

6-1-2003

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Elizabeth A. L. Leamon
Judicial Clerk, Connecticut Supreme Court

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Recommended Citation

Leamon, Elizabeth A. L., "The Zoning of Group Homes for the Disabled...Zeroing in on a Reasonable Accommodation" (2003).
Connecticut Public Interest Law Journal. Paper 4.
http://lsr.nellco.org/uconn_cpilj/4

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**The Zoning -of Group Homes for the Disabled...
Zeroing in on a Reasonable Accommodation**
by Elizabeth A. L. Leamon

Introduction

The Fair Housing Amendments Act ("FHAA") of 1988 mandates reasonable accommodations to provide the disabled equal access to housing using.¹ Since its enactment, group homes for the disabled and townships have debated their reach of the federal law over local zoning regulations. Fourteen years after passage of the FHAA the idea of a group home, especially, a group home for recovering addicts, located in a residential neighborhood still meets with formidable resistance. This attitude prevails in spite of research that reveals a group home generates no adverse impact on the community in which it operates.² Nonetheless, public opposition to a group home "next door" continues to be a powerful weapon against integration and, ultimately, recovery from substance abuse.

In 2000 and 2001 Connecticut federal courts witnessed three separate actions between group homes for recovering addicts and local townships.³ The towns of West Haven, New London, and North Haven found themselves embroiled in litigation to defend their zoning regulations against the tenants and owners of group homes for recovering addicts who claimed that these ordinances were in violation of their rights under the FHAA and the American with Disabilities Act ("ADA").⁴

¹42 U.S.C. § 3604(f)(3)(B) (2000).

²Daniel Lauber, *A Real LULU: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments Act of 1988*, 29 J. Marshall L. Rev. 369, 369 (W. 1996).

³*Tsombanis v. City of West Haven*, 129 F. Supp. 2d 136 (D. Conn. 2001); *Connecticut Hospital v. New London*, 129 F. Supp. 2d 123 (D. Conn. 2001); *Hargrove v. North Haven*, CV 990429323S, 2000 LEXIS 584 (Conn. Super. Mar. 2, 2000).

⁴*Tsombanis v. City of West Haven*, 129 F. Supp. 2d 136 (D. Conn. 2001); *Connecticut Hospital v. New London*, 129 F. Supp. 2d 123 (D. Conn. 2001); *Hargrove v. North Haven*, CV 990429323S, 2000 LEXIS 584 (Conn. Super. Mar. 2, 2000).

The law is fairly well settled – the FHAA includes recovering addicts and applies to local zoning regulations.⁵ Therefore, the war is fought over the breadth of federal legislation's reach into the hallowed "zone" of local land use control and, additionally, the FHAA's mandate to provide a *reasonable accommodation* to afford persons with disabilities equal access to the housing of their choice.⁶ While the substantive legal debate centers on what constitutes a "reasonable accommodation", not surprisingly, the real battle is being fought on procedural grounds. Courts are divided and parties are confused as to *when* judicial consideration of the substantive issue of a reasonable accommodation is warranted. In these cases, the doctrine of ripeness is often at odds with the FHAA's provision that plaintiffs need not exhaust administrative remedies.⁷

While bringing a federal lawsuit is indeed one way, albeit a costly way, to clarify this issue, this note will discuss several legislative solutions and finally advocate a fairly simple legislative response. The mechanism ultimately proposed involves allowing persons with disabilities who are in need of a reasonable accommodation under the FHAA to apply for a special zoning permit and, upon application for the special permit, require the township to request an advisory opinion from the town attorney regarding the town's legal responsibility.

As illustrative of the overall problem, Part I of this note focuses on one recently settled Connecticut case, *Hargov. Town of North Haven*. Part II broadly examines the applicable law; while Part III probes the ripeness doctrine and the exhaustion of administrative remedies under the FHAA and their application to zoning law. Lastly, Part IV explores various legislative

⁵ See, e.g. H.R. Rep. No. 711, 100th Cong., 2d Sess. 24 (1988), reprinted in 1988 U.S.C.A.N. at 2173, 2183, 2186.

⁶ 42 U.S.C. § 3604(f)(3)(B) (2000).

⁷ 42 U.S.C. § 3613(a)(2) (2000).

optionsto resolve the dispute and, finally, concludes with a proposal for a bill conceptualized by
a drafting committee whomet this past Fall at the University of Connecticut School of Law.⁸

I. The *Hargrove* Case

A. The Facts

On March 29, 1999, Robert and Gail Hargrove purchased a building at 600 Middletown
Avenue in North Haven, CT.⁹ Thereafter, they began to rent rooms to fourteen individuals who
had completed detoxification treatment and needed a transitional residential living facility.¹⁰

Upon learning of the Hargroves' activities, the town of North Haven brought a Cease and
Desist Order against the Hargroves.¹¹ The Town claimed that the Hargroves were in violation
of the town zoning regulations of permitted uses in an R-40 single-family residential district, and
that the Hargroves were not continuing a prior non-conforming use.¹² North Haven zoning
regulations allow for an indefinite number of related family members, including, in the
household, seven unrelated members to live together in a Residence R-District.¹³ Section 4.1.4

⁸The drafting session was held on October 12, 2001, organized by the author, and sponsored by People Advocating
Therapeutic Homes ("PATH"). Participants at the meeting included: Attorney Martin Burke, Drafting Session
Chair; Attorney Edward Mattison from the South Central Behavioral Health Network, Attorney Maryellen Griffin of
New Haven Legal Services, Ms. Debra Polun, Representative from State Senator Kevin Sullivan's Office, Attorney
Brian Estep of Conway & Londregan P.C., Attorney Ralph G. Elliot of Tyler, Cooper & Alcorn, Dr. Elise Kabela &
Dr. Robert Triestman from the Personality Disorders Foundation, UConn Health Center, Psychiatry, Mr. Robert
Hargrove owner of the Therapeutic Group Home at 600 Middletown Avenue, North Haven, CT, UConn Law
Professors Robert Whitman and Mark DuBois, Ms. Virginia Lamb, PATH President, Ms. Jessica Rajotte, PATH
Fundraising & Law Student, Ms. Elizabeth Leamon, Drafting Session Coordinator & Law Student.

⁹Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction at 2, *Hargrove v. North Haven*,
Civ. No. 300CV01526AWT, (D. Conn. Sept. 26, 2000).

¹⁰*Id.* at 3.

¹¹*Burns v. Hargrove*, No. CV990429323S, 2000 WL 277296, at *1 (Conn. Super. Ct. Mar. 2, 2000), *reversed and*
remanded on other grounds, *Hargrove v. North Haven*, 64 Conn. App. 251 (2001).

¹²Defendants' Memorandum in Opposition to Motion for Preliminary Injunction at 3, *Hargrove v. North Haven*,
Civ. No. 300CV01526AWT (D. Conn. Sept. 26, 2000).

¹³Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction at 3-4.

provides for the letting of rooms or furnishing of board by the resident of the premises to no more than four related or unrelated persons. ¹⁴

The Hargroves appealed the determination of the Zoning Enforcement Officer to the Zoning Board of Appeals ("ZBA"), which conducted a public hearing on July 19, 1999. While at the hearing North Haven residents spoke, and their comments focused on the tenants' alcoholism and drug addiction, for example: "Drug addicts? I'd rather not have them right next to my house"; "As a mother of young children, do I want these people parking in front of my mailbox?".¹⁵ A member of the ZBA even questioned whether the tenants should register with the local police: "Because of all the concerns that neighbors and people within the area, are these people on file with the Police Department of North Haven... Would you be opposed to it?".¹⁶ Not surprisingly, the ZBA upheld the Cease and Desist Order upon determination that the Hargroves' use of the property as a group home was prohibited in the residential zone. ¹⁷

B. The Procedural History

1. The State Court Action

The North Haven Zoning Enforcement Officer asked the Connecticut Superior Court for injunctive relief to enforce the Cease and Desist Order and the Hargroves appealed the determination of the ZBA. ¹⁸ The state court consolidated the matters and held that, although the property was approved as a convalescent home, a nonconforming use, prior to the enactment of the North Haven Zoning Regulations in 1971, the use as a group home was substantially

¹⁴ Defendants' Memorandum in Opposition to Motion for Preliminary Injunction at 3.

¹⁵ Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction at 4.

¹⁶ *Id.*

¹⁷ *Id.* at 5.

¹⁸ *Burns v. Hargrove*, No. CV990429323S, 2000 WL 277296, at *1 (Conn. Super. Mar. 2, 2000), *reversed and remanded on other grounds*, *Hargrove v. North Haven*, 64 Conn. App. 251 (2001).

different and therefore, not a continuing use. ¹⁹ Further, the judge stated that the Hargroves had failed to show that the action of the ZBA constituted a violation of the FHA's reasonable accommodations requirement, or even that the act applied under these circumstances. ²⁰

On May 1, 2000, the Zoning Enforcement Officer and North Haven Planning and Zoning Commission filed a Motion for Contempt in the injunction action. ²¹ In response, the Hargroves filed an objection to the Motion for Contempt and a Motion for a Stay and Application for Restraining Order. ²² On June 20, 2000, the trial court heard oral argument and subsequently denied the Motion for Stay and Application for Restraining Order and deferred ruling on the Motion for Contempt in order to afford the Hargroves time to comply with the court's orders. ²³ Thereafter, the Hargroves filed a Motion for an Emergency Stay and a Motion for Review with the Appellate Court. The Appellate court ruled on the Motion for Review and denied relief. ²⁴ A further hearing on the Motion for Contempt was held on August 9, 2000 and the court ordered that the Hargroves bring themselves into compliance with the injunction. ²⁵ Ultimately, the court found the Hargroves in contempt of court and fined them \$13 per day for each border exceeding the four allowed by the zoning regulations. ²⁶

2. The Federal Court Action

Following the finding of contempt, the Hargroves and tenants brought an action in federal court to challenge North Haven's zoning regulations as a violation of their rights under the FHA

¹⁹ *Id.* at *5.

²⁰ *Id.*

²¹ Defendants' Memorandum in Opposition to Motion for Preliminary Injunction, at 7, Hargrove v. North Haven, Civ. No. 300CV01526AWT (D. Conn. Oct. 16, 2000).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 7 -8.

²⁶ *Id.* at 8.

and ADA. ²⁷The Plaintiffs asked the court to preliminarily enjoin North Haven from enforcing its zoning regulations, or to order North Haven to make reasonable accommodations to enable the tenants to remain at 600 Middletown Avenue. ²⁸The tenants asserted that because of their addiction to drugs and alcohol they are disabled or handicapped under both the FHA and the ADA. ²⁹They claimed that the town of North Haven was aware of their federally protected status ³⁰ and violated the federal FHA and ADA by refusing to *reasonably accommodate* their housing needs. Further, unless the Court acted immediately the tenants would be irreparably injured by the loss of the group home. ³¹

3. Court's Opinion

Judge Alvin Thompson of the Federal District Court, issued a three -page decision. The court granted a Temporary Restraining Order for injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure and enjoined the Hargroves and the defendants from taking action that would interfere directly or indirectly with the occupancy of the tenants at 600 Middletown Avenue. ³²Judge Thompson stated that there was good cause to believe that the tenant Plaintiffs would suffer irreparable harm if they were forced to leave the group home and that the tenants would likely prevail on the merits of their action. ³³The court further ordered the

²⁷Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction at 1, Hargrove v. North Haven, (D. Conn. Sept. 26, 2000) (Civ. No. 300CV01526(AWT)).

²⁸*Id.*

²⁹*Id.*

³⁰*Id.* at 14 -15. The tenant's alcoholism and drug addiction was discussed at the Zoning Board Hearing on July 15, 1999. A letter from the Hargroves' attorney to the North Haven Town Clerk brought this claim to North Haven's attention.

³¹*Id.* at 1.

³²Hargrove v. North Haven, Civ. No. 300CV1526(AWT), (D. Conn. Jan. __, 2001) (temporary restraining order).

³³*Id.*

plaintiffs to file with the Town of North Haven an application for a variance that would permit the operation of the sober house at 600 Middletown Avenue. ³⁴

C. The outcome

On February 15, 2001, the ZBA of North Haven held a meeting to discuss the Hargroves' variance application to permit the letting of rooms or furnishing of board to 14 unrelated persons as a reasonable accommodation to operate as a sober house in a residential district. ³⁵ Just after the meeting was called to order the Town Attorney, Robert Ciulla, suggested to the board, "because of the unusual nature of the application and the background leading up to the application [they] would be well advised to go into Executive Session to discuss the pending litigation associated with this application." ³⁶ The board returned after one hour and held a public hearing to discuss the application. ³⁷ The Hargroves' attorney, Thomas E. Crosby, presented the application and Judge Thompson's order to the board and testimony was heard from tenants and neighbors. After questioning from the board and a deliberation session, the board unanimously voted to approve the application. ³⁸

The approval restricted the business operation at 600 Middletown Avenue to a sober house as set forth in the Hearing On Motions before Judge Thompson, dated November 7, 2000 "a sober house [is] a residential place where people live that's not a treatment facility. It doesn't provide treatment, but has some basic ground rules established with regard to no drugs and alcohol. And generally that they provide rules about continued participation in recovery

³⁴ *Id.*

³⁵ Minutes of the North Haven Zoning Board of Appeals meeting (Feb. 15, 2001) (on file with the North Haven Zoning Board of Appeals).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

activities and support around that." ³⁹In granting the variance the Board found that the physical nature of the building was not suited for single family residence and that this together with its historical uses were grounds for hardship. Further, the board stated that the property is uniquely situated and set apart from other residences. Additionally, the Board noted it was making a reasonable accommodation to permit federally protected tenants to reside in number 18 at would support a therapeutically and financially viable sober house. ⁴⁰

While this may be an ultimate "win" for the Hargroves, the question remains, could this legal battle, which ended nearly 18 months after it began, have been resolved more efficiently between the Town and the property owners, without judicial intervention, and without exacting such an emotional and financial toll? Although it looks as though the Town willingly approved the variance, in light of the Town's initial opposition to continuing the nonconforming use and the ZBA's careful attention to the "pending lawsuit" during the final hearing for the variance, it is unlikely that the result would have been as favorable had the Hargroves initially requested a variance. Therefore, legal guidance to municipalities and prospective plaintiffs regarding zoning law as it interacts with the FHA is needed.

II. Federal Law

A. Background

1. ADA or FHA?

Most plaintiffs bring claims for housing discrimination under both the FHA and the Americans with Disabilities Act (ADA). Likely, because both the FHA and the ADA prohibit

³⁹ *Id.*

⁴⁰ *Id.*

discrimination against people with disabilities.⁴¹ Although the standards of FHA and the ADA for barring discrimination of people with handicaps are quite similar, legal discussions relating to group homes generally center on the FHA. This is because the FHA directly addresses residential zoning for disabled individuals in *dwellings*; a group home is considered a dwelling under the FHA.⁴² By contrast, the ADA is used as a tool for challenging discriminatory zoning for places that could not be considered dwellings under the FHA, i.e. rehabilitation centers and clinics.⁴³

Although the FHA does not expressly apply to zoning, legislative history clearly states that the Act is meant to affect zoning practices.⁴⁴ Therefore, courts have held that "reasonable accommodations in rules, policies and procedures" do apply to local zoning regulation.⁴⁵ On the other hand, for some time, the courts were split as to whether individuals should be able to use the ADA to challenge local zoning law. It was not until the 1997 Second District of New York's decision in *Innovative Health Systems*⁴⁶, that the ADA was broadly interpreted to apply to local zoning regulations. Since then, courts have followed *Innovative's* line of reasoning.⁴⁷

2. Legislative History of the FHA

Congress intended the FHA to be broad and inclusive. While current users of drugs and alcohol are specifically excluded from coverage under the FHA, persons recovering from

⁴¹ 42 U.S.C. § 3604(f) (2000); 42 U.S.C. § 12131(2) (2000).

⁴² 42 U.S.C. § 3602(b) (2000).

⁴³ *See, e.g., Innovative Health Systems, Inc. v. White Plains*, 117 F.3d 37 (1997).

⁴⁴ H.R. Rep. No. 711, 100th Cong., 2d Sess. 24 (1988) *reprinted in* 1988 U.S.C.C.A.N. 2173.

⁴⁵ *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 735 (1995); *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 151 (2d Cir. 1999); *Oxford House v. Babylon*, 819 F. Supp. 1179, 1181 (E.D.N.Y. 1993); *Oxford House v. City of Albany*, 819 F. Supp. 1168 (N.D.N.Y. 1993).

⁴⁶ 117 F.3d at 44-46.

⁴⁷ *Bay Area Addiction Research & Treatment v. City of Antoch*, 179 F.3d 725 (9th Cir. 1999); *Smith -Berch v. Baltimore County*, 68 F. Supp. 2d 602 (D. Md. 1999); *Discovery House, Inc. v. Consolidated City of Indianapolis*, 43 F. Supp. 2d 997 (N.D. Ind. 1999).

alcoholism or drug addiction are protected by the Fair Housing Act. The House Report stated that "[j]ust like any other person with a disability, such as cancer or tuberculosis, former drug dependent persons do not pose a threat to a dwelling or its inhabitants simply on the basis of their status. Depriving such individuals of housing or evicting them, would constitute irrational discrimination..."⁴⁸

Furthermore, the legislative history of the FHA makes it apparent that Congress was requiring municipalities, through local zoning, to take affirmative steps and make changes to traditional rules in order to allow people with disabilities equal access to housing.⁴⁹ The House Report of the FHAA stated in pertinent part:

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

The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land use regulations, restrictive covenants, and conditional use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community."⁵⁰

Although some have found that this legislative history sounds "the death knell" for the practice of requiring a special use permit for group homes,⁵¹ not all courts have agreed. Furthermore, this may be a misreading of the legislative history. This portion of the legislative history deals with

⁴⁸1988 U.S.C.C.A.N. at 2173.

⁴⁹*Id.* at 2186.

⁵⁰*Id.* at 2173.

prohibiting special permit requirements being imposed on the disabled while not on other unrelated groups of similar size.⁵²

The House Report also addressed what constitutes "reasonable" by stating that "[t]he concept of 'reasonable accommodation' has a long history in regulations and case law dealing with discrimination on the basis of handicap," and cited *Southeastern Community College v. Davis*⁵³, which interpreted Section 504 of the Rehabilitation Act to find an accommodation reasonable unless it required "a fundamental alteration in the nature of the program" or imposed "undue financial and administrative burdens."⁵⁴

Lastly, the House Report stated that under the FHAA "[a]n aggrieved person is not required to exhaust the administrative process before filing a civil action. The Committee intends for the administrative proceeding to be a primary, but not an exhaustive method for a person aggrieved by discriminatory housing practices to seek redress."⁵⁵ Again, the broadest reading of this would indicate that all administrative remedies need not be exhausted, yet, Congress may have been referring directly to the administrative proceedings available through the Department of Housing and Urban Development (HUD) and not all other types of administrative proceedings.

While the intent of Congress to bring local zoning practices under the aegis of the FHAA and to include recovering substance abusers under the definition of the disabled is clear, Congress was not explicit regarding the procedure through which municipalities would be required to reasonably accommodate the disabled. Not surprisingly, it has been left up to the courts to decide, on a case by case basis, when and to what extent a municipality must provide a

⁵¹Daniel Lauber, *A Real LULU: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments Act of 1988*, 29 J. Marshall L. Rev. 369, 390 (W. 1996).

⁵²Oxford House v. City of Virginia Beach, 825 F. Supp. 1251, 1264 (1993).

⁵³442 U.S. 397 (1979).

reasonable accommodation. Therefore, the next section examines the various ways courts apply the FHA to local and used decisions.

B. Case Law

1. Reasonable Accommodations

Congress requires local governments to "make reasonable accommodations in rules, policies and practices, or services, when such accommodations may be necessary to afford such [handicapped] person[s] equal opportunity to use and enjoy dwelling".⁵⁶ Thus, the FHA's requirement for a housing accommodation to be reasonable has three components. The accommodation must be (1) *reasonable* and (2) *necessary* (3) to afford handicapped persons *equal opportunity* to use and enjoy housing. The "necessary" element requires a direct linkage between the requested accommodation and the "equal opportunity",⁵⁷ while the "equal opportunity" requirement ensures there is a certain level and limitation to the benefits sought.⁵⁸ "The FHA does not require accommodation that increase a benefit to a handicapped person above that provided to a nonhandicapped person with respect to matters unrelated to the handicap."⁵⁹

In *Oxford House v. Township of Cherry Hill*, the court stated in very general terms that a "[r]easonable accommodation means changing some rule that is generally applicable so as to make it burdensome on the handicapped individual."⁶⁰ Furthermore, courts have recognized that determining whether an accommodation is reasonable requires the balancing of

⁵⁴ *Id.* at 410, 412.

⁵⁵ 1988 U.S.C.C.A.N. at 2200.

⁵⁶ 42 U.S.C. § 3604(f)(3)(B) 2001.

⁵⁷ *Bryant Woods v. Howard County*, 124 F.3d 597, 604 (4th Cir. 1997).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 799 F.Supp. 450, 462 n.25 (D.N.J. 1992).

the private interests and the public interests. ⁶¹ Additionally, courts hold that a "reasonable accommodation" must not impose undue financial or administrative burdens on the party making the accommodation or require a fundamental alteration in the nature of the program." ⁶² Nevertheless, a party may be required to incur reasonable costs. ⁶³ Lastly, 42 U.S.C. § 3604(f)(9) provides that a dwelling need not be made available to an individual who is directly or indirectly a threat to the health or safety of other individuals.

2. Zoning Regulations

In the context of local zoning regulations of single family residential zones and group homes sited therein, *Stewart B. McKinney Foundation, Inc. v. Town Planning and Zoning Commission of Fairfield*, acknowledged that the prohibition against handicap discrimination in 42 USC § 3604(f) applies to state or local land use decisions and practices. ⁶⁴ Courts have held that the reasonable accommodations clause intend towns to take affirmative steps such as making changes, waivers or exceptions to their zoning rules which will afford people with disabilities the same opportunity for housing as those without disabilities. ⁶⁵ Nonetheless, it has been held that

⁶¹ *E.g.*, *Smith & Lee v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996); *United States v. Village of Palatine*, 37 F.3d 1230, 1234 (7th Cir. 1994); *Brandt v. Village of Chebanse*, 82 F.3d 172, 175 (7th Cir. 1996); *Robinson v. City of Friendswood*, 890 F.Supp. 616 (S.D. Tex. 1995); *Oxford House, Inc. v. City of Virginia Beach*, 825 F.Supp. 1251 (E.D. Va. 1993).

⁶² *E.g.*, *Smith & Lee*, 102 F.3d at 795; *Oxford House v. Town of Babylon*, 819 F.Supp. 1179, 1186 (E.D. N.Y. 1993); *Oxford House v. Township of Cherry Hill*, 799 F.Supp. 450, 462 (D.N.J. 1992); *Oxford House v. City of Plainfield*, 769 F.Supp. 1329, 1344-45 (D.N.J. 1991).

⁶³ *Oconomowoc Residential Programs v. City of Greenfield*, 23 F.Supp.2d 941, 955 (E.D. Wis. 1998); *Shapiro v. Cadman Towers*, 51 F.3d 328, 335 (2d Cir. 1995).

⁶⁴ 790 F.Supp. 1197 (D. Conn. 1992).

⁶⁵ *Horizon House Developmental Serv. v. Township of Upper Southampton*, 804 F.Supp. 683, 699 (E.D. Penn. 1992), *judgment affirmed without discussion*, 995 F.2d 217 (3d Cir. 1993).

zoning regulations are not per se invalid under the FHA.⁶⁶ Yet, local zoning laws that discriminate on the basis of disabilities are unlawful in all but rare instances.⁶⁷

III.U SEOF ADMINISTRATIVE REMEDIES AND RIPENESS

When courts are asked to decide whether there has been a failure to provide reasonable accommodation under the FHA, the concepts of *exhaustion of administrative remedies* and *ripeness* converge. The FHA states that parties need not exhaust administrative remedies,⁶⁸ yet judges often find that until certain administrative procedures are followed the dispute is not ripe for judicial consideration. A clear standard as to what is required before the reasonable accommodation issue is deemed ripe for review remains elusive.

The ripeness doctrine is used to determine whether a dispute has matured to the point that it warrants a judicial determination.⁶⁹ The doctrine rests on the "case and controversy" requirement of the Constitution as well as upon prudential policy considerations.⁷⁰ The central rationale is to keep courts from "entangling themselves in abstract disagreements".⁷¹ Generally, in determining whether a claim is ripe for review, the court considers the fitness of the issue to be decided and the hardship to the parties of the court withholding consideration.⁷² Under the fitness prong the court considers the finality of agency action, certainty of events or development

⁶⁶ *City of Virginia Beach*, 825 F.Supp. 1251 (E.D. Va. 1993); *Pulcinella v. Ridley Tp.*, 822 F.Supp. 204, 215 (E.D. Pa. 1993).

⁶⁷ *Pulcinella*, 822 F.Supp. at 216.

⁶⁸ 42 U.S.C. § 3613(a)(2) (2000).

⁶⁹ James Wm. Moore & Martin H. Redish, *Moore's Federal Practice*, § 101.70[2] (3d ed. 1997).

⁷⁰ *Id.* at § 101.70[3].

⁷¹ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977).

⁷² *Assisted Living Associates of Moorestown v. Moorestown Township*, 996 F.Supp. 409, 426 (D.N.J. 1998).

of factual record necessary for decision. ⁷³When considering the potential hardship to the plaintiff of withholding consideration, the court may feel some pressure to respond if the injury to the plaintiff is immediate and irreparable. ⁷⁴

Nevertheless, the FHA permits private enforcement whether or not an administrative complaint has been filed with secretary of the Department of Housing and Urban Development. ⁷⁵ Further, in regard to FHA disputes, federal courts have generally held that subject-matter jurisdiction exists and parties are not required to exhaust remedies in state court. ⁷⁶

A. Exhaustion of Administrative Procedures not Required

In *Ward v. Harte*, the court broadly held that under 42 U.S.C. 3613(a)(1) of the FHA "a plaintiff need not pursue any administrative remedies at all before filing a suit." (emphasis added.) ⁷⁷ Moreover, some courts have held that an aggrieved party does not need to exhaust local zoning administrative remedies before filing an action in federal court. ⁷⁸ For example, in *Advocacy and Resource Center v. Town of Chazy*, an non-profit corporation, operating community residences for people with disabilities, brought an action pursuant to the FHA seeking a reasonable accommodation and an order to enjoin the town from enforcing its zoning code. ⁷⁹ The plaintiffs were operating the group home in a district zoned for both single-family and two-family dwellings. ⁸⁰ Prior to opening the residence, an informational town meeting was held and

⁷³ James Wm. Moore & Martin H. Redish, *Moore's Federal Practice*, §101.76(3) (3d ed. 1997).

⁷⁴ *Moorestown*, 996 F. Supp. 427.

⁷⁵ 42 U.S.C. §3613(a)(2) 2000. See also, *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 689 F.2d 391, 394 n.3 (2d Cir. 1982); *Bryant Woods v. Howard County*, 124 F.3d 597, 601 (4th Cir. 1997).

⁷⁶ *Pulcinella*, 822 F. Supp. at 207 (E.D. Penn. 1993); *Oak Ridge Care Center v. Racine County*, 896 F. Supp. 867, 874 (E.D. Wis. 1995).

⁷⁷ *Ward v. Harte*, 794 F. Supp. 109, 113 (S.D.N.Y. 1992).

⁷⁸ *Huntington Branch*, 689 F.2d 391, 394 n.3; *Bryant Woods*, 124 F.3d at 601; *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp. 2d 686, 688 (N.D.N.Y. 1999).

⁷⁹ *Advocacy & Res. Ctr.*, 62 F. Supp. 2d at 687.

⁸⁰ *Id.*

several residents expressed opposition. After the meeting, four would-be neighbors filed complaints with the town.⁸¹ In a letter to the Advocacy Resource Center's (ARC) Executive Director, the Town's Code Enforcement Officer stated that since the residence was a non-profit recreational facility, it was prohibited in the district.⁸² ARC did not apply for a variance or seek to amend the zoning code.⁸³ The town contended that the claim was not ripe and should be dismissed since administrative remedies were not exhausted.⁸⁴ The court disagreed, held the action was ripe for review, and stated that "[i]t would seem logical that if an aggrieved party does not need to exhaust HUD remedies before filing a federal action, he or she should not have to exhaust local remedies."⁸⁵ The court added that when the Town issued the violation letter stipulating it as "final and binding on plaintiffs" the case became ripe for review.⁸⁶

Additionally, in *Huntington Branch*, the defendant sought dismissal of the plaintiff's action for their failure to file a formal application for rezoning. Again, reasonable accommodation was at issue and the court held that administrative remedies did not need to be exhausted before the commencement of a FHA action in federal court.⁸⁷ The court noted that "Congress gave explicit consideration to the availability of local remedies and the lack of an exhaustion requirement in Section 812 [as amended by 42 U.S.C. 3612] strongly suggests that such a requirement was not intended."⁸⁸

Similarly, in *Bryant Woods*, the court disagreed with the County's contention that the claim was not ripe for review since after the plaintiff's request for a zoning variance was denied,

⁸¹ *Id.* at 688.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 688.

⁸⁶ *Id.* at 689.

⁸⁷ *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 689 F.2d 391, 394 n.3 (2d Cir. 1982)

⁸⁸ *Id.*

and they did not pursue their right of appeal, the County's decision became final.⁸⁹ The court held that the FHA permits private enforcement whether or not an administrative complaint has been filed. The court stated that "[w]hile the county must be afforded an opportunity to make a final decision, the issue is sufficiently concrete for judicial review once an accommodation is denied."⁹⁰ The court distinguished the requirement in taking claims, which due to the constitutional Just Compensation Clause requires exhaustion of all post-decisional procedures, from FHA claims where a violation occurs when the plaintiff is initially denied a reasonable accommodation.⁹¹

In *Groome Resources v. Parish of Jefferson*,⁹² the court followed the reasoning of the fourth circuit in *Bryant* despite the fact that the Parish did not formally deny the group home's request for a special zoning accommodation to house Alzheimer's patients in a residential zone. Ultimately, the court held the case was ripe for review because the Parish's unjustified delay, 95 days, had the "effect of undermining the anti-discriminatory purpose of the FHAA".⁹³

Lastly, in *Assisted Living Associates of Moorestown (ALA)*, developers and prospective residents of an assisted living facility brought a handicapped discrimination suit against the town.⁹⁴ ALA contended that the town's zoning ordinance, which required an assisted living facility to be within the town's sewer system, thereby preventing them from building in the residential district, was discriminatory under the FHA.⁹⁵ The town responded that ALA had never applied for a variance and, furthermore, had withdrawn its application for building

⁸⁹ *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 601 (4th Cir. 1997).

⁹⁰ *Id.* at 602.

⁹¹ *Id.*

⁹² 234 F.3d 192 (5th Cir. 2000).

⁹³ *Id.* at 200.

⁹⁴ *Assisted Living Assoc. of Moorestown v. Moorestown Township*, 996 F.Supp. 409, 409 (D.N.J. 1998).

⁹⁵ *Id.* at 425.

approval, thus, the controversy was not ripe. ⁹⁶In spite of this, the court disagreed and reasoned the case was ripe for review because of the existence of a "very real controversy regarding the denial of a reasonable accommodation." ⁹⁷

B. Relief through Administrative Remedies Required

On the other hand, courts often require plaintiffs to first seek relief through the local zoning procedures i.e. an amendment, a variance or a special use exemption or permit. ⁹⁸These courts contend that the FHA does not insulate handicapped individuals from following the same procedures required of all citizens when seeking a reasonable accommodation under the FHA. ⁹⁹

In *Oxford House v. City of Virginia Beach*, the plaintiffs maintained a group home for recovering substance abusers in an area zoned for single family dwellings. ¹⁰⁰The City's zoning ordinance stated that no more than four unrelated people may live together in this zone, but allowed group homes after approval of a conditional use permit. ¹⁰¹The Plaintiffs claimed that their status as handicapped under the FHA exempted them from having to seek this permit. ¹⁰²The courts sided with the City and held that, until the Plaintiff requested a conditional use permit, and it was decided upon, the claim was not ripe. ¹⁰³

Although the *Virginia Beach* court acknowledged that the FHA does not require exhaustion of an administrative process before filing a claim, the court distinguished the issue of

⁹⁶ *Id.* at 426.

⁹⁷ *Id.* at 428 n. 11.

⁹⁸ *E.g.*, *Oxford House - Cv. City of St. Louis*, 77 F.3d 249, 253 (8th Cir. 1996); *Oxford House - Av. City of Universal City*, 87 F.3d 1022, 1023 (8th Cir. 1996); *United States v. Village of Palatine*, 37 F.3d 1230, 1233 (7th Cir. 1994); *Tsombanis v. City of West Haven*, 129 F.Supp.2d 136 (D. Conn. 2001); *Oxford House v. City of Virginia Beach*, 825 F.Supp. 1251, 1260 (E.D. Va. 1993).

⁹⁹ *Palatine*, 37 F.3d at 1233.

¹⁰⁰ *Virginia Beach*, 825 F.Supp. at 1254.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

ripeness from administrative exhaustion. Using the Supreme Court's analysis in a takings challenge, the court stated that while ripeness concerns the initial decision-maker's definitive decision, exhaustion refers to administrative and judicial procedures where a party seeking review may obtain a remedy for an adverse decision.¹⁰⁴

The court stated that a zoning permit process is not "remedial" because the zoning scheme is not applied until a permit is requested and the City has acted.¹⁰⁵ Thus, the plaintiff's claim is unripe because had they applied for a permit that may have been awarded.¹⁰⁶ Moreover, the court reasoned that Congress intended to allow municipalities the opportunity to provide relief through the zoning process; otherwise, the federal courts would prematurely entangle themselves in local disputes and become "zoning boards of first instance."¹⁰⁷

Nevertheless, the court found that the plaintiffs' attack on the application process itself was ripe.¹⁰⁸ The plaintiffs claimed that under the FHA, the City was required to issue the permit, and therefore, the City could not require the application for a permit.¹⁰⁹ Ultimately, the court disagreed and held that the FHA did not guarantee the approval of a conditional use permit because the "reasonable accommodation" standard allowed the City to balance the health and safety of all citizens against the individual's interest.¹¹⁰

Finally, the plaintiffs claimed that the public nature of the permit process, i.e. notice and hearing, would have adverse effects on the plaintiffs. Consequently, the FHA exempts the plaintiffs from this process.¹¹¹ Again, the court was unmoved and held that although the FHA protects the disabled from being subjected to a discriminatory process, the process here was

¹⁰⁴ *Virginia Beach*, 825 F.Supp. at 1260.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1261.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

facially neutral because it did not "single them out", and furthermore, the FHA was not intended to shield the disabled from the participation in a public process required of all citizens. ¹¹²

Similarly, in a like case, *United States v. Village of Palatine*, the plaintiffs, members of a group home for recovering substance abusers, brought an action in federal court arguing that the village failed to make a reasonable accommodation when it did not allow the group home to fit the village's definition of a "family" and instead required the plaintiffs to apply for a special permit. ¹¹³ Like *Virginia Beach*, the plaintiffs argued that the reasonable accommodation language of the FHA requires the city to exempt them from the permit process. ¹¹⁴ Here, the court held that unless a resort to the city's zoning process would be futile, and plaintiffs had not shown here that it would, the city could not be found to have failed to make a reasonable accommodation. ¹¹⁵

Although courts have taken different approaches to the dispute on exhaustion of administrative remedies, they tend to impose some measure of ripeness on plaintiffs' claims. Therefore, a closer examination of the ripeness doctrine as applied to pertinent case law concerning the FHA may reconcile the apparent inconsistency among the courts.

C. Establishing Ripeness under the FHAA

Although courts may not require complete exhaustion of the administrative process, a dispute generally will not be considered ripe until a "substantially definite" decision is reached. Generally, a substantially definite decision is reached when the court feels the town's

¹¹¹ *Id.*

¹¹² *Id.* at 1262.

¹¹³ *United States v. Village of Palatine*, 37 F.3d 1230, 1230 (7th Cir. 1994).

¹¹⁴ *Id.* at 1233.

¹¹⁵ *Id.* at 1233 -34

decision is *final* or the court decides that any further action on the part of the plaintiff would prove *futile* and, thus, the parties have reached an impasse.

In *Chazy*, the sole recourse left to the Plaintiffs, a variance or amendment to the zoning ordinance, were difficult to obtain, perhaps this way the court found the issue ripe for adjudication and the town's violation letter was "final and binding."¹¹⁶ Likewise, in *Bryant Woods*, the court held that the Planning Board's decision was considered *final* when it was not appealed to the zoning board.¹¹⁷ The court held the issue ripe and, therefore, did not require the plaintiff to exhaust the administrative appeals procedure to the Board of Appeals.¹¹⁸ Lastly, the court in *Huntington Branch* found that because the "challenged action was a zoning ordinance rather than an administrative decision, it [was] not clear that realistic administrative remedies exist." (emphasis added)¹¹⁹ In all three cases, despite the fact that administrative remedies were not exhausted, the court found a final decision had been reached and held the issue was ripe for review.

Similarly, in cases where the court has held the issue was not ripe for review, the municipality's decision was not considered final because realistic avenues for relief did exist. The court so held in *Palatine*, and stated that where "it appears that Palatine's current zoning ordinance would allow [the Oxford House] to continue in its present condition as a special use, the refusal of the residents to apply for special use approval was fatal to their reasonable accommodation claim."¹²⁰

A similar ripeness standard was found in *Virginia Beach*, where upon approval of a conditional use permit, the City's zoning ordinance allows group homes in all ten residential

¹¹⁶ Advocacy and Resource Center v. Town of Chazy, 62 F. Supp. 2d 686, 689 (N.D.N.Y. 1999).

¹¹⁷ Bryant Woods v. Howard County, 124 F.3d 597, 601 (1997).

¹¹⁸ *Id.*

¹¹⁹ Huntington Branch NAACP v. Town of Huntington, 689 F. 2d 391, 394 n.3 (2nd Cir. 1982).

districts.¹²¹ Although the city wrote a letter which threatened legal action against the group home unless the home complied with the zoning code or applied for a conditional use permit, the court felt the claim was not ripe because the final result of the town's zoning scheme could not be determined until the plaintiffs filed for the permit.¹²²

Likewise, in *City of St. Louis*, the court held that the plaintiffs' failure to apply for a variance was fatal to their reasonable accommodation claim because the City "consistently said it could not make an exception to the zoning code unless the Oxford Houses appl[ie]d for a variance."¹²³ Similarly, in *Tsombanidis*, the representatives of an Oxford House, in several letters to the City, asked that as a reasonable accommodation it be treated as a single-family residence.¹²⁴ The court held that because the Plaintiff had not applied for a variance or special use exception and the City did not have authority to grant the accommodations without a special use permit, an exemption or a variance, the reasonable accommodation claim was not ripe for adjudication.¹²⁵

Futility, while seemingly the flipside of finality, elicits the same response from courts. Thus, when a party shows that they are certain to have their application denied, courts have found the needed measure of ripeness.¹²⁶ For example, in *Moorestown*, the court held that the plaintiffs did not have to seek a zoning variance since there was no question that the town would deny the request.¹²⁷ The court relied on the testimony of a witness for the Township who stated that the variance requested would be inconsistent with the Town's plans because it was not

¹²⁰ *United States v. Village of Palatine*, 37 F.3d 1230, 1232-33 (7th Cir. 1994).

¹²¹ *Oxford House v. City of Virginia Beach*, 825 F.Supp. 1251, 1251 (E.D. Va. 1993).

¹²² *Id.* at 1260.

¹²³ *Oxford House v. City of St. Louis*, 77 F.3d 249, 253 (8th Cir. 1996).

¹²⁴ *Tsombanidis v. City of West Haven*, 129 F.Supp.2d 149 (D. Ct. 2001).

¹²⁵ *Id.* at 160-61.

¹²⁶ *United States v. Village of Palatine*, 37 F.3d 1230, 1234 (7th Cir. 1994).

¹²⁷ *Assisted Living Associates of Moorestown v. Moorestown Township*, 996 F.Supp. 409, 426 (D.N.J. 1998).

within these sewer service area and therefore it was "extremely unlikely" that a variance would be granted.¹²⁸

On the other hand, in *Oxford House v. City of St. Louis*, the circuit court overturned the district court's finding that Oxford House's application for a variance was futile.¹²⁹ The court stated that the district court's finding here was erroneous because the records showed that the Board had granted variances despite opposition from the community.¹³⁰ Additionally, in *Palatine*, the court noted that because the Village had an "exemplary record in responding to the needs of handicapped individuals" and "made numerous zoning changes in the face of community opposition" it could not be said that a request would be futile.¹³¹

Lastly, futility was an important measure in the denial of attorney's fees in *Oxford House v. University City*. Here, two Oxford House members moved into the residence without obtaining a certificate of occupancy.¹³² The city threatened to evict the tenants unless the Oxford House applied for a special use permit or sought an amendment to the zoning code.¹³³ Thereafter, the parties went to court.¹³⁴ While the dispute was pending, the Oxford House filed and the town denied an application for a zoning amendment. Nevertheless, the town ultimately amended the code and resolved the issues in Oxford House's favor.¹³⁵ However, the court denied the Oxford House's request for attorney's fees, reasoning that the issue had not been ripe in the first place since Oxford House sued before exhausting "non-futile procedures... which, when invoked, produced a reasonable accommodation."¹³⁶

¹²⁸ *Id.*

¹²⁹ *Oxford House v. City of St. Louis*, 77 F.3d 249, 253 (8th Cir. 1996).

¹³⁰ *Id.*

¹³¹ *United States v. Village of Palatine*, 37 F.3d 1230, 1234 (7th Cir. 1994) (citation omitted).

¹³² 87 F.3d 1022, 1023 (1996).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1024.

Indeed, courts do not seem to be consistent on the requirement for exhaustion of the local zoning process. Yet, one might be able to reconcile many of the decisions by reasoning that courts require parties to have reached an *animus in se* before finding the dispute ripe for adjudication. Consequently, it becomes clear that plaintiffs will not be allowed to rule out participation in the zoning process as a matter of right. Therefore, a very brief detour and examination of the various avenues for relief provided by local zoning law is warranted.

D. Variances, Amendments, Special Permits and Exemptions

If successfully surmounting the ripeness hurdle requires group homes to simply apply for a zoning permit or variance, one question surely plaintiffs would not automatically do so. There are likely several common place reasons, including federal judicial expertise and speed, that explain why group homes prefer to plead their case before a federal judge rather than a local zoning board.

Additionally, disabled residents are uncomfortable with zoning procedures that subject them to public scrutiny. Although, as we saw in *Virginia Beach* this argument has not been successful in situations where notice requirements are imposed on all citizens in a like manner.¹³⁷ Likewise, Oxford Houses do not sober houses modeled after the Oxford Houses and other group homes may not consider themselves any different from a family.¹³⁸ This may also explain why some group homes, as a matter of course, do not consider it necessary or appropriate to apply for various permits and variances. They believe they meet the ordinance's requirements for a family.

Moreover, the application process for permits and variances may seem daunting and uncertain. A variance allows use of the property in a manner forbidden by the zoning

¹³⁷ *E.g.* Oxford House v. City of Virginia Beach, 825 F. Supp. 1251, 1262 (E.D. Va. 1993).

¹³⁸ *E.g.* United States v. Village of Palatine, 37 F.3d 1230, 1232 (7th Cir. 1994).

ordinances, however, it requires a showing of *unnecessary hardship* that is particularly difficult to meet.¹³⁹ On the other hand, *special permits* or *special exceptions* are qualitatively the same; each involve a use which is permitted by the zoning regulations only when prescribed standards of the ordinance are satisfied.¹⁴⁰ The standards for issuing a special permit or special exception are usually less stringent than for a variance,¹⁴¹ and may be granted without proof of a hardship.¹⁴² Another tool available for relief from the terms of a zoning ordinance is an *amendment*. Simply stated, an amendment changes the zoning classification of a previously zoned area.¹⁴³

While these recourses may seem viable, they are not always applicable or available to group homes. The variance, is often considered a tool for resolving the dispute between towns and group homes, however, it has particularly burdensome requirements. In *Pulcinella v. Ridley Township*, the court stated that "the granting of a variance allows fairly wide discretion to municipal zoning authorities, in general where a party can show hardship to the land, a variance must be granted,"¹⁴⁴ This view overly simplifies the requirements for a variance. The purpose of a variance is to provide relief to a landowner when the terms of the ordinance "would deny a property owner all beneficial use of his land and, thus, amount to a confiscation."¹⁴⁵ In *Horizon House Developmental Serv. v. Township of Upper Southampton*, the court aptly stated that the opportunity to obtain a variance is no accommodation at all because a variance is a "lengthy, costly and burdensome process".¹⁴⁶ Indeed, because zoning boards have wide discretion and the

¹³⁹ 83 AM.J UR.2D *Zoning and Planning* §832(1992).

¹⁴⁰ *See id.* §831.

¹⁴¹ *Id.*

¹⁴² *See id.* §832.

¹⁴³ *See id.* §962.

¹⁴⁴ 822 F.Supp.204,208 (E.D.Penn.1993).

¹⁴⁵ 83 AM.J UR.2 D at §830.

¹⁴⁶ 804 F.Supp.683,700 (E.D.Penn.1992).

party seeking a variance generally has to prove that denial would constitute a government taking of the land, there is often a slim likelihood of obtaining a variance.

An *amendment* is another ordinary mechanism for relief to local zoning law.

Nonetheless, an amendment is considered a fundamental change in the zoning scheme. Although a municipality has the right to change its zoning ordinances, the procedures for effectuating change require a legislative process.¹⁴⁷ An amendment affects all property holders within the district, and therefore, the legislative body must consider not only the individual's interest but also the interest of the entire community.¹⁴⁸ Therefore, the local governing body, generally after public notice and hearing, must determine if the change is in the best interest of the community. Furthermore, overturning an amendment or refusal to amend is extremely difficult since the plaintiff must show that the legislative body's decision was arbitrary, unreasonable and not in the interest of public welfare.¹⁴⁹ To residents of group homes, the prospect of effectuating an amendment to local zoning law is likely to seem not only daunting, but in the face of community opposition, far fetched.

Some municipal zoning regulations, such as *Virginia Beach*, allow for group homes in residential neighborhoods upon the issuance of a special permit or special exemption. Each town may impose their own set of conditions for approval of a permit or exception. Nonetheless, depending on the township, these standards may be stringent and it may seem improbable to the group home that they will meet the specified set of conditions. Furthermore, not all municipalities provide this type of relief for relaxing the zoning requirements to allow group homes in single-family residential districts.

¹⁴⁷ 83 AM.J UR.2 D at §609.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

Applying for and receiving a variance, amendment or special permit is "easier said than done". Municipalities are restricted, not only by political pressure to close the door on group homes, but also by statutory limitations on the uses for variances, and amendments. While courts may prefer to have the disputes resolved at the local level, unless there are viable options available towns and group homes will remain at loggerheads.

IV. LEGISLATIVE OPTIONS

Following are proposals for dealing with the conflict, which arise between group homes and local zoning authorities. Several state legislative options and their chances for success are examined. The first and most progressive is to expand the definition of "family" for those deemed "handicapped" under the FHA. A second considered approach is to permit group homes in single family residential zones subject to dispersal requirements or to allow group homes in selected residential zones. Lastly is a proposal to site group homes in all single-family districts subject to special permit requirements.

A. Expanding the definition of family

Since town zoning laws for single family residential zones allow any number of related family members to live together under one roof, classifying members of group homes for the disabled as "family" would resolve most zoning disputes of this sort. Municipalities seek to define the term "family" in order to preserve the type of atmosphere as single-family residence engenders. Often the definition of "family" results in a "cap" imposed on the number of unrelated persons while allowing an unrestricted number of persons related by blood, marriage or adoption to live together in single-family district. Furthermore, courts agree that "reserving land

for single-family residences preserve the character of neighborhoods, securing zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." ¹⁵⁰

The composition of a group home does not fit the "traditional" concept of a family. Yet, it is for just these reasons that single-family zones are ideal locations for group homes. Although title 42 U.S.C.A. §3607 (b)(1) of the FHA provides a statutory exemption for maximum occupancy restrictions stating that "nothing in the Fair Housing Act limits the applicability of any reasonable local, state or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling," in *City of Edmond v. Oxford House*, the Supreme Court distinguished between *land-user restrictions* which are designed to construct compatible uses for a district from *maximum occupancy restrictions* which are in place to prevent overcrowding. ¹⁵¹ The Court held that statutory exemption from maximum occupancy limits does not apply to zoning limitations on the number of occupants of a single-family residence. ¹⁵² Since the provisions allow any number of people to live in a dwelling as long as they are related by "genetics, adoption, or marriage," they are not intended as an occupancy cap. ¹⁵³ Nonetheless, the court did not decide if Edmond's definition of family, which allowed five or fewer unrelated people to live together, violated the FHA's prohibitions against discrimination. ¹⁵⁴

Recovery for substance abusers is most effective when they live in residential neighborhoods. The court in *Cherry Hill* found that after completion of a rehabilitation program, it was crucial for recovering alcoholics and substance abusers to have a supportive

¹⁵⁰ *City of Edmond*, 514 U.S. at 732 -33, quoting Vill. Age of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (citation omitted, internal quotations omitted).

¹⁵¹ *Id.* at 732 -35.

¹⁵² *Id.* at 738.

¹⁵³ *Id.* at 736.

¹⁵⁴ *Id.* at 738.

environment.¹⁵⁵ Additionally, the location of the group home in a drug-free, single family neighborhood played an important role in recovery since it "promot[ed] self-esteem, help[ed] to create an incentive not to relapse, and avoid[ed] the temptations that the presence of drug trafficking can create."¹⁵⁶ Moreover, because of the nature of their illness, recovering substance abusers need to live in the type of supportive group environment offered by a group home. 157

The Oxford House model increases the chance of recovery fivefold by integrating the individual back into the community while providing a clean, stable, drug and alcohol free environment. 158

In many instances, group homes propose that municipalities make a reasonable accommodation by amending the zoning ordinance's definition of "family" to include persons defined as handicapped under FHA, thereby, allowing group homes in single-family residential districts. Towns are often reluctant to do so. Perhaps the fear is that, a blanket change in the definition of "family", allowing, without restriction, group homes for the handicapped into single-family zones will result in a fundamental disruption of the single-family district.

The City of St. Louis' zoning code's definition of a single-family dwelling includes group homes with eight or fewer unrelated handicapped residents.¹⁵⁹ Residents of group homes that wish to have more than eight members are required to apply for a variance. ¹⁶⁰In *Oxford House v. City of St. Louis*, Oxford House residents brought a lawsuit against the city claiming that the city's effort to enforce the eight-person limit violated the FHA. ¹⁶¹The court stated that "[r]ather than discriminating against Oxford House residents, the City's zoning code favors them on its

¹⁵⁵ *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450, 456 (D.N.J. 1992).

¹⁵⁶ *Id.* at 453.

¹⁵⁷ *Id.* at 456.

¹⁵⁸ *Id.* at 456 n. 11.

¹⁵⁹ *Oxford House v. City of St. Louis*, 77 F.3d 249, 251 (8th Cir. 1996).

¹⁶⁰ *See Id.*

¹⁶¹ *Id.*

face".¹⁶²The court reasoned that municipalities have an interest in "decreasing congestion, traffic, and noise in residential areas, and ordinances restricting the number of unrelated people whomay occupy a single family residence are reasonably related to these legitimate goals."¹⁶³ Further, the city did not need to have a reason for choosing a height, as the cut-off, since line drawing is left to the discretion of legislative bodies, not a judicial function.¹⁶⁴ The court held that the eight-person rule was rational and valid under the FHA.¹⁶⁵

In *Bryant Woods*, the court found no violation of the FHA where the existing zoning regulations permitted group homes by allowing a family to house up to eight handicapped or elderly persons at its principal residence.¹⁶⁶ Where, due to traffic considerations, the town denied the request to increase that number to fifteen, the court employed a balancing test to determine whether the reasonableness requirement was met.¹⁶⁷ The court noted that the plaintiff had introduced no evidence that group homes were not financially viable or less meaningful therapeutically with eight residents rather than fifteen residents.¹⁶⁸ Further, the accommodation was not "necessary" to afford people an opportunity to live in this type of setting, since the vacancy rate at therapeutic group homes for the elderly in the community was between 18 to 23 percent.¹⁶⁹

On the other hand, in *Town of Babylon*, the court held that the Town failed to make a reasonable accommodation in violation of the FHA¹⁷⁰ because the Town's code prohibited rooming houses or boarding houses in multifamily and single family zones. Therefore, the

¹⁶² *Id.*

¹⁶³ *Id.* at 252.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See* *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597 (4th Cir. 1997).

¹⁶⁷ *Id.* at 604.

¹⁶⁸ *Id.* at 605.

¹⁶⁹ *Id.*

¹⁷⁰ *Oxford House, Inc. v. Town of Babylon*, 819 F.Supp. 1179, 1186 (E.D.N.Y. 1993).

plaintiffs were not permitted to locate in any residential district within the Town.¹⁷¹ The group
homewrote to the Town requesting a modification to the definition of "family" as applied to
them¹⁷² but, the town did not respond.¹⁷³ The court stated that the plaintiffs had established that
the accommodation requested was reasonable since it would neither cause a financial burden on
the city nor would it adversely effect the residential nature of the district.¹⁷⁴

Likewise, the Township of Cherry Hill's interpretation of its zoning ordinance prohibited
the Oxford House residents from living in any of the Township's five residential zones.¹⁷⁵
Cherry Hill interpreted its zoning ordinance's definition of "family" in such a way "so as to
impose more stringent requirements on groups of unrelated individuals seeking to rent a single
family home than on groups who are related by blood or marriage."¹⁷⁶ Since the Township failed
to present a legitimate reason for their action, the court held that the Township's application of
the ordinance had a disparate impact on the handicapped.¹⁷⁷ Furthermore, the court added that
the defendant did not meet its burden of establishing that no reasonable accommodation could be
made.¹⁷⁸ The court issued a preliminary injunction preventing the Township from enforcing
their zoning ordinance so as to interfere with the residents' occupancy of the Oxford House.¹⁷⁹

The cases presented indicate that when a municipality's definition of "family" makes no
allowance for a reasonable accommodation for group homes, it is likely to be found in violation
of the FHA. On the other hand, municipalities have fared much better in court proceedings when

¹⁷¹ *Id.* at 1185 n. 10.

¹⁷² See *Id.* at 1185.

¹⁷³ *Id.* at 1185 n. 9.

¹⁷⁴ *Id.* 1186.

¹⁷⁵ *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 456 (D.N.J. 1992).

¹⁷⁶ *Id.* at 455.

¹⁷⁷ *Id.* at 461.

¹⁷⁸ *Id.* at 462.

¹⁷⁹ *Id.* at 465.

they have more liberal self-imposed standards which allow for a limited number of disabled persons to live together in residential areas under an expanded definition of "family".

Therefore, one reasonable suggestion would be legislation that mandates local zoning ordinances "define" family to include a reasonable number, not to exceed maximum occupancy limitation in the housing code, of disabled persons living together. In this way, group homes would be able to sit themselves in single family residential zones as a matter of right. Nevertheless, municipalities will likely resist this type of legislation because it places no restriction on the number of group homes permitted in a residential neighborhood and municipalities will oppose relinquishing control they hold over the makeup and structure of the sacred single-family district. Hope for the approval of such a bill seems unrealistic.

B. Dispersal requirements and "selective" residential zones

One response to the fear of group homes "invading" the single-family neighborhood has been to legislatively impose dispersal requirements. Yet, another suggestion has been to allow group homes in some single-family residential zones and not others. Courts are split as to whether these types of requirements constitute facial discrimination.

1. Dispersal requirements

Dispersal requirements or distance requirements which apply to the disabled living in group homes generally establish minimum distance rules for the spacing between homes which accommodate the disabled. For example, a rule that imposes a minimum distance of 1,000 feet between group homes is a dispersal requirement.

The court in *Family Style of St. Paul, Inc. v. City of St. Paul* held that dispersal requirements furthered the legitimate government interest of integrating the mentally ill in residential homes and, therefore, did not violate the FHA.¹⁸⁰ Nevertheless, the majority of courts have declined to follow the Eighth Circuit's ruling.¹⁸¹ In *ARC of N.J.*, the court stated that if this type of integration were a legitimate government interest, municipalities and states would need to present evidence that there was no less discriminatory alternative.¹⁸² Furthermore, the court in *ARC* noted that *Family Style* opted to follow the less relevant standard of review for discrimination in equal protection claims rather than the test established for Title VIII [Civil Rights] claims.¹⁸³

A dispersal requirement is generally found to be facially discriminatory because it restricts housing choice for the disabled by essentially placing a cap on the number of handicapped that can live in the township.¹⁸⁴ This type of rule is in violation of the FHA, unless the restriction is based on the specific needs of the handicapped and has a rational basis or legitimate government interest. In *Horizon House*, the court rejected the Township's rationale that the spacing requirement would prevent "clustering" and promote "integration" and plainly stated that integration was not an adequate justification under the FHA.¹⁸⁵ The court held that a 1,000-foot distance requirement between group homes for people with mental retardation was invalid under the FHA because the rule clearly restricted the housing choices and constituted "a cap or quota" on the number of disabled people that could live in the township.¹⁸⁶

¹⁸⁰ 923 F.2d 91, 95 (8th Cir. 1991), *rehearing and rehearing en banc denied*.

¹⁸¹ See, e.g., *Larkin v. State of Mich. Dept. of Social Servs.*, 89 F.3d 285 (6th Cir. 1996); *ARC of N.J. v. State of N.J.*, 950 F.Supp. 637 (D.N.J. 1996); *Horizon House Developmental Servs. v. Township of Upper Southampton*, 804 F.Supp. 683 (E.D.Pa. 1992).

¹⁸² *ARC*, 950 F.Supp. at 645.

¹⁸³ *Id.* at 645 -46n.13.

¹⁸⁴ *Horizon House*, 804 F.Supp. at 695.

¹⁸⁵ *Id.* at 694 -95.

¹⁸⁶ *Id.* at 695.

Moreover, the *Horizon House* court stated that the Maryland legislature had repealed its 1,000-foot distance requirement on the advice of its Attorney General that the rule was illegal under the FHA.¹⁸⁷ Additionally, the court noted that in the opinions of attorney generals in Delaware, Kansas and North Carolina distance rules are unlawful.¹⁸⁸

Dispersal requirements may seem as a means of limiting the number of group homes in a residential neighborhood thereby maintaining the fundamental nature of a single-family residential zone. However, this seems to be the exact zoning scheme that Congress intended to prohibit when it disallowed land-use requirements on non-related persons with disabilities where the same requirements were not imposed on groups of unrelated persons.¹⁸⁹ On the other hand, one could argue that dispersal requirements are not discriminatory since but for the group's disability they would not have access to the housing at all. Therefore, the argument goes, in practice the dispersal requirement favors the non-related disabled group over the non-related non-disabled group. Nonetheless, the fact that an arbitrary quota is being imposed on the disabled seems to fly in the face of the FHA's mandate that the disabled be given access to a "dwelling of their choice". Thus, it seems that a legislatively mandated dispersal requirement, no matter how benign the intent, would stand up to a discrimination challenge.

2. "Selective" residential zones for group housing

Another suggestion put forth as a possible reasonable accommodation under the FHA, is to allow municipalities to designate some single-family residential zones as appropriate for handicapped group housing while preventing group homes in other less "appropriate" single-family zones. The question remains somewhat unsettled as to how to interpret the language

¹⁸⁷ *Id.* at 694.

¹⁸⁸ *Id.* at 694 n.4.

"equal opportunity to use and enjoy a dwelling." ¹⁹⁰Nonetheless, the court in *Erdman v. City of Fort Atkinson*, expressed skepticism when the district court concluded that a plaintiff must show inequality of opportunity to live in a *city*, where the statute refers specifically to inequality of an opportunity to live in a *dwelling*.¹⁹¹

Furthermore, "[T]itle 42 U.S.C. 3604(f)(3)(B) dictates that a handicapped individual must be allowed to enjoy a particular dwelling, not just some dwellings somewhere in town." ¹⁹²The court in *City of Plainfield* rejected the defendant's argument that the City did not deny the plaintiff equal access because other locations were available for them to establish a group home.¹⁹³ Therefore, because the defendants had interfered with the plaintiffs' right to live in the neighborhood of their choice, the court held that the plaintiffs had shown a likelihood of success on the merits. ¹⁹⁴

Nevertheless, in *Elliott v. City of Athens*, the court stated that "[w]hile a local government cannot exclude handicapped individuals on the premise that they can go elsewhere, the FHA amendments do not require local governments to permit handicapped individuals to live wherever they desire. ¹⁹⁵For example, in *Forest City Daily Housing v. Town of North Hempstead*, the court upheld a zoning board's denial of a special use permit for construction of an assisted living facility in a commercial zone. ¹⁹⁶The court stated that, in this case, the municipality is not required to make an accommodation for the disabled because persons without

¹⁸⁹H.R. Rep. No. 711, 100th Cong., 2d Sess. 24 (1988) reprinted in 1988 U.S.C.C.A.N. at 2174.

¹⁹⁰42 U.S.C. § 3604(f)(3)(B) (2000).

¹⁹¹84 F.3d 960, 963 (7th Cir. 1996).

¹⁹²*Oxford House v. Town of Babylon*, 819 F. Supp. 1179, 1185 n.10 (1993).

¹⁹³*Oxford House - Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1344 (1991).

¹⁹⁴*Id.*

¹⁹⁵*Elliott v. City of Athens*, 960 F.2d 975, 982-983 (1992), (internal quotation marks omitted) cert. denied 506 U.S. 940 (1992), overruled on other grounds by *City of Edmonds v. Oxford House*, 514 U.S. 725, 730-731 (1995).

¹⁹⁶175 F.3d 144, 146 (2nd Cir. 1999).

disabilities are also restricted from living in a commercial zone.¹⁹⁷ Likewise, in *Thornton v. City of Allegan*, the court upheld the zoning board's refusal to allow the siting of an adult foster care residence in the City's commercial business district.¹⁹⁸ The City stated that it would be inconsistent with its land use plan.¹⁹⁹ The court found that the City had made a reasonable accommodation because it assisted the plaintiff with finding another suitable location within the City.²⁰⁰

Like the court in *Forest City*, the court in *Thornton* implied that disabled residents might be restricted from locating in certain areas. However, most courts agree that where persons who are not disabled are allowed to live, reasonable accommodations must be made to allow disabled persons residence opportunities there as well. Therefore, it seems unlikely that allowing group homes for the handicapped in some single-family residential districts while barring access to others would pass a discrimination challenge under the FHA.

C. Special Permits and Special Exceptions

As discussed previously, some municipal zoning regulations allow for group homes in residential neighborhoods upon the issuance of a special permit or special exemption. Municipalities then impose standards or a set of conditions for approval of the permit. Although legislative history of the FHA has sometimes been interpreted to prohibit municipalities from requiring group homes to apply for a special permit, the context of this prohibition seems to

¹⁹⁷ *Id.* at 152.

¹⁹⁸ 863 F. Supp. 504, 510 (W.D. Mich. 1993).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

apply only when permits would not be imposed on non-disabled persons under similar conditions.²⁰¹

A special permit would certainly be prohibited in a scenario where, for example, a group of five mentally ill residents are required to apply for a special permit and a group of five unrelated people are not. On the other hand, the Supreme Court in *Belle Terre* upheld zoning ordinances which allowed groups of related individuals to live in single-family zones but did not allow groups of non-related individuals.²⁰² Therefore, group homes may have difficulty claiming discrimination when different zoning treatment exists between themselves and a "family".

Nevertheless, where the permit provides access to a residential zone which, but for the groups disabled status, it would be denied access, courts have not found the permit process to be discriminatory. In fact, where the permit gives the disabled group a "lift up" over non-related, non-disabled groups, courts see the permit process not as discriminatory, but as favoring the group homes. Furthermore, unlike a dispersal requirement a special permit imposes no cap on the number of group homes in a residential zone.

Therefore, a legislative measure is envisioned that authorizes zoning boards to issue a special permit to persons entitled to a reasonable accommodation by virtue of the FHAA or ADA.²⁰³ Further, such a proposal would include language to the effect that the special permit application be referred to the municipal attorney for a report as to whether the special permit application creates a responsibility for the town under the FHAA or the ADA.²⁰⁴

²⁰¹ *See, e.g.* Oxford House v. Virginia Beach, 825 F.Supp. 1251, 1264 (1993).

²⁰² Village of Belle Terre v. Borass, 416 U.S. 1, 7-9 (1974).

²⁰³ This proposal is a product of the committee's drafting session, *see supra* note 8.

²⁰⁴ *Id.*

In theory this legislation would provide group homes with the reasonable accommodation required under the FHAA. This permit process envisions that towns will establish reasonable requirements designed to accommodate group homes for the disabled in residential zones. Group homes for the disabled would have access to all single-family residential neighborhoods while the towns would continue to exercise oversight of legitimate zoning matters.

Additionally, a well-researched report by the municipal attorney would provide both parties with a clearer understanding of the law. It is anticipated that with the input of a municipal attorney, local zoning boards could no longer ignore their responsibility to provide reasonable accommodation to disabled persons under the FHA or ADA. Group homes for the disabled would also recognize their responsibility to abide by certain zoning requirements. Simply put, the report of the town's attorney would focus the town and the group home on their respective legal responsibilities. Moreover, the public would also bear witness to the fact that there is relevant federal law as well as local zoning law to be considered when making the decision.

Further, legislation calling for a special permit would encourage towns to provide such a procedure with reasonable requirements. If a town chooses not to implement a special permit application to reasonably accommodate the group housing needs of the disabled, it would not seem unreasonable that a group could argue that this omission is prima facie evidence that the town has failed to provide a reasonable accommodation. Likewise, although a town is allowed to stipulate the requirements for obtaining the permit, if a group home believes the request was unfairly denied, or the requirements of the special permit are unduly restrictive, they have good reason to appeal the decision. Therefore, the act of either applying for the special permit or inquiring into the availability of a special permit to be advised that such an avenue does not exist

would likely fulfill the courts ripeness requirement and the parties would now be allowed to argue the substantive issue of a reasonable accommodation in federal court.

While this proposal does not address all the parties' concerns, it does attempt a fair resolution of the matter at the local level. On the other hand, an argument not previously mentioned against this type of permit procedure is that special permits may limit purchase opportunities for group home operators.²⁰⁵ For example, a group home may condition the purchase of the property on obtaining the necessary special permit. The uncertainty of this type of contingency may make the seller less willing to contract with a purchaser who intends to use the property as a group home. Nevertheless, the certainty of knowing the home is authorized to operate for its intended purpose will likely outweigh the inconvenience and possible delays associated with having to obtain a permit prior to purchase.

CONCLUSION

On balance, litigation in federal court has been an effective means of forcing towns to comply with their responsibility to provide a reasonable accommodation under the FHA to group homes for the disabled. Nonetheless, recently more and more courts have been unsympathetic to disabled groups' arguments that they are not required to participate in the zoning process. Further, although a federal lawsuit may work, it also creates enduring rifts in communities. Thus, while the group home may have won one battle, it will have lost another – on the public opinion front. If there is to be any real acceptance of group homes for the disabled in the community, it is crucial to change the public's negative perception of these group homes. Divisive court battles will not likely produce this result.

²⁰⁵Daniel Lauber, *A Real LULU: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments Act of 1988*, 29 J. Marshall L. Rev. 369, 388 (W. 1996).

Consider the facts of the *Hargrove* case - had legislation, which allowed the town to grant a special permit to the group home been in effect, the dispute would likely have been resolved at the local level. The ensuing divisive litigation in both the State and Federal courts would have been unnecessary. Further, prior to bringing a costly action in court, the Hargroves most likely would have submitted voluntarily to a fair permit process with a realistic chance of success. Similarly, if the Town of North Haven had a special permit application available and was on notice that Federal law required it to make a reasonable accommodation under the FHA, it would have been better able to withstand public pressure and make a fair minded decision relative to the siting of the group home. The parties could have discussed about their legal obligations and failing a resolution, the door to Federal court would have been open to "reasonable accommodation" arguments from both sides.

The time has come for state legislature to clarify the roles of each party in this dispute. Appropriate legislation can work to bring about a change in society's attitude to allowing the disabled and, especially, recovering alcoholics and substance abusers a safe place to call home. It is in instances of unwarranted discrimination, that a legislative or judicial solution is most needed to guide a society into change. Consider where we would be today without the courage of the Supreme Court in *Brown v. Board of Education*.²⁰⁶ Response from our legislators will induce towns to assume their responsibility under the FHA and encourage group homes to respect the legitimate functions of local zoning. With leadership from our elected officials, we can begin to effect a change on public perception; the disabled too should have the opportunity to experience one of America's most supportive environments - our residential neighborhoods.

²⁰⁶347 U.S. 483 (1954).