

CHAPTER 6

**REGULATING GROUP HOMES IN THE TWENTY FIRST CENTURY:
THE LIMITS OF MUNICIPAL AUTHORITY**

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I. INTRODUCTION

Siting group home facilities constitute some of the more challenging land use issues that arise in a municipality. Such facilities run the gamut from adult care homes for the aging or disabled to facilities that serve a clientele often perceived as threatening to a community such as recovering substance abusers or former sex offenders. Citizens often react to perceived concerns of potential criminal activity or decreased property values by attempting to block the siting and operation of such facilities through the use of political pressure and by invoking regulatory provisions contained in a municipality's zoning code.

This article is intended to provide an overview of the legal issues involving the siting and regulation of group homes, what methods and tools local governments use to regulate such facilities and the legal limitations to such regulations with an emphasis on Ninth Circuit Court of Appeals decisions. This paper updates a 1997 article written on group homes and the Federal and State Fair Housing Acts.²

In 1988, the Federal Housing Act Amendment (FHAA) was enacted to extend protection of the 1968 Fair Housing Act (FHA) to people with disabilities. Congress intended that municipal land use as well as health and safety regulations comply with the provisions of the FHAA, stating: "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 effect of limiting the ability of such individuals to live in the residence of their choice in the community." H. Rep. No. 100-711, at 24 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 2173, 2185. The FHAA prohibits intentional discrimination as well as other forms of discrimination in zoning, including discriminatory classification of persons with disabilities, facially neutral zoning laws that have disparate impact on persons with disabilities, and failure of municipal officials to reasonably accommodate the needs of persons with disabilities. In response to the FHAA, the Washington State Legislature in 1993 added a new section to Chapter 35.63 RCW, also known as the Washington Housing Protection Act (WHPA).

Consider the following hypothetical situation. A business (licensed under state authority to operate adult family homes) purchases or rents a residence to house individuals who suffer from mental disabilities. Concerned neighbors attempt to block the operation of these homes on the grounds that the number of residents of the home will exceed a municipality's maximum occupation limits for unrelated individuals or that the group home is in fact a business which is not allowed in a single family zone neighborhood.³ The City, at the behest of affected neighbors, refuses to accommodate

² See Ted H. Gathe, *Group Homes: Local Control and Regulation Versus Federal and State Fair Housing Laws* Municipal Research Services Center, 1997. This article is located online at: <http://www.mrsc.org/artdocmisc/m58gathe.pdf>.

³ While challenges under the maximum occupancy limitation provide plaintiffs with a legal cause of action, the actual motivation for the lawsuits varies. At best, citizens may worry about increased traffic and congestion, thereby transforming the character of land zoned for single-family residences. At worst,

caretakers' plans, with the intent of protecting its municipal zoning authority as well as the integrity of single-family neighborhoods. Litigation under the Fair Housing Amendments Act (FHAA)(1988), 42 U.S.C. §3601, et seq., or the Washington Housing Protection Act (WHPA), Wash. Rev. Code §35A.63.240; §43.185B, et. seq., (2002)⁴ (hereinafter referred to as “the Acts”), ensues. How such litigation ultimately resolves depends on the facts of the case and the rulings of the various Federal Circuit Courts of Appeal as well as the District Courts.

The American Disability Act (ADA) and the Rehabilitation Act (RA) also apply to zoning decisions regarding group homes. *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 732 (9th Cir. 1999). In *Bay Area Treatment*, the Ninth Circuit engaged in a thorough discussion of the application of the ADA to zoning decisions, explaining that while “reasonable accommodation” or “reasonable modification” is required, “requested accommodations” are not always required.⁵ This article will focus on the limitations of municipal zoning and regulatory authority under the FHAA.

II. OVERVIEW OF THE FHAA AND WHPA

The FHAA protects individuals from discriminatory housing practices. It is unlawful for a person to discriminate against a potential home-buyer or renter on the basis of race, color, religion, sex, family status, national origin,⁶ or because a person is handicapped.⁷ In comparison, the WHPA provides, in some instances, even greater safeguards for members of protected classes than those safeguards in the federal Act. Under the WHPA, a plaintiff does not need to demonstrate discriminatory intent

opposition to group homes comes from a “not in my backyard” (NIMBY) attitude, predicated upon simple and common stereotypes about the disabled.

⁴ Technically, the Washington Housing Protection Act is found at Wash. Rev. Code § 43.185B, et seq. However, the court has included § 35A.63.240 as part of the act, apparently, because it complements § 43.185B, et seq. See, *Sunderland Family Treatment Services v. City of Pasco*, 107 Wash. App. 109, 119, 26 P.3d 955 (2001).

⁵ See, White, Robert, Albuquerque City Attorney. “Group Homes and the Americans with Disability Act,” at 6.

⁶ See, 42 U.S.C. §3604 (2002).

⁷ According to 42 U.S.C. §3602(h), the Act defines “handicap” as “(1) a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.” The Act considers recovering drug-addicts and alcoholics as handicapped, and, at present, there is debate as to whether sex offenders should enjoy handicapped status as well. “Wisconsin’s Law, like other community notification laws, rejects this premise on the belief that most sex offenders are not rehabilitated when released from prison. Due to the high rate of recidivism among sex offenders, some experts believe that various sex offenders have a ‘pathological need’ to repeatedly commit sex crimes and, thus, may be mentally disabled. This theory of mental disability is further evidenced by the fact that law enforcement officials often place released sex offenders in mental health facilities after they have completed their prison sentences.” 81 Marq. L. Rev. 1161, 1191—92 (1998)(citations omitted). Still, both the Department of Housing and Urban Development (HUD) and the Department of Justice deny handicap status, in the absence of a physical or mental impairment, to sex offenders. See, “Group Homes, Local Land Use, and the Fair Housing Act,” Joint Statement of the Department of Justice and the Department of Housing and Urban Development, usdoj.gov/crt/housing/final8_1.htm.

underlying an ordinance or the discriminatory effects of local legislation. A city violates the WHPA if it grants a variance or accommodation and then subsequently denies a similar request to a similar group of individuals, such as permitting a “family” to obtain immediate occupancy of a residential structure but requiring “group care facilities” to obtain a SUP before occupying a similar residential structure. See *Sunderland Family Treatment v. City of Pasco*, 107 Wn. App. 109, 122-23 (2001). However, the WHPA contains nothing analogous to the FHAA’s reasonable accommodation requirement.

An individual may attempt to prove housing discrimination under one or more of three causes of action: (1) disparate treatment; (2) disparate impact; and (3) evidence that a municipality failed to make “reasonable accommodations” to its rules, policies or procedures, “when such accommodations may be necessary to afford the [physically disabled] equal opportunity to use and enjoy a dwelling.” See, 42 U.S.C. §3604(f)(3)(B).⁸

A. NINTH CIRCUIT FEDERAL CASES

The Ninth Circuit Court of Appeals and the U.S. District Court for the Western District of Washington filed two important decisions within two days of each other in January of 1997. See, *Gamble v. City of Escondido*, 104 F.3d 300 (9th Cir. 1997)⁹; *Children’s Alliance v. City of Bellevue*, 950 F. Supp. 1491 (W.D. Wash. 1997). Each court applied a similar standard of review to FHAA claims, a standard more rigorous than rational basis review, but less demanding than intermediate or strict scrutiny. While both cases remain “good law,” the court’s *Escondido* decision is especially concise in its articulation of causes of action under the FHAA; a near majority of Circuits have adopted the case’s analysis.¹⁰ *Children’s Alliance* has not enjoyed the same level of judicial approbation.

1. Disparate Treatment¹¹

⁸ A dwelling is “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.” 42 U.S.C. §3602(b).

⁹ Plaintiff, John Gamble, challenged the City’s denial of a building permit to allow the construction and operation of a 10,360 square foot facility for disabled, elderly adults in a single-family residence area. The bottom portion of the building would contain an adult day care facility, intended to serve patients from throughout Escondido. *Gamble v. City of Escondido*, 104 F.3d 300, 303-04 (9th Cir. 1997). As the court noted, “Surrounding homes in the neighborhood were significantly smaller than the proposed complex.” *Id.* at 304. Gamble claimed that the City ran afoul of the FHAA in three respects: 1.) Escondido’s denial of the building permit constituted disparate treatment; 2.) disparate impact; and 3.) the City failed to make a reasonable accommodation for his proposal [I omit the court’s brief consideration of Gamble’s failed Constitutional claims.]. The court denied each of Gamble’s causes of action.

¹⁰ In fact, one might contend that the majority of the Circuits are in line with *Escondido*. There are several Circuits, the 10th, 11th, and D.C., for example, that have followed *Escondido*, but the cases derive from the district court level.

¹¹ “Disparate treatment” differs from direct evidence of discrimination. See, *Neithamer v. Brennehan Property Services, Inc.*, 81 F. Supp. 2d 1, 3-4 (D.C. 1999) (holding that “when a plaintiff offers no direct evidence of discrimination, his claim of discrimination under the FHA is to be examined under the burden-shifting framework of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 36 L. Ed. 2d 668, 93 S.

The Ninth Circuit Court of Appeals analogizes FHAA disparate treatment claims to cases of employment discrimination under Title VII. *Escondido*, 104 F.3d at 304-05 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)).

To bring a disparate treatment claim, the plaintiff must first establish a prima facie case. Adapted to this situation, the prima facie case elements are: (1) plaintiff is a member of a protected class; (2) plaintiff applied for a conditional use permit and was qualified to receive it; (3) the conditional use permit was denied despite plaintiff being qualified; and (4) defendant approved a conditional use permit for a similarly situated party during a period relatively near the time plaintiff was denied its conditional use permit.¹²

Once a plaintiff makes a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. *Id.* at 305 (citations omitted). Then, if the defendant satisfies its burden, the plaintiff must prove by a preponderance of the evidence that the reason asserted by the defendant is a mere pretext. *Id.* According to the court's understanding of the disparate treatment cause of action, proof of discriminatory motive is crucial to the success of the claim. *Id.* (citing *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396, 1401 (D. Minn. 1990)).

Therefore, even in cases of disparate treatment where the court recognizes that the plaintiff has demonstrated a *prima facie* case of intentional discrimination against a protected class, a defendant may rebut the plaintiff's case with a "legitimate" and "nondiscriminatory reason" for its action. "Nondiscriminatory" is synonymous with facially neutral. In contrast, strict scrutiny would demand that a city justify its ordinance as necessary to accomplish a compelling public interest. The Ninth Circuit has chosen a level of review below strict scrutiny. Still, the threshold in *Escondido* is more demanding than rational basis review, requiring that an ordinance be rationally related to a legitimate government objective. As mentioned above, most of the Circuit courts have adopted the *Escondido* analysis.¹³

Ct. 11817 (1973)). If a plaintiff has evidence that a defendant is an outright bigot, then the plaintiff may avoid the burden-shifting, "ping-pong" game outlined in *Escondido/McDonnell-Douglas*. Practically speaking, however, cases of direct evidence of discrimination are sparse. Defendants always have reasons to couch their actions in nondiscriminatory motives. *Escondido*, and cases like it, affords plaintiffs an avenue to pierce discriminatory pretext.

¹² *Escondido*, 104 F.3d at 305.

¹³ *Macone v. Town of Wakefield*, 277 F.3d 1 (1st Cir. 2002)(holding that the Town refused a development based upon "nondiscriminatory" concerns about the scope and size of the builder's proposal.); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 281 F.3d 333 (2d Cir. 2002)(holding that a plaintiff may have stated a claim for intentional discrimination under the FHAA and retaliatory zoning practices); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 2002 U.S. App. 4256 (3d Cir. 2002)(holding that the Zoning Bd. properly rejected a reasonable accommodation claim because a developer's plans for a home for the elderly were not necessary, would cause traffic safety issues, and were not adequate to accommodate emergency vehicles.); *Avalon Residential Care Homes, Inc. v. City of Dallas*, 130 F. Supp. 2d 833 (N.D. TX 2000)(holding that there was a material issue of fact whether the City failed to make reasonable accommodations for a group home for the handicapped.); *Hemisphere Building Co., Inc. v. Village of Richton Park*, 171 F.3d 437 (7th Cir. 1999)(holding that the developer did not demonstrate

2. Disparate Impact

Causes of action under a disparate impact theory must at least establish that the defendant's actions have had a discriminatory effect. *Id.* at 306 (citations omitted). Drawing from *Pfaff v. U.S. Dept. of Hous. & Urban Dev.*, 88 F.3d 739, 745 (9th Cir. 1996), the *Escondido* Court held that a person can challenge an ordinance if that ordinance is (1) outwardly neutral; and (2) significantly and adversely impacts persons protected by the Act. *Id.* (citing *Pfaff*, 88 F.3d at 745-46). Proof of discriminatory intent is not necessary. However, the Ninth Circuit appears to call for or at least to give substantial weight to statistical support for a plaintiff's disparate impact claim. "[The plaintiff] fails to establish a *prima facie* case because he has presented no statistics or other proof demonstrating that the City's permit practices have a significantly adverse or disproportionate impact on the physically disabled or elderly." *Id.* at 306. In *Escondido*, the plaintiff failed to make out a *prima facie* case, but even if he had, the defendant, as in disparate treatment, would have had to rebut the complaint under the court's "legitimate" and "nondiscriminatory reason" standard.

3. Reasonable Accommodation

To establish a *prima facie* case of housing discrimination based on an alleged "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), a plaintiff must show that: (1) she suffers from a handicap as defined in 42 U.S.C. §3602(h); (2) defendant knew of the handicap or should reasonably be expected to know of it; (3) accommodation of the handicap "may be necessary" to afford plaintiff an equal opportunity to use and enjoy the dwelling; and (4) defendants refused to make such accommodation. *See*, Schonfeld, Robert L. "Reasonable Accommodation' Under the Federal Fair Housing Amendments Act," 25 Fordham Urb. L. J. 413, 423-24 (1998).¹⁴ According to the court, "The concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995). "The 'reasonable accommodation' test requires neither a showing of intent or facial discrimination, nor does it require proof that a discriminatory practice has a greater impact on people with disabilities than on non-disabled people. Therefore, it appears easier to prove a case under the 'reasonable accommodation' standard than under the other standards." *Id.*

that his plans were necessary to accommodate the handicapped, and that the City failed to make reasonable accommodations).

¹⁴ Accommodations, however, are not without their limit. The courts demand a highly-fact-intensive, case-by-case analyses of all reasonable accommodation requests. Such requests will fail if they pose too onerous a financial or administrative burden. *See, Janush v. Charities Housing Development*, 169 F. Supp. 2d 1133, 1136 (N. D. CA 2000). In zoning instances, it may be difficult to for a city to prove an onerous financial or administrative burden when municipalities typically do not regulate most group homes (a state activity); while increased traffic may increase wear and tear on city roads, such use may not outweigh a legitimate pressing need for handicapped housing.

In *Escondido*, the plaintiff, attempted to construct a very large facility for the elderly in a residential neighborhood. In respect to “reasonableness” of Gamble’s intended adult day care facility/health complex, the court wrote that if “the health care facility were necessary to house the physically challenged living in the building, reasonable accommodations might be construed to include the health care complex.” *Id.* at 307 (citing *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995)). Interestingly, the Seventh Circuit in *Bronk* merely required that a landlord accommodate a deaf tenant’s need for a hearing dog. Still, the *Econdido* Court places Washington cities on notice that if a pressing public need demands *necessary* (i.e., an accommodation that ameliorates the effect of a handicap) services to handicapped individuals, and group home operators or developers can demonstrate such a need, neighborhoods should be prepared for an altered landscape in areas traditionally zoned for low density residential uses. (emphasis added).

4. Children’s Alliance’s “Best Interests” and “Health and Safety Standard”

In *Children’s Alliance v. City of Bellevue*, the court followed trends from the Sixth and Tenth Circuit Courts of Appeals, adopting a “best interests” or “health and safety” standard. See, *Children’s Alliance*, 950 F. Supp. at 1498 (quoting *Larkin v. State of Mich. Dept. of Social Serv.*, 89 F.3d 285, 290 (6th Cir.)). According to *Children’s Alliance* court, once a plaintiff demonstrates a *prima facie* case of discrimination, the defendant must show either “(1) that the [challenged] ordinance benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes.” *Id.* As alluded to above, subsequent case law has almost ignored the analysis and holding in *Children’s Alliance*. However, the decision is still good law and may influence instances where an ordinance does in fact target a protected class under the Act and yet may enjoy judicial support because it serves a compelling interest.

The plaintiff in *Children’s Alliance* challenged Bellevue’s ordinances governing the makeup and location of group homes as facially discriminatory. The court found that the City illegally differentiated between “families” and “group homes” simply because “group homes” required staff to look after handicapped children. *Id.* at 1497. That is, if Children’s Alliance had not required staff to treat patients, the homes would have fallen under the City’s “family” definition, thereby avoiding Bellevue’s stricter regulation of group facilities. “If a group home fits within the definitions of both ‘Family’ and ‘Group Facility,’ the Ordinance specifies that the latter characterization controls, resulting in different treatment for groups, similarly situated in terms of the Ordinance’s own definition of ‘Family,’ on account of their familial status or handicaps.” *Id.* In the end, the court found Bellevue in violation of the FHAA for imposing: (1) spacing restrictions between group homes and homes for families; (2) disparate limits on maximum occupancy levels for family residences and group facilities; and (3) indefensible distinctions between Class I (for handicapped, domestic violence shelter, and foster family homes) and Class II (for individuals recovering from alcohol or drug dependency) facilities. *Id.* at 1496-97.

While the court cited two possible rebuttals to the plaintiff's disparate treatment claim, reasonable occupancy limits and the FHAA's "direct threat exemption,"¹⁵ the court noted that the defendant "[wisely] has not chosen to focus its rebuttal on these statutory exemptions, as they are inapplicable . . . [and] urges the Court to allow differential treatment based on Bellevue's general interests in public safety, stability, and tranquility." *Id.* at 1497. The court, then, launches into its "best interests" and "health and safety" standard – a standard more exacting than rational basis review, but less demanding than strict scrutiny. *See, supra.* In the end, *Children's Alliance* concluded that "Bellevue's justifications cannot satisfy the scrutiny established by *Larkin* and *Bangerter*"¹⁶ . . . Generalized interests in public safety, stability, and tranquility have been enough to redeem ordinances that drew distinctions between groups when subjected to rational basis review. . . . But under the stricter level of scrutiny adopted here, these interests are only sufficient if they are threatened by the individuals burdened by the Ordinance." *Id.* at 1498. Thus, if a city intends to defend a law that appears to discriminate, it had better offer persuasive reasons that address legitimate "health or safety" issues or demonstrate that its application is in the "best interests" of handicapped individuals.

It can be argued that *Escondido* essentially nullifies *Children's Alliance's* holding. Both decisions support a level of scrutiny more exacting than rational basis review, but *Escondido* invalidates ordinances as soon as the courts make a finding of discrimination. *Children's Alliance*, on the hand, seems to imply that even if an ordinance is targeted at a particular class or group of individuals it still may be valid if it serves the best interests of the affected people. Thus the court would have to make a distinction between "discriminating" ordinances and "targeted" ordinances. In the end, *Escondido* provides greater protections to the Acts' protected groups.

B. WASHINGTON'S STANDARD OF REVIEW AND THE FHAA AND WHPA COMPARED

In contrast to the FHAA, the WHPA does not require a plaintiff to demonstrate discriminatory intent nor does the WHPA require a city, home-seller, or landlord to make reasonable accommodations to permit a person with a handicap to occupy a dwelling. As the court states in *Sunderland*:

Significantly, the WHPA does not contain an intent requirement or require a showing of "discrimination." In other words, the WHPA [*See, Wash. Rev. Code* § 35A.63.240 (2001)] prohibits ordinances, practices, or policies that distinguish between residential structures based on the residents' handicaps and familial status, regardless of an city's intent when enacting or enforcing the ordinance, policy or practice . . .¹⁷

[T]he FHAA also defines discrimination to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such

¹⁵ *See*, 42 U.S.C. §3604(f)(9).

¹⁶ *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir. 1995).

¹⁷ *Sunderland*, 107 Wn. App. at 118.

accommodations may be necessary to afford such a person equal opportunity to use and enjoy the dwelling” . . . ¹⁸ the WHPA does not contain language that would require a city to make reasonable accommodations to permit a person with a handicap to occupy a dwelling.¹⁹

With *Sunderland*, the WHPA accomplishes a kind of uniformity requirement. If a challenger demonstrates that a city has made accommodations to similar requests and groups in the past, the WHPA may require the same accommodations in the future. In tandem, the FHAA and the WHPA place significant limits on municipal zoning authority. However, cities are not entirely impotent. The following lays out several zoning tools and considers their strengths and weaknesses under the Acts.

III. MUNICIPAL ZONING TOOLS CONSIDERED

While the FHAA and WHPA place significant limits on municipal zoning, cities still retain certain authority to question, mitigate, and in some instances, prevent development intended to serve the Acts’ protected classes. Despite the broad reach of the FHAA, not all zoning ordinances which impact handicapped individuals are per se invalid. The FHAA is intended to allow reasonable government limitations so long as they are imposed on all groups and do not discriminate on the basis of a disability. The following section considers several municipal regulatory methods that may implicate issues under the Acts.

A. LICENSING AND REGISTRATION

The FHAA allows a municipality to impose special safety standards for protecting disabled persons and only prohibits standards that are not “demonstrated to be warranted by the unique and special needs” of the population governed by the standards. *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 47 (6th Cir. 1992). In *Williams-Batchelder v. Quasim*, 103 Wn. App. 8, 16 (2000), the Court held that the Department of Social and Health Services did not have to grant a waiver of a licensing requirement for the operator of an adult home where the operator was challenging a regulation that was intended to protect the disabled. *Id.* at 18. The FHAA does not prohibit *reasonable* regulation and licensing procedures for group home facilities. *Larkin v. State of Mich. Dept. of Soc. Services*, 89 F.3d at 292.

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*,²⁰ the Supreme Court upheld Belle Terre's zoning ordinance against a challenge brought by six unrelated students who lived in a single family

¹⁸ *Id.* at 119 (quoting 42 U.S.C. §3604(f)(3)(B)).

¹⁹ *Id.* at 119-20.

²⁰ *Village of Belle Terre v. Borass*, 94 S. Ct. 1536 (1974).

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.²¹ 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.²²

1. Numerical and Occupancy Limitations and the Definition of the "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.²³ 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

²¹ *Moore v. City of East Cleveland*, 97 S. Ct. 1932 (1977).

²² *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).

²³ *City of Edmonds v. Oxford House, Inc.*, 115 S. Ct. 1776 (1995).

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."²⁴ 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] describes²⁵

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.

2. "Dwelling" defined and explained

The FHAA requires reasonable accommodations when necessary to afford handicapped persons equal opportunity to use and enjoy a dwelling. The Third Circuit found that a proposed drug-and-alcohol-treatment facility in an area zoned Community Commercial district qualified as a "dwelling" under the Act. Two factors are used to determine whether a specific facility is a dwelling: 1) whether the facility is intended or designed for occupants who intend to remain in the facility for any significant period of time, and 2) whether those occupants view the facility as a place to return to during that period. *Lakeside Resort Enterprises, LP v. Bd. of Sup'rs of Palmyra Twp.*, 455 F.3d 154, 158 (3d Cir. 2006). The court held that the Lakeside facility was a dwelling under the FHA because it was intended to house persons for a significant period of time (average stay longer than two weeks, which is longer than a typical stay at a hotel or motel) and because those persons would have viewed it as their home during that time. *Id.* at 160.

²⁴ *Id.* at 1782.

²⁵ *Id.* at 1782-3.

The Eleventh Circuit held that a group of six halfway houses were more like homes than hotels, and thus qualified as a “residences” and “dwellings” under the FHA. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1216 (11th Cir. 2008). The court cited to the dictionary definition of “residence” and held that “the house, apartment, condominium, or co-op that you live in is a ‘residence,’ but the hotel you stay in while vacationing at Disney World is not.” *Id.* at 1214.

The phrase “dwelling” generally refers to a generic dwelling located in a residential area, *not* to a particular dwelling of a person’s own choosing. *McKivitz v. Twp. of Stowe*, 769 F. Supp. 2d 803, 826 (W.D. Pa. 2010). The court emphasized that the alternative interpretation would give handicapped people “carte blanche to determine where and how they would live regardless of zoning ordinances to the contrary.” *Id.* at 827 (quoting *Thornton v. City of Allegan*, 863 F.Supp. 504, 510 (W.D.Mich.1993)).

3. Occupancy Turnover Rule and “fundamental alteration”

In *Schwarz*, the plaintiff wanted the City of Treasure Island to relax their occupancy-turnover rule. The court reached different conclusions depending on the locations of the halfway houses. For two halfway houses located within zones which allowed only single-family dwellings and prohibited tourist dwellings, it was not reasonable accommodation to allow high turnover of halfway houses for recovering substance abusers because allowing that would amount to “fundamental alteration” of the city’s zoning scheme. *Schwarz v. City of Treasure Island*, 544 F.3d at 1223. In contrast, the four halfway houses located within zones which already permitted unlimited turnover in multifamily dwelling surrounding the halfway houses, it would be a reasonable accommodation to relax the occupancy-turnover rule because it would not cause a “fundamental alteration” in the city’s long-standing zoning scheme. *Id.* at 1224. The court concluded that the availability of another dwelling somewhere within the city’s boundaries is irrelevant to the question of whether local officials must accommodate recovering substance abusers in the halfway houses of their choice. *Id.* at 1225-26.

4. The Requirement of Making “Reasonable Accommodation” to Maximum Occupancy Limits

Under what circumstances, if any, may a city limit the maximum number of individuals who live in a single-family residence? In *Sunderland*, the court found that the City of Pasco offered no reason to distinguish between the occupants of group homes and children who live with large families or with foster families. *Sunderland*, 107 Wn. App. at 120-22. Thus the City’s maximum occupancy limits were arbitrary. Furthermore, the court noted that the “proposed group home would not require any physical alterations to its exterior and would appear physically indistinguishable from other single-family homes in the area.” *Id.* at 114. Since *Sunderland* did not attempt to alter the neighborhoods aesthetic quality, and because Pasco could not cite a legitimate health and safety concern, the court invalidated the City’s maximum occupancy limitation.

5. Legality of Special Use Permits (SUP’s)

But as the Supreme Court recognized in *Edmonds*, cities are not forced to allow any number of individuals to reside under one roof. If fifteen people live in a 1,300 square foot, two-bedroom cottage, the residents may tax the sanitary limitations of the residence, as well as its basic infrastructure (e.g., electrical wiring). Furthermore, if seven to eight people sleep in one bedroom, it is questionable whether everyone could escape the home in the instance of a fire. However, because there is a considerable “gray” area between legitimate health hazards and what a home and city can reasonable accommodate, virtually every municipality has “special use” provisions in its zoning code. If a group home operator intends to exceed a city’s maximum occupation limit, the operator must obtain a “special use permit” (SUP) from the municipality before opening the home to residents. The permit accommodates members of the home, while at the same time preserving the city’s interest in the health and safety of its citizens.

Even before the passage of the FHAA, overt discrimination against the handicapped through SUP procedures was already outlawed by the Supreme Court. *See, City of Cleburne, Tex. v. Cleburne Living Ctr*, 473 U.S. 432, 105 S. Ct. 3249 (1985). In *Cleburne*, the Court held that a requirement of a SUP 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 no rational basis exists for the separate requirement. While one comes to appreciate that the Acts demand a high degree of municipal cooperation and flexibility, neither Act can require cities to abandon facially neutral procedures for obtaining a SUP from the appropriate zoning authority. Municipal procedures for obtaining and SUP will survive judicial scrutiny under the Acts if they are clearly health and safety related and are applied equally to all group living arrangements in a community.

In *U.S. v. Village of Palatine*, 37 F. 3d 1230 (7th Cir. 1994), residents of a group home did not fit the City’s definition of “family” or “group home.”²⁶ As a result of their status, local zoning regulations prohibited their occupancy, absent a SUP. The U.S. government sued Palatine on behalf of Oxford House, Inc., the group home provider enjoined by Palatine from operating because Oxford House exceeded the City’s maximum occupancy limits. The government argued that Palatine’s SUP procedures violated the FHAA because the municipality failed to make reasonable accommodations to Oxford House by failing to waive the notice and hearing requirements before granting a SUP. The plaintiff argued that the notice and hearing requirements would subject residents of the home to needless scrutiny and that Oxford House deserved use and occupancy of the residence as a matter of right. *Id.* at 1233-34. The court did not agree.

Oxford House-Mallard has not requested a special use approval from the Village. Until it does, the Village cannot authorize its current use of the Mallard Drive property . . . To the extent that the plaintiff’s federal suit alleges that the Village did not make reasonable accommodation in its application of its zoning laws to Oxford House-Mallard, the issue is not ripe . . .²⁷

²⁶ To qualify as a “group home,” Oxford House, Inc. had to have paid staff in residence with those in recovery. *U.S. v. Village of Palatine*, 37 F.3d 1230, 1232 (7th Cir. 1994).

²⁷ *Id.* at 1233.

[D]etermining whether a requested accommodation [a waiver of Palatine's notice and hearing requirement] is reasonable requires, among other things, balancing the needs of the parties involved [citations omitted]. In this case the burden on the inhabitants of Oxford House-Mallard imposed by the public hearing--which they need not attend--does not outweigh the Village's interest in applying its facially neutral law to all applicants for a special use approval [citations omitted]. Public input is an important aspect of municipal decision making; we cannot impose a blanket requirement that cities waive their public notice and hearing requirements in all cases involving the handicapped.²⁸

Permitting processes and application procedures run afoul of the FHAA only if they violate uniformity requirements. See, *Marbrunak, Inc. v. City of Stow*, 974 F.2d at 46; *Potomac Group Home Corp. v. Montgomery Count*, 823 F. Supp. 1285, 1297 (D. Md. 1993).). Furthermore, under the standards set forth in *Children's Alliance's* (based upon *Larkin* and *Bangerter*), any regulation affecting the handicapped must be tailor-made or necessary to benefit the affected class. When a court deems municipal regulations to be needlessly burdensome, such ordinances will immediately trigger the Acts' protections.

In *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains*, 284 F.3d 442 (3d Cir. 2002), the court concluded that Scotch Plains' (NJ) Zoning Board properly denied a special use permit or variance because the plaintiff's project required a (1) fundamental alteration of its zoning program; (2) was not necessary to serve the needs of the elderly; and (3) failed to address municipal concerns centered on traffic safety and emergency vehicle access. Lapid intended to construct a 95 bed facility in a neighborhood zoned for single family residences. The court remained skeptical of the project, but found that the FHAA demanded reasonable accommodations if the plaintiff could demonstrate that the "size of its proposed Facility [was] required to make it financially viable or medically effective." *Id.* at 461. The court was quick to point out that the plaintiff offered no evidence that a 95 bed complex was necessary to serve the elderly as opposed to a six-bed home that was more consistent with the surrounding neighborhood. *Id.* at 461-62. But more importantly, the proposal neglected to consider serious traffic safety and emergency vehicle access concerns. The intended facility simply created more problems than it sought to remedy, and thus the court upheld the City's variance denial.

However, it cannot be stressed enough, that if a municipality denies a SUP or variance and does not offer a valid health and safety reason, the courts will likely hold that the city violated the Acts.

In *Avalon Residential Care Homes, Inc. v. City of Dallas*, the plaintiff claimed that the City violated the FHAA by "denying housing to persons on the basis of handicap. Specifically, Avalon alleged that the City acted with 'purposeful discrimination against the handicapped' by imposing an occupancy restriction as well as a dispersal requirement and such actions have produced discriminatory effects against Plaintiff." *Avalon Residential Care Homes, Inc. v. City of Dallas*, 130 F. Supp. 2d 833, 839 (N.D. Tex 2000). For economic reasons, the City allowed more unrelated handicapped residents to

²⁸ *Id.* at 1233-34.

occupy a dwelling than unrelated non-handicapped residents. *Id.* The City allowed only six unrelated handicapped individuals to live in a group home. All other single-family residences could only house five unrelated, non-handicapped individuals. *Id.* Avalon had residents and staff of eight, violating Dallas' ordinance. The court held that Avalon had utterly failed to demonstrate violations of the FHAA according to both the disparate treatment and impact theories. The court found that the City's ordinances were facially neutral and that they supported legitimate government interests. *Id.* at 840-42.

However, the court did find that Dallas violated Avalon's right to reasonable accommodation under the Act. "Plaintiff has provided some evidence that the City Planning Commission and Dallas City Council did not approve the SUP when such an accommodation may have been reasonable and necessary to afford handicapped persons equal opportunity to use and enjoy a dwelling . . . the evidence [also] suggests that the Commissioners and City Council members relied on generalized perceptions about disabilities and unsubstantiated speculation about threats to health, safety, and community welfare." *Id.* at 841. The court gave the defendant a strong indication that the City needed to be flexible with its zoning requirements. *Id.* In the end, Avalon's group home was allowed to operate with residents and staff in excess of the City's maximum occupancy limits, and the organization was also allowed to locate within 1,000 feet of another group home facility.²⁹ See also, *Regional Economic Comm. Action Program, Inc. v. City of Middletown*, 281 F.3d 333 (2d Cir. 2002) (finding that the City's justifications for its denial of SUP for were mere pretext for its discriminatory motives).

The Second Circuit found that the City of West Haven, Connecticut violated the FHAA when the City intentionally discriminated against a group home for recovering alcoholics and drug addicts by enforcing certain zoning regulations and requiring alterations. The court disapproved of the NIMBY attitudes expressed and pointed to the fact that the neighborhood residents had a history of hostility toward group homes, that there was documentation of political pressure being applied to the mayor and other city officials, that the city rarely took enforcement actions against boarding houses in residential neighborhoods, and other evidence demonstrating the existence of bias. *Tsombanidis v. W. Haven Fire Dept.*, 352 F.3d 565, 580 (2d Cir. 2003).

In contrast to *Tsombadisis*, the pro-City reasoning articulated in *Escondido* was recently revisited by the Ninth Circuit in 2008, reaffirming that a city's interest in achieving its zoning goals has long been recognized as a legitimate governmental interest. *Budnick v. Town of Carefree*, 518 F.3d 1109, 1116 (9th Cir. 2008).

In *Budnick*, a developer failed to produce direct or circumstantial evidence of the town's discriminatory intent in denying its application for a SUP to build a multi-level continuing care retirement community and failed to establish a prima facie case under FHAA for disparate treatment. *Id.* at 1114. The court required statistical evidence in disparate impact cases to show disparate impact on the disabled as compared to any other

²⁹ Note: The Court seemed to reveal itself by analyzing the plaintiff's claim under a reasonable accommodation theory even when the plaintiff failed to offer the theory itself. Furthermore, the court ruled as it did without a citation to *Larkin*.

group of people. *Id.* at 1118. The court accepted the town’s proffered interest in achieving its zoning goals and preserving the character of the neighborhood by examining the comments of the zoning commissioners and the Town Council members when they explained their votes against the SUP. *Id.* at 1116. Despite the developer’s effort to ensure that the development would aesthetically blend in with its surrounding neighborhood, the plans did not meet all of the requirements of the residential zones on which it would have been located. The court found that the votes against the SUP were for legitimate and nondiscriminatory reasons. *Id.* The court also noted that the potential residents did not qualify as “disabled” simply because some of them would become disabled as they aged. *Id.* Finally, the developer’s reasonable accommodation claim was rejected by the court because the developer did not set forth sufficient evidence to establish that its planned facility’s amenities (a luxurious, village-like community) were necessary to house disabled seniors – that but-for the accommodation, the disabled will likely be denied an equal opportunity to enjoy their choice of housing. *Id.* at 1119-20.

In a recent 2012 Tenth Circuit case, the court found that the evidence was insufficient to establish that the City denied a zoning variance to allow a treatment center to operate within a public motel because of the disability of the center’s residents. In order to successfully prove discrimination by disparate treatment, the plaintiff needed to show that a similarly situated group was granted zoning relief like the one requested or that the city would grant a different group of non-disabled applicants the requested variance. *Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City*, 685 F.3d 917, 923-24 (10th Cir. 2012). Because no one, disabled or not, is generally allowed to stay in a motel for more than 29 days or to reside in a “commercial zone”, plaintiff was not denied a “reasonable accommodation” required by the FHA. *Id.* The court took special note of the fact that the city provides some limited exceptions to these rules, and that there is no evidence that the disabled, “because of their disabilities, are any less able to take advantage of these exceptions than the non-disabled.” *Id.*

C. DISPERSION OR SPACING REQUIREMENTS

In an effort to protect the nature of residential neighborhoods, some cities have enacted dispersion requirements, preventing group homes from operating within certain distances of each other. On its face, such laws seek to prevent the “ghettoization” of the handicapped and to facilitate integration. Not surprisingly, the courts have been extremely hesitant to uphold such regulations, contending that more often than not such ordinances are actually predicated upon common stereotypes and “NIMBY” attitudes. *See, Children’s Alliance; Larkin; Horizon House v. Township of upper Southampton*, 804 F. Supp. 683 (E. D. PA 1992). Still, in *Family Style v. City of St. Paul*, 728 F. Supp. 1396 (D. Minn. 1990); *Family Style v. City of St. Paul*, 923 F. 2d 91 (8th Cir. 1991), the court upheld such state and local laws (St. Paul acted according to state authorization.), holding that St. Paul legitimately sought to “deinstitutionalize” handicapped individuals, and that its dispersal requirement avoided the FHAA’s prohibitions.

While the presence of an underlying state policy in *Familystyle* is noteworthy³⁰, another important fact distinguishes the case from *Horizon House* and *Larkin*. Namely, in *Familystyle*, St. Paul sought to address a situation that affected over one hundred disabled people living in close proximity to one other, while the court in *Horizon House* and *Larkin* considered circumstances affecting only four to six people. In *Larkin*, the Court considered *Familystyle*:

MDSS relies again on *Familystyle*, where both the district court and the Eight Circuit found that the goal of deinstitutionalization justified facially discriminatory spacing requirements. [citations omitted]. However, *Familystyle* is distinguishable from the present case. In *Familystyle*, the plaintiff already housed 119 disabled individuals within a few city blocks. The courts were concerned that the plaintiffs were simply recreating an institutionalized setting in the community, rather than deinstitutionalizing the disabled. Here, however, *Larkin* seeks only to house four disabled individuals in a home which happens to be less than 1500 feet from another AFC facility [compare *Horizon House* at six individuals].³¹

A city may prevent the clustering of group homes if such clustering would alter the character of the neighborhood and not be in the “best interests” of handicapped residents. However, in the absence of a significant concentration of disabled individuals within a specific area,, the courts will likely invalidate spacing requirements if no reasonable accommodation is provided to handicapped individuals.

The court invalidated group home spacing requirements in *U.S. v. City of Chicago Heights*, 161 F. Supp. 2d 819 (2001). After purchasing a lot in a residential area, a group home operator sought to place individuals suffering from severe mental disabilities in its residence. Placement would require the City to accommodate more people than allowed under Chicago’s maximum occupancy limits as well as to allow location within 1,000 feet of another similar facility. The City sought to deny the group home’s plans, but the court soundly rejected Chicago’s arguments:

[A]llowing Thresholds [the group home operator] to locate at its chosen location would not undermine the purposes behind the City’s 1972 Zoning Code. First, the undisputed evidence shows that granting the special use permit would not result in the sort of clustering that could prevent disabled persons from integrating into society at large. Second, the undisputed evidence also shows that Threshold’s presence would not change the residential character of the neighborhood in which it seeks to locate.³²

The court also cited to *Larkin*, claiming that mental health experts have denied that “clustering” adversely affects the handicapped. The court found that Chicago’s

³⁰ Ultimately, underlying state support for dispersion requirements is irrelevant. The *Horizon House* Court listed numerous State Attorney Generals who repealed such statutes. See, *Horizon House Developmental Services, Inc., v. Township of Upper Southampton*, 804 F. Supp. 683, 694 (E. D. PA 1992). See also RCW 70.128.010 where state law sets the maximum occupancy for adult family homes at six residents.

³¹ *Larkin v. State of Mich. Dept. of Social Serv.*, 89 F.3d 285, 290 (6th Cir.).

³² *U.S. v. City of Chicago Heights*, 161 F. Supp. 2d 819, 837 (2001).

subsequent 1998 Zoning Code also violated the FHAA because it treated group homes differently than “family and other groups living together.” *Id.* at 843.

The *Chicago* Court found no reason to reject the plaintiff’s request. Chicago pointed to no onerous administrative or financial burdens preventing accommodation, nor did the City prove that its ordinances benefited the handicapped. Furthermore, nothing distinguished the plaintiff’s residence from other homes in the neighborhood. The court concluded that NIMBY attitudes provided the basis for the City’s actions, and thus Chicago violated the Act.

The Seventh Circuit found that a 2,500 feet spacing ordinance for group homes was invalid and that the city failed to provide reasonable accommodation. The mere fact that residents of the proposed group home will occasionally require local police and other emergency services assistance does not rise to the level of imposing a cognizable administrative and financial burden upon the community. *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 786-87 (7th Cir. 2002). Second, the court rejected the city’s argument about the burden imposed by clustering of group homes. The city asserted that over-concentration of group homes will result in disproportionate costs to emergency services for those facilities, and the court did not believe that “two group homes located close together will place a greater demand on emergency services than those same two homes placed 2,500 feet apart.” *Id.* at 787.

In contrast, the *Avalon* court found that a city’s zoning regulation requiring that a handicapped group home had to be located at least 1,000 feet from all other handicapped group homes did not amount to a violation of the FHA where the regulation applied to all unrelated people who were living together regardless of whether they were handicapped or not. *Avalon Residential Care Homes, Inc. v. City of Dallas*, 130 F. Supp. 2d at 839. The court recognized that “such high-occupancy homes must be a certain distance from one another...spacing requirement prevents the problems associated of unrelated people—handicapped or not—in close proximity.” *Id.* at 840.

On balance, dispersion requirements are a questionable tool for regulating the location of group homes and at the least are subject to reasonable accommodation requirements in the Acts.

D. AESTHETIC CONSIDERATIONS

As superficial as it may seem, the courts have, on occasion upheld municipal zoning authority if a city can demonstrate that a group care facility would substantially affect the character of a neighborhood.³³ If a proposed facility would dramatically increase traffic congestion, or if the structure itself is so incompatible with existing residences that it would destroy the aesthetic quality of the neighborhood, the courts will

³³ Again, one must appreciate that the “character of the neighborhood” does not denote the composition of neighborhood residents/families. Rather, cities may prevent a developer from placing facilities that significantly differ from surrounding residences because, in the absence of a compelling reasoning, such facilities may adversely affect property values.

be reluctant to find discrimination and deny group home operator's requests for variances. In *Escondido*, the court was quick to point out the plaintiff's intention to construct a "10,360 square foot" structure, complete with health care complex, would dwarf surrounding homes. *Escondido*, 104 F.3d at 303-04. Still, as argued above, if an operator can prove that a facility is "necessary" to serve protected classes under the Act, both neighborhoods and municipalities must be prepared to make concessions. *Escondido* has been influential through the Circuits.

In *Jackson v. City of Auburn*, an African American developer bought a lot on White St. where he intended to erect a duplex. *Jackson v. City of Auburn*, 41 F. Supp. 2d 1300, 1302 (M.D. AL 1999). Adjacent homes and the neighborhood at large were dominated by single-family residences. *Id.* at 1303. At the time of Jackson's purchase, Auburn's zoning provisions allowed Jackson to construct a duplex. Two months after his purchase, however, Auburn changed its zoning regulations, thereby frustrating Jackson's attempts to construct his intended project. *Id.* at 1304. While Jackson did not offer evidence that racial prejudice motivated the City's change, the court did note that several white neighbors had said they would rather move than live next to Jackson's property. *Id.* at 1303. Among other causes of action, Jackson filed suit against the City, claiming a violation of the FHAA.

The court dismissed Jackson's FHAA suit. After citing *Escondido*, the court held that the "City offers a legitimate, nondiscriminatory justification for denying the plaintiff's application: that the proposed duplex development was incompatible with the surrounding single-family home subdivisions." *Id.* at 1314. Finding that Auburn had answered Jackson's *prima facie* case, the court also found that he failed to demonstrate that the City's rationale simply disguised racial discrimination. Jackson failed to prove that the City's reasons were untrue and that the City was "more likely motivated by racial animus than by its proffered reasons." *Id.* at 1314-15. The court held in favor of the City. *See also, Hemsphere Building Co. v. Village of Richton Park*, 171 F.3d 437 (holding that a City is not obligated to approve construction that would alter the aesthetic character of a residential neighborhood).

E. PROPERTY VALUE

In an unreported Sixth Circuit case, a City did not violate the Act by refusing to approve a re-zone to allow the plaintiffs to construct group homes for elderly and disabled people on their property. The evidence indicated that the decision was based on the city's desire to protect property values and the community's opposition was based on the concerns about property values, not the disabilities of the residents. *Hamm v. City of Gahanna, Ohio*, 109 F. App'x 744, 747 (6th Cir. 2004).

IV. CONCLUSION

A City may defend its zoning laws so long as they attempt to reasonably protect the aesthetic quality of single-family neighborhoods, address legitimate health and safety concerns, are in the best interest of the Acts' protected classes, and do not implicate the

FHAA's "reasonable accommodation" requirement. Because courts will review each circumstance on a case-by-case basis in this highly fact-specific inquiry, a city must be prepared to have strong support and documentation to justify their zoning and land use decisions.