224. *TREATING THE CHEMICALLY DEPENDENT*, *supra* note 222, at 119.

225. *Id.* at 166.

226. *Id.*

227. *Id.* at 155 (summarizing studies).

228. *Id.* at 154.

229. Gelernter, *supra* note 6, at M1 (quoting DePaul University researcher Leonard Jason, who calls Oxford House "an amazing grassroots phenomenon" and "an incredible system of health care delivery" and marvels at the lack of scholarly assessment of the relatively new program's efficacy).

230. See *The Oxford House Experiment*, *supra* note 60, at W15 (describing the application process when a rare opening occurs at one of the Washington, D.C., Oxford Houses).

231. MOLLOY, *supra* note 12, at 1.

pay rent to support the house, limiting the level of government support and building vital self-esteem for the residents.<sup>232</sup> Unfortunately, government loans to start recovery homes are not conditioned on the adoption of all the Oxford House guidelines.<sup>233</sup>

*Potential Pitfalls of the Government Version of Oxford House*

Despite support from the treatment community and the relatively low cost of implementation, there are some serious problems with the rapidly expanding network of recovery homes. First, the homes permit no professional staff.<sup>234</sup> This requirement is consistent with the Oxford House theory of self-reliance<sup>235</sup> and serves to minimize costs. At the same time, however, it eliminates the critical elements of permanence and stability that distinguish other types of congregate housing.<sup>236</sup> Absent some type of permanent staff, paid or unpaid, the only difference between a recovery home and a fraternity house is that the former shelters recovering alcoholics and the latter frequently shelters practicing ones. Both are protected from housing discrimination under the amended FHA.<sup>237</sup>

232. *See id.*

233. *See* Guidelines—Group Homes for Recovering Substance Abusers, 54 Fed. Reg. 15,808 (1989) [hereinafter Federal Guidelines].

234. *See id.*

235. MOLLOY, *supra* note 12, at 23-24.

236. This factor is important from a zoning standpoint. Most jurisdictions that do not limit unrelated persons numerically, structure a definition that allows them to live together as long as they are the "functional equivalent" of a family. Usually this involves some assessment of permanence and stability. The recovery house model, which forbids professional staff and requires expulsion of any member who relapses, is antithetical to such a definition of family. *See, e.g., Oxford House v. City of Albany*, 819 F. Supp. 1168, 1177 n.6 (N.D.N.Y. 1993); *Oxford House—Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1335 (D.N.J. 1991).

237. *See* H.R. REP. NO. 711, *supra* note 34, at 94, *reprinted in* 1988 U.S.C.C.A.N. at 2228-29. This amendment excludes from protection those persons currently using or addicted to a controlled substance; however, the House Judiciary Committee turned back attempts to exclude persons with existing alcohol abuse problems. *Id.* Therefore, under the FHA even current alcoholics are covered unless they fall under one of the statute's other exclusions. This decision prompted dissenting comments from several legislators who viewed such an inclusive approach as conflicting with the national goal of reducing alcohol abuse. *Id.* at 86, 94, *reprinted in* 1988 U.S.C.C.A.N. at 2221, 2228-29.

Second, the federal regulations designed to implement the startup loan program place no restrictions on the origin of the "self-support" funds.<sup>238</sup> By eliminating the Oxford House tenet that residents must work to pay rent, the legislation undercuts the treatment philosophy. It also has spawned a cottage industry of imitators who can pack recovering addicts into a home and deduct their weekly rent from welfare or disability payments.<sup>239</sup> Unfortunately, the autonomy sought by Oxford House as a vehicle for recovery can be replaced by anarchy when a home is started without the proper guidance or motive.<sup>240</sup>

The Oxford House litigators have an outstanding track record, in part because they are able to fill the record with anecdotal evidence of success<sup>241</sup> and statistical evidence of the need for treatment.<sup>242</sup> As a result, federal court precedent is overwhelm-

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238. Federal Guidelines, *supra* note 233, at 15,808. The federal guidelines for establishing a qualifying recovery home are surprisingly limited:

(A) the use of alcohol or any illegal drug in the housing provided by the program will be prohibited;

(B) any resident of the housing who violates such prohibition will be expelled from the housing;

(C) the costs of the housing, including fees for rent and utilities, will be paid by the residents of the housing, and

(D) the residents of the housing will, through a majority vote of the residents, otherwise establish policies governing residence in the housing, including the manner in which applications for residence in the housing are approved.

*Id.*

239. See Warrick & Spiegel, *supra* note 11, at A1.

To fill their facilities with addicts, some operators pay "finders" fees or bonuses for referrals. A Marina del Rey realty agent who owns a South Central Los Angeles home pays his residents \$50 each for every new resident they bring in. A consulting firm charges \$1000 to set up a new sober-living house and fill it.

*Id.*

240. *Id.* In California, as many as 55 recovering addicts are living in a single home, some packed 10 to a room, others squeezed into attic crawl spaces or closets. "Operators sometimes maximize revenue by renting beds in dining rooms, garages, camper trailers, even old cars—anywhere a body can fit. They typically charge \$300 a month per person." *Id.*

241. See *United States v. Village of Palatine*, 3 Am. Disabilities Dec. (Law. Co-op) 271, 279-80 (N.D. Ill. 1993) (recounting testimony of "Tom": After suffering a six-year relapse and undergoing inpatient treatment a second time, Tom "moved directly into Oxford House and has been drug and alcohol free ever since"; testimony of "Steve": Oxford House is "a recovering community that acts like a family").

242. See *Oxford House—C v. City of St. Louis*, 843 F. Supp. 1556, 1564 (E.D. Mo.

ing local ability to regulate group homes. Several courts have construed as discriminatory mere application procedures for obtaining use permits.<sup>243</sup> Such cases threaten to open the door to less benevolent operators who seek to exploit the disabled at government expense. Oxford House officials contend that new home residents still must demonstrate that they are handicapped within the meaning of the statute,<sup>244</sup> but they argue simultaneously that any application or permitting process violates their right to "reasonable accommodation" in zoning practices.<sup>245</sup> Their nationwide practice of evading local zoning enforcement defeats legitimate attempts to verify that recovery home residents are, in fact, entitled to protection under the FHA and to make reasonable accommodations in local ordinances for such homes.

### *The Permissible Purposes of Zoning*

Much of the substantive zoning law derives from common law nuisance doctrines that were, of course, derived from disputes between neighboring landowners over the proper uses of land in a common district.<sup>246</sup> Neighborhood opposition, therefore, is not a per se indication of impermissible discrimination.<sup>247</sup> Indeed, as the discussion above illustrates, the establishment of unsupervised group homes in residential districts raises legitimate concerns.<sup>248</sup> Unfortunately, illegitimate concerns often motivate neighborhood opposition.<sup>249</sup>

1994) (relating testimony of the Director of Missouri Division of Alcohol and Drug Abuse: with more than 300,000 individuals fighting drug and alcohol problems in the state, "there is a tremendous need for Oxford House in the treatment continuum").

243. See *id.* at 1581-82; *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).

244. Telephone Interview with Steve Polin, Chief Counsel, Oxford House, Inc. (Mar. 9, 1994).

245. *Oxford House, Inc. v. City of Va. Beach*, 825 F. Supp. 1251, 1255-56 (E.D. Va. 1993); see *United States v. Village of Palatine*, 37 F.3d 1230, 1234 (7th Cir. 1994); *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168, 1177-78 (N.D.N.Y. 1993).

246. See ANDERSON, *supra* note 21, § 8.01.

247. See Ellis, *supra* note 32, at 275-76.

248. See *supra* notes 234-40 and accompanying text.

249. See Ellis, *supra* note 32, at 289-91. Motivation is key, because it affects the presumption of validity afforded local zoning decisions. Valid zoning decisions face the reversal of that presumption if made with discriminatory animus. *Id.*

Before reviewing a possible system to accommodate both recovery home operators and home neighbors, it is helpful to consider some of the valid reasons for local regulation of recovery homes. First, the more intense use, namely increased traffic and noise, is a nuisance for surrounding homeowners. The Supreme Court has recognized the nuisance presented by a more intensive use: "More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds."<sup>250</sup> Several of the complaints against recovery homes have involved increased noise and traffic.<sup>251</sup> Unlike group homes for the disabled, or foster homes for children, recovery homes house adults, with adult relationships, needs for transportation, and social habits.<sup>252</sup> The fact that residents are recovering alcoholics does not diminish the greatly increased demands placed on a home and neighborhood by ten adult men or women living in one place.<sup>253</sup>

Second, local officials have a legitimate interest in documenting and regulating nonconforming uses, regardless of their ability to reject such uses. Oxford House contends that even application requirements in zoning codes violate their right to a reasonable accommodation, and some courts have agreed.<sup>254</sup> Their conclusion ignores a basic prerequisite to the application of the FHA—the determination that a protected class is involved. By removing the mechanism through which localities ensure compliance with the FHA, the federal courts would require local planners to sue in federal court in order to establish that recovery home residents were, in fact, entitled to favored status. In addition, the policy preempts a reasonable accommodation

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250. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

251. *See id.*; *United States v. Borough of Audobon*, 797 F. Supp. 353, 356 (D.N.J. 1991), *aff'd*, 968 F.2d 14 (3d Cir. 1992).

252. Oxford House, Inc. has recognized some of the problems associated with traffic and intensity of use, as noted in its technical manual: "[T]he only threat of an Oxford House being less than a good neighbor is the automobile." MOLLOY, *supra* note 12, at 17.

253. The average number of residents in a chartered Oxford House is ten. *Id.* at 13. The homes are all single sex. *Id.*

254. *See Oxford House—C v. City of St. Louis*, 843 F. Supp 1556, 1579 (E.D. Mo. 1994); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).

through the process established by the locality.

A more complicated question is whether permanency and stability are legitimate goals for zoning to pursue. A few of the cases turn on definitions of family that require such permanency.<sup>255</sup> In *Oxford House, Inc. v. Township of Cherry Hill*,<sup>256</sup> for example, the township's zoning ordinance defined "family" as "a collective body of persons doing their own cooking and living together upon the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bond."<sup>257</sup> Such functional definitions attempt to codify those elements of a biological family that provide for harmonious relationships among residential neighbors. Oxford House contends that residents in its homes meet this functional definition. Although recovery homes are supposed to simulate the structure of a family to aid in recovery, the rule requiring expulsion of any member who relapses is antithetical to the concept of permanency attached to functional definitions of family.<sup>258</sup>

Many of these concerns can be addressed by a slight modification to local zoning practices that accounts for the special concerns of both sides. Local regulators must recognize the impact of the federal mandate, expressed through inclusion in the FHA and the startup loan provisions. Recovery home operators must realize that this mandate does not create a blanket waiver of local regulation. The final section of this Note attempts to offer a regulatory middle ground based on the legislatively- and judicially-created boundaries for local control.

#### TOWARD A SOLUTION

[W]hat this matter truly needs is not judicial action, whether it be state or federal, but for the parties to search their consciences, recognize the needs and hopes of the plaintiffs and the concerns and fears of the neighbors, and arrive at an

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255. *Cherry Hill*, 799 F. Supp. at 454; *Oxford House—Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1333 (D.N.J. 1991); *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168, 1170 (N.D.N.Y. 1993).

256. 799 F. Supp. at 450.

257. *Id.* at 455.

258. *See Albany*, 819 F. Supp. at 1177 n.6.

accommodation which serves and enriches all who are involved in and affected by it.<sup>259</sup>

"The right to 'establish a home' is an essential part of the liberty guaranteed by the Fourteenth Amendment."<sup>260</sup> In recovery home disputes, however, both parties' rights to establish a home conflict in fundamental ways.

In addition to resolving the individual claims, the litigation arising from these conflicts provides a useful basis for establishing the limits of each party's legitimate objections. For instance, recovery home operators have asserted that any use permit requirement is an unacceptable burden because of the threat of public humiliation attendant with the hearing process, which may threaten the residents' recovery.<sup>261</sup> Most courts, however, have held that an application process for such permits is not per se discriminatory as long as applications are required of other similarly-situated groups of unrelated people.<sup>262</sup> These decisions impliedly approve of some type of registration, licensing, or permitting scheme as a legitimate means of control over unsupervised group homes. This view is consistent with the majority of state statutes on the subject.<sup>263</sup>

Recovery home operators also contend that maximum occupancy limitations should not apply to recovery homes because an individual's recovery process depends on socialization within a group home. This claim has not been entirely successful. In *Elliott v. City of Athens*,<sup>264</sup> the Eleventh Circuit upheld a local limit of four unrelated persons as reasonable in light of the city's

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259. *Plainfield*, 769 F. Supp. at 1331.

260. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 15 (1973) (Marshall, J., dissenting).

261. See *Oxford House, Inc. v. City of Va. Beach*, 825 F. Supp. 1251, 1255 (E.D. Va. 1993).

262. See *United States v. Village of Palatine*, 37 F.3d 1230 (7th Cir. 1994); *Virginia Beach*, 825 F. Supp. at 1257; *Albany* 819 F. Supp. at 1178. But see *Oxford House—C v. City of St. Louis*, 843 F. Supp. 1556, 1581-82 (E.D. Mo. 1994) (holding that a recovery home could not "lawfully be required" to undergo a public hearing and other variance procedures in order to qualify for an accommodation).

263. Of the 36 states that have passed legislation to preempt local zoning and allow traditional group homes as of-right uses, nearly all require the homes to be licensed by the state. See Steinman, *supra* note 33, at 25-36.

264. 960 F.2d 975 (11th Cir. 1992).

asserted interest in preventing overcrowding.<sup>265</sup> Other courts, including the Ninth Circuit, have reached different conclusions.<sup>266</sup> Regardless of how the Supreme Court rules on the issue, the language of the FHA exemption for reasonable occupancy limitations, suggests that numerical limitations of some sort expressly are allowed.<sup>267</sup> Moreover, even if the exemption is not applied to a numerical family definition, it does not follow that numerical regulation of any sort is forbidden. The FHA prohibits discrimination not regulation. Both Oxford House and the federal guidelines for start-up loans permit the establishment of recovery homes with as few as six residents.<sup>268</sup> Beyond this number, the assertion that residents must share housing is economic, not implicating therapeutic concerns.<sup>269</sup>

The Oxford House cases also establish that localities may not make distinctions based on arbitrary classifications. Use permits required only for disabled groups seeking congregate housing, suspect since the *Cleburne* decision,<sup>270</sup> are now clearly invalid.<sup>271</sup>

Discriminatory motives will no longer be tolerated. The presumption of validity granted to local zoning ordinances is reversed when those ordinances are passed or enforced for discriminatory purposes.<sup>272</sup> Although the Supreme Court was hesitant to extend suspect class status to the handicapped in *Cleburne*,<sup>273</sup> the FHA effectively raised the standard by which

265. *Id.* at 982-83.

266. *See City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994) (denying FHA exemption for ordinance that imposed maximum occupancy limitations solely on group recovery homes), *cert. granted*, 115 S. Ct. 417 (1994).

267. *See Elliott*, 960 F.2d at 978-79.

268. *See Federal Guidelines*, *supra* note 233, at 15,808; MOLLOY, *supra* note 12, at 13.

269. *United States v. Village of Palatine*, 3 Am. Disabilities Dec. (Law. Co-op) 271, 298 (N.D. Ill. 1993) ("Suffice it to say that it is clear on the record that all of Oxford House's rehabilitative purposes could be served with six or eight residents."), *adopted*, No. 93-C-2154, 1993 WL 462848 (N.D. Ill. Nov. 9, 1993), *vacated*, 37 F.3d 1230 (7th Cir. 1994).

270. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447-48 (1984).

271. *See* 42 U.S.C. § 3615; *supra* note 123 and accompanying text.

272. *See Ellis*, *supra* note 32, at 276.

273. *See Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); *supra* notes 35-39 and

barriers to their equal access to housing are reviewed. Moreover, the broad interpretation of discriminatory intent under the FHA requires scrupulously nondiscriminatory zoning enforcement.<sup>274</sup>

A useful regulatory scheme begins to emerge within these judicially-established criteria. A recent attempt to design an ordinance for traditional group homes by the ABA Land Use Regulation Committee identified the components of such a scheme.<sup>275</sup> They included (1) specific acceptance of residential treatment, (2) density limits concerning occupancy, parking, and group home dispersion, (3) objective standards and licensing requirements to ensure compliance with health and safety requirements, and (4) opportunities for community input.<sup>276</sup>

Many of these issues already have been addressed by statutes governing more traditional, supervised and licensed group homes.<sup>277</sup> These statutes frequently declare a state policy favoring residential treatment and allow moderate-sized group homes as of-right uses if certain licensing procedures are met.<sup>278</sup>

Unlike regular group homes, which frequently are supervised treatment facilities, recovery homes present special problems for local lawmakers. Under the federal statute, recovery homes receiving startup grants can have no professional staff.<sup>279</sup> There is also no licensing procedure in place for homes not operating under the Oxford House umbrella.<sup>280</sup> Moreover, the tran-

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accompanying text.

274. See *supra* notes 121-35 and accompanying text.

275. Peter W. Salsich Jr., *A Model Ordinance for Group Homes and Shared Housing*, PROB. & PROP., Nov.-Dec. 1989, at 32, 34; see also, Salsich, *supra* note 55, at 432.

276. See Salsich, *supra* note 55, at 432-33.

277. Steinman, *supra* note 33, at 18-20.

278. Usually group homes of six to eight residents are allowed in most residential districts, subject to their license and inspection by a state health department or agency. See, e.g., ARIZ. REV. STAT. ANN. §§ 36-581 to -582 (1993); CAL. WELF. & INST. CODE §§ 5115-5117 (West 1984); FLA. STAT. ANN. § 163.3177(6)(f) (West Supp. 1994); MD. CODE ANN., HEALTH-GEN. §§ 7-601 to -612 (1994); MICH. COMP. LAWS ANN. §§ 125.216a, 125.286a, 125.583b (West 1986 & Supp. 1994); N.Y. MENTAL HYG. LAW § 41.34 (Consol. 1989 & Supp. 1993); N.C. GEN. STAT. §§ 168-21 to -23 (1987 & Supp. 1994); VA. CODE ANN. § 15.1-486.3 (Michie Supp. 1994); W. VA. CODE §§ 27-17-1 to -4, 8-24-50b (1992).

279. Federal Guidelines, *supra* note 233, at 15,509.

280. *Id.*

siency, inherent in recovery homes as a result of the policy of evicting residents who relapse, presents problems of stability and accountability that generally are not present under the typical group-home setting.<sup>281</sup> While many recovery homes affiliate with local non-profit corporations, or with Oxford House itself, there is no requirement that they do so.<sup>282</sup>

The remainder of this Note will address these differences in an attempt to create a statutory definition of a recovery home.<sup>283</sup> The goal is to structure a definition that would allow the effective use of the recovery home model while retaining some measure of local control over regulation of such homes.

Several modifications to traditional group home statutes would recognize the legitimate concerns of both parties to the recovery home dispute. First, because most states,<sup>284</sup> and the federal government,<sup>285</sup> already have declared a policy favoring residential treatment of the disabled, specific acceptance and announcement of that goal would serve a useful educational purpose for potential group home neighbors. The fact that the Oxford House model has proven a successful aid in the prevention of relapse provides evidence that the expansion of that system should be encouraged. The announcement, whether formal or informal, might be accompanied by the delegation of supervisory authority over recovery home regulation to an existing or newly-created local agency. The agency should administer a program of registration and licensing for recovery homes seeking to locate within the jurisdiction.

281. Of course, the idea of the homes is to prevent relapse, but they are not always successful. In Plainfield, New Jersey, for example, the evidence showed that 13 of the 20 people admitted to the local Oxford House had left, nine due to relapse. *Oxford House—Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1342 (D.N.J. 1991). The average length of stay for an Oxford House resident is 13 to 15 months. *Oxford House—C v. City of St. Louis*, 843 F. Supp. 1556, 1563 (E.D. Mo. 1994).

282. Federal Guidelines, *supra* note 233, at 15,808.

283. A statutory definition is the simplest way to modify local zoning ordinances. Most zoning codes include a definitions section, which defines prescribed uses, at the beginning and then list those uses in the relevant zoning districts where they are either permitted as a matter of right or subject to conditions. *See, e.g.,* ROANOKE, VA., CODE § 36.1-25 (1993); VIRGINIA BEACH, VA., CODE app. A § 111 (1994).

284. *See* Steinman, *supra* note 33, at 18-20.

285. *See* H.R. REP. NO. 711, *supra* note 34, at 23, *reprinted in* 1988 U.S.C.C.A.N. at 2184.

Density limits, both in terms of occupancy and spacing requirements between group homes, are probably the most divisive of the group home issues. Although appellate courts have recognized the legitimacy of maximum occupancy limits<sup>286</sup> and spacing requirements,<sup>287</sup> group home operators also have defeated attempts to exclude residents based on both numerical<sup>288</sup> and functional<sup>289</sup> definitions of family and turned back dispersion requirements.<sup>290</sup> Recognition of recovery homes by definition in the zoning code will provide a useful basis for determining the exact limits of numerical and functional family definitions. Many of the disputes can be resolved by creating a new zoning use with the particular needs of recovery homes in mind.

The most difficult element of any provision authorizing congregate housing in a single-family residential area is the number of residents permitted.<sup>291</sup> In the state statutes governing traditional group homes, nearly all allow group homes of between six and eight residents as of-right uses.<sup>292</sup> A recovery home of similar size places no greater burden on the neighborhood and also should be allowed of-right. However, most recovery homes are substantially larger,<sup>293</sup> housing as many as eigh-

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286. *Elliott v. City of Athens*, 960 F.2d 975, 983 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 376 (1992).

287. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991).

288. *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994) (holding unrelated persons limit not exempt from FHA), *cert. granted*, 115 S. Ct. 417 (1994); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993) (holding that under FHA, town's refusal to modify definition of "family" in zoning ordinance that limited number of unrelated people who could live in residence was discriminatory); *Oxford House—C v. St. Louis*, 843 F. Supp. 1556 (E.D. Mo. 1994) (holding that ordinance restricting dwellings in single-family zone was classic "unrelated persons" provision and did not fall within exemption to FHA).

289. *Oxford House—Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1343 (D.N.J. 1991); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 461 (D.N.J. 1992).

290. *Horizon House Dev. Servs. v. Township of Upper Southampton*, 804 F. Supp. 683, 693 (E.D. Pa. 1992).

291. In *St. Louis* the court commented that "a great deal of evidence at trial was devoted to the appropriate size of an Oxford House, both from a therapeutic and from a financial viewpoint." *St. Louis*, 843 F. Supp. at 1571.

292. See Steinman, *supra* note 33, at 18-20; statutes cited *supra* note 278.

293. MOLLOY, *supra* note 12, at 13. The average number of residents per Oxford House is ten. Many of the homes not affiliated with Oxford House are even larger. There are no maximum limits imposed by the Federal Guidelines. See Federal

teen to twenty recovering addicts. These larger homes should be subjected to a permitting process to assess the legitimate interests of neighboring property owners.

A definition that allowed recovery homes of ten or fewer residents as an of-right use would comport with most state laws, as they frequently allow eight unrelated individuals and two unrelated staff members.<sup>294</sup> Because the recovery home residents serve the dual role of patient and counselor in one another's recovery, the limit of ten is consistent with state-imposed group home mandates for other populations. More important, this definition would permit homes of sufficient size to be both economically and therapeutically viable.

A second tier of the definition, called a conditional recovery home, should be created to accommodate group homes of greater than ten.<sup>295</sup> At this level, recovery home operators should be required to submit to the traditional form of public hearing required for a conditional use by the local jurisdiction.<sup>296</sup>

Oxford House has challenged such hearings on two points. First, they contend the large number of residents is crucial to the economic and therapeutic viability of recovery homes.<sup>297</sup> The therapeutic argument, however, is disputed by their own guidelines,<sup>298</sup> and those of the federal program,<sup>299</sup> which re-

Guidelines, *supra* note 233.

294. See, e.g., ALA. CODE. § 11-52-75.1 (1994) (allowing ten residents plus two staff); COLO. REV. STAT. § 30-28-115 (1993) (allowing eight residents plus staff); KAN. STAT. ANN. § 12-736 (1991) (allowing eight residents plus two staff); MONT. CODE ANN. § 89.020(2) (1993) (allowing eight residents plus two staff).

295. Although the average Oxford House has ten residents, many are larger, and the federal guidelines for startup loans do not place an upper limit on the number of recovery home residents. See Federal Guidelines, *supra* note 233.

296. Note that the larger homes are still permitted uses, subject to proper permitting and perhaps the imposition of certain conditions (parking, safety improvements, etc.). Such conditional uses should be distinguished from variances, which seek exemption from certain specific requirements such as setbacks, or occupancy limits. The variance process should not be used to "spot zone" certain homes as adequate for recovery home purposes. See *Oxford House—C v. City of St. Louis*, 843 F. Supp. 1556, 1569-70 (E.D. Mo. 1994) (discussing the difference between conditional uses and variances).

297. See *St. Louis*, 843 F. Supp. at 1564 n.2; *Oxford House—Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1334 (D.N.J. 1991).

298. MOLLOY, *supra* note 12, at 13.

299. Federal Guidelines, *supra* note 233, at 15,808.

quire no less than four residents to constitute a recovery home. The economic argument is not relevant to the disability and should not be a factor in allowing a nonconforming use unless it can be shown that smaller, less expensive homes are unavailable. Such a showing properly can be made before local officials during the conditional use review process.

Second, recovery home operators argue the permit process itself is discriminatory because it may subject residents to community scorn and jeopardize their rehabilitation. Courts disagree, however, and have required participation in the local review process as a precondition to suit under the FHA.<sup>300</sup>

The purpose of the reasonable accommodation clause in the statute is to balance the interests of the handicapped against those of the other members of the community. As one district court has pointed out, this balance is particularly important in the context of land-use cases.<sup>301</sup> A definition that distinguishes between recovery homes of ten or fewer and larger homes does not necessarily exclude the latter.<sup>302</sup> By requiring recovery home operators to meet with local residents, the distinction facilitates the type of balancing called for under a reasonable accommodation test.

Another element of consideration should be the proximity of other group homes. Many of the state statutes covering traditional group homes include spacing or dispersion guidelines.<sup>303</sup> Such guidelines serve to avoid an unhealthy concentration of group homes, which results in a "ghettoization" of the disabled that is contrary to the normalization principles group homes

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300. *United States v. Village of Palatine*, 37 F.3d 1230, 1234 (7th Cir. 1994); *Oxford House, Inc. v. City of Va. Beach*, 825 F. Supp. 1251, 1261 (E.D. Va. 1993); *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168, 1178 (N.D.N.Y. 1993); see *supra* notes 175-84.

301. See *Virginia Beach*, 825 F. Supp. at 1261.

302. *St. Louis*, 843 F. Supp. at 1580 (acknowledging the desirability of permitting larger recovery homes as "conditional uses").

303. See, e.g., DEL. CODE ANN. tit. 9, § 4923 (1989) (requiring that no similar group homes be within a 5000-foot radius of the home); MINN. STAT. ANN. § 462.357(7) (West 1991) (excessive concentration prohibited); N.Y. MENTAL HYG. LAW § 41.34 (Consol. 1989 & Supp. 1993) (concentration cannot substantially alter the character of the area); N.C. GEN. STAT. § 168-21 to -23 (1987 & Supp. 1994) (one mile radius); W. VA. CODE §§ 27-17-1 to -4, 8-24-50b (1990 & 1992) (1200 feet outside municipality, one per block within the municipality).

seek to promote.

The third element of model group home regulation is objective standards for group homes. This area overlaps somewhat with the licensing requirement because frequently,<sup>304</sup> licensing is dependent on the application of some objective set of criteria. Nearly all state statutes designed to permit the establishment of group homes require licensing, usually by some state authority, in order to qualify as an of-right use.<sup>304</sup> Recovery homes, however, differ fundamentally from these more traditional forms of community-based treatment. The cause of alcohol and drug addiction is as much a factor of environment as physical or mental condition. Recovering addicts' ability to care for themselves and for property is not impaired,<sup>305</sup> nor does their disability place any greater burden on a building than that of a typical group of unrelated adults.<sup>306</sup> Therefore, a cumbersome system of inspection and licensing, while necessary to protect the safety interests of group home residents with more severe physical disabilities, would cause hardship for recovery homes not legitimately related to the land use.

Nonetheless, localities have legitimate interests in regulating nonconforming land uses. Oxford House's policy of moving in unannounced, waiting for zoning enforcement action, and then seeking relief in the federal courts removes any opportunity for local officials to act. It may be, as Oxford House litigators suggest,<sup>307</sup> that the locality is powerless to exclude them, but the

304. See, e.g., CONN. GEN. STAT. ANN. §§ 8-3e, -3f (West 1989 & Supp. 1994) (Department of Mental Retardation); MD. CODE ANN., HEALTH-GEN. §§ 7-601 to -612 (1994) (Department of Health and Mental Hygiene); N.J. STAT. ANN. §§ 40:55D-66.1 to -66.2 (West 1993) (Department of Human Services); N.Y. MENTAL HYG. LAW § 41.34 (Consol. 1989 & Supp. 1993) (Office of Mental Health); VA. CODE ANN. § 15.1-486.3 (Michie Supp. 1994) (Department of Social Services); W. VA. CODE §§ 27-17-1 to -4, 8-24-50b (1990 & 1992) (Department of Health); WIS. STAT. ANN. §§ 46.03(22) (West 1987 & Supp. 1994) (Department of Health and Social Services).

305. United States v. Borough of Audobon, 797 F. Supp. 353, 358 (D.N.J. 1991). The local regulators in *Audobon* asserted, and Oxford House did not dispute, that the residents were not physically disabled. Rather, their handicap was based on an inability to live independently. *Id.* at 359.

306. United States v. Village of Palatine, 3 Am. Disabilities Dec. (Law. Co-op) 271, 295-96 (N.D. Ill.) (concluding Oxford House residents were more like a family for purpose of increased fire safety regulations), *adopted*, No. 93-C-2154, 1993 WL 462848 (N.D. Ill. Nov. 9, 1993), *vacated*, 37 F.3d 1230 (7th Cir. 1994).

307. See *Oxford House, Inc. v. City of Va. Beach*, 825 F. Supp. 1251, 1261 (E.D.

locality should not be powerless to know who and where they are and require some evidence or declaration that the residents indeed are handicapped within the meaning of the FHA.

Accordingly, a permitting system should be required for recovery homes of all sizes. Proposed operators would fill out relatively simple paperwork as a condition of receiving the recovery home designation. The principle elements of the registration or license would be the identification of a responsible party,<sup>308</sup> the location and size of the proposed home, the number of residents, their names, and the nature of their disabilities. In addition, the statute would permit the request of assurances that none of the residents suffered from "current, illegal use of or addiction to a controlled substance,"<sup>309</sup> or had prior convictions that would exempt them from protection under the Act.<sup>310</sup>

Such a form would not expose the prospective residents to any public ridicule or contempt that could jeopardize their recovery. Indeed, it would be a far less intrusive means of establishing their right to reasonable accommodation than litigating their claims in federal court. Of course, conditional recovery homes of greater than ten residents could still be required to apply for a conditional use permit.

Opportunities for community input are critical to the success of a system of recovery home regulation. The federal courts have threatened to expropriate this right in cases where the application and hearing process was held to be invalid under the FHA.<sup>311</sup> The conditional use permitting process provides opportunities to consider community concerns as well as involve potential neighbors in the work of recovery homes. Because smaller recovery homes present less of an intrusion, a municipality should exclude them from the conditional use permitting

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Va. 1993).

308. Most Oxford Houses are leased either to the group itself or to a number of individual residents. The prospective residents should be required to designate either the owner, one or more leaseholders, or a local recovery home leader or non-profit officer as the principle contact for zoning complaints.

309. 42 U.S.C. § 3602(h) (1988).

310. *Id.* § 3607(4).

311. Oxford House—C v. City of St. Louis, 843 F. Supp. 1556, 1581 (E.D. Mo. 1994); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).

requirement, but some form of community involvement should be encouraged, perhaps through a board of directors or neighborhood association to aid in the home's funding and maintenance. For larger homes, a permit hearing gives neighbors the chance to voice appropriate concerns and gives recovery home residents an opportunity to address those concerns.

Considering the elements of local permitting or registration and numerical limits on the number of residents, a model definition of a recovery home might provide the following:

*Recovery Home* - A dwelling or facility housing ten or fewer persons unrelated by blood, marriage, adoption, or guardianship, and registered with [the appropriate local authority] for the purpose of the residents' joint rehabilitation from alcohol or drug addiction.

*Conditional Recovery Home* - A dwelling or facility housing more than ten persons, unrelated by blood, marriage, adoption, or guardianship, and registered with [the appropriate local authority] for the purpose of the residents' joint rehabilitation from alcohol or drug addiction.

Recovery homes, so defined, would be of-right uses in all residential districts. Conditional recovery homes would be permitted in all residential districts subject to the conditional-use permitting process of the local jurisdiction. The factors to be considered in awarding such a permit would include the size of the home, the financial viability of alternative sites, and the proximity of other group-home uses.

#### CONCLUSION

This Note has explored the conflict between local homeowners, their municipal governments, and operators of unsupervised, group homes for recovering alcoholics and drug addicts. Although the amended FHA and successful arguments by recovery home operators in the federal courts have limited greatly the ability of localities to control the placement of these homes, this Note has argued such interpretations should not be extended to eliminate legitimate local interests. In light of the rapid expansion of such homes and the special regulatory problems they present, this Note offers modifications to the typical group home

definition that will help alleviate the genuine concerns of local residents while still allowing the development of this effective and economical recovery program.

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