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# Group Homes: Local Control and Regulation Versus Federal and State Fair Housing Laws

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**Table of Contents**



## Local Control and Regulation Versus Federal and State Fair Housing Laws

Ted H. Gathe, Vancouver City Attorney [ The views expressed in this article are those of the author and not those of the City of Vancouver.]

## I. INTRODUCTION

In September, 1996, the Mayors of Palatine, Illinois and Edmonds, Washington testified before a subcommittee of the House Judiciary Committee. These local officials asked Congress to legislatively remedy a series of judicial interpretations of the Fair Housing Act Amendments of 1988 that severely restrict the ability of cities to decide how and where group homes can be located.

This plea for a legislative response symbolizes the frustrations of many city officials who have, over the last few years, waged a mostly losing battle with group home and fair housing advocates who have been strongly supported by the Federal Government through the Departments of Housing (HUD) and Justice. Lawsuits involving Palatine and Edmonds have run the gauntlet of the federal judiciary and in

so doing have established significant precedents favorable to group home advocates.

This article is intended to provide a review and update on the Fair Housing Act as last reviewed in the 1993 ELUL Mid-Year Seminar. In particular, it will examine the conflict between the federal policy of supporting the unrestricted location of residential group homes for the handicapped and cities' interests in protecting and preserving the residential character of single family neighborhoods. Last, it will examine the most recent case law and proposed federal and state legislation in this area.

## II. BACKGROUND

The deinstitutionalization of persons with mental and physical handicaps has rapidly occurred throughout the country in the last several decades. This has resulted in a proliferation of alternate living arrangements commonly referred to as "group homes". Such homes allow handicapped individuals to live together in a residential setting with the advantages of a family like structure. For many such individuals, group living arrangements are beneficial for integrating into society as well as economically necessary. In recent years, the group home concept has included a number of unsupervised, self-governing homes that provide housing for recovering alcoholics and drug addicts. A prime example are the Oxford Houses found in many communities throughout the country.

The rapid increase of group homes has been controversial. In the past, a number of municipalities took a "not in my backyard" approach in regulating such housing often bowing to local neighborhood opposition by restricting their location, placement and operation. For a variety of reasons including the actions of some local governments, Congress, in 1988, amended the Fair Housing Act. [ Fair Housing Act, 42 U.S.C. § 3601 et seq .]

### A. Overview of 1988 Amendments to the Fair Housing Act

The amendments to the Fair Housing Act ("FHAA") prohibit discrimination against people with disabilities and on account of familial status in public as well as private housing. The 1988 Act also strengthened existing enforcement mechanisms by providing HUD with the power to refer cases involving breaches of conciliation agreements to the Department of Justice.

In construing the Act, courts have given it broad application in order to prohibit discriminatory housing practices, and have required "a generous construction. . . in order to carry out a policy that Congress considered to be of the highest priority." [ United States v. Columbus Country Club , 915 F.2d 877, 883 (3rd Cir. 1990).]

It is possible for municipalities to violate the Act in two different areas. First, the original Fair Housing Act invalidates "any law of a State, a political subdivision, or any other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this [Act]." [ 42 U.S.C. § 3615.] The Federal Courts have repeatedly interpreted this provision to prohibit municipal zoning and land use policies that affect the availability of housing for individuals protected by the Act. [ See, e.g., Metropolitan Housing Dev. Corp. v. Village of Arlington Heights , 558 F.2d 1283 (7th Cir. 1977).] Second, the 1988 Amendments specifically define discrimination against the handicapped to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." [ 42 U.S.C. § 3604 (f)(3)(B).]

In response to the FHAA, the Washington State Legislature added a new section to chapter 35.63 RCW during the 1993 session. It reads:

No city may enact or maintain an ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure occupied by persons with handicaps differently than a similar residential structure occupied by a family or other unrelated individuals. [ 1993 Wash. Laws, 478, § 20 (also known as the Washington Housing Policy Act); see also Wash. Admin. Code 365-195-860; Wash. Rev. Code § § 35.63.220, 35A.63.240.] [emphasis added]

As a result, Washington has established an anti-discrimination policy that supports individuals who fall under the FHAA definition of "handicapped," by prohibiting land use regulations and policies which treat such individuals differently than the non-handicapped. Whether or not this provision prohibits regulations that prevent the clustering of group homes and promote community integration, is uncertain. However, as discussed herein, in light of various judicial decisions interpreting the FHAA, it does seem clear that municipal regulations may "treat a residential structure occupied by persons with handicaps differently," only if there are legitimate state and local interests properly tailored to achieve valid regulatory goals. [ See supra S ection III.]

B. Definition of Handicapped

The FHAA adopted the definition of "handicap" used in section 504 of the Rehabilitation Act of 1973. [ See 29 U.S.C. § 701-794.] "Handicap" with respect to a person means that such person has a "physical or mental impairment which substantially limits one or more major life activities; a record of such an impairment; or is regarded as having such an impairment." [ 24 C.F.R. § 100.201; see also 42 U.C.S. § 3602 (h).] "Major life activities" include caring for oneself, walking, seeing, hearing, speaking, breathing, learning and working. Thus, any person suffering from a physiological, neurological or mental disorder or disability of any type will be protected by the Act. This broad application is further expanded by including individuals who are perceived to be handicapped either by appearance or because of a history of some impairment covered by the Act.

C. Application of the FHAA to Zoning and Land Use Regulations

Prior to passage of the FHAA, the Supreme Court had already outlawed overt discrimination against the handicapped. [ See City of Cleburne v. Cleburne Living Center , 473 U.S. 432, 105 S. Ct. 3249 (1985).] In *Cleburne*, the Court held that a requirement of a special use permit for group homes for the mentally retarded and not for any other type of commercial living arrangement such as nursing homes and boarding houses violated equal protection because there was no rational basis for the separate requirement. Thus, it would appear that Congress' intent in passing the 1988 Amendments was to provide broader legal protection to handicapped individuals in addition to prohibiting intentional discrimination.

The legislative history of the FHAA clearly indicates that Congress intended that municipal land use as well as health and safety regulations comply with its provisions. "The Act is intended to prohibit the application of special requirements through land use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." [ H.R. Rep. No . 711, 100th Cong., 2d Sess., reprinted in 1988 U.S.C .C.A.N. 2173, 2185 ("House Report").] What is less clear is the application of facially neutral laws that may have some effect on the siting and operation of group homes. An example of this is the exemption in the FHAA which permits "reasonable. . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling." [ 42 U.S.C. § 3602(h).] In a recent decision, however, the U.S. Supreme Court has brought more clarity to this issue. (See discussion in Section III (B) (1) below.)

Because the Act provides additional protection to the handicapped, their ability to successfully litigate against what are viewed as restrictive zoning and land use laws has increased dramatically. Under the FHAA, litigants need not argue that zoning and land use restrictions fail the rational relation test. Nor are they required to show discriminatory intent in order to invalidate a challenged ordinance. Such litigants need only show that restrictions in question discriminate against them because of their status. Although the language in the Act is somewhat ambiguous, in a series of decisions, the courts have applied any one of three tests to scrutinize such regulations. These include: 1) discriminatory intent, 2) discriminatory impact and 3) failure to make reasonable accommodation.

In construing municipal regulations challenged under the pre-1988 Fair Housing Act, the courts frequently included an analysis of such regulations' discriminatory intent against and discriminatory effect on protected classes. Today, however, under the FHAA such cases usually find only discriminatory effect because municipalities rarely enact laws that overtly discriminate against a

particular type of use or user.

## III. METHODS OF MUNICIPAL REGULATION

A number of different methods have been utilized by municipalities to regulate the location, size and use of group homes. Some of these methods have been found to be invalid. Others have been the subject of conflicting judicial decisions. This section discusses these types of regulations and the judicial responses thereto.

### A. Licensing and Registration

There are a number of valid reasons to require the registration and/or licensing of group homes: 1) protecting group home residents from individuals who may take advantage of them; 2) maintaining adequate health and safety standards for protection of the occupants and 3) identifying and facilitating appropriate responses to homes whose residents may require special assistance during an emergency.

So far, however, regulations based on such policies have not fared well. Many states have extensive licensing schemes for such homes that preempt any local regulation. (See, for example, the provisions in Washington State law (Chap. 70.128 RCW) that establish adult family homes, regulate their operation and preempt local zoning.) Even registration requirements asking for no more than the submission of basic information regarding the proposed group home has been the subject of legal challenge. In *Oxford House, Inc. v. Township of Cherry Hill*, [ Oxford House, Inc. v. Township of Cherry Hill , 799 F.Supp. 450, 462 (D.N . J . 1992).] the court construed as discriminatory mere application procedures for obtaining use permits. Likewise, other litigants have successfully argued that any application or permitting process violates their right to "reasonable accommodation" in zoning practices. [ See United States v. Village of Palatine , 37 F.3d 1230, 1234 (7th Cir. 1994).]

Even seemingly valid public safety concerns have been viewed as overly paternalistic in nature. Advocates for the handicapped argue that health and safety concerns of local government simply perpetuates public misconceptions about the handicapped that the FHAA attempts to neutralize. [ See Oxford House, Inc. v. City of St. Louis , 843 F.Supp. 1556, 1581 (E.D. Mo. 1994).] Based on the above, it seems unlikely that a registration requirement would survive judicial scrutiny under the Act unless it is clearly health and safety related and is applied equally to all group living arrangements in a community.

### B. Density Limitations

Prior to passage of the FHAA, the U.S. Supreme Court considered several cases where municipalities attempted to limit the number of persons living together in a single-family dwelling.

In *Village of Belle Terre v. Borass*, [ Village of Belle Terre v. Borass , 94 S.Ct. 1536 (1974).] the Supreme Court upheld Belle Terre's zoning ordinance against a challenge brought by six unrelated students who lived in a single family house. The ordinance in question defined family in such a way that no more than two of the unrelated students could live in the house. The Court found that the ordinance was not an unconstitutional violation of equal protection or the rights of association, travel, and privacy, and concluded that the regulation was a reasonable legislative decision.

In 1977, the Court was confronted with a challenge to a municipal ordinance that defined "family" in a way that included only a narrow category of individuals who were directly related to one another and thereby excluded the Plaintiff's family from residing together. [ Moore v. City of East Cleveland , 97 S.Ct. 1932 (1977).] The Court distinguished *East Cleveland* from *Belle Terre* noting that the ordinance in *Belle Terre* affected only unrelated individuals. The Court further held that the East Cleveland ordinance interfered with the freedom of personal choice in family living arrangements in violation of the Due Process Clause of the Fourteenth Amendment. Following the *Belle Terre* and *East Cleveland*, cases, many cities regulated the size of group living arrangements by distinguishing between related and non-related individuals using a restrictive definition of "family".

However, after passage of the FHAA, group home advocates challenged such restrictions with support from HUD and the Department of Justice. A series of cases worked their way through the federal judiciary resulting in two conflicting opinions rendered by the Circuit Courts, one of which relied on the distinction the U.S. Supreme Court had drawn in the *Belle Terre* case. Ultimately the Supreme Court accepted review of a Ninth Circuit appeal involving the City of Edmonds. [ Elliot v. City of Athens , 960 F.2d 975 (11th Cir. 1992); City of Edmonds v. Wash. State Bldg. Code Council , 18 F.3d 802 (9th Cir. 1994).]

1. Numerical and Occupancy Limitations and the Definition of "Family"

As clarified by the Supreme Court in *City of Edmonds v. Oxford House, Inc.*, there is a distinction between municipal land use restrictions and maximum occupancy limits. [ City of Edmonds v. Oxford House, Inc ., 115 S.Ct. 1776 (1995).] Whereas land use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded (such as categories of single-family residences versus commercial zones), maximum occupancy limits cap the number of occupants per dwelling, relative to the available floor space or number of rooms. Maximum occupancy limits are supposed to apply uniformly to all residents of all dwelling units, since the purpose is to protect health and safety by preventing overcrowding. However, it is argued that municipalities often mask land use restrictions as maximum occupancy limits through restrictive definitions of "family" and family composition rules.

That was the crux of the *Edmonds* case. In *Edmonds*, the Supreme Court held that a zoning provision governing an area zoned for single-family dwelling units, which defined a "family" as, "persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related," described who made up a family unit, not the maximum number of occupants the unit could house. Therefore, it did not fall within the FHAA's exemption for total occupancy limits.

Municipal zoning rules that cap the total number of occupants in order to prevent overcrowding of a dwelling are designed to protect public safety. Because these are non-discriminatory, legitimate government interests, maximum occupancy limits are exempted from scrutiny under the FHAA. However, the City of Edmonds' regulation described *who* could compose a family unit, and not the maximum number of occupants each unit may have.

In answering the question of whether the Edmonds' family composition rule qualified under the maximum occupancy exemption, the court explained the distinction between land use restrictions and maximum occupancy limits. Justice Ginsburg noted that the provisions of the Edmonds Community Development Code as invoked against a group home for recovering substance abusers are "classic examples of a use restriction and complementing family composition rule. These provisions do not cap the number of people who may live in a dwelling. In plain terms, they direct that dwellings be used only to house families." [ Id . at 1782.] The court went to state:

But Edmonds' family composition rule surely does not answer the question: 'What is the maximum number of occupants permitted to occupy a house?' So long as they are related 'by genetics, adoption, or marriage,' any number of people can live in a house...Family living, not living space per occupant, is what [the code] describes· [ Id . at 1782-3.]

Finally, the Court emphasized that the scope of their holding was limited to concluding that the Edmonds' family composition rule did not qualify for an exemption permitting a limit on the maximum number of occupants under the FHAA. It remanded to the lower courts the issue of whether Edmonds' actions against Oxford House violate the FHAA's prohibitions against discrimination.

As usual, cases in this area often raise as many questions as they answer. If Edmonds family composition rule is invalid, on what basis can the state defend R.C.W. 70.128.010(1) which limits the number of residents of state licensed adult family homes to a maximum of six?

Likewise, could municipalities in Washington "piggyback" on this state law provision to support similar

municipal density limitations?

2. The Requirement of Making "Reasonable Accommodation"

In a suit alleging violations of the FHAA, a court must address two main questions: First, is the litigant "handicapped" within the meaning of the FHAA. As discussed above, this includes not only physically and mentally disabled individuals, but also recovering addicts, who are not currently using drugs or alcohol. If a litigant is not handicapped, he or she will not be protected under the FHAA. If the litigant is handicapped, the court moves onto its second tier of analysis: whether the government regulation or activity is discriminatory. This includes a review of the challenged zoning practices for discriminatory intent, discriminatory effects or impacts, and the "reasonable accommodations" test. While zoning regulations may be discriminatory, they may still be upheld if, on balance, they serve legitimate government interests and are rationally related to the goals of health, safety and community welfare.

The FHAA requires that governments provide a, "reasonable accommodation" for the handicapped if necessary to afford an equal opportunity to use and enjoy housing. The 1988 Amendments declare that discrimination includes: "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." [ 42 U.S.C. § 3604 (f)(3)(B) (1988).] The reasonable accommodation provision of the FHAA requires that municipalities be flexible when applying zoning restrictions to handicapped persons living in group homes. Government officials are required to tailor certain zoning provisions to the needs of the handicapped and the establishment of group homes, especially where it would not impose an undue burden on the local government. Often, a group home operator or handicapped individual will request a "reasonable accommodation" in the local ordinance, using the FHAA requirement as leverage. Any refusal to make "reasonable accommodations" may constitute illegal discrimination under the FHAA.

The implication of the reasonable accommodation requirement is that a jurisdiction must sufficiently broaden its zoning rules and regulations to allow the establishment of sufficient community residences to accommodate handicapped citizens who want to live in a "homestyle" setting, rather than in an institutional environment. A city can reasonably accommodate group homes by not enforcing an exclusionary definition of "family" or other such illegitimate zoning restrictions, or by changing its Code. A reasonable accommodation, according to a majority of courts, is one which would not impose an undue hardship or burden upon the entity making the accommodation and would not undermine the basic purpose which the requirement seeks to achieve. [ United States v. Village of Marshall , 787 F. Supp. 872, 878 (W.D. Wis. 1991).]

It is important to note that the courts have upheld legitimate government zoning regulations where they intentionally promote public health and safety, and are narrowly designed to reach specific ends. While the "reasonable accommodations" requirement in the FHAA takes away some municipal zoning power, it does so only to the extent that government regulations conflict with the policy behind the FHAA: to protect the handicapped from baseless stereotyping, and assist in their ability to achieve normalization and community integration.

C. Dispersion or Spacing Requirements

Requiring a mandatory minimum distance between group homes would seem to limit the number of housing opportunities available to handicapped persons in a community and thus violate the FHAA. Surprisingly, however, some advocates for group homes promote dispersion and a number of states have enacted statutory dispersion requirements. [ See Kevin Zenner, Note, Dispersion Requirements for the siting of group homes: Reconciling New York's Padvian Law with the Fair Housing Amendments Act of 1988 , 44 Buff. L.Rev. 249 (1996).] The rationale behind this kind of policy is that by requiring group homes to be distributed throughout the community, the residents are able to live in mainstream residential neighborhoods rather than in a cluster of group homes segregated from the rest of the community.

1. *Familystyle*

In an early reported decision involving group homes under the FHAA, a federal district court upheld the refusal of the City of St. Paul, Minnesota to renew special use permits for three of plaintiff's group homes, because such homes would violate a local zoning provision requiring spacing between each facility.

*Familystyle of St.Paul, Inc. v. City of St. Paul* [ Familystyle of St. Paul, Inc. v. City of St. Paul , 728 F. Supp. 1396 ( ) .] addressed the appropriateness of a spacing requirement in a Minnesota statute applicable to facilities which provide residential services to handicapped individuals. In order to obtain a license for a residential program, applicants had to comply with several conditions, including a 1,320 foot spacing requirement between existing residential facilities. These special conditions were in place to, "effectuate the Minnesota policy of deinstitutionalization of the mentally ill," and to "allow them the benefits of normal residential surroundings." [ Id . at 1398.] The City of St. Paul Zoning Code also provided for the minimum distance requirement of 1, 320 feet between zoning lots for community residential facilities.

*Familystyle*, which provided residential living homes for the handicapped, purchased properties in St. Paul in order to operate new facilities. However, three of its permits were denied on the grounds that the facilities did not meet the 1,320 foot spacing requirement of the zoning code. On appeal to the Planning Commission, *Familystyle* argued that the spacing requirement had the effect of reducing the number of residents it could house, limiting a handicapped person's choice of where to live, and thus was invalid as a discriminatory housing practice under section 3615 of the FHAA.

In response, the City denied the charge and asserted that federal, state, and city laws all had the same purpose, i.e. increasing the housing options available to all handicapped people by integrating them into the mainstream of the community, through a policy of deinstitutionalization. The City further argued that, even if spacing requirements were discriminatory, they were valid because handicapped people are not a "suspect class" under *Cleburne v. Cleburne Living Center*; [ 473 U.S. 432 (1985).] and second, that even under strict scrutiny, the policy of deinstitutionalization and prevention of "ghettoization" is a compelling government interest which is narrowly tailored to achieve its ends through zoning dispersal.

The court agreed with the City. In its holding, the court explained that, "[t]here is a significant difference between laws which directly regulate individuals and laws which regulate institutions." It explained:

Surely the Congress intended states to maintain some control over such facilities. The spacing requirements are a part of Minnesota's licensing process and the zoning code [of St. Paul] builds on those requirements in implementing its system. Because the handicapped are not directly prohibited from residing at these residences, and because states must maintain some authority over such institutions, the state and local laws are not "preempted" by section 3615. [ Id . at 1401.]

Next, the court analyzed the spacing requirement to determine whether it had a discriminatory effect within the meaning of Title VIII and the equal protection clause of the Constitution. In holding that the spacing requirement was not discriminatory under a rational basis standard of scrutiny, the court concluded that because the Attorney General, the Legislature, the courts, Congress and the state of Minnesota had all promoted the policy of integration of the handicapped into the mainstream of the community, St. Paul's dispersion requirement was not discriminatory. In finding that dispersal furthers a compelling government interest, the court reasoned,

Forcing new residential facilities to locate at a distance from other facilities by its very terms prevents the clustering of homes which could lead the mentally ill to cloister themselves and not interact with the community mainstream. Because the state and local laws prohibit this clustering effect, the do further the goal of integrating the handicapped into the community. [ Id . at 1404.]

Last, the court was unwilling to find that a distance requirement of less than 1,320 feet would be a less drastic means of attaining the policy of deinstitutionalization, thereby finding the city zoning law narrowly drawn to promote a compelling government interest.

On appeal, the Eighth Circuit affirmed the district courts findings that the challenged state laws and local ordinances were not preempted by the FHAA. It noted that, "Congress did not intend to abrogate a state's power to determine how facilities for the mentally ill must meet licensing standards," and that, "the challenged state laws and city ordinance do not affect or prohibit a retarded or mentally ill person from purchasing, renting, or occupying a private residence or dwelling." [ 923 F.2d 94.]

2. *Horizon House*

In contrast to *Familystyle*, *Horizon House Developmental Services, Inc. v. Township of Upper Southampton* found that a distance requirement of 1000 feet between group homes was a violation of the Fair Housing Act and the equal protection clause of the Constitution. In *Horizon House*, Southampton enacted an ordinance, requiring a 1000 foot spacing requirement between group homes for the handicapped. However, this was the fourth ordinance of its kind to be drafted by the township, beginning with a 3000 foot distance requirement which was ultimately reduced to 1000 feet. These ordinances grew out of community opposition to Horizon House's intent to open up group homes, evidenced by "NIMBY" testimonials voiced at public meetings. In one of its findings of fact, the court explained that, "like its predecessors, the spacing requirement in Ordinance No. 300 is grounded in community opposition, stereotyping and prejudice against people with handicaps." [ Horizon House Developmental Services, Inc. v. Township of Upper Southampton , 804 F.Supp. 683, 690 (E.D. P a . 1992).]

The court did not believe the Township's rationale that the group homes ordinance was a well-intentioned effort to, "avoid potential clustering of homes for people with mental retardation and to promote their integration into the neighborhood." [ Id . ] The court based its skepticism on the fact that the city provided no evidence how the ordinance would promote integration to support the reasonableness and legitimacy of their motives. As a result, it held that the spacing requirement was facially invalid under the FHAA, because it created an explicit classification based on handicap with no rational basis or legitimate government interest and that it was unnecessary for plaintiffs to prove bad motives on the part of the City's legislative body in enacting the group homes ordinance; instead the court found that it was sufficient that plaintiffs prove the City meant and aimed to restrict housing opportunities for people with handicaps.

While the *Horizon House* court found both facial invalidity and purposeful discrimination on the part of the Township, it also concluded that the 1000 foot distance requirement violated the FHAA because it has a disparate impact or effect on the housing choices of people with handicaps. It stated, "the spacing requirement limits the numbers of people with handicaps within the Township, limits their choices on where to live, limits their access to essential community resources, and thwarts the efforts to treat people with handicaps equally in the community negatively affecting their self-esteem." [ Id . at 697.] Because the city did not provide any evidence that clustering is detrimental to the health, safety and welfare of the community, and did not substantiate any legitimate government interest in enacting the spacing requirement, the court found that there are less discriminatory ways to accomplish these goals.

Had the city provided a rational basis for dispersing occupants of group homes that was narrowly tailored to advance its' objectives, the court might have found a legitimate interest in enacting the spacing requirement. Ultimately, however, "the City was prohibited by the Fair Housing Act from using its concern for the safety and health of its disabled citizens as a pretext for actions that are actually based on outdated and unfounded prejudices and stereotypes about the abilities and limitations of handicapped persons." [ Id . at 699]

3. Comparative Analysis in Light of Recent Cases

There are two main distinctions between *Familystyle* and *Horizon House* that help explain the difference in their treatment of spacing requirements. First, there seems to be a significant difference between when a State enacts a broad policy against clustering and "ghettoization" of group homes in order to further the legitimate interests of integration, and when a municipality enacts a local ordinance without a supporting state policy. Second, even if a municipality could enact a dispersal ordinance without such a state policy or statute, it cannot do so without having legitimate public health and safety objectives in mind at the outset when drafting such an ordinance. It must show a sincere desire to further the policy of integration, and not merely assert apparent neutrality while actually acting upon the fears and NIMBY attitudes of its non-handicapped citizens.

Some commentators distinguish the *Familystyle* and *Horizon House* holdings based on the fact that in *Familystyle*, the municipality acted as a result of guidance from a State regulatory policy favoring integration, rather than independently. [ Zenner, supra note 25, at 275-278.] In *familystyle*, both the state and city were able to demonstrate that their motives were based on findings that spacing requirements prevents clustering, and produced evidence that clustering of group homes hinders rather than promotes FHAA policies to prevent discrimination of the handicapped.

There seems to be less scrutiny of statewide polices, since states regulate "institutions" rather than "individuals." As was stated in *Familystyle*, because the state did not have any individuals in mind when enacting its dispersal regulation, it could not have violated the FHAA which prohibits discrimination against handicapped individuals. Another way to rationalize the holding of *Horizon House* in light of *Familystyle* is that the municipality there acted, not only without state regulatory guidance, but also without asserting legitimate government interests in defending its exclusionary zoning practices.

Where a municipality acts without authorization or guidance from the State, its motives are more likely to be viewed as suspect and potentially discriminatory. Additionally, the thrust of the holding in *Familystyle* was that States do not regulate individuals when enacting policy regulations, but instead, monitor institutions in the interest of public health, welfare, and safety. When a municipality enacts spacing requirements, however, eventually only a finite number of group homes will be able to locate within its boundaries. Therefore, dispersal zoning comes closer to regulating individuals, rather than group homes as "institutions," by eventually limiting the housing choices available to the handicapped.

Recent cases have also helped to clarify the reason for the disparate holdings of *Familystyle* and *Horizon House*. In *Charter Township of Plymouth v. Department of Social Services, et al.* the Michigan Court of Appeals following the decision of *Familystyle*, upheld the validity of a municipal dispersal requirement. [ 501 N.W.2d 186 (1993).] The Department of Social Services was enjoined from issuing any further licenses for the operation of adult foster care facilities for failure to comply with the requirement that facilities be spaced at least 1,500 feet from each other, among other requirements. The defendant claimed it was not required to comply because the FHAA preempted those statutes. The Court of Appeals disagreed. By comparing its case with *Familystyle*, the court explained,

[W]e note that the challenged statutory requirements pertaining to notice, 'excessive concentration,' and the distance between adult foster care facilities regulate commercial institutions or enterprises... and make no attempt to prohibit handicapped or mentally ill people from residing wherever they choose. While we recognize that the clear intent of the FHAA is to prohibit discrimination against handicapped individuals in the housing market, we decline to read the remedial purposes of the act broadly to apply to profit-oriented enterprises operating adult foster care facilities for handicapped people. [ Id . at 188.]

Even though the adult home in question would have accommodated six or fewer residents, the court still found that the government interest in regulating group homes outweighed any claims of discrimination in this case.

In *Bangerter v. Orem City Corporation*, [ 797 F.Supp. 918 (D.Utah 1992) , rev'd , 46 F.3d 1491 (10th Cir. 1995).] the plaintiff, a mentally retarded man, attempted to live in a group home operated by Chrysalis Enterprises. Because the home did not obtain a conditional use permit as required by local law, he was transferred to a different group home. The conditional use permit criteria required group

homes to provide assurances that there was 24-hour supervision of the residents, and that the facility establish a community advisory committee through which neighborhood concerns could be addressed. Bangerter challenged the requirements as violations of the FHAA.

Using *Familystyle* as authority, the court found that, while the conditions were discriminatory in that they treat handicapped people differently than the non-handicapped, they were nonetheless valid because they were rationally related to legitimate government purposes. The court held that the Orem City ordinance was based on a state statute that is targeted specifically at residential facilities which accommodate handicapped individuals, who require, "a combination or sequence of special interdisciplinary or generic care, treatment, or other services that are individually planned and coordinated to allow the person to function in and contribute to, a residential neighborhood." [ Id . at 922.] Because the statute reflected legislative concerns that the handicapped be integrated into normal surroundings, yet recognizing their special needs, it found the ordinance to be sufficiently tailored to meet legitimate state and local interests.

By contrast, *North Shore-Chicago Rehabilitation Inc. v. Village of Skokie* refused to uphold a group homes ordinance which required that residents live in the home on a "permanent basis." [ North Shore-Chicago Rehabilitation Inc. v. Village of Skokie , 827 F.Supp 497 (N.D. III. 1993).] Because the ordinance did not make reasonable accommodation for brain-injured individuals, it was discriminatory. Additionally, Skokie failed to present evidence establishing a legitimate, non-discriminatory reason for its refusal to grant North Shore's application, and proving that a reasonable accommodation was impossible. The court asserted,

Skokie's justification for the state licensing requirement arises out of its concern for the welfare of the residents of the proposed facility. There is no doubt that the state is better equipped to maintain oversight agencies to assure proper care of persons in rehabilitation facilities than is Skokie. To this extent, as a general matter, local municipalities should be free in forming their zoning ordinances to require that certain rehabilitation facilities obtain available state certification or licensing... In the instant case, however, the two restrictions seized upon by Skokie bear no rational relationship to the general welfare or safety of the proposed North Shore residents. [ Id . at 922.]

While the North Shore-Chicago court recognized the importance of state and local regulation of group homes under the appropriate circumstances, it refused to follow *Familystyle* since the municipality enacted its own regulation, unlike the state's, imposing both discriminatory and non-accommodating requirements against the handicapped.

4. Dispersion of Group Homes in Washington

One possible solution to the problem of regulating group homes by location is through adoption of a state statute or policy that prescribes dispersal of such facilities in a manner similar to the Minnesota provisions discussed herein. Legal support for such a statute would have to be based on the *Familystyle* and related decisions with the caveat that the practical effect of any such proposed statute or policy must not result in the prohibition of group homes within a community and must recognize the necessity of providing for reasonable accommodation.

This was the approach taken by sponsors of House Bill 1049 which was introduced in the 1997 Washington Legislature. The Bill amends the Washington Housing Policy Act (RCW 35.63.220) and authorizes local governments to "promote the nondiscriminatory integration of persons with disabilities and medically frail individuals who live in group homes by regulating the dispersion of group homes in residential neighborhoods." The policy rationale for this Bill is to: 1) promote mainstreaming of the handicapped into community life; 2) avoid overconcentration of similar facilities that create an artificial i.e. institutional environment; 3) insure that dispersion does not create artificial quotas on group homes and 4) require that any regulations in this area provide for reasonable accommodation to handicapped individuals in choosing their housing options.

The drafters of the legislation felt that because of the conflicting decisions in the federal judiciary, a bill

which used as its cornerstone the integration of the handicapped into the community was more likely to be found in compliance with FHAA and State Housing Laws. In addition, Washington state courts have not yet dealt with whether group home dispersion laws are valid and enforceable. A 1992 Attorney General's opinion discussed dispersion. [ AGO 1992, No.25.] While acknowledging potential issues with the Fair Housing Act, the opinion suggests that in those cases, other than adult family homes, where the State licenses group residential facilities, such licensing authority does not preempt cities from enforcing dispersion type ordinances. This opinion, however, was issued prior to passage of the 1993 Washington Housing Policy Act which includes a provision restricting cities from regulating housing occupied by handicapped persons differently than housing occupied by non-handicapped individuals. [ Wash. Rev. Code 35.63.220; 35A.63.240.]

A 1995 decision by the Washington Supreme Court concluded that abused or neglected teenagers were not considered handicapped under the provisions of the Washington Housing Policy Act (RCW 35.63.220). [ Sunderland v. City of Pasco, 127 Wn.2d 782 (1995).] As a result, the Court did not consider the question of whether a municipality could, under State and Federal fair housing laws, require a crisis residential center for teens to go through a siting procedure.

## IV. RECENT FEDERAL CASELAW AND PROPOSED LEGISLATION

House Bill 1049 discussed above was abandoned shortly after its sponsors were notified of a January 8, 1997, decision rendered by U.S. District Court Judge Thomas S. Zilly in the matter of *The Children's Alliance, et al. v. City of Bellevue*. [ W.D.Wash. Case No. C95-905Z.] This case arose from attempts by the City of Bellevue to regulate group homes. The City enacted three ordinances between 1994 to 1996. One was repealed in 1996, a second which was invalidated by a Growth Management Hearings Board and the third became the subject of the *Children's Alliance* litigation.

The last ordinance established two classes of group care facilities. Class I facilities included adult family homes (which are authorized permitted uses in all residential zones by state law. See Ch. 70.128 RCW), homes for the handicapped, domestic violence shelters and foster family homes. All other facilities were grouped into Class II.

Class I facilities can locate in residential zones however, Class II homes are restricted from residential areas if 1) there is no resident staff, 2) residencies in such homes are for less than 30 days and 3) residents are non-handicapped individuals who constitute a potential danger to the community because of violence, sexual deviancy, current substance abuse or felony status. Class II facilities must also go through a permitting system which includes public comment. The Ordinance imposes occupancy limits (six residents) on all group facilities within single family residential zones and requires at least 1000 foot distance between group facilities of the same type. As a result of these restrictions, the Court found that Bellevue had little if any available housing for homeless youth and no Class II Facilities anywhere within the City.

Even though Bellevue attempted to craft its ordinance to be in compliance with the FHAA and its various exemptions, the Court found it to be invalid. At the time of this article, it is not known if Bellevue has appealed the *Children's Home* decision to the Ninth Circuit Court of Appeals. Based on the Ninth Circuit's previous ruling in *Edmonds supra,* which strongly supported the FHAA in striking down family composition restrictions, it would seem unlikely that this ruling would be overturned. Therefore, Judge Zilly's decision may be instructive on what, if any, remaining authority Washington cities have to regulate group home facilities under the FHAA.

In his decision, Judge Zilly chose to analyze Bellevue's Ordinance under the disparate impact theory after finding that the Ordinance was discriminatory on its face. As an example of such facial invalidity, the Court pointed out that while the Ordinance's definition of "family" includes group homes, the Ordinance also defines "group facility" based on the presence of "staff". Where a group home fits both definitions, the later controls. This results in separate restrictions being applied to the "group facility" such as the 1000 foot dispersion requirement and a limitation on the number of residents. This was found to be violative of the FHAA because the Court determined that the use of the term "staff " to differentiate between types of group facilities "is a proxy for a classification based on the presence of

individuals under eighteen and the handicapped as both groups require supervision and assistance." [ Children's Alliance , Order at page 10.]

The Court also pointed out the disparity in treatment of youth between Class I and II facilities. Adult family homes with resident staff are class I facilities while family homes for youth with resident staff are not. Thus, the additional burdens on Class II facilities described above fall on such youthful residents while adult residents can locate throughout the City's residential zones. The Court found that these provisions facially discriminate on the basis of familial status thus avoiding the issue of whether abused or neglected youth are handicapped under the FHAA. [ Sunderland v. City of Pasco, 127 Wn.2d 782 (1995).]

Bellevue appropriately argued that the disparity in treatment discussed above was based on its general police power authority to provide for public health, tranquillity and safety and that under the standard of review adopted in the *Familystyle* case [ See Section III (C) (1).] , a court should only apply the rational basis test to review its Ordinance. The Court recognized that the Ninth Circuit has not yet adopted a standard of review in these types of cases but declined to use the rational basis test. Instead, it chose the method of analysis used in the Sixth and Tenth circuits in part because it found that the FHAA makes both children and the handicapped protected classes. That standard requires that to rebut a finding of facial discrimination, the defendant must show either 1) the ordinance benefits the protected class or 2) it responds to legitimate safety concerns raised by the individuals affected rather than being based on stereotypes. [ See Larkin v. State of Michigan Dept. of Social Services, 89 F.3d 285, 290 (6 th Cir. 1996).] In reviewing the factual claims, the Court found that Bellevue could not demonstrate that its group home regulations met the *Larkin* test.

With regard to the 1,000 foot dispersion requirement, the Court was not impressed with Bellevue's rationale. The Court found that language purporting to help members of a protected class (similar to that discussed in House Bill 1049 regarding community integration etc.) should be scrutinized to determine whether its "benefits" clearly outweigh its burdens. In Bellevue's case, the Court found no factual justification to support the separation requirements.

The Court also made short work of the reasonable accommodation defense (i.e. that so long as an ordinance requires that a municipality make reasonable accommodation in dealing with individuals protected under the FHAA, the court cannot find the ordinance to be facially discriminatory) and instead adopted the rule that the thrust of a reasonable accommodation claim is that a defendant must make an affirmative change in an otherwise valid law or policy. [ The Court specifically rejected the approach taken by the 5 th Cir. in the case of Elderhaven Inc. v. City of Lubbock , 98 F.3d 175 (1996).]

The Court did not consider constitutional challenges to the Ordinance since the FHAA (specifically 42 USCA 3615) authorizes courts to invalidate any laws deemed to be found discriminatory under the Act.

As a result of a number of federal court decisions like *Children's Home*, local and state legislators have been lobbying Congress to make changes in the FHAA. House Bill 589, also known as the Fair Housing Reform and Freedom of Speech Act was introduced in February, 1997 and attempts to amend the FHAA in several different areas.

Part of its impetus comes from a series of incidents that occurred several years ago involving individuals and community groups who protested against the placement of certain housing projects. In a number of cases, HUD either sued or threatened suit against individuals under the FHAA claiming that their statements opposing the location of group homes constituted discrimination against the handicapped. Amid claims of first amendment violations and political pressure, HUD eventually backed off these cases.

These free speech cases together with lobbying efforts of local governmental officials has created a political climate that could lead to Fair Housing Act amendments. House Bill 589 is intended to allow local government to exercise reasonable zoning and other land use regulations in determining the occupancy, number, location and composition of residential group homes located in single family

neighborhoods. This legislation, however, is limited to "the occupancy of a dwelling by a convicted felon, sex offender, or recovering drug addict. . . " and does not deal with the more common type of group home facilities found in many communities.

## V. CONCLUSION

In interpreting the Fair Housing Act, it is clear that the federal judiciary including the Supreme Court will not tolerate restrictive definitions of "family" masked as maximum occupancy limitations, where they actually serve to define who constitutes a family, rather than to cap the number of individuals per dwelling in the interest of public safety.

Additionally, the courts have generally prohibited licensing and registration schemes on the basis that the permitting process has been misused by prejudicially denying permits to build and locate group homes in residential neighborhoods. Licensing requirements have been found to violate the rights of handicapped individuals to "reasonable accommodations" in zoning practices. However, conditional use permits issued not to discriminate against the handicapped, but to protect their safety as well as the safety of the community in general, may be valid in situations where handicapped individuals with well defined special needs require adequate supervision, and a condition of the issuance of the permit is the assurance of that adequate oversight.

Dispersion or spacing requirements once seen as one possible remaining method of municipal land use regulations in this area are also unlikely to be upheld by the courts despite the acknowledged importance of community integration of the handicapped.

Good public policy, however, dictates that legitimate state and local government regulations, when performed in the name of public health, safety and community welfare, should not be preempted by the Fair Housing Act. Unreasonable government actions born out of outmoded stereotypes against the disabled, disguised as legitimate land use regulations, will be suspect and will not pass the constitutional and statutory standards prohibiting discrimination. As stated by Peter Salsich Jr., founder of Oxford House, in his proposed model ordinance for group homes:

The ordinance was drafted to provide assistance to communities which are willing to accept appropriate forms of shared living arrangements, but which also have a legitimate concern that stable neighborhoods not be overwhelmed by facilities that are physically incompatible with existing housing arrangements.

Whether local communities will be allowed to govern on that basis remains to be seen.