

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

COMMUNITY HOUSING TRUST, et al., )  
Plaintiffs, )  
v. ) Civil Action No. 01-2120 (HHK)  
D.C. DEPARTMENT OF CONSUMER )  
& REGULATORY AFFAIRS, et al. )  
Defendants. )

---

BRIEF OF  
JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW,  
NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY,  
AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES,  
WASHINGTON LEGAL CLINIC FOR THE HOMELESS,  
NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS,  
WHITMAN-WALKER CLINIC LEGAL SERVICES, AND  
UNIVERSITY LEGAL SERVICES  
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS

William F. Sheehan, Bar. No. 174714  
Shea & Gardner  
1800 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 828-2000

May 16, 2002

TABLE OF CONTENTS

INTEREST OF AMICI.....	1
STATEMENT	4
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	7
I. ZONING ORDINANCES HAVE HISTORICALLY EXCLUDED OR HINDERED PEOPLE WITH MENTAL DISABILITIES FROM JOINING RESIDENTIAL COMMUNITIES.....	7
A. Single-family Zoning Ordinances As Tools of Exclusion .....	7
B. People With Mental Disabilities Are Common Targets.....	9
II. CONGRESS’S PRIMARY GOAL IN PASSING THE FAIR HOUSING AMENDMENTS ACT OF 1988 WAS TO SUPPORT INTEGRATION OF PERSONS WITH DISABILITIES INTO COMMUNITIES.....	11
A. The Importance of Integration.....	11
B. The Federal Policy of Integration.....	15
C. The FHAA—Removing Barriers to Integration.....	17
III. THE DISTRICT’S ZONING REGULATIONS VIOLATE THE FHAA BY PRECLUDING HOMES OCCUPIED BY PERSONS WITH DISABILITIES FROM CLASSIFICATION AS SINGLE-FAMILY DWELLINGS .....	19

**TABLE OF AUTHORITIES**

<b><u>CASES:</u></b>	<b><u>Page</u></b>
<i>Allegheny Valley Sch. v. Zoning Hearing Bd.</i> , 517 A.2d 1385 (Pa. Commw. Ct. 1986) .....	14
<i>Appeal of Lynch Cmty. Homes, Inc.</i> , 554 A.2d 155 (Pa. Commw. Ct. 1989) .....	9, 10
<i>Buchanan v. Warley</i> , 245 U.S. 60 (1917) .....	7
<i>City of Cleburne v. Cleburne Living Center, Inc.</i> , 473 U.S. 432 (1985) .....	10, 13
<i>City of Edmonds v. Oxford House, Inc.</i> , 514 U.S. 725 (1995) .....	1, 5, 10, 20
<i>City of Kenner v. Normal Life of La., Inc.</i> , 483 So. 2d 903 (La. 1986) .....	8, 9
<i>City of Santa Barbara v. Adamson</i> , 610 P.2d 436 (Cal. 1980) .....	8
<i>Horizon House Developmental Services, Inc. v. Township of Upper Southampton</i> , 804 F. Supp. 683 (E.D. Pa. 1992), <i>aff'd mem.</i> , 995 F.2d 217 (3d Cir. 1993) .....	22
<i>Marbrunak, Inc. v. City of Stow</i> , 974 F.2d 43 (6th Cir. 1992) .....	1
<i>McMinn v. Town of Oyster Bay</i> , 488 N.E.2d 1240 (N.Y. 1985) .....	8
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977) .....	8
<i>Olmstead v. L.C.</i> , 527 U.S. 581 (1999) .....	13, 17
<i>Oxford House-C v. City of St. Louis</i> , 843 F. Supp. 1556 (E.D. Mo. 1994) .....	20
<i>Potomac Group Home Corp. v. Montgomery County</i> , 823 F. Supp. 1285 (D. Md. 1993) .....	1, 20
<i>Roundup Found., Inc. v. Board of Adjustment</i> , 626 P.2d 1154 (Colo. Ct. App. 1980) .....	9
<i>Township of Washington v. Central Bergen Cmty. Mental Health Ctr., Inc.</i> , 383 A.2d 1194 (N.J. Super. Ct. Law Div. 1978) .....	14

<i>Trafficante v. Metropolitan Life Ins. Co.</i> , 409 U.S. 205 (1972) .....	5
<i>Village of Belle Terre v. Boraas</i> , 416 U.S. 1 (1974) .....	8
<i>Washington ex rel. Seattle Title Trust Co. v. Roberge</i> , 278 U.S. 116 (1928).....	7
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886) .....	7
<i>Zoning Bd. v. T.A.R.C.</i> , 510 So. 2d 751 (La. Ct. App. 1987) .....	9

**STATUTES:**

Americans with Disabilities Act of 1990:

42 U.S.C. § 12101(a)(2) .....	16
42 U.S.C. § 12101(a)(3) .....	16
42 U.S.C. § 12101(a)(5) .....	16

Anti-Drug Abuse Act of 1988:

42 U.S.C. § 300x-25 .....	16
---------------------------	----

Developmentally Disabled Assistance and Bill of Rights Act,

Pub. L. No. 94-103, 89 Stat. 486, 502, 42 U.S.C. § 6010(2).....	16
---	----

Fair Housing Amendments Act of 1988:

42 U.S.C. § 3604 .....	5
42 U.S.C. § 3604(f) .....	19, 20
42 U.S.C. § 3604(f)(1).....	20, 24
42 U.S.C. § 3604(f)(2).....	20, 24
42 U.S.C. § 3604(f)(3)(B) .....	19
42 U.S.C. § 3610(g)(2)(C).....	18

Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282, <i>repealed by Omnibus Budget Reconciliation Act of 1981,</i> Pub. L. No. 97-35, § 902(e)(2)(B), 95 Stat. 357, 560.....	15
--	----

**REGULATIONS:**

28 C.F.R. pt. 35, App. A.....	16
11 D.C.M.R. § 199.1.....	21

**LEGISLATIVE HISTORY:**

H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988), <i>reprinted in</i> 1988 U.S.C.C.A.N. 2173.....	17, 18, 19, 24
<i>President’s Message to Congress on Mental Illness and Mental Retardation, 88th Cong., 1st Sess. (1963), reprinted in</i> 1963 U.S.C.C.A.N. 1466.....	12

**OTHER AUTHORITIES:**

Paul J. Carling, <i>Housing and Supports for Persons with Mental Illness: Emerging Approaches to Research and Practice,</i> 44 Hosp. & Cmty. Psych. 439 (1993).....	14, 17
Community Council for the Homeless at Friendship Place, Q&A.....	15
Timothy M. Cook, <i>The Americans With Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393 (1991) .....</i>	11, 13, 15
GAO, <i>An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled App. I</i> (Aug. 17, 1983).....	10, 15
Stephen M. Goldfinger <i>et al.</i> , <i>Housing Placement and Subsequent Days Homeless among Formerly Homeless Adults with Mental Illness, 47 Psych. Servs. 381, 382 (1996) .....</i>	14

Arlene S. Kanter, <i>A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People With Mental Disabilities</i> , 43 Am. U. L. Rev. 925 (1994).....	11
Clifford J. Levy, <i>Here, Life is Squalor and Chaos</i> , N.Y. Times, Apr. 29, 2002.....	17
T. Mangan <i>et al.</i> , <i>Residential Services for Persons with Mental Retardation and Related Conditions: Status and Trends Through 1993</i> (1994).....	14
Sandra J. Newman, <i>The Housing and Neighborhood Conditions of Persons with Severe Mental Illness</i> , 45 Hosp & Cmty. Psych. 338 (1994).....	13
Bengt Nirje, <i>The Normalization Principle and its Human Management Implications</i> , in President's Comm. on Mental Retardation, <i>Changing Patterns in Residential Services for the Mentally Retarded</i> 179 (R. Kugel & W. Wolfensberger eds., 1969).....	12
Peter W. Salsich, Jr. & Timothy J. Tryniecki, <i>Land Use Regulation: A Legal Analysis &amp; Practical Application of Land Use Law</i> 337 (1998).....	7
R. Schonfeld, "Five-Hundred-Year Flood Plains" and Other Unconstitutional Challenges to the Establishment for Community Residences for the Mentally Retarded, 16 Fordham Urb. L.J. 1 (1988).....	9
The Sentencing Project, <i>Mentally Ill Offenders in the Criminal Justice System: An Analysis and Prescription</i> (2002).....	17
Lester D. Steinman, <i>The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study</i> , 19 Urb. Law. 1 (1987).....	9
Gilda M. Tuoni, <i>Deinstitutionalization and Community Resistance by Zoning Restrictions</i> , 66 Mass. L. Rev. 125 (1981).....	12

## INTEREST OF AMICI

Judge David L. Bazelon Center for Mental Health Law is a national legal advocacy organization representing low-income adults and children with mental disabilities. The Center seeks their full integration into the community by protecting their rights to choice and dignity and expanding their access to housing and other support. Among others, the Center has been counsel of record or counsel for *amici* in a number of significant fair housing cases involving zoning and land use issues, including *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995); *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43 (6th Cir. 1992); and *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993). Because of their disability and poverty, many clients and constituents of the Bazelon Center rely on community and group homes to provide more humane and integrated settings than are available in state hospitals and nursing homes. The Center advocates broad enforcement of the Fair Housing Act so that people with disabilities may have an equal opportunity to use and enjoy the broadest possible range of dwellings.

The National Law Center on Homelessness & Poverty (“National Law Center”) is a not-for-profit organization established in 1989 to address issues relating to homelessness and poverty at the national level. Working with groups across the country, the National Law Center seeks to protect constitutional and other legal rights of poor and homeless people. The National Law Center has extensive experience with federal issues affecting homeless persons, and regularly participates in legislation, public education and litigation, including as *amicus curiae*, to address such issues. In order to prevent

homelessness, and ensure that homeless people are able to access housing, the National Law Center seeks to ensure and enforce compliance with federal statutes that protect the housing rights of homeless persons - such as the Fair Housing Act and Amendments, the Rehabilitation Act, and the Americans With Disabilities Act. The National Law Center's purpose here as an *amicus curiae* is to protect the fair housing rights of persons with disabilities in the District of Columbia.

The American Association of People with Disabilities (“AAPD”) is a national membership organization promoting the political and economic empowerment of all children and adults with disabilities in the United States. AAPD has a vital interest in strong enforcement and implementation of the Fair Housing Act and other civil rights laws protecting Americans with disabilities.

The Washington Legal Clinic for the Homeless is a private, non-profit legal service and advocacy organization in the District of Columbia. Its mission is to use law and advocacy to meet the needs, and alleviate the suffering, of clients who struggle with homelessness and poverty. It provides pro bono legal services to individual clients who are homeless and works through systemic advocacy and law reform to improve the programs, benefits, resources and opportunities available to people who are homeless, challenged by mental illness, or living in poverty. An integral part of its work is assisting clients in securing appropriate, stable housing opportunities that will provide the foundation for those clients to overcome myriad challenges and difficulties. Therefore,

the Legal Clinic is committed to assuring maximum availability throughout the District of Columbia of such housing opportunities.

The National Association of Protection and Advocacy Systems (“NAPAS”) is the membership organization for the nationwide system of protection and advocacy (“P&A”) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network. NAPAS has participated as *amicus curiae* in a number of cases involving the rights of individuals with disabilities. This case is of particular interest to NAPAS because housing discrimination against individuals with disabilities – particularly those with mental disabilities – is pervasive. NAPAS supports the efforts of plaintiffs seeking to enforce the Fair Housing Act against impermissible zoning regulations.

Whitman-Walker Clinic is the primary community-based provider of HIV and AIDS services in the Washington, D.C. metropolitan area, touching the lives of thousands of people with AIDS in Washington. Through four sites in the District of Columbia, Maryland and Virginia, the Clinic provides a wide range of medical and social services to thousands of people living with HIV/AIDS. The Clinic’s housing program provides low-cost, transitional housing to approximately 100 low-income, displaced and homeless

people every year who are living with HIV/AIDS in the District of Columbia. These include parents and their children living with HIV/AIDS in the McKinney House and those who are in recovery from substance abuse and living with AIDS at the Chavez House. Whitman-Walker Clinic has a direct interest in vigorous enforcement of the Fair Housing Act and other laws prohibiting housing discrimination against persons living with disabilities.

University Legal Services (“ULS”) is the federally mandated protection and advocacy program for the District of Columbia. It represents hundreds of individuals with mental illness every year on issues related to abuse and neglect, discrimination, and access to mental health treatment. ULS is particularly concerned with the need to develop safe and appropriate community based housing options for District citizens who rely on the Department of Mental Health for their support. Without such options, persons with mental illness who want to, and are otherwise able to, live independently in the community will be forced to remain in more restrictive environments that are sometimes unsafe and violate their rights under the Americans With Disabilities Act.

### **STATEMENT**

*Amici* adopt plaintiffs’ statement of the case.

### **SUMMARY OF ARGUMENT**<sup>1/</sup>

This case involves what, on its face, may appear to be an insignificant matter –

---

<sup>1/</sup> Elizabeth G. Porter, a law clerk at Shea & Gardner, made invaluable contributions to the research and drafting of this brief.

whether the District of Columbia may lawfully require a group of six unrelated men, five with mental illnesses, to obtain a certificate of occupancy before they may occupy a home together. But in fact this requirement is a form of discrimination that falls squarely within the core prohibitions of the Fair Housing Amendments Act of 1988 (“FHAA”).

The Fair Housing Act was initially drafted in 1968 in “broad and inclusive” language, which is to be given a “generous construction” in order to implement a policy of nondiscrimination in housing “that Congress considered to be of the highest priority.” *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212, 211 (1972) (quotation omitted). In 1988 Congress extended coverage of the Act to include (among others) persons with disabilities. The Supreme Court has ruled that the FHAA should be accorded the same generous construction as the original Act. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995). The FHAA makes it illegal to discriminate against people with disabilities in any aspect of the sale or rental of housing. 42 U.S.C. § 3604.

We show in Part I below that the District of Columbia’s requirement that Zeke’s House obtain a certificate of occupancy is merely one example of the many ways in which municipalities have historically used zoning laws to hinder or prevent persons with mental disabilities from moving into communities. In particular, as courts and commentators have long recognized, municipalities often exploit their zoning power by designating prime residential areas as “single-family” zones, and then defining family in such a way as to exclude unwanted individuals or groups, or to erect bureaucratic

obstacles to their inclusion. Persons with mental disabilities are frequently the targets of these exclusionary zoning practices.

In Part II, we demonstrate that Congress passed the FHAA to confront and overcome the difficulty people with disabilities have in obtaining access to decent housing. Legislators, disability experts, and advocates overwhelmingly agreed that the segregation of persons with mental disabilities in institutions is harmful and inhumane, and for thirty years the federal government had followed a policy of integrating such persons into residential communities. The Amendments reflected and reinforced that long-standing policy, and were aimed in particular at discriminatory zoning ordinances.

Then, in Part III, we show that the zoning ordinances at issue here are precisely the kind Congress intended the FHAA to outlaw. The District's single-family ordinance permits a family to reside in a single-family dwelling, and defines family to include up to six or more unrelated persons. But then the Community-Based Residential Facility ordinance removes persons with disabilities from the family definition by declaring that persons who require assistance in some aspect of daily living are inhabitants of a "facility," subject to inspections and other structural requirements not imposed on single-family dwellings. In short, the ordinances carve out persons with disabilities from the category of "families" eligible to reside in single-family dwellings. The District has offered no remotely plausible justification for this discriminatory treatment of persons with disabilities. Thus the District's ordinances facially violate the FHAA, and the plaintiffs are entitled to summary judgment barring their enforcement.

## ARGUMENT

### I.

#### **ZONING ORDINANCES HAVE HISTORICALLY EXCLUDED OR HINDERED PEOPLE WITH MENTAL DISABILITIES FROM JOINING RESIDENTIAL COMMUNITIES**

##### **A. Single-family Zoning Ordinances As Tools of Exclusion.**

American municipalities generally grant preferential treatment to freestanding, relatively large-lot, single-family housing. See Peter W. Salsich, Jr. & Timothy J. Tryniecki, *Land Use Regulation: A Legal Analysis & Practical Application of Land Use Law* 337 (1998) (“Salsich”). Municipalities have often sought to retain the “purity” of these residential neighborhoods through restrictive zoning ordinances. Some have been explicitly exclusionary.<sup>1/</sup> Others, perhaps more sophisticated but no less designed to exclude or at least hinder, have imposed minimum lot requirements, or barred multiple family dwellings, or limited the number of bedrooms in new homes. See Salsich at 339.

Single-family zoning ordinances have often defined “family” in such a way as to keep unwanted groups out of residential areas. For example, in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court held that a group of college students could be lawfully prevented from renting a house together because they did not constitute a family

---

<sup>2/</sup> See, e.g., *Washington ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (striking down an Seattle ordinance discriminating against elderly poor people); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down an ordinance that was enacted and enforced for the purpose of excluding Chinese from owning laundries in San Francisco); *Buchanan v. Warley*, 245 U.S. 60 (1917) (striking down an ordinance that prevented persons from occupying certain dwellings based on their race).

within the meaning of the local ordinance, which prohibited unrelated groups of more than two individuals from cohabiting in a single-family dwelling.<sup>1/</sup> See also *Moore v. City of East Cleveland*, 431 U.S. 494, 496 (1977) (ordinance defined family in such a way that it was illegal for a grandmother to live with two grandsons who were cousins, not brothers); *City of Kenner v. Normal Life of La., Inc.*, 483 So. 2d 903 (La. 1986) (permanently enjoining a group of six mentally retarded persons from moving into a home together because they did not constitute a family under the local ordinance); *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1241 (N.Y. 1985) (ordinance defined a family as those related by blood, marriage, or adoption, or “two persons not so related but both of whom are 62 years of age or older”); *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980) (ordinance defined a family as a maximum of five unrelated persons, but excluded household servants from any numerical limitations).

**B. People With Mental Disabilities Are Common Targets.**

Exclusionary zoning ordinances are often aimed at or enforced against people with mental disabilities – including both mental illness and mental retardation. See Lester D. Steinman, *The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study*, 19 Urb. Law. 1 (1987); see also R.

---

<sup>3/</sup> The ordinance made an exception for “household servants,” of which there could be an unlimited number, regardless of whether they were related. 416 U.S. at 2.

Schonfeld, “*Five-Hundred-Year Flood Plains*” and *Other Unconstitutional Challenges to the Establishment for Community Residences for the Mentally Retarded*, 16 *Fordham Urb. L.J.* 1, 14 (1988) (noting ordinances that effectively excluded community residences for persons with mental disabilities by using a restrictive definition of family).

These ordinances have often achieved their goals. For example, in *City of Kenner v. Normal Life of La., Inc.*, 483 So. 2d 903 (La. 1986), the Louisiana Supreme Court affirmed a permanent injunction that prohibited operation of a group home for six individuals with mental retardation, upholding a local ordinance that allowed a maximum of four unrelated individuals to share a single-family dwelling.<sup>4/</sup>

---

<sup>4/</sup> See also, e.g., *Roundup Found., Inc. v. Board of Adjustment*, 626 P.2d 1154, 1156 (Colo. Ct. App. 1980) (a group home for persons with mental disabilities did not satisfy an ordinance’s definition of family and did not constitute a single-unit dwelling); *Zoning Bd. v. T.A.R.C.*, 510 So. 2d 751, 753 (La. Ct. App. 1987) (upholding injunction against home violating family ordinance requiring residents to be related); *Appeal of Lynch Cmty Homes, Inc.*, 554 A.2d 155, 158 (Pa. Commw. Ct. 1989) (requiring group home to obtain a special exemption because it did not meet the requirement of a single-family dwelling).

Moreover, the enforcement procedure for many of these ordinances often results in discrimination against certain groups. The American Planning Association, a non-profit association of 28,000 professional and regional planners, stated its finding, based on 40 years of monitoring municipal zoning practices, that “the definition of family is rarely enforced and when enforced, it is nearly always in response to a neighbor who objects to the characteristics of the people (usually individuals with disabilities) who live in a community residence \* \* \*.”<sup>5/</sup> And a report by the United States General Accounting Office found that 18 percent of sponsors of small group homes for persons with mental disabilities experienced “great difficulty” with obtaining zoning permission.<sup>6/</sup>

---

<sup>5/</sup> Brief for the American Planning Association as *Amicus Curiae* In Support of Respondents, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995).

<sup>6/</sup> GAO, *An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled* App. I at 2 (Aug. 17, 1983).

Some ordinances, like the ones at issue in this case, may not be absolutely exclusive but force some people to obtain a special variance, a conditional use permit, or a certificate of occupancy in order to gain access to a single-family home.<sup>1/</sup> Even when persons with mental disabilities do succeed in gaining access to the housing of their choice, the process of applying for permits, variances, or of appealing adverse decisions can be costly and time-consuming. The expense of litigation frustrates not-for-profit sponsors of group homes and other providers of housing for persons with mental illness, and discourages prospective donors from contributing to such organizations. The very need to satisfy special procedures, or to litigate their lawfulness, is itself a stigma, a tangible symbol of society's hostility to persons with mental disabilities.

As we now show, discriminatory ordinances such as the one at issue here fall squarely within those Congress meant to outlaw in the FHAA of 1988.

## II.

### **CONGRESS'S PRIMARY GOAL IN PASSING THE FAIR HOUSING AMENDMENTS ACT OF 1988 WAS TO SUPPORT INTEGRATION OF PERSONS WITH DISABILITIES INTO COMMUNITIES**

---

<sup>1/</sup> See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (ruling unconstitutional a city's denial of a special use permit to a group of eight mentally retarded persons who planned to share a single-family dwelling); *Appeal of Lynch Cmty. Homes, Inc.*, 554 A.2d 155, 158 (Pa. Commw. Ct. 1989) (requiring a group home to obtain a special exemption because it did not meet the requirements of a single-family dwelling).

### **A. The Importance of Integration.**

Beginning in the 1950s, legislators and medical professionals recognized that the practice of segregating persons with mental disabilities in institutions was not only ineffective but also violated fundamental principles of human dignity.<sup>1/</sup> Indeed, the evidence showed that persons with mental illness confined to institutions were positively harmed, rather than helped, by segregated treatment. Cognitive and social skills were degraded and the quality of life was low. Gilda M. Tuoni, *Deinstitutionalization and Community Resistance by Zoning Restrictions*, 66 Mass. L. Rev. 125, 129 (1981).

The so-called “deinstitutionalization” movement gained momentum in the 1960s with the civil rights movement. In 1963, President Kennedy exhorted the nation to “retain in and return to the community the mentally ill and mentally retarded [in order] to restore and revitalize their lives \* \* \*.” *President’s Message to Congress on Mental Illness and Mental Retardation*, 88th Cong., 1st Sess. (1963), reprinted in 1963 U.S.C.C.A.N. 1477 (1963). President Kennedy’s statement reflected a growing

---

<sup>8/</sup> See Arlene S. Kanter, *A Home of One’s Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People With Mental Disabilities*, 43 Am. U. L. Rev. 925, 929 (1994); Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 399-414 (1991) (describing state segregation and sterilization laws for persons with mental disabilities).

professional consensus that persons with disabilities benefit from the freedom of choice and responsibility that comes with the highest possible degree of independence.

Today legislators and professionals still concur that most people with disabilities can and should live in normal residential communities, with appropriate supports when necessary. That is because people with disabilities, like others, have a right to, and benefit from, “the normal routines of occupation, leisure, and personal life.”<sup>9/</sup> Research has “demonstrate[d] overwhelmingly that the various outcomes obtained in integrated settings – in terms of, for example, skills learned, improvements in affect and appearance, post-education and training employment experiences, and expectations of service providers and even of parents – are far superior to the outcomes obtained in segregated settings.” Cook, *supra*, at 398. In contrast, “confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.” *Olmstead v. L.C.*, 527 U.S. 581, 601 (1999).

It should come as no surprise that access to adequate housing is critical to integrating people with mental disabilities into communities.<sup>10/</sup> Many people with disabilities can live independently in apartments or houses. Others do best when living

---

<sup>9/</sup> Bengt Nirje, *The Normalization Principle and its Human Management Implications*, in President’s Comm. on Mental Retardation, *Changing Patterns in Residential Services for the Mentally Retarded* 179, 186-87 (R. Kugel & W. Wolfensberger eds., 1969).

<sup>10/</sup> Sandra J. Newman, *The Housing and Neighborhood Conditions of Persons With Severe Mental Illness*, 45 *Hosp & Cmty. Psych.* 338, 338 (1994).

with a small group of other people, perhaps with a surrogate parent or part-time resident manager. In adopting the 1988 Amendments, Congress endorsed the view that people with disabilities are entitled to a broad range of housing options, and to be free from discrimination in determining the housing that is most appropriate to their needs. As Justice Marshall suggested, for some people with severe disabilities, small group homes are frequently the best option: “[A]s deinstitutionalization has progressed, group homes have become the primary means by which retarded adults can enter life in the community.” *City of Cleburne*, 473 U.S. at 461 (Marshall, J., concurring in part and dissenting in part).

Homes where persons with mental disabilities live together have grown in number over the past twenty years,<sup>11/</sup> and small supportive homes like Zeke’s House play an important part in the continuum of housing opportunities for people with disabilities. They provide housing that is affordable to very poor residents and that offers them the stability of a family-like environment.<sup>12/</sup> As one court put it, residents share cooking, cleaning and shopping, and generally “present a picture very much akin to that of a traditional family \* \* \*.” *Township of Washington v. Central Bergen Cmty. Mental*

---

<sup>11/</sup> As of 1993, there were 37,358 community residences for six or fewer persons with mental retardation in the United States. T. Mangan et al., *Residential Services for Persons With Mental Retardation and Related Conditions: Status and Trends Through 1993* 42 (1994).

<sup>12/</sup> See Paul J. Carling, *Housing and Supports for Persons With Mental Illness: Emerging Approaches to Research and Practice*, 44 *Hosp. & Cmty. Psych.* 439, 439 (1993) (“Because disabilities can be economically catastrophic, disabled people are disproportionately represented in the group labeled ‘very poor,’ or those well below the poverty level.”).

*Health Ctr., Inc.*, 383 A.2d 1194, 1209 (N.J. Super. Ct. Law Div. 1978); see also *Allegheny Valley Sch. v. Zoning Hearing Bd.*, 517 A.2d 1385, 1389 (Pa. Commw. Ct. 1986) (“There is no logical inconsistency in a residential use existing as a charitable institution and functioning as a single household.”). Some group homes provide 24-hour staffing and on-site medical services. Others – referred to as “supportive housing” or “evolving consumer households” – are managed primarily by residents, with minimal oversight. Stephen M. Goldfinger *et al.*, *Housing Placement and Subsequent Days Homeless among Formerly Homeless Adults with Mental Illness*, 47 *Psych. Servs.* 381, 382 (1996).

It is also not surprising that the most important factor for the success of a group home is its location in a safe, stable neighborhood with predominantly single-family dwellings. GAO, *An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled* App. I at 8 (Aug. 17, 1983).

What is less immediately obvious is that the communities themselves benefit when individuals with mental disabilities settle into residential neighborhoods. Zeke’s House is a case in point. The residents of Zeke’s House are local people, from Ward 3 in the District of Columbia. See Plaintiffs’ Ex. 5, *Community Council for the Homeless at Friendship Place, Q & A* at 1. The community improves when five of its members who were formerly homeless have decent, safe, long-term shelter. The community also benefits in intangible but no less important respects by living up to its best instincts of

charity and acceptance. See Cook, *supra*, 64 Temp. L. Rev. at 441 (research shows “without doubt \* \* \* that prejudice is lessened through integration”).

### **B. The Federal Policy of Integration.**

For almost four decades, the federal government has broadly endorsed a policy of community integration of persons with mental disabilities through funding and through legislation. The Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963 provided federal funding for mental health services in the community.<sup>13/</sup> The Developmentally Disabled Assistance and Bill of Rights Act made it federal policy that people with developmental disabilities should be treated or cared for in a setting “designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person’s personal liberty.”<sup>14/</sup> The Anti-Drug Abuse Act of 1988 requires states to provide funding to self-run, self-supported homes for persons recovering from alcohol or drug addiction.<sup>15/</sup>

More recently, the Americans With Disabilities Act (“ADA”) of 1990 referred expressly to “segregation” of persons with disabilities as a “form[] of discrimination,” and to discrimination that persists in the area of “institutionalization.”<sup>16/</sup> And the preamble to

---

<sup>13/</sup> Pub. L. No. 88-164, 77 Stat. 282, *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 902(e)(2)(B), 95 Stat. 357, 560.

<sup>14/</sup> Pub. L. No. 94-103, 89 Stat. 486, 42 U.S.C. § 6010(2) (1976),

<sup>15/</sup> 42 U.S.C. § 300x-25 (Supp. V 1993).

<sup>16/</sup> 42 U.S.C. § 12101(a)(2), (3), (5).

the Attorney General’s Title II regulations implementing the ADA defines “the most integrated setting appropriate to the needs of qualified individuals with disabilities” to mean “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.”<sup>17/</sup>

---

<sup>17/</sup> 28 CFR pt. 35, App. A, at 522-27, 530-32 (1998).

Despite this long-standing federal policy, community resistance has continued to prevent or hinder people with mental disabilities from obtaining housing in a residential neighborhood of their choice. As of the early 1980s, a majority of the approximately 2 million Americans with long-term serious mental illness “lived in inadequate houses, lacked needed supports, or were homeless,”<sup>18/</sup> and even today persons with mental disabilities are warehoused in unsafe, underfunded institutions.<sup>19/</sup> Still others end up alternating between homelessness and stints in jails or prisons.<sup>20/</sup>

### **C. The FHAA – Removing Barriers to Integration.**

Congress’s paramount purpose in amending the Fair Housing Act in 1988 was to remedy the harm caused by continued discrimination against persons with disabilities, including mental disabilities. The FHAA “is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream.” H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (“House Report”).

---

<sup>18/</sup> Carling, *supra*, at 439.

<sup>19/</sup> See, e.g., Clifford J. Levy, *Here, Life is Squalor and Chaos*, New York Times, Apr. 29, 2002, at A1 (describing horrible living conditions and a complete lack of medical attention for 325 residents of Seaport Manor, an adult home for persons with mental disabilities); *Olmstead*, 527 U.S. at 593-94 (finding discrimination under the ADA where a patient was confined to a mental institution for several months after her treating psychiatrist found that she could be appropriately treated in a community-based setting).

<sup>20/</sup> See The Sentencing Project, *Mentally Ill Offenders in the Criminal Justice System: An Analysis and Prescription* 7 (2002) (“The revolving door between jail and the street is propelled largely by untreated mental illness and co-occurring substance abuse disorders among individuals who have committed relatively minor crimes.”).

The legislative history as well as the statutory text makes clear that Congress understood that exclusionary zoning ordinances were a major cause of housing discrimination against persons with mental disabilities. The House Report explicitly stated that the new amendments would

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.

House Report at 2185.

Congress particularly noticed the harmful impact of single-family zoning ordinances. It stated that since “health, safety or land-use requirements” that are sometimes imposed on persons with disabilities “are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.” *Id.* Even facially neutral laws, Congress found, are frequently applied or enforced in a discriminatory manner. *Id.* The FHAA was intended to invalidate terms or conditions of rentals or sales of dwellings “which have the effect of excluding, for example, congregate living arrangements for persons with handicaps.” House Report at 2184.

Other provisions in the FHAA directly enhance the ability of persons with disabilities to fight zoning discrimination. For example, the statute gives the Secretary of the Department of Housing and Urban Development specific authority to investigate

allegations of discriminatory zoning policies, and to refer probable violations to the Attorney General “for appropriate action.” 42 U.S.C. § 3610(g)(2)(C). In addition, the Act’s broad standing provisions ensure that non-profit organizations that provide housing to persons with mental disabilities, such as plaintiff Community Council for the Homeless at Friendship Place, may litigate to prevent discrimination against residents in those homes. 42 U.S.C. § 3604(f). And the FHAA grants special protections to persons with disabilities that do not apply to other protected classes under the Fair Housing Act, requiring localities to make “reasonable accommodations” to persons with disabilities when “necessary to afford” such persons “equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B).

In short, the FHAA is a powerful expression of Congress’s belief that housing discrimination against people with disabilities must cease, for “[t]he right to be free from housing discrimination is essential to the goal of independent living.” House Report at 2179.

### III.

#### **THE DISTRICT’S ZONING REGULATIONS VIOLATE THE FHAA BY PRECLUDING HOMES OCCUPIED BY PERSONS WITH DISABILITIES FROM CLASSIFICATION AS SINGLE-FAMILY DWELLINGS**

The District of Columbia zoning ordinances at issue in this case are precisely the type of local zoning law the FHAA was meant to invalidate. The FHAA makes it unlawful

[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap \* \* \*;

[t]o 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 a dwelling, because of a handicap \* \* \*.

42 U.S.C. § 3604(f).

These provisions apply to zoning ordinances as well as to sellers and landlords. See, e.g., *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995) (holding that a zoning regulation limiting the number of persons in a family was subject to the FHAA); *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556, 1575 (E.D. Mo. 1994) (noting that use of the broad phrase “otherwise make unavailable” and the legislative history make clear that § 3604(f)(1) “applies not only to sellers or landlords, but also to more sophisticated methods of denying housing such as enforcing zoning or other land use laws which have the effect of denying housing.”); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296 (holding that a neighbor notification requirement violates § 3604(f)(1)). As we now show, the District’s ordinances place an uncertain and unnecessary limitation on the ability of six unrelated persons to live together, based solely on their disability, and to that extent make unavailable single family homes to disabled persons because of their disability (§ 3604(f)(1)) and discriminate against such persons in the terms, conditions, and privileges of the sale and rental of such homes (§ 3604(f)(2)).

The District’s zoning ordinances permit a family to reside in a single-family dwelling, and they define “family” to mean (among other things) up to six or more unrelated persons. But then they remove persons with disabilities from the family definition by declaring that all persons who require assistance in some aspect of daily living are inhabitants of a “facility,” subject to a requirement for a certificate of occupancy and related inspections not imposed on single-family dwellings. In short, the ordinances essentially have a carve-out from the category of families for persons with disabilities.

The district defines a “family” as:

one (1) or more persons related by blood, marriage, or adoption, or not more than six (6) persons who are not so related, including foster children, living together as a single housekeeping unit, using certain rooms and housekeeping facilities in common; Provided, that the term family shall include a religious community having not more than fifteen (15) members.

11 D.C.M.R. § 199.1.

The residents of Zeke’s House, five men with mental disabilities and one resident manager, qualify as a family under that provision. They are excluded, however, by another definition, that of a Community-Based Residential Facility, which provides that any home inhabited by persons who have “a common need for treatment \* \* \* assistance, or supervision in daily living” is not a single-family dwelling but is instead a “community-based residential facility” subject to an uncertain number of additional zoning and regulatory requirements. 11 D.C.M.R. § 199.1. See also Pl. Ex. 39, Letter

From Greg Love to Lynn Shea, Oct. 9, 2001 at 1 (noting that the dismissal of the infraction against Zeke’s House is predicated on compliance with “the substance of the requirements for health and safety at Zeke’s House as contemplated in the certificate of occupancy guidelines”); Pl. Ex. 40, Deposition of Olutoye Bello, March 18, 2002 at 103-04 (stating that prior to the grant of a certificate of occupancy, there would be inspections by “construction, electrical, plumbing, fire, and zoning inspector[s]”).

The term “in common need of assistance or supervision in daily living” is simply a ten-word euphemism for “disabled.” Thus six “normal” persons may live as a family in a single-family home, but if they are disabled they cannot be a family and their residence is now not a single-family home but a “community-based residential facility.”<sup>21/</sup>

Artful phrasing cannot disguise a discriminatory regulation. In *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992), *aff’d mem.*, 995 F.2d 217 (3d Cir. 1993), an ordinance required that “facilities” for persons in need of “permanent care” or “professional supervision” be spaced at a minimum of 1,000 feet apart. The court ruled that this language “clearly refers” to

---

<sup>21/</sup> Indeed, under the District’s ordinances, all persons with disabilities who require assistance in daily living are automatically disqualified from living in “single-family dwellings,” even if they are relatives. An elderly couple with around-the-clock care would not be eligible as a family for purposes of occupying a “single-family dwelling,” for their common need of assistance in daily living would mean that their home would be classified as a “facility.”

persons with disabilities and that the ordinance thereby “creates an explicit classification based on handicap with no rational basis or legitimate government interest.” *Id.* at 693-94. The District’s Community-Based Residential Facility ordinance creates a similarly explicit classification based on handicap: it excludes persons with disabilities from the category of single-family dwellings without any showing that such exclusion is necessary.

The District never really addresses that point in its Memorandum in support of its motion for judgment on the pleadings (or summary judgment). It contends simply that its exclusionary definition of family is constitutional. See Defendants’ Mem. at 15. We doubt that is true, but in any case it is irrelevant, for plaintiffs’ claim rests on the nondiscrimination mandate of the FHAA, not on the constitution.

The District’s proffered justifications for its discriminatory regulations – that they gather needed information and are merely a “perfunctory” formality<sup>22/</sup> – are makeweight, self-condemning, and self-contradictory. They are makeweight because, as the District concedes, it already has all the information from the plaintiffs that a certificate of occupancy would provide. Defendants’ Mem. at 26. They are self-contradictory because a bona fide need to gather necessary information cannot be squared with the performance of a “perfunctory exercise.” And they are self-condemning because they highlight the senselessness of their imposition on persons with disabilities: the District has never even

---

<sup>22/</sup> See Defendants’ Memorandum of Points and Authorities in Support of Defendants’ Motion for Judgment on the Pleadings or, In the Alternative, For Summary Judgment at 17 (citing deposition testimony to the effect that for Zeke’s House to obtain a certificate of occupancy “would have been a perfunctory process”).

suggested, let alone offered any support for, any rational relationship between the certificate of occupancy requirement and the disabilities of the residents of Zeke's House. Under the FHAA, "[g]eneralized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion." House Report at 2179.

In sum, without justification the District's ordinances treat five persons with mental disabilities differently than five similarly-situated persons without such disabilities and hinder persons with mental disabilities from settling into normal residential communities. Thus those ordinances make unavailable single family homes to disabled persons because of their disability, in violation of § 3604(f)(1), and discriminate against such persons in the terms, conditions, and privileges of the sale and rental of single family dwellings, in violation of § 3604(f)(2). Accordingly, we urge the Court to grant plaintiffs' motion for summary judgment.

Respectfully submitted,

William F. Sheehan, No. 174714  
Shea & Gardner  
1800 Massachusetts Ave. NW  
Washington, D.C. 20036  
(202) 828-2000

Counsel for *Amici Curiae*

May 16, 2002

