IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-2095 and 93-2096

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CITY OF PHILADELPHIA,

Defendant-Appellant.

DAVID B., DAVID J., EDWARD L.,
MICHAEL M., AND JACQUELINE S.,

Plaintiffs-Appellees,

v.

CITY OF PHILADELPHIA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

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

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February 28, 1994

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

PAGE

STATUTES:

PAGE

Page

PAGE

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BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICI CURIAE

The National Fair Housing Alliance ("NFHA"), the Judge David L. Bazelon Center for Mental Health Law (the "Bazelon Center") and Oxford House, Inc. ("Oxford House") file this brief as amici curiae in support of appellees the United States of America and David B., David J., Edward L., Michael M., and Jacqueline S.[1/]

1/ Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, amici curiae have obtained each party's written consent to the filing of this brief. The written consents are attached as Appendix A, infra.

The NFHA is a non-profit corporation which represents more than sixty private, non-profit fair housing councils or centers throughout the United States.[2/] The NFHA seeks to identify and eliminate practices that constitute barriers to equal access to housing for all of the classes of persons protected under the Fair Housing Act, including persons with disabilities. The NFHA attempts to fulfill this purpose by, inter alia, researching the nature and effects of housing discrimination and acting as an advocate for effective programs of fair housing enforcement and compliance.

Groups promoting housing for persons with disabilities often face community opposition based on stereotypes about and aversions to persons with disabilities. The NFHA provides technical 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.

Because government housing programs supply much of the funding for housing for persons with disabilities, the NFHA and similar organizations recently met with United States Department of Housing and Urban Development ("HUD") Secretary Henry Cisneros to encourage the continuation of such programs. Secretary Cisneros acknowledged the problems disabled persons face in locating housing, agreed to review the programs, and suggested that the NFHA and other interested groups work with Congress to increase funding levels for housing programs for persons with disabilities.

2/ A list of the members of NFHA is attached as Appendix B, infra.

The Bazelon Center is a national legal organization advocating for persons with mental disabilities.[3/] The Bazelon Center uses a coordinated strategy of litigation and policy advocacy to secure the protection of this nation's laws for adults and children with mental illness and mental retardation. Since its formation in 1972, the Bazelon Center has acted 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. The Bazelon Center has also litigated a number of state and federal lawsuits to promote housing opportunities for people with disabilities.

The Bazelon Center 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 and, since enactment of that statute, has worked with HUD in its promulgation of related regulations and policies. HUD has awarded the Bazelon Center a contract to provide written guidance to HUD investigators on the implementation of the FHAA.

Both before and since the passage of the FHAA, the Bazelon Center has actively lobbied Congress for additional funding for housing for persons with disabilities. It does so because of its first-hand experience with the need for low and moderate income housing that is accessible to people with physical and mental disabilities, the historic inability of the private market to provide such housing, and the stigma attached to persons with disabilities that inhibits their access to private and non-federal housing development and support funds.

Oxford House, Inc. is a non-profit corporation that acts as the umbrella organization for a national network of individual self-run, self-supported group houses for persons recovering

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3/ Until March 1993, the name of the Bazelon Center was the Mental Health Law Project.

from addictions to alcohol and/or drugs. The first Oxford House was established in 1975. Congress recognized the success of Oxford House and the need for sober living environments for individuals who have recently completed drug or alcohol recovery programs when it enacted the Anti-Drug Abuse Act of 1988, which effectively requires states to establish revolving loan funds to support the establishment of group homes based on the Oxford House model. Without these revolving loan programs, it would be extremely difficult for recovering addicts to obtain the financial resources initially needed to rent a house. Since Congress passed the Anti-Drug Abuse Act in 1988, the Oxford House network has grown from 18 to approximately 470 houses.

Despite this Congressional endorsement, Oxford Houses frequently encounter community opposition based on unsubstantiated fears and prejudices regarding recovering substance abusers. They are regularly forced to endure hostile public hearings and have too often been forced to resort to litigation to enforce their rights under the FHAA to rent houses in suitable neighborhoods. See, e.g., Oxford House v. Town of Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D.N.J. 1991); Oxford House-C v. City of St. Louis, No. 91-2402-C(7), 1994 U.S. Dist. LEXIS 1182 (E.D. Mo. Jan. 28, 1994); Cherry Hill Township v. Oxford House, Inc., 621 A.2d 952 (N.J. Super. App. Div. 1993).

INTRODUCTION AND SUMMARY

This case concerns the meaning of the mandate in the Fair Housing Amendments Act of 1988 that "reasonable accommodations" in rules, policies, practices, or services be made when such accommodations "may be necessary" to afford persons with handicaps equal opportunity to housing. 42 U.S.C. § 3604(f)(3)(B). The District Court held that the City of Philadelphia violated the FHAA by failing to grant a reasonable accommodation necessary to enable Project H.O.M.E. to renovate and use 1515-1523 Fairmount Avenue as a home for persons with

handicaps. The City of Philadelphia challenges that ruling on the ground that no accommodation is "necessary" within the meaning of the FHAA because the impediments to Project H.O.M.E. were created not by the City but by long, drawn-out zoning litigation brought by community opponents and by Project H.O.M.E.'s purported choice to rely on financing from lenders who require an opinion of counsel as to the absence of litigation or zoning restrictions that could impede construction. The City also contends that the District Court erred by finding a violation of the reasonable accommodation requirement absent proof that the City intentionally discriminated against Project H.O.M.E. or that the zoning provision at issue had a disparate impact on persons with disabilities.

Each of the amici is familiar with both the financing of and community opposition to housing for persons with disabilities. Hence they are well suited to address the issues raised by the City's appeal. As we will show below, non-profit sponsors of housing for persons with handicaps typically have no choice but to rely on public financing to establish the group homes that the FHAA encourages, and lenders, be they public or private, routinely require an opinion of counsel regarding compliance with zoning laws and the absence of litigation that could impede construction and timely completion of a project. Thus, if the District Court's judgment is overturned, the efforts of persons with handicaps to obtain housing will regularly be frustrated by strategic litigation by community opponents. We will show below, however, not only that Congress specifically intended that its reasonable accommodation mandate would be used to neutralize community prejudice against persons with handicaps and to forbid the resulting denials of housing, but also that Congress did not exempt a governmental entity from the reasonable accommodation requirement simply because the obstacle to housing was not created by that entity in the first instance. Indeed, this is the paradigmatic case for a reasonable accommodation because the City contests neither the reasonableness of the requested

accommodation nor the fact that, if made, the accommodation would enable Project H.O.M.E. to proceed with renovation of the Fairmount Avenue properties.

A ruling that the City is not required to make a reasonable accommodation in this case will enable community groups (or even one prejudiced person) to block construction of housing for persons with disabilities by filing any kind of frivolous lawsuit. It will create a loophole in the FHAA by enabling a municipality to grant a permit knowing full well that community members will litigate the validity of that permit for years, and then to use the litigation as an excuse for its refusal to make a reasonable accommodation to the zoning provision at issue. Because the costs, delay and potential loss of funding generated by such litigation will often be too much for non-profit housing sponsors to bear, persons with disabilities will be placed in a box: they will not be able to afford to contest the litigation, yet without contesting it they will be unable to obtain the opinion letter necessary for release of funding critical to their housing project. In either instance, they will be denied housing. This result is contrary to the intent of the FHAA to outlaw denials of housing based on prejudice and stereotypes.

STATEMENT

A. The Proposal by Project H.O.M.E.

Project H.O.M.E. is a Pennsylvania non-profit corporation that provides a continuum of care to homeless persons who are mentally ill and/or recovering substance abusers. It has acquired two adjacent buildings at 1515 and 1523 Fairmount Avenue in Philadelphia which it proposes to use for single-room occupancy ("SRO") permanent housing for homeless persons with disabilities. District Court Opinion ("Opinion") at 2-4. Project H.O.M.E. has obtained funding from public and private sources to pay for the purchase and rehabilitation of the Fairmount Avenue properties. The financing includes, among other things, approximately

$1 million in first and second mortgage loans from the Pennsylvania Housing Finance Authority ("PHFA"), a $500,000 loan from the City of Philadelphia, and $1,910,650 in so-called net syndication proceeds.[4/] Rent subsidies committed by the United States Department of Housing and Urban Development under its Section 8 Moderate Rehabilitation Program and its Shelter Plus Care Program will help Project H.O.M.E. repay the loan portion of the funding.[5/]

The Philadelphia Department of Licensing and Inspections granted Project H.O.M.E. a zoning and use permit for the Fairmount Avenue properties on August 9, 1990. However, as a precondition to release of its loan funds, the PHFA requires Project H.O.M.E. to provide an opinion of counsel stating that "'there is no legal action pending or threatened, or proposed changes in zoning, which would prevent the construction from being commenced or completed in accordance with the plans and specifications and existing zoning laws and requirements.'"[6/] Receipt of the PHFA funds is in turn necessary to obtain promised funding from private investors.[7/] Counsel for Project H.O.M.E. has been unable to issue the required opinion because of the litigation we now describe. Opinion at 5, 14.

4/ Opinion at 4; Mar. 29, 1993 Declaration of Mark E. Levin ("Levin Declaration"), Joint Appendix (hereinafter "J.A.") at 172. As explained below infra page 19 and note 25, the net syndication proceeds will be contributed by for-profit investors who, as limited partners in the syndicate that will own and operate 1515-1523 Fairmount Avenue, will receive the benefit of federal low-income housing tax credits allocated to the project in exchange for their contributions. These investors are not obligated to make this investment until the PHFA has released its funds. Levin Declaration, J.A. at 172.

5/ Levin Declaration, J.A. at 172.

6/ Opinion at 5; Levin Declaration, J.A. at 172.

7/ Id.; see supra note 4; infra note 25.

B. The State Litigation

When the City granted Project H.O.M.E.'s permit, certain members of the community immediately objected to the proposed location of Project H.O.M.E.'s facility. They met with the City's Housing Director,[8/] circulated flyers opposing the proposed facility,[9/] and asked their City Councilman to block Project H.O.M.E. and all other "institutions serving the homeless, mentally retarded, halfway houses, [and] chemical addiction programs," because they would supposedly "dilute the quality of life for our community as a whole."[10/] Their City Councilman thereupon wrote to the City's Housing Director, stating:

> "[A]fter discussions with several community organizations and conversations with residents in the immediate area of the 1500 Block of Fairmount Avenue, I have made a decision regarding development of a SRO in this particular neighborhood. . . . [Y]ou will understand my decision to support the communities and oppose the proposed SRO."[11/]

Two community groups appealed the grant of the zoning and use permit. Since then, over three years of administrative proceedings and judicial litigation regarding Project H.O.M.E.'s right to a permit under the Philadelphia Zoning Code have ensued. Opinion at 6-7. The litigation is still pending and no reliable estimate can be made respecting its conclusion.

8/ March 30, 1993 Declaration of Sister Mary Scullion ("Scullion Declaration") at ¶ 21, J.A. at 122.

9/ The flyer included the following language:

> "The people who will live in the facility have serious and long standing social and psychiatric problems. Many are not working and are on Supplemental Security Income. They have a history of - drug addiction - alcoholism - chronic mental illness." "Truth and Misrepresentations About Project HOME for Homeless in Francisville/Spring Garden," J.A. at 240.

10/ Sept. 7, 1990 letter from Concerned Citizens of Francisville to City Council President John Street, J.A. at 241.

11/ September 19, 1990 letter from Councilman John Street to the Office of Housing and Community Development Director, J.A. at 242.

The issue in the litigation is whether the Zoning Code requires 1515 Fairmount to have a rear yard. Id. at 6. Although the house has a large side yard, it allegedly does not meet the rear yard requirements of the Zoning Code. Id. at 6-7. As explained in the City's opening brief, one case is currently pending before the Pennsylvania Supreme Court and another before the Pennsylvania Commonwealth Court. Brief of Appellant City of Philadelphia ("Opening Brief") at 12. Although Project H.O.M.E. currently has the zoning permits required to commence construction, id. at 10, the existence of such litigation precludes issuance of the opinion letter required for release of the project's funding, Opinion at 5, 14.

C. The Litigation and Rulings Below

In late 1991, potential residents of Project H.O.M.E.'s proposed facility (who are persons with handicaps within the meaning of the FHAA) brought the reasonable accommodation requirement of the FHAA to the attention of the City's Licensing and Inspections Commissioner, and in October 1992 they specifically requested that the City make a reasonable accommodation by granting a zoning permit deeming the side yard area to satisfy the Zoning Code's rear yard requirement. 1515 Fairmount Avenue's side yard satisfies all of the purposes -- access for the fire department, ventilation, and room for recreation -- of the rear yard requirement.[12/] The Commissioner nevertheless denied the reasonable accommodation request. Because the issue in the state court proceedings is whether the rear yard requirement applies to Project H.O.M.E., the requested accommodation -- deeming the side yard to satisfy the rear yard requirement -- would moot the state court proceedings and thus permit Project

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12/ Opinion at 12-13; Deposition of Frank P. Antico ("Antico Dep."), J.A. at 198-99, 200-201, 205. Mr. Antico, a 35-year employee of the Department of Licensing and Inspections who is thoroughly familiar with the Zoning Code, was the witness designated by the City under Fed.R.Civ.P. 30(b)(6) to answer questions concerning the purpose of the rear yard requirement. Antico Dep., J.A. at 190-91.

H.O.M.E.'s counsel to write the opinion letter required for release of the funding that Project H.O.M.E. needs finally to commence construction -- three and a half years after receipt of its original permit. The City of Philadelphia admits that such housing is needed in Philadelphia and consistently reiterates its support for Project H.O.M.E. and its belief that Project H.O.M.E. is entitled to a permit under the Philadelphia Zoning Code. Opening Brief at 14-15. Yet the City refuses to make the requested accommodation.

In related cases filed in the U.S. District Court for the Eastern District of Philadelphia, the United States and potential residents of Project H.O.M.E.'s proposed facility alleged that the City of Philadelphia's failure to grant the requested zoning permit substituting the side yard for the rear yard constituted a violation of the FHAA's reasonable accommodation requirement. On cross-motions for summary judgment, the District Court ruled for the plaintiffs. It first ruled that the requested accommodation is reasonable because it would impose no financial or administrative burden on the City and would not require a fundamental alteration of the Philadelphia Zoning Code. Opinion at 12-13. It then held that the requested accommodation is "necessary" within the meaning of § 3604(f)(3)(B) because, without it, the ongoing litigation regarding the validity of Project H.O.M.E.'s zoning permit precludes Project H.O.M.E.'s attorney from issuing the opinion letter required for release of critical funding and thus prevents Project H.O.M.E. from renovating and using the Fairmount Avenue properties. Id. at 14. Finally, the District Court ruled that plaintiffs need not show that the zoning provision at issue has a disparate impact upon persons with handicaps in order to prove a violation of § 3604(f)(3)(B)'s reasonable accommodation requirement. Id. at 15-17.

ARGUMENT

We describe, in Part I.A. below, the FHAA's reasonable accommodation requirement, and then demonstrate in Part I.B. that Project H.O.M.E.'s need for a reasonable accommodation was not self-created by its choice of lender. The many federal programs that fund housing for persons with disabilities demonstrate Congress' awareness that the housing it seeks to foster through the FHAA cannot be created without public financial support. Such funding is not provided, however, without assurances both that it will be used promptly for its intended purpose and that, if in the form of a loan, it will fund a project that will generate revenue to repay the loan. Thus lenders routinely require the borrower and/or its counsel to opine on compliance with zoning laws and the absence of litigation that could impede or preclude construction and operation of the facility. Unfortunately, this legitimate opinion letter requirement makes entities attempting to establish homes for persons with disabilities particularly vulnerable to litigation brought by a community group -- or even by an individual -- to prevent establishment of such homes. We then show in Part I.C. that the FHAA was enacted to address just such community opposition, that Congress intended that reasonable accommodations must be made whenever and by whomever necessary to prevent community prejudice from denying housing to persons with disabilities, and that the District Court's opinion should accordingly be upheld.

Finally, in Part II, we show that the City misunderstands the nature of the reasonable accommodation requirement by confusing the equal treatment required by § 3604(f)(1) and (2) with the additional reasonable accommodations mandated by § 3604(f)(3)(B) in order to remove obstacles to equal opportunity to housing. While the concepts of intentional discrimination and disparate impact are integral to a claim of unequal treatment in violation of § 3604(f)(1) or (2),

they have no place in a claim under § 3604(f)(3)(B) of failure to make a reasonable accommodation.[13/]

I. THE DISTRICT COURT CORRECTLY HELD THAT THE REQUESTED ACCOMMODATION IS "NECESSARY" WITHIN THE MEANING OF § 3604(f)(3)(B) OF THE FAIR HOUSING AMENDMENTS ACT

A. The FHAA Mandates That Reasonable Accommodations be Made to Certain Zoning Practices

The Fair Housing Amendments Act was enacted in 1988 to extend the Fair Housing Act's anti-discrimination mandates to protect persons with disabilities, and contains broad prohibitions against discrimination on the basis of handicap in the provision of housing. It 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).

"[D]iscrimination" under the FHAA is also independently 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[s] [with disabilities] equal opportunity to use and enjoy a dwelling." Id. at § 3604(f)(3)(B).

13/ The City does not argue that the plaintiffs are not handicapped within the meaning of the FHAA, or that the requested accommodation is not reasonable, or that the City is not being asked to make an accommodation in rules, policies, practices, or services, or that Project H.O.M.E. could commence renovation without the accommodation. Nor does the City now argue that the federal courts should abstain from the case pending resolution of the state court proceedings. It thus has effectively conceded that all other elements of the FHAA have been satisfied.

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.

The FHAA's prohibitions against discrimination, including its reasonable accommodation mandate, were meant to reach zoning practices, which Congress knew often discriminate against persons with disabilities. As the House Report accompanying the bill that became law explained:

> "[The prohibitions against discrimination against the handicapped] apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. * * *
>
> "The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices." H.R. Rep. No. 100-711, 100th Cong., 2d Sess. at 24 (1988) ("H. Rep. 100-711"), reprinted in 1988 U.S.C.C.A.N. 2173, 2185 (emphasis added).

Congress also made it abundantly clear that the reasonable accommodation mandate extends to facially neutral zoning codes and practices. As explained by Congress:

> "Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner that discriminates against people with disabilities. . . . These and similar practices would be prohibited." Id.

Congress incorporated the reasonable accommodation concept from regulations and case law dealing with discrimination on the basis of handicap under § 504 of the Rehabilitation Act. H. Rep. 100-711 at 25. The reasonable accommodation requirement imposes affirmative duties to accommodate the needs of persons with disabilities, and requires that "changes be made to . . . traditional rules or practices if necessary to permit a person with handicaps an equal

opportunity to use and enjoy a dwelling." H. Rep. 100-711 at 25.[14/] As originally articulated in cases under § 504 of the Rehabilitation Act[15/] and subsequently reiterated in cases under the FHAA,[16/] 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. Numerous courts interpreting the reasonable accommodation requirement under the FHAA have ruled that municipalities must change, waive or make exceptions to their zoning ordinances and other land use regulations and practices.[17/]

14/ See, e.g., Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1186 (E.D. N.Y. 1993) (under reasonable accommodation requirement, "municipalities must change, waive or make exceptions in their zoning rules" to provide persons with disabilities equal opportunity to housing); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992) (making a 'reasonable accommodation' means "changing some rule that is generally applicable to everyone so as to make its burden less onerous on the handicapped individual"); Horizon House Developmental Servs., Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 699-700 (E.D. Pa. 1992), aff'd mem., 995 F.2d 217 (3d Cir. 1993) (under the reasonable accommodations provision, affirmative steps are required to change rules or practices if necessary to give a person with a disability an opportunity to live in the community); Stewart B. McKinney Found., Inc. v. Town Plan and Zoning Comm'n, 790 F. Supp. 1197, 1221 (D. Conn. 1992) (same).

15/ Alexander v. Choate, 469 U.S. 287, 299-301 (1985); Southeastern Community College v. Davis, 442 U.S. 397, 405-10, 413 (1979); Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1384-85 (3d Cir. 1991); Doherty v. Southern College of Optometry, 862 F.2d 570, 575 (6th Cir. 1988); Strathie v. Department of Transp., 716 F.2d 227, 230-31 (3d Cir. 1983); Majors v. Housing Auth. of DeKalb, 652 F.2d 454, 457 (5th Cir. 1981).

16/ Town of Babylon, 819 F. Supp. at 1186; Township of Cherry Hill, 799 F. Supp. at 461; Parish of Jefferson v. Allied Health Care, Inc., Nos. 91-1199, 91-1200, 91-3959, 1992 U.S. Dist. LEXIS 9124, at *13-*19 (E.D. La. June 10, 1992); United States v. Village of Marshall, 787 F. Supp. 872, 878 (W.D. Wis. 1991); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1344-45 (D.N.J. 1991); United States v. Commonwealth of Puerto Rico, 764 F. Supp. 220, 224 (D.P.R. 1991).

17/ See, e.g., Town of Babylon, 819 F. Supp. at 1185-86; Township of Cherry Hill, 799 F. Supp. at 461-63; Horizon House, 804 F. Supp. at 699-700; Easter Seal Soc'y v. Township of North Bergen, 798 F. Supp. 228, 234 (D.N.J. 1992); McKinney Found., 790 F. Supp. at 1221-22; Parish of Jefferson, 1992 U.S. Dist. LEXIS 9124, at *13-*21; Village of Marshall, 787 F. Supp.

In the case at hand, the District Court held that "[b]ecause Project H.O.M.E. will be unable to go forward with its plans to renovate and use 1515-1523 Fairmount without its requested accommodation . . . such an accommodation is 'necessary' within the meaning of § 3604(f)(3)(B)." Opinion at 14. For good reason, the City of Philadelphia does not seem to dispute that, given the pending state court litigation for which no resolution is imminent, the requested accommodation is practically necessary to enable funding to be released and Project H.O.M.E. to proceed with renovation. Instead, the City contends that because this necessity has supposedly been generated by factors outside of its control -- Project H.O.M.E.'s choice to rely on state funding, the PHFA's legal opinion requirement, and state court challenges by community groups to the legality of Project H.O.M.E.'s zoning permit -- the requested accommodation is not legally necessary under the FHAA. We now show that the District Court rightly rejected that contention, for both the City's factual predicate and its legal analysis are incorrect.

B. Non-Profit Providers of Housing for Persons with Disabilities Need Public Funding, and an Opinion Letter is a Routine Prerequisite to Release of Funds

The City contends that Project H.O.M.E.'s inability to proceed with development of the Fairmount Avenue properties is self-inflicted because it voluntarily "chose" to rely on public funding from a lender that requires an opinion of counsel to the effect that no potentially frustrating litigation is pending. Opening Brief at 16. This contention is inconsistent with, and ignores, the practical realities of financing of group homes for persons with handicaps. Most non-profit housing providers such as Project H.O.M.E. must rely on public funding. It is not a matter of choice. Moreover, even if Project H.O.M.E. could obtain a standard bank loan, it

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at 876-79; City of Plainfield, 769 F. Supp. at 1344-45; Puerto Rico, 764 F. Supp. at 224.

would make no difference, for both public and private lenders routinely (and legitimately) require opinion letters regarding zoning and the absence of litigation to ensure that funds dedicated to a construction project will promptly be put to their intended use. If the City is permitted to lay the blame on Project H.O.M.E.'s doorstep, while refusing to make reasonable accommodations that are necessary and within its power, strategic litigation fueled by even a single opponent will always be able to block housing projects that Congress meant to foster when it passed the FHAA.

1. Non-Profit Organizations Such as Project H.O.M.E. Require Public Financing to Provide Housing to Persons with Disabilities

Congress has recognized that non-profit organizations such as Project H.O.M.E. which develop housing for persons with disabilities require public funding in order to fulfill their mission. "The resources of communities, non-profit groups and charitable institutions are stretched to the breaking point as they attempt to provide basic shelter and essential services for the homeless." H.R. Rep. No. 100-10(I), 100th Cong., 1st Sess. 17 (1987), reprinted in 1987 U.S.C.C.A.N. 362 (consideration of the McKinney Homeless Assistance Act). Congress has accordingly declared that "[t]he objective of national housing policy shall be to reaffirm the long-established national commitment to decent, safe, and sanitary housing for every American by strengthening a nationwide partnership of public and private institutions," National Affordable Housing Act, 42 U.S.C. § 12702,[18/] and has consequently created a number of

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18/ In considering the National Affordable Housing Act, which established supportive housing programs for the elderly, persons with disabilities, and the homeless, Congress stated:

> "The overriding objective [of national housing policy] is to strengthen a nationwide housing investment partnership of public and private institutions . . . [F]rom now on, the federal government must operate as one among a number of important partners in the effort to make housing more affordable. Other partners must include not only States and local governments . . . but also private

programs to provide funding, either directly or through public housing agencies, to non-profit organizations for the development of housing for persons with disabilities.

Thus, the Supportive Housing Program provides grants to public housing authorities and private non-profit organizations, among others, to defray the cost of acquiring and/or rehabilitating existing buildings to house and provide supportive services to homeless persons and homeless persons with disabilities, and makes direct payments to fund a portion of the annual operating costs for such programs. Subtitle C, Title IV of the McKinney Homeless Assistance Act, 42 U.S.C. § 11381, et seq.[19/] Similarly, the Supportive Housing for Persons with Disabilities program makes capital advances to non-profit sponsors to finance development of rental housing with supportive services for the disabled. National Affordable Housing Act, 42 U.S.C. § 8013.[20/] And the Supportive Housing for the Elderly program makes capital advances to non-profit sponsors to finance development of rental housing with supportive

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industry and nonprofit organizations, whose resources and skills must also be mobilized more effectively." Sen. Rep. No. 101-36, 101st Cong., 2d Sess. 40 (1990), reprinted in 1990 U.S.C.C.A.N. 5763, 5802 (report accompanying the National Affordable Housing Act).

19/ The Supportive Housing Program is administered by HUD in accordance with regulations set forth at 24 C.F.R. Part 583. The McKinney Act originally established the Supportive Housing Demonstration Program, which had two separate components -- Transitional Housing (24 C.F.R. Part 577) and Permanent Housing for Handicapped Homeless Persons (24 C.F.R. Part 578). The transitional housing component provided grants to public and private nonprofit entities, while the permanent housing component provided grants to states on behalf of private nonprofit organizations, among others. Congress has amended the McKinney Act to combine the two demonstration programs into one permanent program under which nonprofit organizations may apply directly for grants for both transitional and permanent housing.

20/ Capital advances under this program are interest-free and need not be repaid as long as the housing remains available for at least 40 years for very low-income persons with disabilities. This program is administered by HUD in accordance with regulations set forth at 24 C.F.R. Part 890.

services for the elderly. Housing Act of 1959, 12 U.S.C. § 1701q, as amended by § 801 of the National Affordable Housing Act.[21/]

Congress has also utilized its control over federal funds to require states to provide financial support for group homes for recovering addicts and alcoholics. Under the Anti-Drug Abuse Act of 1988, 42 U.S.C. § 300x-25 (1992), states wishing to receive federal block grant funds for alcohol and drug abuse and mental health services are required to establish a revolving fund of at least $100,000 to make loans to help establish group homes for six or more individuals recovering from alcohol or drug abuse.[22/]

The low-income housing tax credit provides another major source of federal funding for housing for persons with disabilities. 26 U.S.C. § 42. The federal government authorizes each state to allocate a certain volume of low-income housing tax credits to eligible projects within its boundaries. The value of the credits allocated to a given project is based on the project's cost and the extent to which the project is used as low-income housing.[23/] The owners of the

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21/ Because the elderly are often "handicapped" within the meaning of the FHAA, see, e.g., Puerto Rico, 764 F. Supp. at 220, the benefits of the Supportive Housing for the Elderly program often go to persons with disabilities. Capital advances made under the Supportive Housing for the Elderly program are interest-free and do not have to be repaid as long as the housing remains available for at least 40 years for very low-income elderly persons. This program is administered by HUD in accordance with regulations set forth at 24 C.F.R. Part 889. The supportive housing programs for the elderly and persons with disabilities replaced an earlier program of direct loans in support of housing for the elderly and handicapped under § 202 of the Housing Act of 1959.

22/ The requirements for states establishing revolving loan funds pursuant to the Anti-Drug Abuse Act are set forth at 45 C.F.R. § 96.129 (interim final regulation), 58 Fed. Reg. 17062, 17076-77 (1993).

23/ 26 U.S.C. §§ 42(c),(d).

residential rental property used for low-income housing to which such credits have been allocated claim the credit over a ten-year period.[24/]

Tax-exempt organizations such as Project H.O.M.E. use low-income housing tax credits to obtain private investment in a housing project. Typically a limited partnership becomes the formal owner of the low-income housing. The general partner is the non-profit organization, and the limited partners are the for-profit investors whose capital contributions are made in exchange for the low-income housing tax credits.[25/] The availability of low-income housing tax credits is dependent, however, upon the viability of the project to which they are allocated. Such credits may not be used until the project is "placed in service," 26 U.S.C. § 42(f)(1), which occurs on the date the building is "ready and available for its specifically assigned function, i.e., the date on which the first unit in the building is certified as being suitable for occupancy in accordance with state or local law," I.R.S. Notice 88-116, 1988-2 C.B. 449, 450. Thus, when community opposition prevents a non-profit organization such as Project H.O.M.E. from placing a housing project "in service," it effectively blocks that organization's access to the private investment generated by low-income housing tax credits.

Finally, Congress has also established a number of programs that provide rental assistance to organizations such as Project H.O.M.E. once their housing programs are operational. Funding from two of these programs -- HUD's Section 8 Moderate Rehabilitation

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24/ 26 U.S.C. § 42(f).

25/ See Celia Roady, Low Income Housing Organizations: Adapting the Rules of the 70's to the Needs of the 90's, 7 Exempt Organization Tax Review 597, 597 (1993). The low-income housing tax credits allocated to the Fairmount Avenue project would be Project H.O.M.E.'s biggest single source of funding for that project. If Project H.O.M.E. could supply the opinion letter required for release of the PHFA funding, the for-profit investors in the limited partnership that has been organized to own the project and receive the tax credits would contribute $1,910,650 in net syndication proceeds. See Declaration of Mark Levin, J.A. at 172.

Single Room Occupancy ("SRO") Program for Homeless Individuals, and its Shelter Plus Care program -- make the loan portion of Project H.O.M.E.'s funding affordable. Opinion at 4-5; see also Levin Declaration, J.A. at 172.[26/]

As we shall see, many of these federal programs require, as a condition to funding, opinion letters similar to the one required in this case.

2. Opinion Letters and Borrower Representations as to Zoning Compliance and Absence of Litigation are Standard Requirements for Both Public and Private Construction Financing

The PHFA's opinion letter requirement is routine. Both public and private construction lenders regularly require opinions of counsel and borrower representations that the project to be funded complies with zoning laws and/or is not under a cloud of threatened or pending litigation. The requirement is both obvious and justified: it ensures, to the extent possible, that neither zoning disputes nor litigation will interfere with prompt use of the funds for their intended purpose, efficient completion of the project, and, if the funds take the form of a loan, timely repayment.

26/ The Section 8 Moderate Rehabilitation SRO Program, 24 C.F.R. § 882, Part H, provides funding to state public housing authorities, which, in their applications to HUD, identify the sponsors of proposed projects, specific structures to be rehabilitated, prospective sources of financing, and a plan for providing supportive services to the intended building residents. The public housing agencies in turn make Section 8 rental assistance payments to participating project sponsors on behalf of the homeless persons who rent the rehabilitated SRO buildings. The Shelter Plus Care program, 24 C.F.R. Part 582, provides grants to states and units of local government (and Indian tribes) for rental assistance in combination with support services to homeless persons with disabilities. The Shelter Plus Care programs provide a combination of tenant- and program-based rental assistance.

(a) Federal Housing Programs. To help guarantee efficient use of scarce public resources, a number of the federal programs discussed above require, as a prerequisite to funding, that a borrower or grantee provide an opinion of counsel (or some other form of assurance) as to compliance with zoning laws. Before HUD will make a capital advance under the Supportive Housing for Persons with Disabilities program, for example, a project owner must provide an opinion letter "as to the . . . building permit, and compliance with zoning laws and requirements". 24 C.F.R. § 890.415(e). The same opinion letter is a prerequisite to issuance of a capital advance under the Supportive Housing for the Elderly program. 24 C.F.R. § 889.415(e).[27/]

The Supportive Housing Program requires similar assurances regarding zoning.[28/] Applicants who are conditionally selected to receive funding under the Supportive Housing Program are required to submit either (1) a written statement from the local government unit where the housing will be located that the proposed use is permissible under applicable zoning laws, or (2) a copy of the zoning ordinance, the zoning map, and the definition of the designated use, or (3) if the proposed site is zoned for a different use, evidence that the zoning will be changed within one year following initial notification of an award or proof that a lawsuit or HUD complaint has been filed, or a commitment that it will be filed within three months

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27/ The predecessor program to Supportive Housing for the Elderly also made an opinion letter regarding zoning compliance a prerequisite to issuance of a loan. See 24 C.F.R. §§ 885.415(e), 885.815(e).

28/ As discussed above, this Program supersedes the Supportive Housing Demonstration Program. See supra note 19.

after initial notification of an award, challenging the zoning requirement's legality under the Fair Housing Act.[29/]

(b) Private Lenders. Opinion letters and borrower representations regarding compliance with zoning laws and the absence of pending or threatened litigation are also common prerequisites to private real estate and construction loans. That is because

> "failure to obtain necessary zoning . . . permits or approvals may delay or prevent the completion of the project. Even if these entitlements are eventually obtained, the increased interest expense and other costs associated with the delay may cause the project to fail. . . . For these reasons, zoning . . . opinions are often an essential part of the lender's underwriting decision with respect to the loan."[30/]

Moreover, if a project ultimately goes uncompleted due to noncompliance with zoning requirements, it will never generate the revenue necessary to repay the loan. Banks and other private lenders therefore regularly require opinions of counsel or other representations

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29/ United States Department of Housing and Urban Development, Application for the Supportive Housing Program (1993), Exhibit 17 (Site Control and Zoning). Both the transitional and permanent components of the Supportive Housing Demonstration Program similarly required, as part of a grant application, either (1) a written statement of zoning compliance from the local government unit where the housing would be located, or (2) other evidence that the proposed use of the site was permissible under local zoning laws, or (3) a statement describing the proposed actions necessary to make the use permissible, "with evidence that there is a reasonable basis to believe that the proposed zoning actions will be completed successfully and within four months following submission of the application." 24 C.F.R. §§ 577.210(b)(10), 578.210(b)(13). Application requirements for the consolidated Supportive Housing Program are now set forth in HUD's application package rather than in regulations governing the program. 24 C.F.R. § 583.210.

30/ Joint Committee of the Real Property Law Section, State Bar of California, and the Real Property Section, Los Angeles County Bar Association [hereinafter "Joint Committee"], Legal Opinions in California Real Estate Transactions, 42 Bus. Law. 1139, 1193 (1987). The Joint Committee suggests that an opinion letter as to zoning compliance should include a statement not only that the appropriate governmental body has approved the zoning application, but also that the time for appeal of that decision has expired or, if it has not, a discussion of whether there appear to be any significant defects in the permits or in the approval procedures followed by the issuing authority that would create substantial questions as to validity or effectiveness. Id. at 1196-97.

regarding compliance with zoning laws,[31] and assurances as to the absence of litigation regarding a planned construction project.[32] Indeed the required opinion letter may often be

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31/ See Carl J. Seneker II, Drafting Environmental and Land Use Opinion Letters, Practical Lawyer, September 1988, at 39 (land use opinions are a common requirement in development transactions); Special Joint Committee of the Maryland State Bar Association, Inc., and the Bar Association of Baltimore City [hereinafter "Special Joint Committee"], Special Joint Committee on Lawyers' Opinions in Commercial Transactions, 45 Bus. Law. 705, 745 (1990) (in commercial transactions involving real property, lender may want assurance that property and improvements to be built will comply with applicable zoning laws or regulations); Alvin L. Arnold, Construction and Development Financing ¶ 3.02[4] at 3-8 (2d ed. 1991) (failure to comply with zoning and building requirements during construction can result in denial of occupancy certificate or issuance only at additional cost); Thomas K. Zebrowski, Construction Loan Agreement, in 1 Construction Industry Forms § 5.4 at 202 (Robert F. Cushman, George L. Blick, eds. 1988) (sample construction loan agreement requires counsel for borrower to opine that "all public approvals, including zoning . . . necessary for construction of the Project and for its intended use are validly issued and outstanding, with appeal periods expired with no appeal filed") (emphasis added); id. at § 5.04 at 199 (same agreement requires borrower to warrant and represent that all permits and zoning approvals have been obtained "and will remain in full force and effect") (emphasis added); I Jack Kusnet and Justine T. Antopol, Modern Banking Forms at 3-50 (3d ed. 1981) (sample commitment letter for construction mortgage requires that "proposed use shall comply with the zoning and building requirements. All zoning amendments and variances shall have been procured duly . . . ."); id. at Supp. 3-69 (sample construction loan agreement requires borrower to furnish evidence satisfactory to lender that all approvals necessary for construction have been obtained and remain in force and effect, suitably zoned for intended use); James A. Douglas & Terry D. Rice, Basic Banking Forms § 21 at 3-20 (1984) (sample commitment letter for construction mortgage loan provides that "[p]roposed use shall comply with the zoning and building requirements"); Arnold, Construction and Development Financing at 3-91 (sample construction loan commitment provides that "Borrower will furnish evidence . . . that the project is in compliance with all applicable zoning and other laws and regulations and that it may be lawfully occupied and used for the purposes for which the same has been constructed"); id. at 4-219-220 (sample construction loan agreement requires written opinion of borrower's counsel that building will comply with all applicable zoning laws and ordinances).

32/ See Joint Committee, Legal Opinions in California Real Estate Transactions, 42 Bus. Law. at 1199 (noting that, if successful, a suit by a citizen's group challenging the validity of a development plan could affect the issuance of permits); Arnold, Construction and Development Financing at 4-220 (sample construction loan agreement requires borrower's counsel to opine that there are no litigation or proceedings pending or threatened that could or might materially affect borrower's agreements with contractors); id. at 4-211 (requiring borrower to warrant and represent the same); Linda A. Striefsky, Acquisition, Development and Construction Loan Commitment Letters, in Construction Renovation Formbook at 268 (Robert F. Cushman, John W. Dinicola, eds. 1991) (sample construction loan commitment letter requires borrower to represent and warrant that no litigation or proceedings are pending or threatened that could

required to opine broadly about litigation regarding the borrower or the property generally, as well as about litigation concerning the project.[33/]

3. No Responsible Attorney Would Issue the Requested Opinion Letter Under the Present Circumstances

The PHFA has asked Project H.O.M.E.'s counsel to opine that "'there is no legal action pending or threatened, or proposed changes in zoning, which would prevent the construction from being commenced or completed in accordance with the plans and specifications and existing zoning laws and requirements.'" Levin Declaration, J.A. at 172. The purpose of such a letter, as articulated by the PHFA's Chief Counsel, is "to indemnify PHFA if funds were given to Project H.O.M.E. but the project was subsequently determined to be illegal."[34/] By giving the requested opinion, therefore, Project H.O.M.E.'s counsel would in effect become a guarantor of the ultimate outcome of the state litigation -- litigation in which rulings have to-date gone both for and against Project H.O.M.E.

The City contends that the state court litigation challenging Project H.O.M.E.'s permit is "frivolous" and that "the only obstacle" to Project H.O.M.E. is the supposedly faint-hearted

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materially affect the operations or prospects of borrower or the project); I Kusnet and Antopol, Modern Banking Forms at 3-47 (sample permanent mortgage loan commitment letter provides that lender's counsel may require an opinion from borrower's counsel that "there is no threatened or pending litigation that might affect the loan or the property").

33/ Such representations as to the absence of litigation against the borrower or its properties are standard prerequisites to the closing of any commercial transaction. See Special Joint Committee, Lawyers' Opinions in Commercial Transactions, 45 Bus. Law. at 745; 1989 Report of the Committee on Corporations of the Business Law Section of the State Bar of California Regarding Legal Opinions in Business Transactions, in 1 Business Opinions at 63, 115 (PLI Corporate Law Practice Course Handbook Series No. 674, 1990); Scott FitzGibbon and Donald W. Glazer, Opinions as to the Absence of Litigation and Claims, in 1 Business Opinions at 435, 437-38 (PLI Corporate Law Practice Course Handbook Series No. 674, 1990).

34/ Joint letter from counsel for parties the United States and the City of Philadelphia to Judge Pollak, J.A. at 245.

refusal of its own counsel to issue the required opinion. Opening Brief at 16. But no responsible attorney could possibly issue the opinion letter at this time. Whether frivolous or not, the fact remains that the community opponents of Project H.O.M.E. have been litigating Project H.O.M.E.'s right to a permit continuously since soon after the City first issued Project H.O.M.E. a permit on August 10, 1990. Opening Brief at 5-6. Their litigation is a direct challenge to the viability of the project to be financed by the PHFA. It would be wholly unreasonable, and indeed professionally irresponsible, for Project H.O.M.E.'s counsel to opine under these circumstances that "there is no legal action pending or threatened, or proposed changes in zoning, which would prevent the construction from being commenced or completed in accordance with the plans and specifications and existing zoning laws and requirements."

We have seen so far that non-profit housing providers for persons with disabilities regularly receive their funding from public agencies, and that those agencies, as well as private lenders, regularly condition their release of funds upon assurances from the borrower or grantee that applicable zoning requirements have been satisfied and that no litigation threatening to derail or defeat the project is pending. In short, as matter of practical reality, we may safely assume that Project H.O.M.E. had no access to lenders who would not require an opinion letter, and hence could not have side-stepped the impediment to its progress created by the community-sponsored litigation which has now gone on for several years. We have also seen that Congress specifically targeted zoning decisions as devices of discrimination against disabled persons and declared as a prohibited act a municipality's refusal to make a reasonable accommodation in a zoning ordinance or practice so as to guarantee equal access to housing. Finally, we have seen that the City does not dispute that allowing Project H.O.M.E. to use its side yard to satisfy the zoning ordinance's rear yard requirement would be a reasonable accommodation because it would not compromise any of the purposes of the rear yard

requirement. In these circumstances, as we now demonstrate, the District Court correctly ruled that the requested accommodation to the City's zoning practices is "necessary" within the meaning of § 3604(f)(3)(B) of the FHAA.

C. The FHAA Requires the City to Make the Requested Accommodation

The City's position, if we understand it correctly, is that Project H.O.M.E. is in the ludicrous position of being entitled, regardless of the outcome of the state litigation, to a permit enabling it to renovate and occupy the Fairmount Avenue properties, but of being unable to obtain such a permit at the present time. The City asserts that Project H.O.M.E. is entitled to a permit under the zoning ordinance as it is written. The City also all but concedes that, if it had originally denied Project H.O.M.E.'s request for a permit because of non-compliance with the Zoning Code, it would have been required, as a "necessary" reasonable accommodation, to grant a permit in which it deemed 1515 Fairmount's side yard to satisfy the Zoning Code's rear yard requirement. It will similarly be required to grant such a permit as a "necessary" reasonable accommodation if the Pennsylvania Supreme Court orders revocation of Project H.O.M.E.'s permit because of noncompliance with the Zoning Code. And the City does not dispute Project H.O.M.E.'s practical need, due to the pending state court litigation brought by community opponents of Project H.O.M.E., for the requested accommodation if it is to proceed promptly with renovation of the Fairmount Avenue properties. Yet the City insists that Project H.O.M.E. must endure the delay, cost (including the potentially devastating loss of funding), and stigma generated by the "frivolous" but time-consuming state court litigation because, in the City's view,

the FHAA does not require it to grant Project H.O.M.E. the requested accommodation now in order to obviate all such litigation and its concomitant denial of housing.[35/]

1. The District Court Correctly Interpreted the Plain Language of 42 U.S.C. § 3604(f)(3)(B)

The language of the statute is the starting point in determining whether the requested accommodation "may be necessary" under § 3604(f)(3)(B). Southeastern Community College, 442 U.S. at 405; Village of Marshall, 787 F. Supp. at 876. On its face, the language of § 3604(f)(3)(B)'s prohibition -- "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling" -- encompasses the situation at hand. The requested accommodation is plainly "necessary," as that word is used in its ordinary sense, to Project H.O.M.E.'s ability to proceed with renovation. Without the requested accommodation, Project H.O.M.E. will be forced to endure, for an indeterminable period, zoning litigation brought to block construction of the proposed facility, while with one simple step (one reasonable accommodation) the City can end what the City itself characterizes to be "frivolous" zoning challenges.

The City argues, however, that when impediments to housing arise from actions of third parties unrelated to the City, the FHAA does not require the City to make a reasonable accommodation.[36/] But that argument wrongly assumes that the statute requires an

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35/ Had the City first denied the permit and then granted one substituting the side yard for the rear yard as a reasonable accommodation, there would have been no litigation regarding the applicability of the zoning code's rear yard requirement to Project H.O.M.E. Under the City's analysis, Project H.O.M.E. is therefore in the absurd position of being worse off because the City originally granted the permit.

36/ The City also argues that providing the requested accommodation would "set a precedent fundamentally undermining the coherence of the entire Philadelphia zoning ordinance," Opening Brief at 14, and that it should not be required to "alter its zoning code" in

accommodation only when the obstacle to housing is created by the entity from whom the accommodation is requested. That is not what the statute says. Congress placed no limitations on who is required to make reasonable accommodations.[37/]

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) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982)).[38/] To read into the statute the limitation proffered by the City would be contrary to the well-accepted principle of statutory interpretation that courts should not, in the absence of evidence of legislative intent to the contrary, read into a statute exceptions or limitations that are not specifically set forth therein. See Andrus v. Glover Construction Co., 446 U.S. 608, 616-17 (1980). It would also be contrary to the Supreme Court's mandate -- followed by the District Court -- that the "broad and inclusive" language of the Fair Housing Act is to be given a "generous construction" in order to carry out a "'policy that Congress considered to be of the highest priority.'" Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209, 212, 211 (1972) (citation omitted); see also Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982); United

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these circumstances, id. at 18. These arguments misconstrue the reasonable accommodation requirement. As demonstrated by the accommodation requested in this case -- deeming the property's side yard to satisfy the Philadelphia Zoning Code's rear yard requirement -- a reasonable accommodation is a case by case waiver of zoning requirements, and requires absolutely no change in the code itself. Indeed, one of the explicit requirements for an accommodation to be "reasonable" is that it not undermine the purposes of the zoning program. By admitting that the side yard satisfies all of the purposes of the rear yard requirement, the City has in fact conceded that the requested accommodation would not undermine the Philadelphia Zoning Code.

37/ The FHAA does not require an entity to make reasonable accommodations only when such accommodations may be necessary "to obviate obstacles to housing created by such entity."

38/ See also United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989); Government of Virgin Islands v. Knight, 989 F.2d 619, 633 (3d Cir. 1993); Smith v. Fidelity Consumer Discount Co., 898 F.2d 907, 909-910 (3d Cir. 1989).

States v. Columbus Country Club, 915 F.2d 877, 883 (3d Cir. 1990); United States v. Gilbert, 813 F.2d 1523, 1526-27 (9th Cir. 1987); Easter Seal, 798 F. Supp. at 234 ("Courts have broadly interpreted the Act's clear prohibition on 'all practices which [make unavailable or deny] a dwelling on prohibited grounds.'") (citations omitted).

2. The Legislative History of the Reasonable Accommodation Requirement Further Supports the District Court's Ruling

The legislative history of and policy behind the FHAA directly support the District Court's ruling.[39/] In enacting § 3604(f)(3)(B), Congress articulated its clear intent that affirmative steps (whatever they might be so long as they are reasonable) must be taken (by whomever necessary) to guarantee persons with disabilities equal opportunity to housing: "This section would require that changes be made to . . . traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling." H. Rep. 100-711 at 25. It is just such an affirmative step that the City of Philadelphia is being asked to take. By deeming 1515 Fairmount Avenue's side yard to satisfy the Philadelphia Zoning Code's rear yard requirement and thus mooting the state court litigation, the City will remove all obstacles to issuance of the opinion letter required for release of the needed funding and commencement of renovation.

As demonstrated above, supra pp. 24-25, the impediment to initiation of construction on the Fairmount Avenue properties is the community opposition to Project H.O.M.E.'s proposed

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39/ Where the plain meaning of a statute is manifest, a court must give it effect unless the party offering a differing interpretation can demonstrate "a clear indication of a contrary legislative intent," Knight, 989 F.2d at 634 (emphasis added), or if such a literal reading "would thwart the obvious purposes" of the statute, Mansell v. Mansell, 490 U.S. 581, 592 (1989). See also Ron Pair Enterprises, 489 U.S. at 242; Smith, 898 F.2d at 910; Consumer Party v. Davis, 778 F.2d 140, 147 (3d Cir. 1985). The City does not -- and indeed cannot -- point to anything in the legislative history of the FHAA to support its erroneous interpretation of § 3604(f)(3)(B).

facility for people with disabilities -- an impediment explicitly recognized by Congress as being illegitimate and prohibited by the FHAA. In the words of Congress:

> "The Fair Housing Amendments Act . . . is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.
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> * * *
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> "All of these groups [of handicapped persons] have experienced discrimination because of prejudice and aversion -- because they make non-handicapped people uncomfortable. H.R. 1158 clearly prohibits the use of stereotypes and prejudice to deny critically needed housing to handicapped persons. The right to be free from housing discrimination is essential to the goal of independent living." H. Rep. 100-711 at 18.

As often recognized, "Congress intended this Act to put an end to all manner of discrimination in housing, whether it be subtle or blatant." Project B.A.S.I.C. v. City of Providence, No. CIV. A. 89-248P, 1990 WL 429846, at *4 (D.R.I. Apr. 25, 1990).

Whether community prejudice is embodied in a restrictive zoning ordinance or litigation against a group home is irrelevant -- both are aimed at denying housing to persons with disabilities and thus both are prohibited by the FHAA. Because the City has acted in furtherance of that prejudice by refusing to grant Project H.O.M.E. an accommodation it concedes to be reasonable, it too has violated the FHAA.

3. The District Court's Ruling is Consistent with Other Courts' Actions Under the FHAA to Eliminate the Effects of Community Opposition to Housing

Community prejudices leading to public hearings, variance proceedings, and litigation regarding proposed housing for persons with disabilities deny housing to persons with disabilities not only when they conclusively preclude such persons from obtaining housing, but also when

they delay or increase the cost of providing such housing.[40/] The unreasoned prejudices voiced in such proceedings further injure persons with disabilities by stigmatizing them.[41/] And the harm can be especially severe when the persons temporarily or permanently denied housing are recovering addicts or alcoholics who need the stability and support that group homes provide in order to continue their recovery and avoid relapse.[42/] Fortunately, persons with disabilities no

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40/ See, e.g., Potomac Group Home Corp. v. Montgomery County, Maryland, 823 F. Supp. 1285, 1298 (D. Md. 1993) ("hearings . . . consistently held because of public opposition to the group homes [for elderly disabled persons] and for the purpose of appeasing neighboring residents . . . cause[] great harm to plaintiffs because of resulting delays and burdensome costs"); McKinney Found., 790 F. Supp. at 1219-20 (requiring handicapped group to apply for special exception could be burdensome and expensive); Horizon House, 804 F. Supp. at 700 ("variance is a lengthy, costly and burdensome procedure"); Township of Cherry Hill, 799 F. Supp. at 464 (delay generated by application for a variance would cause plaintiffs to suffer irreparable harm); Easter Seal, 798 F. Supp. at 237 (prospective tenants of community residence for developmentally disabled recovering substance abusers suffer irreparable harm given the delay of their treatment due to township's refusal to issue construction permit); see also Project B.A.S.I.C. (city's moving of proposed homeless shelter in capitulation to racially motivated opposition to original siting caused delays in the opening of the shelter and resulted in the loss of grant money).

41/ See, e.g., Oxford House-C v. City of St. Louis, No. 91-2402-C(7), 1994 U.S. Dist. LEXIS 1182, at *74 (E.D. Mo. Jan. 28, 1994) (variance procedures requiring public hearing, public advertisement of the hearing and the posting of conspicuous notices "stigmatize[] recovering alcoholics and addicts, [and] perpetuate[] their self-contempt"); Potomac Group Home, 823 F. Supp. at 1297 (neighborhood notification process provoked petitions and letter writing campaigns in opposition to the proposed group homes that resulted in "stigma to [residents that] is not easily erased.").

42/ See, e.g., Sullivan v. City of Pittsburgh, 811 F.2d 171, 179 (3d Cir. 1987) ("without 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"); Easter Seal, 798 F. Supp. at 237 ("placement in community residences . . . is integral to the prospective residents' continuing treatment and recovery"); City of Plainfield, 769 F. Supp. at 1339-40 ("in addition to losing their residence, . . . plaintiffs would also lose the benefit of their therapeutic and supportive living environment, and may relapse"); Parish of Jefferson, 1992 U.S. Dist. LEXIS 9124, at *7 (availability of group homes in a community "'is an essential ingredient of normal living patterns for persons who are mentally [disabled]'") (quoting City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 438 n.6 (1985)); Township of Cherry Hill, 799 F. Supp. at 463 ("ability of recovering alcoholics and drug addicts to live in a supportive drug free environment in a quiet residential area is critical to their recovery).

longer must endure such injuries, for the FHAA plainly outlaws the discriminatory practices leading to them.

Courts have acted under the FHAA to eliminate the effects of community opposition to housing for the disabled at every stage of the zoning process and to ensure that community groups do not -- directly or indirectly -- deny housing to persons with disabilities. They have struck down requirements for public hearings on permit requests as violative of the FHAA.[43/] They have held that persons with disabilities denied permits under a zoning code are not required -- as persons with disabilities are -- to apply for a variance or special use permit.[44/] And when state courts have enforced municipalities' discriminatory zoning decisions or

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43/ See, e.g., Potomac Group Home, 823 F. Supp. at 1297-99 (public program review board hearing process has discriminatory impact on home's future elderly disabled residents in violation of FHAA); see also Ardmore, Inc. v. City of Akron, No. 90-CV-1083, 1990 WL 385236, at *5 (N.D. Ohio Aug. 2, 1990) ("Congress strongly and clearly articulated its intent to protect handicapped individuals' right to procure adequate housing in the community without being singled out for discriminatory public scrutiny").

44/ See, e.g., Township of Cherry Hill, 799 F. Supp. at 465 (preliminarily enjoining Township from enforcing against a group home for recovering addicts and alcoholics and its residents a zoning ordinance requiring application to zoning board for a variance or an interpretation and enjoining city from interfering with plaintiffs' occupancy of house); McKinney Found., 790 F. Supp. at 1222 (preliminarily enjoining town zoning commission from requiring a special exception in connection with use of residence by nonprofit group providing shelter and assistance to HIV-infected persons or from taking any zoning enforcement action against plaintiff or its future tenants for failure to obtain a special exception); City of St. Louis, 1994 U.S. Dist. LEXIS 1182, at *64-*80 (finding that city's requirement of compliance with variance procedures had disparate impact on homes for recovering alcoholics and drug addicts and violated reasonable accommodation requirement in violation of FHAA, and permanently enjoining City from enforcing zoning codes against homes); Ardmore, 1990 WL 385236, at *4-*6 (preliminarily enjoining city from enforcing conditional use permit ordinance against facility for persons with handicaps); Horizon House, 804 F. Supp. at 695-97 (requiring provider of residential services to persons with mental retardation to obtain a variance from ordinance requiring distance of 1,000 feet between group homes is no accommodation at all and violates reasonable accommodation requirement).

supported community groups' discriminatory attitudes, federal courts have enjoined their orders.[45/]

This case simply presents the newest mechanism by which community prejudice denies housing to persons with disabilities. Here the community prejudice has taken the form of litigation and the City, despite its protestations of support for Project H.O.M.E.'s proposal, has refused to make a reasonable accommodation that would enable Project H.O.M.E. to proceed with its housing plans. The "necessity" for a reasonable accommodation is once again generated by community opposition to housing for persons with disabilities, and is thus a necessity long recognized by Congress and the courts as one requiring a reasonable accommodation. Persons with disabilities should no more be required to endure this sort of litigation than to endure a public hearing, variance proceeding, or court order based on community prejudice, as all deprive them of housing. To rule otherwise would be to allow community hostility to persons with disabilities to win the day.[46/]

45/ See, e.g., City of Plainfield, 769 F. Supp. at 1346 (preliminary injunction modifying state court's temporary restraints on number of handicapped residents in group home by increasing number from six to nine pending ruling under FHAA); Puerto Rico, 764 F. Supp. at 224-27 (preliminarily enjoining state court order to close home during pendency of federal court case under FHAA).

Although the City has not argued that community members have a right to their day in court, these cases demonstrate that no such right exists when it entails discrimination against the handicapped. This Court will be doing nothing new by using the FHAA to forestall zoning litigation.

46/ The City raises the specter of lenders and developers entering into loan agreements for projects that violate the Zoning Code, and then forcing the City to grant an accommodation that waives or alters those portions of the Code that conflict with the loan agreement by alleging that persons with disabilities are among the project's prospective tenants. Opening Brief pp. 19-20. Aside from this being a far-fetched scenario, it is one not supported by the law. An accommodation would be required only if the project could demonstrate (a mere allegation would be insufficient) that it would house persons with disabilities and that the requested accommodation would be both "reasonable" and "necessary to afford such persons equal opportunity to use and enjoy a dwelling." If these elements could be demonstrated, however,

In short, the District Court's interpretation "is entirely consistent with Congress' goal of eliminating housing discrimination based upon stereotypes, prejudice, or irrational fear of those who are 'handicapped.'" Roe v. Sugar River Mills Associates, 820 F. Supp. 636, 640 (D.N.H. 1993).[47/] The interpretation advocated by the City, on the other hand, would undermine the policy behind the FHAA. Reversing the District Court and adopting the City's interpretation would be a vote for community prejudice and against equal opportunity to housing for persons with disabilities. It would create a loophole in the FHAA that would enable a municipality to grant a permit knowing that the community will litigate the grant for years, and then to justify its refusal to waive the requirements of whatever provision is at the core of the litigation. Indeed, a ruling in favor of the City might well encourage communities to bring such litigation and possibly defeat altogether the opening of group homes because the costs, delay, and potential loss of funding associated with such litigation may be too much for the group home sponsors to bear. As recognized by the Common Pleas Court in the state court litigation against Project H.O.M.E., "[a]s a matter of fact, many appeals of this type are taken by community organizations for no reason other than to hijack -- to blackmail, blackmail owners into making concessions for one reason or another."[48/]

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the FHAA would of course mandate a reasonable accommodation as that is the purpose of the FHAA's reasonable accommodation requirement.

47/ The district court's ruling is consistent with traditional canons of statutory construction requiring that a statute be interpreted in a manner that "effectuates rather than frustrates the major purpose of the legislative draftsmen," and avoids "an unreasonable result 'plainly at variance with the policy of the legislation as a whole.'" Shapiro v. United States, 335 U.S. 1, 31 (1948) (citation omitted); see also In re Borba, 736 F.2d 1317, 1320 (9th Cir. 1984) (statute should be interpreted to effect legislative purpose and not "to render it partially or entirely void").

48/ Transcript of Sept. 14, 1992 Hearing, J.A. at 251-252. Other cities have tried unsuccessfully to use an argument similar to that made by Philadelphia to avoid liability in intentional discrimination cases under the Fair Housing Act. Courts have rejected the argument

II. THE DISTRICT COURT CORRECTLY HELD THAT PROOF OF THE FAILURE TO MAKE A REASONABLE ACCOMMODATION DOES NOT REQUIRE PROOF OF DISPARATE IMPACT

The District Court properly held that proof of a violation of the FHAA's reasonable accommodation requirement, 42 U.S.C. § 3604(f)(3)(B), does not require proof of disparate impact. Opinion at 15. The City's argument to the contrary stems from a fundamental misunderstanding of the nature of the reasonable accommodation requirement.

Had plaintiffs alleged discrimination in violation of 42 U.S.C. §§ 3604(f)(1) or (2), which make it unlawful "to discriminate" in the provision of housing "because of a handicap," they unquestionably would have had to prove either that the City acted with discriminatory intent or that its actions had a discriminatory impact on individuals with disabilities as a class. Section 3604(f)(3)(B), however, goes beyond the mandate for equal treatment contained in §§ 3604(f)(1) and (2) by requiring further action in the form of "reasonable accommodations," when such accommodations may be necessary to afford persons with disabilities equal opportunity to use

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that a city is not liable for discriminating when it is simply responding to community sentiment which happens to be discriminatory. See, e.g., United States v. Borough of Audubon, 797 F. Supp. 353, 361 (D.N.J. 1991) ("Discriminatory intent may be established where animus towards a protected group is a significant factor in the community opposition to which the commissioners are responding."); Association of Relatives & Friends of Aids Patients (A.F.A.P.S.) v. Regulations & Permits Admin., 740 F. Supp. 95, 104 (D.P.R. 1990) ("if an official act is performed simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decisionmaker personally has no strong views on the matter"); Project B.A.S.I.C., 1990 WL 429846, at *6 ("Fair Housing Act . . . can cover situations in which the defendant's actions are not themselves racially motivated, but . . . are inspired by others whose motivations are not free from racial bias."). "[A] decisionmaker has a duty not to allow illegal prejudices of the majority to influence the decisionmaking process." A.F.A.P.S., 740 F. Supp. at 104. The City of Philadelphia has failed to live up to just that duty here. The City is ultimately deferring to community opposition by purporting to stand on the sidelines and refusing to make a reasonable accommodation.

and enjoy a dwelling.[49/] The conceptual underpinning of the reasonable accommodation requirement, which recognizes that in certain situations persons with disabilities may need added protection in order to have equal opportunities, thus differs fundamentally from the traditional concept of equal treatment that underlies theories of intentional discrimination and disparate impact.[50/]

Section 3604(f)(3)(B) establishes an independent definition of "discrimination" which, by its terms, is not limited to refusals to make reasonable accommodations "because of a handicap," and the District Court properly declined to imply such a restriction into the provision. See Marshall v. Western Union Tel. Co., 621 F.2d 1246, 1251 (3d Cir. 1980) (where Congress "has carefully employed a term in one place and excluded it in another, it should not be implied where excluded"). Congress enacted the reasonable accommodation provision as a "specific requirement[] to augment the general prohibitions under (f)(1) and (2)," H. Rep. 100-711 at 24 (emphasis added), and, as the District Court recognized, "to read § 3604(f)(3) as requiring a showing of disparate impact -- that is a showing sufficient to establish liability under

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49/ See Town of Babylon, 819 F. Supp. at 1186 n.11 (plaintiffs "correctly assert that as handicapped persons they are entitled to preferential treatment under § 3604(f)(3)(B)"); Parish of Jefferson, 1992 U.S. Dist. LEXIS 9124, at *19 (legislative history "acknowledges that because of their special needs, handicapped persons are often denied equal opportunities when they are treated like all other non-handicapped persons"); Township of Cherry Hill, 799 F. Supp. at 462 n.25 ("reasonable accommodation" means changing a rule of general application to make its burden "less onerous on the handicapped individual").

50/ The City argues that requiring a reasonable accommodation in this case, where the rear yard requirement applies equally to both handicapped and non-handicapped individuals, would convert the Fair Housing Act "from a mandate of equal opportunity into an affirmative action statute." Opening Brief at 22. This argument ignores the widely accepted distinction between the affirmative yet modest steps required to make a "reasonable accommodation" and the substantial, fundamental changes to an existing program or policy that are the hallmark of "affirmative action." See Alexander, 469 U.S. at 300; Southeastern Community College, 442 U.S. at 412-13; Freeman v. Cavazos, 939 F.2d 1527, 1529 (11th Cir. 1991).

§§ 3604(f)(1) and (2) -- would render § 3604(f)(3)(B) superfluous," Opinion at 17. Such an interpretation would violate the cardinal rule of statutory construction that one should "give[] effect 'to every clause and word of [a] statute.'" Negonsott, 113 S. Ct. at 1123 (quoting Moskal v. United States, 498 U.S. 103, 109-110 (1990)).

The City evidences its misunderstanding of the nature of the reasonable accommodation requirement when it attempts to support its interpretation by asserting that there is a "vast difference between saying that [the Plaintiffs] face an obstacle because of specific problems associated only with the particular property they seek to occupy, and saying that they face obstacles everywhere in the City because a City policy or ordinance impacts on them by virtue of their membership in a protected class." Opening Brief at 21. The City is indeed correct that there is such a distinction. What the City fails to recognize, however, is that the former situation is precisely what the reasonable accommodation provision is intended to address. The reasonable accommodation inquiry is by definition a case-by-case analysis specifically intended "to address individual needs and respond to individual circumstances." Horizon House, 804 F. Supp. at 699; see also Town of Babylon, 819 F. Supp. at 1186; Nathanson, 926 F.2d at 1385. Courts analyzing reasonable accommodation claims thus look not at the reasonableness of a given ordinance, rule, or practice or at its general effect on a protected class -- as they would with an intentional discrimination or disparate impact claim -- but at the reasonableness of a particular proposed accommodation.[51/] The reasonable accommodation Plaintiffs request --

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51/ See, e.g., Town of Babylon, 819 F. Supp. at 1180-81, 1186 (assessing reasonableness of requested accommodation to zoning rules to permit continued use of group home at 73 East Walnut Avenue in East Farmingdale, New York); Village of Marshall, 787 F. Supp. at 873, 878-79 (examining reasonableness of requested accommodation to zoning rules to enable establishment of group home at 410 Hubbell Street in Marshall, Wisconsin); City of St. Louis, 1994 U.S. Dist. LEXIS 1182, at *79, *80 (examining reasonableness of requested accommodation to permit continued use of group homes on Clayton Road and Westminster Avenue in St. Louis, Missouri); Parish of Jefferson, 1992 U.S. Dist. LEXIS 9124, at *15-*16

that the City deem 1515 Fairmount Avenue's side yard to satisfy the Philadelphia Zoning Code's rear yard requirement without impairing any of the Code's objectives -- is just such a limited, individual accommodation.[52/]

Courts interpreting § 3604(f) have expressly recognized that individuals with disabilities can establish a violation of the FHAA either

> "by proving the disparate impact of a practice or policy on a particular group . . . or by showing that the defendant failed to make reasonable accommodations in rules, policies, or practices so as to afford people with disabilities an equal opportunity to live in a dwelling."[53/]

Courts have thus found violations of the reasonable accommodation requirement either in the absence of proof of intentional discrimination or disparate impact, see, e.g., Village of Marshall, 787 F. Supp. at 878-79; Parish of Jefferson, 1992 U.S. Dist. LEXIS 9124, at *12-*21, or as an additional grounds for recovery independent of any showing of intentional discrimination or

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(assessing reasonableness of requested accommodation to permit continued use of group homes at 3705-07 Alton Street and 4530-4532 Argonne Street in Jefferson Parish).

52/ The City erroneously suggests that the reasonable accommodation provision of the FHAA would require that zoning provisions be "rewritten at the request [of] any person who is a member of a class protected under the Act." Opening Brief at 23. First, the reasonable accommodation requirement applies only with regard to persons with disabilities and does not apply to any other groups protected under the Fair Housing Act. Second, individuals with disabilities are not automatically entitled to a requested accommodation. They must prove that the accommodation may be necessary to afford them equal opportunity to use a dwelling. The accommodation, moreover, must be reasonable -- it cannot impose an undue financial or administrative burden, or undermine the fundamental purpose of the rule or practice in question. See supra pp. 14-15. Finally, the granting of a reasonable accommodation does not require that an ordinance or practice be struck down or rewritten; it merely requires that an individual accommodation be made to such ordinance or practice under a particular set of circumstances in order to provide a person or persons with disabilities equal opportunity to enjoy a particular dwelling.

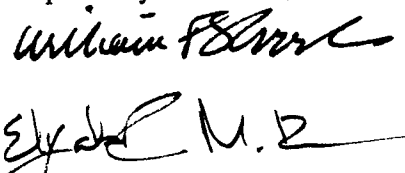
53/ Town of Babylon, 819 F. Supp. at 1182 (internal citations omitted) (emphasis added); see also City of St. Louis, 1994 U.S. Dist. LEXIS 1182, at *75 (failure to make a reasonable accommodation is an "independent Fair Housing Act violation" in addition to intentional discrimination and disparate impact).

disparate impact, see, e.g., Town of Babylon, 819 F. Supp. at 1185; City of St. Louis, 1994 U.S. Dist. LEXIS 1182, at *74-*76; Horizon House, 804 F. Supp. at 695-700.[54/] The District Court's ruling simply adopts this uniform interpretation of the reasonable accommodation requirement.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be affirmed.

Respectfully submitted,



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February 28, 1994

54/ In contrast, not one of the cases cited by the City in support of its argument has held that one must prove discriminatory intent or disparate impact in order to prove a violation of § 3604(f)(3)(B)'s reasonable accommodation requirement. See Horizon House, 804 F. Supp. at 699-700; Township of Cherry Hill, 799 F. Supp. at 462-63; City of Plainfield, 769 F. Supp. at 1344-45. While these cases address claims of discriminatory intent or disparate impact under §§ 3604(f)(1) and (2), and later discuss the reasonable accommodation provision as an additional basis for relief, they simply do not hold that proof of the former is necessary for proof of the latter.

55/ The certification required by Local Rules 28.3(d) and 46.1(e) appears at Appendix C, infra.

APPENDIX A

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February 17, 1994

BY FACSIMILE

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Re: United States of America v. City of Philadelphia and David B., David J., Edward L., Michael M., and Jacqueline B. v. City of Philadelphia, Nos. 93-2095 and 93-2096 (in the United States Court of Appeals for the Third Circuit)

Dear Mr. Eichert:

This letter confirms that you have consented to our filing by February 28, 1994, a brief on behalf of the National Fair Housing Alliance, Oxford House, Inc., and possibly the Bazelon Center for Mental Health, as amicus curiae in support of the appellees in the above-captioned cases. Your signature below will show your written consent to this filing.

Sincerely,

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Dear Ms. Troth:

This letter confirms that you have consented to our filing by February 28, 1994, a brief on behalf of the National Fair Housing Alliance, Oxford House, Inc., and possibly the Bazelon Center for Mental Health, as amicus curiae in support of the appellees in the above-captioned cases. Your signature below will show your written consent to this filing.

Sincerely,

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Re: United States of America v. City of Philadelphia and David B., David J., Edward L., Michael M., and Jacqueline S. v. City of Philadelphia, Nos. 93-2095 and 93-2096 (in the United States Court of Appeals for the Third Circuit)

Dear Mr. Kahne:

This letter confirms that you and your co-counsel, Stephen F. Gold and David Rudovsky, have consented to our filing a brief by February 28, 1994, on behalf of the National Fair Housing Alliance, Oxford House, Inc., and possibly the Bazelon Center for Mental Health, as amicus curiae in support of the appellees in the above-captioned cases. Your signature below will show your written consent to this filing.

Sincerely,

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APPENDIX B

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APPENDIX C

CERTIFICATION BY COUNSEL

I, William F. Sheehan, one of counsel for the National Fair Housing Alliance, the David L. Bazelon Center for Mental Health Law, and Oxford House, Inc., certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit, having been admitted thereto on October 27, 1983.

William F. Sheehan

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 1994, I served two copies of the foregoing Brief of the National Fair Housing Alliance, the David L. Bazelon Center for Mental Health Law and Oxford House, Inc. as Amici Curiae in Support of Appellees on each of the parties separately represented by causing copies to be sent

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