IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1600 EMSL

OXFORD HOUSE-C, et al.,

Plaintiffs-Appellees,

v.

CITY OF ST. LOUIS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri, Eastern Division

BRIEF OF THE NATIONAL FAIR HOUSING ALLIANCE AND THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW AS AMICI CURIAE IN SUPPORT OF APPELLEES

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Re: Oxford House-C v. City of St. Louis

Dear Bonnie and John:

Enclosed please find a copy of the amicus brief we filed today in the Eighth Circuit.

Yours,

Elizabeth M. Brown

Enclosures

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INTERESTS OF AMICI CURIAE[1/]

The National Fair Housing Alliance ("NFHA") is a nonprofit corporation which represents over sixty private, non-profit fair housing councils or centers throughout the United States (listed in Appendix B, infra). The NFHA seeks to identify and eliminate practices that constitute barriers to equal access to housing for all classes of persons protected under the Fair Housing Act, including persons with disabilities, by researching the nature and effects of housing discrimination and acting as an advocate for effective programs of fair housing enforcement and compliance. Efforts to secure housing for persons with disabilities often face community opposition based on stereotypes about and aversions to persons with disabilities. The NFHA provides advice to members who are facing opposition to the location of group homes from either sellers or neighborhood residents, and has made numerous referrals to the Department of Justice regarding actions taken by municipalities and local planning commissions to prohibit or restrict housing for persons with disabilities.

The Judge David L. Bazelon Center for Mental Health Law (the "Bazelon Center") is a national legal organization advocating for persons with mental disabilities. Formerly known as the Mental Health Law Project, the Bazelon Center acts as a national resource to assist providers, advocates, and government officials in responding to exclusionary zoning and other barriers to the development of appropriate community living opportunities for people with mental disabilities. It worked closely with the federal government on the drafting of the Fair Housing Amendments Act of 1988 (the "FHAA") to ensure that people with disabilities were fairly included in its coverage. Since enactment of the FHAA, the Center has worked with the U.S. Department of Housing and Urban Development ("HUD") in its promulgation of related regulations and policies, has written educational materials and conducted dozens of training sessions on the Act, and has assisted state legislatures and Attorneys General in revising state laws to conform to the FHAA. HUD has

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1/ The parties' written consents to the filing of this brief are attached as Appendix A, infra.

awarded the Bazelon Center a contract to provide written guidance to HUD investigators on the implementation of the Act.

In our Argument below we address the FHAA's reasonable accommodation requirement and the correct disparate impact analysis under that Act. We begin, however, with a discussion of the genesis and importance of group homes, not only to put the ensuing legal arguments in context but also because the City challenges the factual underpinnings of the Magistrate's finding that group homes have a benign rather than adverse impact on residential neighborhoods. Brief of Appellant ("Brief") at 25 n.9.[2/]

GROUP HOMES

The historic response to individuals with developmental disabilities, mental illness, or physical disabilities was to institutionalize them. As a result they were denied the treatment and care they needed to foster their ability to become independent, functioning members of society. Since the 1960's, however, advanced ideologies and a better understanding of the capabilities and needs of individuals with disabilities have led to a movement away from institutional care and towards community living. This movement has generated an enormous need for community-based group housing.[3/]

2/ In affirming the Magistrate's opinion, this Court may take judicial notice of the studies described herein. See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954) (taking judicial notice of psychological studies regarding the effect of segregated education on African-American children); United States v. Martinez, 3 F.3d 1191 (8th Cir. 1993) (taking judicial notice of the reliability of DNA fingerprinting based on studies regarding its accuracy and methodology); United States v. Jordan, 913 F.2d 1286, 1287 n.2 (8th Cir. 1990).

3/ See Lauber, Report on Houston's Interim Regulatory and Zoning Ordinance Proposals for Group Homes, Halfway Houses, Hospices, Emergency Shelters, and Social Service Facilities, at 1-5 (1992) (hereinafter "Lauber Report"); U.S. General Accounting Office, An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled, at 1 (1983) (hereinafter "GAO Report"); Lauber et al., National Census of Residential Facilities: 1982 Profile of Facilities and Residents, 89 Am. J. Mental Deficiency 236-45 (1984).

The deinstitutionalization movement is founded on the theory of "normalization," which aims to expose individuals with disabilities to, and indeed immerse them in, "the patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of life of society."[4/] Allowing people with disabilities to live in homes in ordinary neighborhoods that offer opportunities for normal social integration and interaction will maximize their ability to achieve their human potential and become contributing members of society.[5/] Without exposure to the community, normalization is unlikely to occur, and in fact residents of group homes that are geographically and socially isolated from the surrounding community achieve less independent behavior and less development of social competency. Lauber Report at 7 n.24; Environmental Factors at 848.

Although the normalization thesis was initially developed by experts in the field of mental retardation/developmental disabilities, experts on physical handicaps, mental illness, and drug and alcohol addiction all now subscribe to its principles. Lauber Report at 2. In short, persons whose disabilities arise from different sources share a need to live in normal, safe, residential communities

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4/ Steinman, The Impact of Zoning on Group Homes for the Mentally Disabled: A National Survey, at 1, ABA Section of Urban, State, & Local Gov't Law (1986) (citing Nirje, "The Normalization Principle," in Changing Patterns in Residential Services for the Mentally Retarded, at 231 (Kugel & Shearer rev. ed. 1976)); Lauber Report at 6, 8 (citing Butler & Bjaanes, "Activities and the Use of Time By Retarded Persons in Community Care Facilities," in Observing Behavior: Theory and Application in Mental Retardation, at 379-380 (Sackett ed. 1978) (hereinafter "Use of Time By Retarded Persons")).

5/ Jaffe & Smith, American Planning Ass'n, Planning Advisory Serv. Rep. No. 397, Siting Group Homes for Developmentally Disabled Persons, at 4 (Hecimovich ed. 1986) (hereinafter "Siting Group Homes"); Lauber Report at 7; Cournos, M.D., The Impact of Environmental Factors on Outcome in Residential Programs, 38(8) Hosp. & Community Psychiatry 848 (Aug. 1987) (hereinafter "Environmental Factors").

where they can interact with the community -- a need that is reflected in their common designation as "handicapped" and their entitlement to identical protections under the FHAA.[6/]

Residents of a group home, along with any necessary support staff, constitute a single housekeeping unit and function very much like a family. Persons with mental, physical or developmental disabilities learn personal hygiene, shopping, laundry, and recreational skills; how to handle money; and how to use public transportation and community facilities, as in any family. The goal is for group home residents to achieve independence and responsibility and to establish themselves and develop ties in the community. In these respects the group home fosters the very same family values that are advanced in exclusive residential zoning districts. Like persons without disabilities, residents of group homes typically spend their days at school or work, and then return home to relax, prepare and share meals, handle household chores, and enjoy recreation.[7/]

The number of residents in a home varies from two to twenty depending upon the preference of the residents, economic constraints, and medical needs. Siting Group Homes at 4-6. The amount of staff supervision similarly varies according to the needs of the residents. While homes for persons with mental or developmental disabilities generally have full-time professional staff members who give residents considerable individual attention, homes for recovering alcoholics and drug addicts, such as Oxford Houses, are entirely self-sufficient.

6/ 42 U.S.C. § 3602(h); H.R. Rep. No. 100-711, 100th Cong., 2d Sess., at 18, 22 (1988), reprinted in 1988 U.S.C.C.A.N. 2173 (hereinafter "H. Rep. 100-711").

7/ See Lauber Report at 8. Indeed, many state courts have held that persons with disabilities living in a group home constitute a "family" within the meaning of the applicable zoning code despite restrictive definitions. See, e.g., Missouri v. Liddle, 520 S.W.2d 644, 650-51 (Mo. Ct. App. 1975) (group home for 10 delinquent boys constituted "family" because home provided a "family-style environment"); Little Neck Community Ass'n v. Working Org'n for Retarded Children, 383 N.Y.S.2d 364, 367 (App. Div. 1976) (group home for 7-12 mentally retarded children constituted "family"); City of West Monroe v. Ouachita Ass'n for Retarded Children, Inc., 402 So. 2d 259, 265-66 (La. Ct. App. 1981) (group home for six mentally retarded adults constituted "family").

The 1983 survey of group homes sponsored by the U.S. General Accounting Office found that the single most important siting factor for group homes for mentally disabled persons was a safe neighborhood, followed by neighborhood stability and a high percentage of single-family residences within the neighborhood. GAO Report, App. I, at 9; see also Siting Group Homes at 8. Recovering addicts and alcoholics have a particular need to live in residential communities and to avoid neighborhoods where drugs and alcohol dominate.[8/] Proximity to community support services, recreation, shopping, public transportation, and other public amenities is also important in siting a group home. Clustering group homes in one area of a city essentially creates a de facto institutional atmosphere and undermines the goals of normalization. Lauber Report at 10; GAO Report, App. I, at 27.

For many years communities and homeowners have opposed the establishment in their neighborhoods of group homes for persons with disabilities. This opposition has arisen out of prejudice and unfounded fears that the existence of such homes would lower property values, increase crime, and change the character and quality of life of the community. In response to these concerns, numerous studies have evaluated the actual impact of group homes on the surrounding communities. The results of these studies may be startling to some, but they are nonetheless clear: the presence of group homes has not lowered property values or increased the rate of turnover; has not increased crime; and has not changed the character of the neighborhood. Nor have the homes

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8/ Communal Sober Living; After Treatment; Oxford House Answers the Question of "What Next?," in EAPA Exchange, at 26 (Nov. 1989); Molloy, Self-Run, Self-Supported Houses for More Effective Recovery from Alcohol and Drug Addiction, at 16 & n.12 (Technical Assistance Publication Series No. 5, DHHS Publication No. (ADM) 92-1678 (1992).

deteriorated or become conspicuous institutional landmarks. Communities have come to accept them, and group home residents have benefitted from access to community life.[9/]

These findings are consistent across the studies and do not turn on the nature of the disability involved. The studies have addressed group homes for persons who are mentally retarded/developmentally disabled, mentally ill, elderly, recovering drug addicts and alcoholics, ex-offenders, and a variety of combinations thereof.[10/] Thus the fears and prejudices of neighborhood

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9/ See summaries of 58 studies in Community Residences Information Services Program of White Plains, N.Y., There Goes the Neighborhood...A Summary of Studies Addressing the Most Often Expressed Fears About the Effects of Group Homes in Neighborhoods in Which They Are Placed: Declining Property Values, Crime, Deteriorating Quality of Life, and Loss of Local Control (Normann ed. 1990) (hereinafter "There Goes the Neighborhood"); see also summaries of nine studies in Lauber, Impacts of Group Homes on the Surrounding Neighborhood: An Evaluation of Research (Planning/Communications Aug. 1981) (hereinafter "Impacts of Group Homes").

10/ See Human Services Research Institute, Becoming a Neighbor: An Examination of the Placement of People with Mental Retardation in Connecticut Communities (Mar. 1988), summarized in There Goes the Neighborhood, at 29 (group homes for the mentally retarded have no impact on property values, selling time or property turnover rates, and have no adverse effect on the character of the neighborhood or the crime rate); Comfort et al. of the Graduate School of Public and International Affairs, Univ. of Pittsburgh, Community Care: Group Homes in Allegheny County (Aug. 1987) (study of 18 group homes for the mentally ill, mentally retarded, dependent/delinquent, physically disabled or adult offenders finding no evidence of significant difference in physical appearance of houses, percent change in mean reported crimes, social interaction, or percent change in mean property values between neighborhoods with group homes and neighborhoods without group homes); Lauber, Impacts on the Surrounding Neighborhood of Group Homes for Persons with Developmental Disabilities (Planning/ Communications Sept. 1986) (group homes for the developmentally disabled do not affect the value of property in or the stability of the neighborhood; group home residents pose no threat to neighborhood safety); Lauber, Impacts of Group Homes, at 1 (proximity of group homes for mentally retarded/developmentally disabled, prison pre-parolees, mentally ill or recovering addicts and alcoholics have no effect on market values or turnover; maintenance of group homes is generally better than that of surrounding properties; group homes are consistent and compatible with neighboring structures and have no effect on local crime); Louisiana Center for Public Interest, Impact of Group Homes on Property Values in the Surrounding Neighborhoods (Feb. 1981), summarized in There Goes the Neighborhood, at 49 (survey of mental health homes, alcohol and drug centers, and ex-offender halfway houses in variety of neighborhoods found no decline in neighborhood character or property value and homes were integrated, well-maintained and inconspicuous); Sigelman et al., Community Reactions to Deinstitutionalization: Crime, Property Values and Other Bugbears, J. Rehabilitation 52 (1979) (existing evidence indicates that crime rates do not increase in neighborhoods with residential facilities for the handicapped, property values do not decline, turnover rates do not

residents are simply not based in fact. Yet units of suitable housing continue to be lost through community opposition -- opposition that is often reflected in restrictive zoning requirements.[11/]

In passing the FHAA, Congress therefore targeted zoning ordinances and practices that exclude group homes for persons with disabilities because "[t]he right to be free from housing discrimination is essential to the goal of independent living." H. Rep. 100-711 at 18. Congress recognized that state and local authority over land use has been exercised to "restrict the ability of individuals with handicaps to live in communities" through the "enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related people with disabilities. Since these requirements are not imposed on families and groups of similar size of unrelated people, these requirements have the effect of discriminating against persons with disabilities." H. Rep. 100-711 at 24.

With this background in mind, we turn now to the reasons for upholding the Magistrate's decision.

ARGUMENT

In Part I we demonstrate that the FHAA requires municipalities to make reasonable accommodations in their zoning ordinances when necessary to afford persons with handicaps equal opportunity to housing, and that the Magistrate correctly held that the City violated the FHAA by refusing to grant the Oxford Houses' request for nonenforcement of the eight-handicapped-persons

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increase, neighborhood lifestyles are not altered, resident/neighbor contacts are rarely negative, and neighbors become more favorably disposed toward facilities and their residents as a result of first-hand experience); City of Lansing Planning Dep't, The Influence of Halfway Houses and Foster Care Facilities Upon Property Values (Oct. 1976), summarized in There Goes the Neighborhood, at 9 (no relationship between presence of a halfway house or foster home for ex-alcoholics, adult ex-offenders, youth offenders or mentally retarded and property values in the neighborhood).

11/ See Kanter, Combatting NIMBY: Recent Zoning Cases Uphold Establishment of Group Homes for the Mentally Disabled, 18 Clearinghouse Rev. 515 (Oct. 1984).

limitation as to them. Although the Oxford Houses are entitled to relief based solely on that ruling, we go on in Part II to show that the Magistrate also correctly ruled that the City's ordinance has an impermissibly disparate impact on persons with disabilities.

I. THE MAGISTRATE CORRECTLY HELD THAT THE CITY OF ST. LOUIS FAILED TO PROVIDE THE OXFORD HOUSES WITH A REASONABLE ACCOMMODATION

A. The Magistrate Correctly Held That The Reasonable Accommodation Requirement Applies to the City's Zoning Ordinance.

The FHAA makes it unlawful:

> "(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap . . . [or]
>
> "(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap." 42 U.S.C. § 3604(f)(1)-(2).

"Discrimination" under the FHAA is defined 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). Hence persons with disabilities are not simply entitled to equal treatment; rather, Congress has singled them out from all other classes of persons protected under the Fair Housing Act by conferring on them the added protection of the "reasonable accommodation" requirement. City of Edmonds v. Washington State Building Code Council, 18 F.3d 802, 806 (9th Cir. 1994).

Relying on this language and on the legislative history of the FHAA, the Magistrate held that the reasonable accommodation requirement applies "not only to sellers or landlords, but also to more sophisticated methods of denying housing such as enforcing zoning or other land use laws which have the effect of denying housing." Memorandum Opinion ("Opinion") at 37; see also id. at 52.

The City argues that the reasonable accommodation requirement does not apply to its -- or any -- zoning ordinance. It argues that discrimination, including the failure to make a reasonable accommodation, is forbidden only when selling or renting a dwelling. Since the City is not a seller or a landlord, it reasons, it is subject only to the stricture that it not "otherwise make unavailable or deny" a dwelling -- a stricture that supposedly is different from discrimination. Thus, in the City's view, zoning ordinances are governed solely by the "otherwise make unavailable or deny" prohibition, which is not a prohibition against discrimination, which means that the reasonable accommodation provision never applies to zoning ordinances. Brief at 26-28.

This argument cannot be sustained on the face of the statute, runs squarely counter to the legislative history and policy of the FHAA, and ignores the many uniform rulings that zoning ordinances are subject to the Act's reasonable accommodation requirement. We start with the statutory language. The Act does not limit its nondiscrimination mandate to "sellers" or "lessors"; instead it broadly outlaws discrimination "in the sale or rental" of dwellings. The City's enforcement of its zoning code to preclude the plaintiffs from renting the dwellings in question amounts to discrimination "in the rental" of those dwellings -- discrimination that indeed could be avoided by a reasonable accommodation on the City's part. The soundness of this interpretation is further supported by the language of the reasonable accommodation requirement, which mandates that reasonable accommodations be made whenever they "may be necessary to afford [persons with disabilities] equal opportunity to use and enjoy a dwelling" and places no restrictions on who is required to make such accommodations. 42 U.S.C. § 3604(f)(3)(B).

Where, as here, the will of Congress "'has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.'" Negonsott v. Samuels, 113 S. Ct. 1119, 1122-23 (1993) (quotation omitted). To read into the statute the limitation proferred by the City would severely restrict the additional protections explicitly provided by Congress in the reasonable

accommodation requirement and would be contrary to the well-accepted principle of construction that courts should not read into a statute exceptions or limitations that are not specifically set forth therein. See Andrus v. Glover Const. Co., 446 U.S. 608, 616-17 (1980). On the other hand, the Magistrate's interpretation that "the reasonable accommodation requirement applies to zoning ordinances and their enforcement," Opinion at 52, gives the "broad and inclusive" language of the FHAA the "generous construction" intended by Congress. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209, 212 (1972).

The legislative history of the FHAA also supports this reading. Congress knew that zoning ordinances often discriminate against handicapped persons by barring group homes for persons with disabilities, and nothing could be clearer than its statement that it "intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices." H. Rep. 100-711, at 24.

Accordingly, federal courts interpreting the reasonable accommodation requirement have invariably applied it to municipal zoning rules and practices, and have ruled that municipalities must change, waive or make exceptions to their zoning rules and practices to afford people with disabilities the same opportunity to housing as those who are not disabled.[12/]

B. The City's Ordinance Is Not A Reasonable Accommodation.

The City argues that its ordinance permitting eight unrelated handicapped persons to reside in a single-family dwelling is itself a reasonable accommodation. Brief at 28-29. That argument

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12/ See, e.g., Edmonds, 18 F.3d at 806; United States v. City of Philadelphia, 838 F. Supp. 223, 228 (E.D. Pa. 1993), aff'd, Nos. 93-2095 and 93-2096 (3d Cir. June 10, 1994); Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1294 (D. Md. 1993); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993); United States v. Village of Marshall, 787 F. Supp. 872, 876-79 (W.D. Wis. 1991); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1344-45 (D.N.J. 1991); United States v. Puerto Rico, 764 F. Supp. 220, 224 (D.P.R. 1991).

United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), cited by the City, is inapposite because it did not even address the reasonable accommodation requirement.

misunderstands the nature of the reasonable accommodation requirement, which by definition focuses on the needs of an individual handicapped person ("such person") and thus demands a case-by-case analysis "to address individual needs and respond to individual circumstances." Horizon House Developmental Servs., Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 699 (E.D. Pa. 1992), aff'd mem., 995 F.2d 217 (3d Cir. 1993); see also Nathanson v. Medical College, 926 F.2d 1368, 1385 (3d Cir. 1991); Babylon, 819 F. Supp. at 1186. The reasonable accommodation analysis requires a fact-based inquiry into, one, the need for changes in traditional rules in order "to permit a person with handicaps an equal opportunity to use and enjoy a dwelling" and, two, the reasonableness of the requested accommodation. See, e.g., Philadelphia, 838 F. Supp. at 228-29; Babylon, 819 F. Supp. at 1186; Horizon House, 804 F. Supp. at 699. Hence courts look not at the reasonableness of a given ordinance or at its general effect on a protected class, but at the reasonableness of a particular proposed accommodation to the otherwise applicable terms of the ordinance. See, e.g., Majors v. Housing Auth. of Dekalb, 652 F.2d 454, 457-58 (5th Cir. Unit B 1981) ("[E]ven if the . . . rule is itself emminently reasonable, nothing in the record rebuts the reasonable inference that the Authority could easily make a limited exception for that narrow group of persons who are handicapped"). The City obviously does not contend that, in adopting the eight-handicapped-persons rule, it addressed the individual needs of anyone. Thus the City could not possibly have satisfied the FHAA's reasonable accommodation requirement in advance of a particular case -- this one or any other.

Moreover, even if the question before the Magistrate was whether the eight-handicapped-persons restriction constituted a reasonable accommodation, the Magistrate effectively found that it was not. After a careful analysis of the evidence, the Magistrate found that Oxford House-C and Oxford House-W each require more than eight persons to be financially and therapeutically viable. Opinion at 28, 47. The Magistrate found that, to avoid relapse, recovering alcoholics and addicts

require the continuing and reliable support of other persons in the same situation and that smaller houses cannot guarantee that such support will be available when needed. Id. at 46-47. The Magistrate also found that, given the types of jobs and salaries typically available to recovering alcoholics and addicts at their stage of recovery, Oxford House residents must live in larger groups so that their pooled resources may allow them to afford homes in drug-free residential neighborhoods. Id. at 27-28 & n.9. In these circumstances the eight-handicapped-persons rule, rather than being a reasonable accommodation, only "continued the discrimination against the handicapped." Id. at 47. The City has not even contended, much less shown, that these findings of fact are clearly erroneous. Hence they must be upheld under Fed. R. Civ. P. 52(a). See, e.g., Craft v. Metromedia, Inc., 766 F.2d 1205, 1211-12 (8th Cir. 1985).

C. The Magistrate Correctly Held That the Oxford Houses Need Not Submit To The Variance Process.

The City argues that it has no duty to make a reasonable accommodation because the plaintiffs have not exhausted the City's variance procedures. The Magistrate's decision rejecting that argument falls squarely in line with decisions of many other courts recognizing Congress' goal of protecting the right of persons with disabilities to procure adequate housing without being subjected to discriminatory public scrutiny.[13/] Those courts have struck down requirements for public hearings on permit requests as violative of the FHAA, and have held that persons with disabilities whose residences are not in compliance with a zoning code are not required to apply for a variance or special use permit.[14/] They recognize that variance proceedings effectively deny

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13/ The applicability of the variance procedure to non-handicapped persons does not justify imposing it on disabled persons. Shapiro v. Cadman Towers, Inc., 844 F. Supp. 116, 126 (E.D.N.Y. 1994); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).

14/ See, e.g., Horizon House, 804 F. Supp. at 695-97 (requiring provider of residential services to persons with mental retardation to obtain a variance violates reasonable accommodation requirement); Cherry Hill, 799 F. Supp. at 465 (preliminarily enjoining Township from requiring

housing to persons with disabilities by delaying and increasing the cost of such housing, and further injure them by providing an opportunity for community members to ventilate stereotypical and unfounded fears about problems that handicapped persons might pose for the neighborhood.[15/] When the persons temporarily or permanently denied housing are recovering addicts or alcoholics who need the stability and support that group homes provide, their recovery itself may be jeopardized.[16/] The Magistrate's ruling was based in part on evidence of these very dangers:

> "Requiring compliance with [the variance] procedures in this situation would have a discriminatory effect on plaintiffs . . . . [who] presented credible evidence that [the public hearing] process stigmatizes recovering alcoholics and addicts, perpetuates their self-contempt, and increases the stress which can so easily trigger relapse." Opinion at 54.

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a group home for recovering addicts and alcoholics to apply for a variance); McKinney Found., Inc. v. Town Plan & Zoning Comm'n, 790 F. Supp. 1197, 1222 (D. Conn. 1992) (preliminarily enjoining zoning commission from requiring a special exception for use of residence by HIV-infected persons); Potomac, 823 F. Supp. at 1297-99 (striking down public hearing process because of its discriminatory impact on home's disabled residents). But see Oxford House, Inc. v. City of Virginia Beach, 825 F. Supp. 1251, 1262-63 (E.D. Va. 1993); Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168 (N.D.N.Y. 1993); City of St. Joseph v. Preferred Family Healthcare, Inc., 859 S.W.2d. 723 (Mo. Ct. App. 1993).

Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375, 379-80 (9th Cir. 1988), cited by the City, involved a constitutional challenge to a zoning ordinance and thus did not address the statutory issue involved here.

15/ See, e.g., Potomac, 823 F. Supp. at 1297-99 (public hearing process facilitates and gives weight to the expression of prejudices, resulting in "stigma to [group home residents that] is not easily erased," and "causes great harm to plaintiffs because of resulting delays and burdensome costs"); Horizon House, 804 F. Supp. at 700 ("variance is a lengthy, costly and burdensome procedure"); Cherry Hill, 799 F. Supp. at 464 (delay would cause plaintiffs irreparable harm); Easter Seal Soc'y v. Township of North Bergen, 798 F. Supp. 228, 237 (D.N.J. 1992) (same); McKinney, 790 F. Supp. at 1219-20 (public hearing process is burdensome and inflames public opposition against handicapped persons).

16/ See, e.g., Sullivan v. City of Pittsburgh, 811 F.2d 171, 179 (3d Cir. 1987) ("[w]ithout proper care, supervision and peer support [recovering alcoholics] could easily suffer a relapse. . . . [which] threatens not only a potentially irremediable reversion to chronic alcohol abuse but immediate physical harm or death"); Plainfield, 769 F. Supp. at 1339-40 ("[i]n addition to losing their residence . . . plaintiffs would also lose the benefit of their therapeutic and supportive living environment, and may relapse"); Cherry Hill, 799 F. Supp. at 463.

Although we believe that a per se rule excusing persons with handicaps from submitting to local variance procedures is justified, this Court can affirm the Magistrate's ruling on the narrower ground that a party need not submit to local zoning procedures if -- as the Magistrate found here -- such an effort would be futile. See, e.g., Horizon House 804 F. Supp. at 692; Easter Seal, 798 F. Supp at 236.[17/] The Magistrate found that, because the outcome of variance requests turn largely on community and aldermanic support or opposition, and the local alderman and neighborhood organizations opposed the Oxford Houses, they "would not have obtained a variance had they sought one. . . . The variance process would have provided only a futile remedy, and going through the process may well have caused the very risk of relapse that Oxford House attempts to prevent." Opinion at 54-55. Her finding was not clearly erroneous and should be upheld.

Moreover, requiring the plaintiffs to run the variance gantlet now would result in an exercise in futility of a different kind. The Magistrate found that the accommodation which plaintiffs seek -- nonenforcement of the eight-handicapped-persons limitation with regard to them -- is a reasonable accommodation under the FHAA, a finding the City does not challenge on any ground other than those addressed -- and rebutted -- in this brief. Making the Oxford Houses apply for a variance to which they are entitled on the merits regardless of the outcome of the variance proceeding would be a waste of time and resources for both parties in this case, and would cause the very harms Congress intended to eliminate.

D. Nonenforcement Will Provide the Oxford Houses Equal Opportunity to Housing.

The City's final objection to the Magistrate's reasonable accommodation ruling is that, by basing her ruling on the financial needs of the Oxford House residents, the Magistrate gave them greater access to housing than most nonhandicapped persons have. Brief at 36. This argument

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17/ There was no finding of futility in the FHAA cases cited by the City as requiring exhaustion. Virginia Beach, 825 F. Supp. 1251; Albany, 819 F. Supp. 1168; St. Joseph, 859 S.W.2d 723.

ignores two critical facts: first, that the Magistrate's ruling was based on the therapeutic, as well as financial, need of the Oxford House residents and, second, that the residents' financial need is inextricably bound up with their handicapped status.

The Magistrate found that, for therapeutic reasons, recovering alcoholics and addicts need to live in supportive group homes with more than eight residents in safe, stable residential neighborhoods that are relatively free of alcohol and drugs. Opinion at 8, 47. She also found that the Oxford Houses need more than eight residents to make the rent affordable. Id. at 27-28, 47. Specifically, "[t]he $60 figure is a reasonable minimum that a person entering an Oxford House in St. Louis could be expected to pay, given the types of jobs typically available to addicts and alcoholics at the stage of recovery of a typical new Oxford House resident." Id. at 28 n.9. This finding of financial need resulting from their handicapped status was based on considerable evidence, including expert testimony, that recovering addicts and alcoholics are much more likely to be living at or below the poverty level than nonhandicapped persons because their addiction will have caused them to drop to the lowest rungs of the economic ladder. See Testimony of Herbert D. Kleber, Transcript II at 49-50.[18/] Waiving the eight-handicapped-persons rule to make affordable residential group homes available to the Oxford House residents therefore simply accommodates their handicapped status in order to provide them equal opportunity to housing.

In sum, the Magistrate correctly held that the City violated the reasonable accommodation requirement of the FHAA by refusing the request that the eight-handicapped-persons restriction not be enforced against the plaintiffs. As she found, "the evidence presented at trial showed that non-enforcement of the zoning code in these instances would have no adverse effect on the City's

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18/ See also U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 175, Poverty in the United States: 1990, at Table 16, Work Disability Status of Persons 16 to 64 Years Old, by Poverty Status in 1990 (U.S. Government Printing Office, Washington, D.C. 1991).

zoning scheme or on the surrounding neighborhoods," and "the City admitted that it does not enforce its related-party rule in the absence of complaints, so non-enforcement in this situation would not fundamentally change its zoning program." Opinion at 55-56. In these circumstances, non-enforcement "would not have required any fundamental change in defendant's zoning policy, nor would it have imposed any financial or administrative burden on the defendant." Id. at 55. The Magistrate's ruling should accordingly be affirmed.[19/] Although this Court can affirm the Magistrate's decision based solely on the correctness of her reasonable accommodation ruling, we next show that the Magistrate's disparate impact ruling should also be upheld.

II. THE MAGISTRATE'S DISPARATE IMPACT RULING WAS CORRECT

In evaluating the Oxford Houses' claim of disparate impact, the Magistrate first found that the Oxford Houses had made a prima facie showing that the City's ordinance has an adverse impact on handicapped persons because handicapped persons "need" group housing arrangements while unrelated non-disabled persons "occasionally wish to live together." Opinion at 45-47. Additionally, because "80% of all Oxford Houses have more than eight residents," id. at 47 & n.19, the City's eight-handicapped-persons limit effectively segregated Oxford Houses in the "I" Central Business and "L" Jefferson Memorial districts. Turning to the City's burden, the Magistrate required the City to show that "its actions were necessary to promote legitimate governmental interests." Id. at 48. Then, recognizing the City's legitimate interest in maintaining the residential character of single-family neighborhoods, the Magistrate found that the City's eight-handicapped-persons ordinance "does not promote [that] interest" and that "there are other, less discriminatory ways to promote such a goal." Id. at 50, 49 n.22. The City "presented no specific justification for the . . . ordinance's

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19/ A reasonable accommodation is one which would not impose an undue financial hardship or administrative burden upon the entity making the accommodation, and would not undermine the basic purpose of the entity's rule or practice. See, e.g., Philadelphia, 838 F. Supp. at 228; Babylon, 819 F. Supp. at 1186; Cherry Hill, 799 F. Supp. at 461; Marshall, 787 F. Supp. at 878.

limit of eight persons, and stated no legitimate interest that allowing eight Oxford House residents, but not ten or twelve, would promote." Id. at 50. Given that the City allows doctors' offices, a gas station, a hotel, babysitting centers, and bed-and-breakfast establishments to locate in the same area, and permits an unlimited number of related persons to live in a single dwelling, it could not be said that the Oxford Houses would somehow destroy the settled, single-family residential character of their neighborhoods. Id. at 49-50.

The City contends that the Magistrate should have compared the eight-handicapped-persons limitation's effect on handicapped persons to the City's three-unrelated-persons restriction's effect on nonhandicapped persons. Brief at 20-21. But that is effectively what the Magistrate did. She first concluded that the three-unrelated-persons rule "had a discriminatory impact on handicapped individuals" because they "need" residential group housing "as a result of their disability" while groups of unrelated non-disabled people "may occasionally wish to live together in residential neighborhoods." Opinion at 45-46. The Magistrate then found that the eight-handicapped-persons ordinance had a disparate impact on the handicapped because it "has not cured the discrimination, but has, as enforced, continued the discrimination against the handicapped" because Oxford Houses need more than eight residents to be therapeutically and financially viable. Id. at 47.

Moreover, the Magistrate should have compared the effect of the eight-handicapped-persons restriction to the effect of the City's rule allowing any number of related persons to live together. In a disparate impact case the question is whether the rule at issue has a disproportionate effect on the protected class as compared to all other persons. See, e.g., Babylon, 819 F. Supp. at 1183; Cherry Hill, 799 F. Supp. at 461; Plainfield, 769 F. Supp. at 1344. As Congress recognized, the "imposition of health, safety or land-use requirements . . . have the effect of discriminating against persons with disabilities" because they "are not imposed on families and groups of similar size of other unrelated people." H. Rep. 100-711 at 24 (emphasis added). The City's ordinance could not

survive under this more stringent test, for it prefers traditional families to groups of disabled persons.

The City also contends that the Magistrate erred by requiring the City to show that its ordinance was "necessary to promote legitimate governmental interests," arguing that she should have applied the more lenient "rationally related" standard governing challenges to zoning restrictions under the Equal Protection Clause. Brief at 21. But the City effectively failed even the more lenient test when the Magistrate found that its ordinance "does not promote the City's asserted governmental interest in maintaining the residential character of its single-family zoning district" and "does not promote those goals." Opinion at 50, 49. Because an ordinance that "does not promote" its articulated interest cannot be said to be rationally related to that interest, even under the test contended for by the City the Magistrate's ruling should be affirmed.

Moreover, the "rationally related" standard is inapposite here because Congress has given persons with disabilities a higher level of protection under the FHAA than the Constitution provides. The handicapped are not a protected class under the Constitution. Hence a zoning ordinance that discriminates against them will be upheld if it is not arbitrary and bears a rational relationship to a permissible state objective. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985). But Congress is free to grant greater rights than the Constitution provides,[20/] which is what it did in the FHAA: under the FHAA the handicapped are a protected class, and any zoning ordinance allegedly discriminating against them must be reviewed with heightened scrutiny to determine if it complies with the Act's mandates. See Potomac, 823 F. Supp. at 1295 n.8; Horizon House, 804 F. Supp. at 695 n. 6.

20/ See City of Rome v. United States, 446 U.S. 156, 177-78 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

Recognizing this distinction, courts apply a modified Title VII analysis to claims of discrimination under the Fair Housing Act. As recently summarized in Casa Marie, Inc. v. Superior Court, 988 F.2d 252, 269 n.20 (1st Cir. 1993), the plaintiff must first make a prima facie case that the challenged ordinance has a discriminatory effect by showing either that it has a greater adverse impact on handicapped persons than on nonhandicapped persons, or that it perpetuates an existing pattern of segregating handicapped persons in the community. Direct proof of discriminatory intent, while not required, may bolster the showing of discriminatory effect. Then the defendant must show a legitimate, nondiscriminatory interest served by the ordinance, and the court must balance the proferred justification against the discriminatory effect.[21/] In evaluating the defendant's interest, at least two circuits and numerous district courts have ruled, as the Magistrate did here, that the defendant must demonstrate that there is no less discriminatory means of serving its interest.[22/]

This Court's disparate impact decisions under the Fair Housing Act have looked in different directions. In United States v. City of Black Jack, 508 F.2d 1179, 1185 & n.4 (8th Cir. 1974), involving a race-based claim, the Court borrowed the compelling interest test applicable to race-based claims under the Constitution. In Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 94 (8th Cir. 1991), involving mental handicaps, the Court borrowed the rational relation test

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21/ Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 928 (2d Cir.), aff'd, 488 U.S. 15 (1988) (per curiam); Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986); Smith v. Town of Clarkston, 682 F.2d 1055, 1065 (4th Cir. 1982); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 130 (3d Cir. 1977); Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1285 (7th Cir. 1977).

22/ See, e.g., Huntington, 844 F.2d at 937; Rizzo, 564 F.2d at 148-149; Potomac, 823 F. Supp. at 1295-96; Babylon, 819 F. Supp. at 1182-83; Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, 808 F. Supp. 120, 136 (N.D.N.Y. 1992); Horizon House, 804 F. Supp. at 697-98; Cherry Hill, 799 F. Supp. at 461; McKinney, 790 F. Supp. at 1219-21; Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin., 740 F. Supp. 95, 106-07 (D.P.R. 1990); But see Bangerter v. Orem City Corp., 797 F. Supp. 918 (D. Utah 1992).

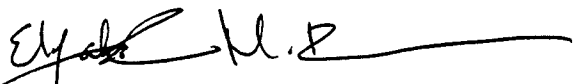
applicable to constitutional claims by non-suspect classes. And in United States v. Badgett, 976 F.2d 1176, 1178 (8th Cir. 1992), without mentioning the preceding cases, the Court adopted the test used in Title VII employment discrimination cases alleging disparate treatment, not impact.

If this Court finds it necessary to reach the disparate impact issue, we urge it to use this case as a vehicle for settling the law of the Circuit and to do so by adopting the approach described above. The decisions cited in note 22, supra, eschew the compelling interest test of Black Jack as imposing too heavy a burden on Fair Housing Act defendants, but also recognize that Congress intended to give FHA plaintiffs more protection than the rational relation test of Familystyle and that the Title VII disparate treatment test is an intent-based standard which is inapposite to disparate impact claims. See Huntington, 844 F.2d at 939; Rizzo, 564 F.2d at 148-149. Adopting the approach described above would have the twin virtues of serving the purposes of the Fair Housing Act and harmonizing the law among the Circuits.

CONCLUSION

For the reasons stated above, the Magistrate's decision should be affirmed.

Respectfully submitted,



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June 27, 1994

APPENDIX A

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June 23, 1994

BY FACSIMILE

Julian L. Bush, Esquire
Associate City Counselor
Room 314 City Hall
St. Louis, Missouri 63103

Re: Oxford House-C, et al., v. City of St. Louis, No. 94-1600 EMSL (in the United States Court of Appeals for the Eighth Circuit)

Dear Mr. Bush:

This letter confirms that you have consented to our filing a brief by June 27, 1994 on behalf of the National Fair Housing Alliance and the Bazelon Center for Mental Health as amicus curiae in support of the appellees in the above captioned case. Your signature below will show your written consent to this filing.

Sincerely,

Bernice M. Blair

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June 23, 1994

BY FACSIMILE

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Re: Oxford House-C, et al., v. City of St. Louis, No. 94-1600 EMSL (in the United States Court of Appeals for the Eighth Circuit)

Dear Professor Eastman:

This letter confirms that you have consented to our filing a brief by June 27, 1994 on behalf of the National Fair Housing Alliance and the Bazelon Center for Mental Health as amicus curiae in support of the appellees in the above captioned case. Your signature below will show your written consent to this filing.

Sincerely,

Bernice M. Blair

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June 23, 1994

BY FACSIMILE

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Re: Oxford House-C, et al., v. City of St. Louis, No. 94-1600 EMSL (in the United States Court of Appeals for the Eighth Circuit)

Dear Ms. Wood:

This letter confirms that you have consented to our filing a brief by June 27, 1994 on behalf of the National Fair Housing Alliance and the Bazelon Center for Mental Health as amicus curiae in support of the appellees in the above captioned case. Your signature below will show your written consent to this filing.

Sincerely,

Bernice M. Blair

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APPENDIX B

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I hereby certify that on this 27th day of June, 1994, I served two copies of the foregoing Brief of the National Fair Housing Alliance and the Judge David L. Bazelon Center for Mental Health Law as Amici Curiae in Support of Appellees by causing such copies to be

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