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THERE GOES THE NEIGHBORHOOD: THE EVOLUTION OF "FAMILY" IN LOCAL ZONING ORDINANCES

INTRODUCTION

Few questions inspire as much heated discussion in town halls as: what is a "family?" The definition of this simple word in a zoning ordinance can inspire responses ranging from cries of "not in my backyard" to suspected acts of arson towards unpopular group homes in single family zoned districts.¹

Great care must be taken by legislators to draft rules which accomplish community goals without burdening fundamental constitutional rights. The judiciary must use even greater care when called upon to review zoning ordinances which interpret the word "family" in ways which raise constitutional issues.

Although many rights have been discussed in connection with zoning restrictions, those most often raised are contained in the Fourteenth Amendment's Due Process² and Equal Protection³ Clauses, the Taking Clause of the Fifth Amendment⁴ and First Amendment association rights.⁵ These same fundamental rights are protected by the New York State Constitution.⁶

1. Letta Tayler & Estelle Lander, *Target — Planned Northport Home for Mentally Retarded Damaged*, *NEWSDAY*, June 9, 1992 at 3, 109 (a proposed group home for the mentally retarded was damaged by apparent arson after 30 to 40 residents voiced their opposition to the home at a village board meeting held the previous week. The fire was the fifth instance of arson in a group home on Long Island between 1988 and 1992.).

2. U.S. CONST. amend. XIV, § 1, cl. 3. The Due Process Clause provides: "[N]or shall any State deprive any person of life, liberty or property without due process of law" *Id.*

3. U.S. CONST. amend. XIV, § 1, cl. 4. The Equal Protection Clause provides: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

4. U.S. CONST. amend. V, cl. 5. The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." *Id.*

5. U.S. CONST. amend. I. The First Amendment, in relevant part, provides: "Congress shall make no law . . . abridging the freedom of speech,

This comment will chart the gradual shift away from the traditional definition of "family," and analyze how changes in federal law are effecting local zoning litigation. Part I will focus on the decisions of the Supreme Court. Part II will examine the reaction to these decisions by the New York State judiciary. Part III will discuss the impact of amendments to the Fair Housing Act,⁷ protecting the rights of the handicapped, upon the application of zoning ordinances defining the term "family." Finally, Part IV will examine the potential impact of the amendments to the Fair Housing Act on litigation in New York State.

I. FEDERAL COURTS ALLOW TRADITIONAL FAMILY RESTRICTIONS

Plaintiffs who seek to challenge restrictive definitions of "family" on constitutional grounds face a difficult task. Federal courts give great deference to zoning laws because land use is primarily a local concern.⁸ Furthermore, because of a reluctance to decide constitutional issues if there is another way to dispose of the case, courts will often find that the plaintiffs have no standing to sue.⁹ Even if the court does reach the merits of the case, traditional definitions of "family" are usually upheld.¹⁰

or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." *Id.*

6. N.Y. CONST. art. I, § 6, ("No person shall be deprived of life, liberty or property without due process of law."); N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof."); N.Y. CONST. art. I, § 7 (a) ("Private property shall not be taken for public use without just compensation."); N.Y. CONST. art. I, § 9 ("No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government . . .").

7. 42 U.S.C. §§ 3601 - 3616 (1988).

8. *See Moore v. City of East Cleveland*, 431 U.S. 494, 525 (1977) (Burger, C.J., dissenting); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Doe v. City of Butler*, 892 F.2d 315, 318 (3d Cir. 1989).

9. *See Warth v. Seldin*, 422 U.S. 490 (1975). In *Warth*, plaintiffs claimed that a town zoning ordinance excluded low and moderate income residents from living in the area in violation of their constitutional rights. *Id.*

One of the first significant decisions of the Supreme Court involving the constitutionality of zoning ordinances which restricted rights of property owners was *Village of Euclid v. Ambler Realty Co.*¹¹ In *Euclid*, a landowner challenged a village ordinance regulating commercial activity in areas zoned for residential use.¹² The Court set forth a two part test to determine whether an ordinance is unconstitutional. First, it must be shown to be "arbitrary and unreasonable."¹³ Second, the ordinance must bear no clear relationship to "public health, safety, morals or general welfare."¹⁴ Using this mere rationality standard,¹⁵ the

at 495. Plaintiffs, who were taxpayers in the town, claimed that they were subject to higher taxes because potential residents were being excluded. *Id.* at 496. The Court held that those plaintiffs who claimed the ordinance prevented the construction of affordable housing, suitable to meet their needs, had not alleged an injury sufficient to meet the "Case or Controversy" requirements of Article III, and thus had no standing to sue. *Id.* at 508. Similarly, those plaintiffs who claimed higher tax bills due to the ordinance failed to point to any right, constitutional or statutory, which had been violated. The taxpayers thus had no right to assert a claim. *Id.* at 510. Lastly, plaintiff associations had failed to allege that any of their members had suffered a cognizable injury. The Court held that none of the plaintiffs demonstrated that they were the proper parties to invoke judicial resolution of the suit. *Id.* at 518. *But see* *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252 (1977) (non-profit developer denied re-zoning to allow construction of low income housing had standing to sue, as did individual who claimed that town's denial deprived him of opportunity to live closer to place of employment).

10. *See* *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (zoning ordinance limiting single family residences to no more than two unrelated persons upheld); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (zoning ordinance regulating location of trades, industries, apartment houses, height of buildings, and other uses was upheld as "valid exercise of authority"); *But see* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (statute excluding residences for the "feeble minded" held constitutionally invalid as applied).

11. 272 U.S. 365 (1926).

12. *Id.* at 379-83.

13. *Id.* at 395.

14. *Id.* *See also* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (ordinance construed to prohibit live nude dancing found to bear no rational relationship to legislative goals); *Village of Belle Terre v. Boraas*, 416 U.S. at 8 (ordinance restricting use of land to no more than two unrelated persons did not violate constitutional rights); *Doe v. City of Butler*, 892 F.2d

Court determined that the legitimate power of a municipality to keep industrial sections separate from residential ones was controlling unless matters of public interest tipped the scales.¹⁶

Justice Sutherland, writing for the majority, pointed out that zoning ordinances were first enacted in the United States around 1900.¹⁷ The problem with these ordinances was that the boundaries of a municipality's legitimate exercise of police power were found to be exceedingly difficult to define.¹⁸ Ordinances could, for example, be found constitutionally valid when applied to city conditions and violative when applied to a rural setting.¹⁹ The Court determined that the challenged ordinance was not arbitrary or unreasonable²⁰ because the landowner had an opportunity to seek a building permit.²¹ Therefore, the landowner had suffered no actual injury.²² The *Euclid* Court held that the general scope and content of the ordinance were valid.²³ Furthermore, the Court found that due process considerations were better left to instances where an actual injury or deprivation had occurred.²⁴ The Court concluded that before the question of constitutionality is reached, there must be an actual injury apart

315 (3d Cir. 1989) (ordinance which regulated numbers of unrelated persons in household found constitutional).

15. See *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (protecting local business was not found to be a legitimate state interest justifying higher taxes on out of state insurance companies); *Zobel v. Williams*, 457 U.S. 55 (1982) (legislative scheme distributing retroactive benefits to residents based upon how long they had been citizens did not serve asserted state interest of inducing people to move to state, and statute was declared invalid); See also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (strict scrutiny rejected in favor of heightened rationality standard); *Belle Terre*, 416 U.S. at 9.

16. *Euclid*, 272 U.S. at 389-90.

17. *Id.* at 386-87.

18. *Id.* at 387.

19. *Id.*

20. *Id.* at 397.

21. *Id.* at 386.

22. *Id.* at 395-96.

23. *Id.* at 397.

24. *Id.*

from a vague claim that the ordinance adversely affected the value of property within the zoned district.²⁵

In *Village of Belle Terre v. Boraas*,²⁶ the Supreme Court upheld traditional family restrictions, provided they were undertaken to achieve positive goals. In *Belle Terre*, property owners who rented a house to six unrelated college students were cited for violating the village's zoning ordinance.²⁷ The Court held that a zoning ordinance, which prohibited occupancy by two or more unrelated persons, was constitutionally valid.²⁸ In his majority opinion, Justice Douglas wrote that the desire to maintain the peace and sanctity of a community was a legitimate legislative concern.²⁹ Therefore, an ordinance restricting the occupancy of homes in this manner was a proper exercise of legislative discretion.³⁰

As noted in *Euclid*, the discretion to legislate in areas concerning activities protected by the United States Constitution must be exercised in a reasonable way, and must support an identifiable state objective.³¹ But what of the narrow definition of "family" contained in the ordinance? It would seem that a "family" in the non-traditional sense could just as easily describe a group of three or four unrelated persons.³² By extending rights to two unrelated persons living together and denying such property rights to a group of three, it would seem that the

25. *Id.* at 395.

26. 416 U.S. 1 (1974).

27. *Id.* at 2-3.

28. *Id.* at 7-10. The word 'family' as used in the ordinance means:

One or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.

Id. at 2.

29. *Id.* at 8-9.

30. *Id.*

31. *Id.* at 8.

32. *Id.*

association and privacy rights guaranteed by the First Amendment would be frustrated.³³

The *Belle Terre* Court justified the potential for disparate treatment under the ordinance by pointing out that an absolute guideline will inevitably leave someone on the other side.³⁴ In such a case, the power to draw such distinctions must lie with the legislature, not the judiciary.³⁵

Undoubtedly, the keystone of Justice Douglas' decision was the idea that the legislature should take an active role in promoting positive goals such as peace and quiet, clean air, and reduced traffic.³⁶ The power to regulate land use was to be used not only to eradicate "filth, stench and unhealthy places . . ." but to promote guidelines aimed at protecting "family needs" as well.³⁷

Justice Marshall's dissent was notable for his view that the ordinance violated the tenant's fundamental constitutional rights of association and privacy expressed in the First and Fourteenth Amendments.³⁸ While such ordinances may have been designed to further a variety of family and community objectives, Justice Marshall maintained that these goals could not compromise "fundamental constitutional rights."³⁹ By limiting the rights of unrelated persons who lived in one home, the City of Belle Terre excluded those persons who chose to live their lives in ways different from most current residents.⁴⁰

According to Justice Marshall, an ordinance limiting a person's right to choose living companions created "classification[s] which

33. *Id.* at 12. (Marshall, J., dissenting). Justice Marshall maintained that because the ordinance differentiated between related and unrelated individuals, plaintiff's First Amendment rights were burdened, and therefore a strict scrutiny standard should have been applied by the Court. *Id.* (Marshall, J., dissenting).

34. *Id.* at 8.

35. *Id.*

36. *Id.* at 9.

37. *Id.*

38. *Id.* at 13 (Marshall, J., dissenting).

39. *Id.* at 14 (Marshall, J., dissenting).

40. *Id.* at 16 (Marshall, J., dissenting).

impinged upon fundamental personal rights."⁴¹ Therefore, Justice Marshall would review the ordinance under a strict scrutiny standard.⁴² His position was that the ordinance did not protect the legitimate interests of residents in preserving their community because it did not effectively control population density.⁴³ Justice Marshall suggested that there were other effective ways to control the problems associated with overcrowding which were more effective than the challenged ordinance, and did not intrude on protected rights.⁴⁴ Even though the interests sought to be protected were valid, Justice Marshall would hold it unconstitutional because there was no evidence to show a tight fit between the ordinance and the stated goals.⁴⁵

A more narrow and tightly focused ordinance was struck down by a plurality opinion⁴⁶ three years later in *Moore v. City of East Cleveland*.⁴⁷ Justice Powell, writing for the Court, found that an ordinance which prevented a grandmother from living with her grandsons violated the Due Process Clause of the Fourteenth Amendment.⁴⁸

In *Moore*, the grandmother was convicted of a criminal offense for living in a home with her sons and two grandsons.⁴⁹ The two grandsons were first cousins, and one of them had come to live with her out of necessity after his mother died.⁵⁰ The ordinance was fairly typical in that it restricted land use to single family

41. *Id.* at 18 (Marshall, J., dissenting) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (denial of welfare benefits to those who had not resided in state for at least one year created classification which denied plaintiffs equal protection of the laws, promoting invidious discrimination)).

42. *Belle Terre*, 416 U.S. at 18 (Marshall, J., dissenting).

43. *Id.* at 18-19 (Marshall, J., dissenting).

44. *Id.* at 18 (Marshall, J., dissenting).

45. *Id.* at 20 (Marshall, J., dissenting).

46. Justice Powell wrote for the Court, joined by Justices Brennan, Marshall, and Blackmun. Justice Brennan, joined by Justice Marshall, filed a concurring opinion, as did Justice Stevens. Chief Justice Burger dissented, as did Justices Stewart, White and Chief Justice Rehnquist.

47. 431 U.S. 494 (1977).

48. *Id.* at 499.

49. *Id.* at 496.

50. *Id.* at 496-97.

dwellings,⁵¹ but it contained an unusual and complicated clause which allowed only certain relations to live together as a "family."⁵²

Justice Powell distinguished the instant case from *Belle Terre*, because the ordinance there permitted occupancy by individuals who were related by "blood, adoption, or marriage,"⁵³ thus promoting family concerns.⁵⁴ In contrast, the challenged ordinance in *Moore* was described as "slicing deeply into the family itself."⁵⁵ While the Court professed to be applying a mere rationality test,⁵⁶ Justice Powell appeared to subject the statute to a heightened scrutiny when he wrote that the Court "must examine carefully the importance of the governmental interests

51. *Id.* at 495-96.

52. *Id.* at 496 n.1. The Housing Code of the City of East Cleveland, Ohio, §1341.08 provided:

"Family" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

- (a) Husband or wife of the nominal head of the household; and
- (b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
- (c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.
- (d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who had more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

Id.

53. *Moore*, 431 U.S. at 498 (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974)).

54. *Id.*

55. *Id.*

56. *Id.* at 498 n.6. "[O]ur cases have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose." *Id.*

advanced and the extent to which they are served by the challenged regulation.”⁵⁷ The Court invalidated the ordinance because it impinged upon fundamental rights protected by the Due Process Clause of the Fourteenth Amendment.⁵⁸ Justice Powell pointed out that substantive due process rights were exceedingly difficult to define, but history and tradition indicated that family rights should be protected.⁵⁹ He noted that extended families were traditional in American culture, and therefore restrictions which prevented “nuclear” families from living together violated due process rights.⁶⁰ Justice Powell found that the ordinance in question attempted to control family life in violation of the Constitution, and was therefore invalid.⁶¹

The bottom line is that the plurality opinion of *Moore*, served to both narrow and clarify the broad holding of *Belle Terre*.⁶² While a municipality could regulate the type of residences allowed in a single family zone in order to further positive goals,⁶³ an ordinance which intruded into the province of family decisions violated substantive due process rights.⁶⁴

While the distinctions between households comprised of related and unrelated persons seem obvious, how should an ordinance which regulates homes for the disadvantaged be treated? Does the two prong test established in *Euclid*⁶⁵ provide sufficient protection to assure that the rights of the disadvantaged will not be subverted to the groundless fears of neighbors?

57. *Id.* at 499. Justice White, in his dissent, wrote: “I have no trouble in concluding that the normal goals of zoning regulation are present here and that the ordinance serves these goals by limiting, in identifiable circumstances, the number of people who can occupy a single household.” *Id.* at 551 (White, J., dissenting).

58. *Id.* at 500-01.

59. *Id.* at 502-03.

60. *Id.* at 504-05.

61. *Id.* at 506.

62. *Id.*; See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

63. See *Belle Terre*, 416 U.S. at 9.

64. *Moore*, 431 U.S. at 502-03.

65. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

The Supreme Court, in *City of Cleburne v. Cleburne Living Center, Inc.*,⁶⁶ sought to define the standard of inquiry used when examining statutes governing residences for the mentally disadvantaged. In *Cleburne*, a Texas municipality required that the Cleburne Living Center (CLC) obtain a special use permit to establish a group home for the mentally retarded.⁶⁷ The determination was made based upon a statute which excluded, among other uses, homes for the "feeble minded."⁶⁸ However, the zoning district allowed the establishment of apartment houses, fraternity houses, hospitals and nursing homes without the necessity of acquiring a use permit.⁶⁹ Justice White, writing for the majority, agreed with the court of appeals that the statute in question was constitutionally invalid as applied,⁷⁰ but held that it did not violate the Equal Protection Clause.⁷¹ Justice White refused to label the mentally impaired as a "quasi-suspect classification,"⁷² and rejected the adoption of a heightened standard of review.⁷³

66. 473 U.S. 432 (1985).

67. *Id.* at 436.

68. *Id.* at 437.

69. *Id.* at 436 n.3. TEX. HUM. RES. CODE § 32.001. Section 32.001 states in pertinent part:

[T]he Cleburne zoning ordinance allows the following uses in [an Apartment House District]:

1. Any use permitted in District R-2.
2. Apartment houses, or multiple dwellings.
3. Boarding and lodging houses.
4. Fraternity or sorority houses and dormitories.
5. Apartment hotels.
6. Hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts.

Id.

70. *Euclid*, 473 U.S. at 450.

71. *Id.* at 444-46.

72. *Id.* at 446; The Court defined a quasi-suspect class as those individuals who "cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large." *Id.* at 445.

73. *Id.* at 446.

The majority considered heightened scrutiny inappropriate unless the questioned legislation made distinctions based upon "race, alienage, or national origin."⁷⁴ In Justice White's view, the mentally disadvantaged were a group with distinguishing characteristics which legislators could not ignore when formulating rules for their benefit.⁷⁵ Therefore, laws which categorize the mentally ill need only be rationally related to a legitimate state objective to satisfy the requirements of the Equal Protection Clause.⁷⁶

Applying this diminished standard, the majority nonetheless found that there was no rational relationship between the exclusion of the "feeble-minded" from the zoning district and any proffered goal of the ordinance.⁷⁷ Justice White saw no reason why a residence for the mentally disadvantaged needed a special permit if fraternity and sorority houses, apartment houses, and hospitals did not.⁷⁸ Thus, the statute as applied, violated the Equal Protection Clause of the Fourteenth Amendment.⁷⁹

Implementing the Supreme Court's mandate, the Third Circuit in *Doe v. City of Butler*,⁸⁰ held that an ordinance which regulated the numbers of unrelated people living in the same house was constitutional.⁸¹ The plaintiffs were seeking to establish a temporary shelter for battered women and their children.⁸² The *Butler* ordinance provided for such "transitional dwellings"⁸³ as

74. *Id.* at 440.

75. *Id.* at 442-43.

76. *Id.* at 441-42.

77. *Id.* at 450.

78. *Id.*

79. *Id.*

80. 892 F.2d 315 (3d Cir. 1989).

81. *Id.* at 321. The challenged zoning ordinance limited "transitional dwellings to six residents, excluding staff or supervisory personnel." *Id.* at 316-17.

82. *Id.* at 316. The plaintiffs were three battered women who brought suit after the city refused to approve an application by the Volunteers Against Abuse Center to open a shelter for abused women and children.

83. *Id.* at 317. "The ordinance defines a transitional dwelling as 'a building occupied for residential purposes by not more than six individuals being provided temporary special care plus supervisory family or individual.'" *Id.*

“conditional uses”⁸⁴ allowing up to six persons plus one “supervisory family or individual” per residence.⁸⁵ The ordinance provided a procedure for granting approval for such uses, but the plaintiffs’ application was denied due to their failure to show that the proposed use would comply with the restriction.⁸⁶ Concern was also expressed about negative impact on “density, parking, property values, and on the neighborhood’s character as single-family residential.”⁸⁷

The court noted that zoning ordinances should be given deference, and that restrictions should be upheld if they are not unreasonable and arbitrary, and if they bear a significant relationship to legitimate public concerns.⁸⁸ Additionally, the court found the legislative goals of limiting population density and traffic congestion legitimate.⁸⁹ Therefore, the restrictions were not arbitrary,⁹⁰ and the validation of the ordinance was justified under the holding in *Belle Terre*.⁹¹

Moore, on the other hand, was distinguishable because the ordinance in controversy sought to limit the number of related

84. *Id.* Conditional uses were subject to the approval of the City Council.

85. *Id.*

86. *Id.* at 316-17.

87. *Id.* at 317. *See also* *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980). The Supreme Court of California rejected traditional justifications for a restrictive ordinance while offering less restrictive means to achieve the city’s goals:

“[R]esidential character” can be and is preserved by restrictions on transient and institutional uses (hotels, motels, boarding houses, clubs, etc.). Population density can be regulated by reference to floor space and facilities. Noise and morality can be dealt with by enforcement of police power ordinances and criminal statutes. Traffic and parking can be handled by limitations on the number of cars (applied evenly to all households) and by off-street parking requirements. In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users.

Id. at 441-42.

88. *Butler*, 892 F.2d at 318. *See also* *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

89. *Butler*, 892 F.2d at 319-20 (citing *Belle Terre*, 416 U.S. at 9 (1974)).

90. *Id.* at 320-21.

91. *Id.* at 320-21; *See supra* notes 36-37 and accompanying text.

individuals living together.⁹² A finding that a municipality could not limit the numbers of unrelated individuals living together would be an unacceptable intrusion upon the holding of *Belle Terre*.⁹³

In conclusion, it is evident that any ordinance which seeks to regulate the numbers of people living together by offering a definition of "family" must strike a balance between the holding of *Belle Terre*, which allowed restrictions which were reasonable and in furtherance of legitimate goals,⁹⁴ and the holding of *Moore*, which defined areas of family life into which municipalities could not intrude.⁹⁵

II. NEW YORK STATE SUPPORTS A MORE FLEXIBLE DEFINITION OF FAMILY

Surprisingly enough, the normally conservative courts of New York State have shown considerable disagreement with the holding in *Belle Terre*, and instead have tended to protect the rights of non-traditional families by striking down ordinances deemed overly restrictive.⁹⁶ While the holding of *Belle Terre* is almost always acknowledged, ordinances which have been struck down in New York would likely be upheld if given the same deference as the Supreme Court has applied. The New York Court of Appeals has exhibited a notable intolerance towards ordinances which exclude non-traditional families that seems incompatible with *Belle Terre*.

The New York judiciary did not wait long to take issue with the Supreme Court. The court of appeals decided a significant case dealing with the interpretation of the word "family" shortly

92. *Butler*, 892 F.2d at 321; *See supra* note 48.

93. *Butler*, 892 F.2d at 321.

94. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974).

95. *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977).

96. *See McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985); *Group House of Port Washington, Inc. v. Board of Zoning & App.*, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

after the Supreme Court decided *Belle Terre*. In *City of White Plains v. Ferraioli*,⁹⁷ the court determined that a group home consisting of a married couple, their two natural children, and ten foster children fell well within the definition of "family" as defined in the local zoning statute.⁹⁸ The City of White Plains sought to prevent Abbot House, a not-for-profit agency, from establishing a group foster home in a single family zone.⁹⁹ The court of appeals held that while an ordinance may restrict land use to single families, it may not control "the genetic or intimate internal family relations of human beings."¹⁰⁰ A family lead by a "householder," comprised of a normal number of children as would be found in a traditional "biologically unitary" family could not be excluded.¹⁰¹

The court of appeals agreed with the Supreme Court's reasoning in *Belle Terre* that a municipality could restrict use to promote family values and control population density.¹⁰² Such restrictions, the court found, served to perpetuate a family environment, and were a proper exercise of local authority.¹⁰³ The group home proposed by Abbot House, however, was designed to provide just such a family environment.¹⁰⁴ Although the city had a right to propose legislation in furtherance of family goals, the group home was found by the court to qualify as a "family" under the ordinance.¹⁰⁵ The court of appeals stepped

97. 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

98. *Id.* at 305-06, 313 N.E.2d at 758, 357 N.Y.S.2d at 452-53. The ordinance provided: "A 'family' is one or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers or sisters of the owner or the tenant or of the owner's spouse or tenant's spouse living together as a single housekeeping unit with kitchen facilities. *Id.* at 304, 313 N.E.2d at 758, 357 N.Y.S.2d at 451.

99. *Id.* at 303, 313 N.E.2d at 757, 357 N.Y.S.2d at 450.

100. *Id.* at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452. *See Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977).

101. *Ferraioli*, 34 N.Y.2d at 306, 313 N.E.2d at 759, 357 N.Y.S.2d at 453.

102. *Id.* at 305, 313 N.E.2d at 758, 357 N.Y.2d at 452.

103. *Id.*

104. *Id.*

105. *Id.* at 305-06, 313 N.E.2d at 758, 357 N.Y.2d at 452-53. *See Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977).

around the deference granted to local authority in *Belle Terre*¹⁰⁶ and *Euclid*.¹⁰⁷ This end-around was achieved by applying reasoning reminiscent of Justice Powell's majority opinion in *Moore* to a situation where "family" members were not related by blood or adoption. An apt description for this is a "functionally equivalent family."

In a case involving a similar conflict, *Group House of Port Washington, Inc. v. Board of Zoning and Appeals*,¹⁰⁸ the court of appeals held that a group home consisting of two permanent surrogate parents and seven children qualified as a "family" under a local zoning ordinance.¹⁰⁹ *Group House* stood for the proposition that while towns have the ability to legislate for positive goals as described in *Belle Terre*,¹¹⁰ they must allow group homes consisting of the "functional equivalent" of a family.¹¹¹ The petitioner sought to open a foster care facility for local children who were displaced from their homes.¹¹² The Town denied a building permit on the grounds that a group home was an impermissible use in a one-family district.¹¹³ The local zoning ordinance defined "family" as those related by blood,

106. See *supra* notes 26-40 and accompanying text.

107. See *supra* notes 11-25 and accompanying text.

108. 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978).

109. *Id.* at 272, 380 N.E.2d at 209, 408 N.Y.S.2d at 379. The ordinance defined "family" as:

One (1) or more persons related by blood, marriage or legal adoption residing or cooking or warming food as a single housekeeping unit; with whom there may not be more than two (2) boarders, roomers or lodgers who must live together in a common household.

Id. at 270, 380 N.E.2d at 208, 408 N.Y.S.2d at 378.

110. *Id.* at 271, 380 N.E.2d at 209, 408 N.Y.S.2d at 379. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

111. *Group House of Port Washington*, 45 N.Y.2d at 274, 380 N.E.2d at 211, 408 N.Y.S.2d at 381. See also *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980), where the Supreme Court of California discussed functionally equivalent families at length. The *Adamson* court interpreted the California Constitution's provision relating to privacy to include freedom to live in an "alternative family with persons not related by blood, marriage or adoption." *Id.* at 440.

112. *Group House of Port Washington*, 45 N.Y.2d at 272, 380 N.E.2d at 210, 408 N.Y.S.2d at 380.

113. *Id.* at 270, 380 N.E.2d at 208-09, 408 N.Y.S.2d at 378-79.

marriage or adoption, plus two additional persons.¹¹⁴ The court determined that the home was intended to serve as the “functional equivalent” family for the seven children for as long as they needed to be there.¹¹⁵ Therefore, the Town could not forbid the group home because it was indistinguishable from a “natural” family.¹¹⁶

The Town’s argument that the residents were mere transients, and that the petitioner was running something akin to a boarding house or fraternity house rather than a foster care facility was rejected.¹¹⁷ The court reasoned that while individual children might come and go, the petitioner intended for the “family” to be a stable and ongoing entity.¹¹⁸ Furthermore, if foster care were to be excluded because of its temporary nature, any home with more than two foster children would be illegal under the ordinance.¹¹⁹ Endowing the word “temporary” with such “talismanic significance” was seen by the court as absurd.¹²⁰ Any group home could be excluded for a lack of permanence.¹²¹ Therefore, the court of appeals granted petitioners’ declaratory relief, stating that their home was a “family” within the meaning of the zoning ordinance.¹²²

The *Group House* court’s willingness to recognize that a stable “family” may exist even when residents of a group home are transitory represents a different perspective on the issue of

114. *Id.* at 270, 380 N.E.2d at 208, 408 N.Y.S.2d at 378. The applicable zoning ordinance described a family as “[o]ne (1) or more persons related by blood, marriage or legal adoption residing or cooking or warming food as a single housekeeping unit; with whom there may not be more than two (2) boarders, roomers or lodgers who must live together in a common household.” *Id.*

115. *Id.* at 273, 380 N.E.2d at 210, 408 N.Y.S.2d at 380.

116. *Id.* at 272, 380 N.E.2d at 209-10, 408 N.Y.S.2d at 379-80. “The ‘group home’ in the present case, as described in the record before us, is the functional and factual equivalent of a natural family, and to exclude it from a residential area would be to serve no valid purpose.” *Id.*

117. *Id.* at 273, 380 N.E.2d at 210, 408 N.Y.S.2d at 380.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 274, 380 N.E.2d at 211, 408 N.Y.S.2d at 381.

group homes.¹²³ Rather than focusing on the plight of the individuals, or their characteristics, the court looked to the stability and permanence of a fictional family entity comprised of shifting individuals.¹²⁴ In other words, a family may have permanence even though its members change.¹²⁵

Taking the line of reasoning employed in *Ferraioli* one step further, the New York Court of Appeals decision in *McMinn v. Town of Oyster Bay*¹²⁶ continued its shift away from condoning the type of traditional restrictions upheld in *Belle Terre*. In *McMinn*, an ordinance defining "family" as those related by blood, marriage or adoption, or alternatively, two unrelated persons over age sixty-two,¹²⁷ was found to be facially unconstitutional.¹²⁸ The court came to this conclusion by employing a two part, rational relationship test¹²⁹ similar to that implemented by the Supreme Court in *Euclid* and its progeny.¹³⁰ Any ordinance failing to satisfy both prongs would violate the Due Process Clause of New York's Constitution.¹³¹

123. *Id.* at 273, 380 N.E.2d at 211, 408 N.Y.S.2d at 381.

124. *Id.*

125. *Id.*

126. 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985).

127. *McMinn*, 66 N.Y.2d at 547-48, 488 N.E.2d at 1242, 498 N.Y.S.2d at

130. Town of Oyster Bay Building Zone Ordinance, article I, § 1 defined a "family" as:

(a) Any number of persons, related by blood, marriage, or legal adoption, living and cooking on the premises together as a single, non-profit housekeeping unit; or (b) Any two persons not related by blood, marriage, or legal adoption, living and cooking on the premises together as a single, nonprofit housekeeping unit, both of whom are sixty-two years of age or over, and residing on the premises.

Id. at 547-48, 488 N.E.2d at 1241-42, 498 N.Y.S.2d at 130.

128. *Id.* at 551-52, 488 N.E.2d at 1244, 498 N.Y.S.2d at 132.

129. *Id.* at 549, 488 N.E.2d at 1242, 498 N.Y.S.2d at 130-131. The court stated that in order for an ordinance to be found constitutionally valid: "(1) it must have been enacted in furtherance of a legitimate governmental purpose and (2) there must be a . . . reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end" *Id.*

130. See *supra* notes 11-79 and accompanying text.

131. *McMinn*, 66 N.Y.2d at 549, 488 N.E.2d at 1242, 498 N.Y.S.2d at 130-31.

The court recognized that the ends sought to be achieved by the ordinance were legitimate, but rejected the notion that the definition of "family" helped to further those goals.¹³² Further, the court found that the ordinance was over inclusive because it attempted to exclude households which did not threaten the traditional single-family character of the neighborhood.¹³³

The court of appeals was aware that its decision in *McMinn* seemed at odds with *Belle Terre*, but the court justified its decision by pointing out that the challenged ordinance contained an age restriction which distinguished it from that reviewed by the Supreme Court.¹³⁴ Additionally, the court pointed out that *Belle Terre* offered no guidance to help define "family" in such a way as to "survive Federal due process scrutiny."¹³⁵ The decision of the court was therefore grounded upon the prior holdings of *Ferraioli* and *Group House*.¹³⁶

But what happens when a statute is silent concerning the definition of "family"? In *Braschi v. Stahl Associates*,¹³⁷ when a New York City Rent and Eviction Regulation¹³⁸ was considered inconclusive, the court of appeals was forced to construct a

132. *Id.* at 549-50, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131.

133. *Id.* at 549, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131.

134. *Id.* at 551, 488 N.E.2d at 1244, 498 N.Y.S.2d at 132. *See supra* notes 26-40 and accompanying text.

135. *McMinn*, 66 N.Y.2d at 551, 488 N.E.2d at 1244, 498 N.Y.S.2d at 132.

136. *Id.*; *but see* *People v. Multari*, 135 Misc. 2d 913, 517 N.Y.S.2d 374 (Sup. Ct. Albany County Ct. 1987), *appeal denied, sub nom* *People v. See*, 70 N.Y.2d 877, 518 N.E.2d 15, 523 N.Y.S.2d 504 (1987) (ordinance which limited the numbers of unrelated adults living in a single household to three did not violate the two-prong test of *Belle Terre*).

137. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

138. *Id.* at 209, 543 N.E.2d at 52, 544 N.Y.S.2d at 787.

[S]ection 2204.6 of the New York City Rent and Eviction Regulations (9 NYCRR 2204.6), . . . authorizes the issuance of a certificate for the eviction of persons occupying a rent-controlled apartment after the death of the named tenant, provides, in subdivision (d), noneviction protection to those occupants who are either the "surviving spouse of the deceased tenant or *some other member of the deceased tenant's family.*"

Id.

definition of "family."¹³⁹ The court found that "family" "should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order."¹⁴⁰ The court concluded that a reasonable definition of family for the purposes of the eviction regulation was "those who reside in households having all of the normal familial characteristics."¹⁴¹

Further evidence of the court's shift away from the traditional definition of "family" was provided in *Baer v. Town of Brookhaven*.¹⁴² In *Baer*, the court held that an ordinance which prevented five elderly women from living together violated the New York State Constitution because it restricted the size of a "functionally equivalent family" while placing no such restrictions on traditional families.¹⁴³ The court further stated that the defendant's reliance on *Belle Terre* was misguided because the ordinance burdened those rights protected by the New York Due Process clause.¹⁴⁴

Genesis of Mount Vernon, Inc. v. Zoning Board of Appeals,¹⁴⁵ seemed to present an ideal opportunity for the court of appeals to expand upon traditional definitions of family. The petitioners were denied approval to construct a two family house for elderly residents on the grounds that "boarding houses" were not permitted by the town zoning ordinance.¹⁴⁶ The petitioners

139. *Id.*

140. *Id.* at 211, 543 N.E.2d at 53, 544 N.Y.S.2d at 788.

141. *Id.* at 211, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

142. 73 N.Y.2d 942, 537 N.E.2d 619, 540 N.Y.S.2d 234 (1989).

143. *Id.* at 943, 537 N.E.2d at 619, 540 N.Y.S.2d at 234. *See also* Group House of Port Washington, Inc. v. Board of Zoning & App., 45 N.Y.2d 266, 274, 380 N.E.2d 207, 211, 408 N.Y.S.2d 377, 381 (1978); *Children's Village v. Holbrook*, 171 A.D.2d 298, 576 N.Y.S.2d 405, 406-407 (3d Dep't 1991) (ordinance restricting size of unrelated families but not those related by blood held invalid).

144. *Baer*, 73 N.Y.2d at 944, 537 N.E.2d at 619, 540 N.Y.S.2d at 235.

145. 152 Misc. 2d 997, 579 N.Y.S.2d 968 (Sup. Ct. Westchester County 1991), *aff'd as modified*, 81 N.Y.2d 741, 609 N.E.2d 122, 593 N.Y.S.2d 769 (1992).

146. *Id.* at 998, 579 N.Y.S.2d at 970.

challenged the town's definition of "boarding house"¹⁴⁷ and "family,"¹⁴⁸ on the ground that they were overbroad and unconstitutional.¹⁴⁹

The Supreme Court, Westchester County, employed the familiar rational relationship test.¹⁵⁰ While the court considered the first prong of the test to be satisfied,¹⁵¹ Mount Vernon's definitions of "boarding house" and "family" were found to fail the second prong of the test, thus violating the Due Process Clause of the New York State Constitution.¹⁵²

The trial court found that the definition of a "boarding house"¹⁵³ could be applied to a mother, father and two children

147. Section 267-2 of Mount Vernon's Zoning Ordinance defined a "boarding house" as:

[A] building other than a hotel in which accommodations are offered for fire [sic] and /or hired out for the lodging of four (4) or more persons either individually or as families, with separate cooking facilities or with central kitchen or dining room for the preparation and service of meals to said persons.

Id. at 999, 579 N.Y.S.2d at 971.

148. Mount Vernon's Zoning Ordinance, Section 267-2 defined a "family" as follows: "'Family' — One (1) or more persons related by blood, marriage or legal adoption who live together in one (1) dwelling unit and maintain a common household." *Id.* After the litigation was commenced, the ordinance was changed to read:

One (1) or more persons having a common domestic bond who live together in one (1) dwelling unit as a traditional family or its functional equivalent, headed by one (1) or more resident persons who have authority over the care, functioning or management of their common household.

Id.

149. *Genesis of Mount Vernon*, 152 Misc. 2d at 999, 579 N.Y.S.2d at 970-71.

150. *Id.* at 999, 579 N.Y.S.2d at 971 (citing *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 549, 488 N.E.2d 1240, 1242, 498 N.Y.S.2d 128, 130-31 (1985)). See also *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

151. *Genesis of Mount Vernon*, 152 Misc. 2d at 1000, 579 N.Y.S.2d 971-72 (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974)).

152. *Id.* at 1004, 579 N.Y.S.2d 974.

153. See *supra* note 147.

renting a home or apartment.¹⁵⁴ The court stated that the definition was only workable because it was applied in an arbitrary manner.¹⁵⁵ Because the court found that no rational relationship existed between the ordinance,¹⁵⁶ and any governmental goals relating to noise, traffic, chirping birds, or population density, the "boarding house" portion of the ordinance was declared to be facially invalid.¹⁵⁷

The trial court next examined the definition of "family."¹⁵⁸ The phrase "domestic bond" was seen by the court to be synonymous with the word "family," but was too vague to be of any help.¹⁵⁹ The portion of the ordinance which required that a family have a recognized head of the household was seen as being susceptible to several interpretations.¹⁶⁰ If interpreted to mean that one or more people must take control of the residence, families of related individuals who evenly distributed responsibility would be excluded.¹⁶¹ Furthermore, a requirement of absolute central authority was seen by the court as being merely one relevant criteria in deciding whether a non-traditional family existed.¹⁶² Granting this requirement "talismanic significance" went against the court's view of the proper definition of "family" in a zoning ordinance.¹⁶³

According to the trial court, the proper test for the determination of a family is "whether in theory, size, appearance and structure a home is set up to emulate the living arrangements of a family."¹⁶⁴ Therefore, the court found that the definition of family contained in the Mount Vernon zoning ordinance bore no

154. *Genesis of Mount Vernon*, 152 Misc. 2d at 1004, 579 N.Y.S.2d at 974.

155. *Id.*

156. *Id.*

157. *Id.*

158. *See supra* note 148.

159. *Genesis of Mount Vernon*, 152 Misc. 2d at 1004, 579 N.Y.S.2d at 974.

160. *Id.* at 1005, 579 N.Y.S.2d at 974.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 1005, 579 N.Y.S.2d at 974..

rational relationship to any legitimate goals, and was facially unconstitutional.¹⁶⁵ Furthermore, the court found that the ordinance was unconstitutional as applied to the proposed use.¹⁶⁶ It suggested that a home where elderly people lived independently, yet shared company and expenses, be considered a "family equivalent."¹⁶⁷ A declaratory judgment was granted stating that the definitions violated the Due Process Clause of the New York State Constitution, and the denial of variances was annulled.¹⁶⁸

Subsequently, the court of appeals vacated that part of the judgment which found the definition of "family" unconstitutional.¹⁶⁹ While the lower court's decision concerning the definition of "boarding house" was upheld, the court determined that the "family" question should not have been considered because the denial of the variance had been based on the determination that the proposed use constituted a "boarding house."¹⁷⁰

The court of appeals held fast to the rule that no statute should be declared unconstitutional unless the controversy before the court absolutely required such a determination.¹⁷¹ Since Mount Vernon never determined whether the proposed household for elderly residents constituted a "family," as defined by the ordinance, the constitutionality of the definition was not properly before the court.¹⁷² The judgment of the supreme court was

165. *Id.* at 1005, 579 N.Y.S.2d at 975.

166. *Id.*

167. *Id.* at 1005-06, 579 N.Y.S.2d at 975. *See also* City of Santa Barbara v. Adamson, 610 P.2d 436, 438 (Cal. 1980).

168. *Genesis of Mount Vernon*, 152 Misc. 2d at 1006, 579 N.Y.S.2d at 975.

169. *Genesis of Mount Vernon, Inc. v. Zoning Bd. of Appeals*, 81 N.Y.2d 741, 745, 609 N.E.2d 122, ___, 593 N.Y.S.2d 769, 772.

170. *Id.*

171. *Id.* at 745, 609 N.E.2d 122, ___, 593 N.Y.S.2d 771-72 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 294-95 (1981), *judgment vacated*, 453 U.S. 901 (1981)). In *Hodel*, the Court stated that "the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary." *Id.* at 294-95.

172. *Id.* at 745, 609 N.E.2d at ___, 593 N.Y.S.2d at 772.

modified by vacating the order and judgment relating to the definition of "family."¹⁷³

What is unfortunate about this result is the rejection of an innovative definition of family advanced by the trial court.¹⁷⁴ If a household looked like a family, acted like a family, thought, ate, slept, and lived like a family — then it *was* a family. Perhaps that is the same thing as saying a household is a "functionally equivalent" family,¹⁷⁵ but the trial court was addressing more than just function.¹⁷⁶ Rather, in the court's view, a home had to "emulate" a traditional family or take an active role in trying to fit the bill.¹⁷⁷ The trial court's conception of a proper definition of "family" was, in all probability, more likely to survive constitutional scrutiny than most zoning ordinances which labor to nail down this elusive concept.¹⁷⁸ But the issue was never reached because the variance was denied pursuant to the "boarding house" provision of the ordinance.¹⁷⁹

It seems that the New York Court of Appeals is inclined to disagree with the broad interpretation of a municipality's right to exercise its police power as outlined in *Belle Terre*. The decisions discussed above evidence a shift away from the traditional notion of "family," and toward a less restrictive definition which focuses more on the function of a family unit rather than the biological and legal relationships of family members. But developments in federal law aimed at preventing discrimination

173. *Id.*

174. *See* *Genesis of Mount Vernon v. Zoning Bd. of Appeals*, 152 Misc. 2d 997, 1005, 579 N.Y.S.2d 968, 974 (Sup. Ct., Westchester County 1991), *aff'd as modified*, 81 N.Y.2d 741, 609 N.E.2d 122, 593 N.Y.S.2d 769.

175. *See* *Group House of Port Washington, Inc. v. Board of Zoning & Appeals*, 45 N.Y.2d 266, 274, 380 N.E.2d 207, 211, 408 N.Y.S.2d 377, 381 (1978).

176. *Genesis of Mount Vernon*, 152 Misc. 2d at 1005, 579 N.Y.S.2d at 974. The court indicated that a home had to be a family in "theory" as well as in "structure," implying a state of mind requirement. *Id.*

177. *Id.*

178. *Id.* *See* *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980); *Group House of Port Washington, Inc., v. Board of Zoning & Appeals*, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978).

179. *Genesis of Mount Vernon*, 152 Misc. 2d at 998, 579 N.Y.S.2d at 970.

against the handicapped may offer a way for many plaintiffs to sidestep constitutional challenges to definitions of family. The continuing conflict between the New York Court of Appeals and the Supreme Court's holding in *Belle Terre* remains unresolved.

III. THE FAIR HOUSING ACT: OPENING THE DOOR TO CHALLENGE DISCRIMINATORY HOUSING ORDINANCES IN FEDERAL COURTS.

When the Fair Housing Act (FHA) was amended in 1988 to include protection for the handicapped,¹⁸⁰ new weaponry was handed to the disadvantaged to fight the "Not in my backyard" (NIMBY)¹⁸¹ reactions of neighbors who oppose group homes. A person is handicapped for the purposes of the Act if he or she has a "physical or mental impairment" which limits a "major life activity."¹⁸² The Act requires local governments to make "reasonable accommodations" in zoning statutes to allow handicapped individuals to live in a neighborhood.¹⁸³ Furthermore, localities are not permitted to withhold building

180. 42 U.S.C. § 3602(h), 3604(c)-(f) (1988); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

181. Jack Rosenthal, *On Language: Acronym Power*, N.Y. TIMES, Aug. 5, 1990, § 6 at 16. (NIMBY is a popular acronym for "Not in my backyard").
Id.

182. 42 U.S.C. § 3602(h) (1988) Section 3602 provides:

"Handicap" means, with respect to a person—

- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
- (2) a record of having such an impairment, or
- (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance.

183. 42 U.S.C. § 3604(f)(3)(B) (1988). Section 3604 (f)(3)(B) provides, in relevant part:

- (3) For purposes of this subsection, discrimination includes . . .
 - (B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling

Id.

permits or otherwise impede modifications needed to make a home suitable for the handicapped.¹⁸⁴ The definition of "family" in zoning ordinances; formerly a local concern,¹⁸⁵ will now be increasingly litigated in federal courts.

Because the amendments are fairly recent,¹⁸⁶ many implementation questions remain unanswered. One such question that has received some attention in the Second Circuit is: what type of analysis is used to prove discrimination under the handicapped provisions of the Act? This issue was recently addressed by the circuit court in *Huntington Branch, N.A.A.C.P. v. Town of Huntington*.¹⁸⁷ In *Huntington Branch*, the Town of Huntington was sued by the local chapter of the National Association for the Advancement of Colored People (NAACP) because it refused to amend a zoning ordinance necessary to permit subsidized housing in the area. Utilizing a disparate impact analysis, the court determined that the Town of Huntington violated the Fair Housing Act. Under this test discriminatory effect must be proven, not the higher level discriminatory intent.¹⁸⁸ According to the court, intent need not be proven since it is easy for one to hide or disguise discriminatory intent.¹⁸⁹

184. 42 U.S.C. § 3604(f)(3)(A). Section 3604 (f)(3)(A) provides, in relevant part:

(3) For the purposes of this subsection, discrimination includes —

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises

Id.

185. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities."). *See also Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

186. *See* 42 U.S.C. § 3601 (1988). The amendments to the Fair Housing Act became effective on March 12, 1989. *Id.*

187. 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988).

188. *Id.* at 934.

189. *Id.* at 935.

A more difficult question remains unanswered, however: what are the outer limits of the definition of "handicapped" under the Act?¹⁹⁰ Impairment of "major life activities"¹⁹¹ seems to be a wide and expansive standard to determine who is handicapped for the purposes of the Act. Most of the litigation of these provisions points to the flexibility of the handicapped designation.¹⁹²

The Second Circuit district courts have ruled on several cases involving handicapped plaintiffs challenging local zoning ordinances under the Fair Housing Act. In *Cason v. Rochester Housing Authority*,¹⁹³ the district court held that a locality's denial of housing based upon a handicapped persons' inability to live independently, violated the Fair Housing Act.¹⁹⁴

One of the three named plaintiffs in *Cason* was a 31-year old woman suffering from schizophrenia, the other two were elderly women with physical handicaps.¹⁹⁵ They all were denied public housing because they did not satisfy a public housing eligibility standard requiring applicants to be capable of living independently.¹⁹⁶ The Rochester Housing Authority (Authority)

190. 42 U.S.C. § 3602(h) (1988).

191. *Id.*

192. *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43 (6th Cir. 1992); *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992); *United States v. City of Taylor*, 798 F. Supp. 442 (E.D. Mich 1992); *Easter Seal v. North Bergen*, 798 F. Supp. 228 (D.N.J. 1992); *Stewart B. McKinney Found. v. Town Plan and Zoning Comm'n.*, 790 F. Supp 1197 (D. Conn. 1992); *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002 (W.D.N.Y. 1990); *Baxter v. Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989).

193. 748 F. Supp. 1002 (W.D.N.Y. 1990).

194. *Id.* at 1007. A notable aspect of the case was that plaintiffs were granted class certification under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. Even though the class was small in *Cason*, the certification of a large class could have an enormous impact on litigation from the perspective of a state or municipal defendant.

195. *Id.* at 1004.

196. *Id.* The relevant eligibility standard allowed consideration of "an applicant's ability to live independently, or to live independently with minimal aid" (quoting Rochester Housing Authority Rental and Occupancy Manual, § 124 (a) at pp 17-18.). The phrase "ability to live independently" was defined as follows:

Ability to live independently shall mean that an applicant is able to perform those basic functions of adult living for and by him/her self.

conducted extensive evaluations of individual applicants, but not of family applicants.¹⁹⁷ The plaintiffs' applications were denied on the basis of these evaluations.¹⁹⁸

The court first noted that the Authority received federal monetary assistance, and accordingly, compliance with the Fair Housing Act was mandatory.¹⁹⁹ It then stated that in order for the plaintiffs to succeed with a claim of discrimination under the Act, they must show that the Authority's conduct evidenced an intent to discriminate or had a discriminatory effect.²⁰⁰ Since no non-handicapped individuals were denied housing because they could not live independently, the court held that the plaintiffs had made an adequate showing of discriminatory effect.²⁰¹ The fact that the plaintiffs did not show discriminatory intent did not undercut their Fair Housing Act claim.²⁰² Therefore, the court ordered Authority to cease using the "ability to live independently" standard and reversed the denials issued to the plaintiffs.²⁰³

Another Second Circuit case which dealt with an extremely controversial question was *Stewart B. McKinney Foundation v. Town Plan & Zoning Commission*.²⁰⁴ *McKinney Foundation* dealt with an issue having widespread ramifications on society — housing for families consisting of persons infected with the AIDS virus.²⁰⁵

These activities include: ability to understand and to sign contracts and legal agreements, ability to perform basic housekeeping and personal care; ability to perform necessary daily activities ability to understand and conform to applicable standards of safety. (sic);
Id. (quoting the Rochester Housing Authority Rental and Occupancy Manual, § 124).

197. *Id.* at 1005.

198. *Id.* at 1005-06.

199. *Id.* at 1006.

200. *Id.* at 1007. *See supra* notes 187-89.

201. *Cason*, 748 F. Supp. at 1007.

202. *Id.*

203. *Id.* at 1011.

204. 790 F. Supp. 1197 (D. Conn. 1992).

205. *Id.* at 1203.

The plaintiff in *McKinney Foundation* was a not-for-profit foundation which had purchased a house in Fairfield, Connecticut.²⁰⁶ The Foundation intended to rent the home to persons who tested positive for HIV, and who were either homeless or in immediate danger of becoming homeless.²⁰⁷ Predictably, neighbors who opposed the home formed a group, "Concerned Neighbors of Fairfield" (CNF), to fight against the proposed project.²⁰⁸ The Zoning Commission of the Town of Fairfield (the Commission) eventually decided that a special exception was needed for the plaintiff's proposed use.²⁰⁹ The Commission claimed that the home was comparable to a charitable nursing home and that a variance would be needed.²¹⁰ The Foundation, on the other hand, claimed that the proposed residence conformed to the definition of family in Fairfield's zoning ordinance and, therefore, no exception should be required.²¹¹ Under the Fairfield zoning ordinance, a family was defined as "a group of not more than five unrelated persons, plus domestic servants or guests, who live together as a single housekeeping unit maintaining a common household."²¹²

The Foundation brought suit in district court to enjoin Fairfield from requiring the variance.²¹³ In its decision, the court stated that in order for a preliminary injunction to issue in the Second Circuit, the moving party must establish: "(1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claim to make them fair ground for litigation."²¹⁴ Upon examining the relief sought by the Foundation, the court ruled that irreparable harm could be presumed through a violation of the Fair Housing

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 1205.

210. *Id.* at 1206.

211. *Id.*

212. *Id.* at 1207.

213. *Id.*

214. *Id.* at 1208 (citing *Plaza Health Lab. Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989)).

Act and that the Commission had not offered evidence to rebut that presumption.²¹⁵ The Commission's claim that the Foundation was inflicting the harm upon itself by refusing to seek the special exception was rejected by the court.²¹⁶

Addressing the merits of the Fair Housing Act claim, the court held that Fairfield unlawfully discriminated against the Foundation on the basis of a handicap.²¹⁷ The court noted that the Foundation was able to show that their tenant's HIV positive status was one factor in the denial of housing.²¹⁸ Discriminatory intent was shown by the Commission's "differential treatment of similarly situated groups."²¹⁹ For example, the Commission required the Foundation to answer a questionnaire, which the court found to be a departure from normal procedure.²²⁰

215. *Id.* The court noted that prospective tenants had been turned away, and expressed the opinion that. "[m]oney damages would not adequately compensate the plaintiff" *Id.* at 1209.

216. *Id.* at 1209.

217. *Id.* at 1210. The Fair Housing Act's prohibition of discrimination against the handicapped states that it shall be unlawful 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 of—

(A) that buyer or renter;

(B) a person resident in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

42 U.S.C. § 3604 (f) (1) (1988).

218. *McKinney Foundation*, 790 F. Supp. at 1210-11. "The plaintiff's evidence of 'discriminatory intent,' . . . must demonstrate only that the HIV infected status of the plaintiff's future tenants was one factor, not the sole factor, in the Commission's decision to require the Foundation to apply for a special exception." *Id.* (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977)).

219. *Id.* at 1211 (citing *Huntington Branch N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 933 (2d. Cir. 1988), *aff'd*, 488 U.S. 15 (1988)). Factors considered by the court in determining discriminatory intent included "1) discriminatory impact; 2) the historical background of the decision; 3) the sequence of events leading up to the challenged decision; 4) departures from normal procedural sequences; and 5) departures from normal substantive criteria" *Id.*, (citing *Angell v. Zinsser*, 473 F. Supp 488, 497 (D.Conn. 1979)).

220. *Id.* at 1204-05. The questionnaire inquired about: garbage disposal; the name of the record title holder; average age of occupants; standards of

Furthermore, the HIV positive status of the prospective residents was a motivating factor in their decision that the home required a special exemption.²²¹ The court found that Foundation home conformed to the zoning regulation definition of family,²²² and rejected the Commission's arguments that it was a nursing home²²³ or a charitable institution,²²⁴ which would require a variance.²²⁵ The court concluded that the Foundation had a strong likelihood of success under a "discriminatory intent" test.²²⁶ The court then considered whether the Commission's actions caused a disparate impact on the Foundation.²²⁷

The court considered disparate impact analysis appropriate when housing was denied to the handicapped.²²⁸ This less stringent test furthers a policy of broad judicial interpretation of the handicapped provisions deemed necessary in order to carry

admission; number of residents; length of time persons would live at the home; when occupants would be required to leave; leases; payment of rent and expenses; staffing of the residence; services provided; and transportation. *Id.*

221. *Id.* at 1213.

222. *Id.*; see *supra* note 212 and accompanying text.

223. *McKinney Foundation*, 790 F. Supp. at 1214-15. The town zoning regulation referred to the Connecticut Health Code, which defined a nursing home as:

a long term institution having facilities and all necessary personnel to provide skilled nursing care under medical supervision and direction to carry out simple, non-surgical treatment and dietary procedures for chronic diseases or convalescent stages of acute diseases or injuries.

Id.

224. *Id.* at 1215. In rejecting the Commission's contention that the Foundation's home was a charity, the court considered a letter to the director of the zoning board, from the Foundation attorney which described the proposed use:

The Foundation intends to lease each unit separately. Each unit shall be used strictly as a residence by its occupants. The Foundation intends to lease each unit to two (2) or three (3) individuals. The Foundation will not provide services to the occupants. The Foundation will not conduct any of its operations from the residence.

Id. at 1214-15.

225. *Id.* at 1213.

226. *Id.*

227. *Id.*

228. *Id.* at 1218.

out congressional goals.²²⁹ The court pointed to legislative history that indicated the Act would prohibit the type of restrictions the Commission had placed upon the Foundation.²³⁰ In addition, the court noted that the procedural impediments created by the Commission were not applied to any other unrelated family groups.²³¹ The court also held that less discriminatory means were available to address the Commission's concerns.²³² Lastly, the court stated that the Commission's actions fueled public opposition, subjected future residents to public scrutiny, and served to perpetuate segregation of HIV positive citizens.²³³ Thus, requiring the Foundation to obtain a special exception established a *prima facie* case of disparate impact.²³⁴

The court next examined whether the Foundation was likely to succeed on their claim that the Commission had refused to make "reasonable accommodations"²³⁵ to allow it to establish the residence.²³⁶ The Commission took the position that the Foundation merely had to apply for a special exemption,

229. *Id.*

230. *Id.*

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. This has been accomplished by such means as the enactment or imposition of health, safety or land use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements 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.

H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 24, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 2185.

231. *McKinney Foundation*, 790 F. Supp. at 1219.

232. *Id.* at 1220. The court pointed out that the Fairfield could "use its traditional police powers to ensure the property is used in a manner conforming with [the applicable] zone, to address any health or law enforcement problems that may arise, and to protect the welfare of prospective tenants and the neighborhood." *Id.*

233. *Id.* at 1219-20.

234. *Id.* at 1220.

235. 42 U.S.C. § 3604(f)(3)(B) (1988).

236. *McKinney Foundation*, 790 F. Supp. at 1221.

therefore, it had made reasonable accommodations.²³⁷ The court found that no legitimate basis was offered by the Commission to justify the special exception.²³⁸ Furthermore, even if a rational basis did exist, the evidence still showed that sufficiently serious questions existed going to the merits of the case to make them a fair ground for litigation.²³⁹ The Commission was enjoined from requiring the exception and from "taking any zoning enforcement action" against the home.²⁴⁰

The *McKinney Foundation* decision is significant in several respects. First, the court applied the discriminatory impact test used in *Huntington Branch NAACP*,²⁴¹ to a case involving the handicapped provisions of the Act. Second, the court expressed the belief that the Act should be interpreted broadly in order to carry out congressional intent to protect the handicapped from housing discrimination.²⁴² Third, the fact that the court considered a special exception to be an undue burden, when applied only to the handicapped, indicates that any requirements that are not evenly applied violate the Act.²⁴³ This assertion goes against the broad legislative deference granted to local governments by the Supreme Court in *Belle Terre*,²⁴⁴ because it prevents localities from creating different procedures that apply only to the handicapped.

District courts in other circuits have also held that persons with AIDS are handicapped under the Fair Housing Act. For example, in *Baxter v. Belleville*,²⁴⁵ the Southern District of Illinois determined that people who carried the HIV virus were handicapped for the purposes of the Act. The court also held that the section of the Act that allows housing to be denied to "individual[s] whose tenancy would constitute a direct threat to

237. *Id.*

238. *Id.* at 1221-22.

239. *Id.*

240. *Id.* at 1222.

241. *See supra* notes 187-89 and accompanying text.

242. *See supra* note 230 and accompanying text.

243. *See supra* notes 233-34 and accompanying text.

244. *See supra* notes 36-37 and accompanying text.

245. 720 F. Supp.720 (S.D. Ill. 1989).

the health or safety of other individuals”²⁴⁶ was inapplicable.²⁴⁷ Therefore, any defense to denying housing to HIV positive residents based upon public health concerns will probably be unsuccessful. In fact, the *Baxter* court labeled these concerns as “irrational hysteria and public panic.”²⁴⁸ Therefore, persons infected with the HIV virus are considered handicapped under the Act.

In a case involving a procedural requirement similar to the one challenged in *McKinney Foundation*,²⁴⁹ the Sixth Circuit, in *Marbrunak, Inc. v. City of Stow*,²⁵⁰ held that a zoning ordinance requiring special safety precautions for a residence established for four mentally retarded women violated the Fair Housing Act.²⁵¹ In *Marbrunak*, family members sought to create a residence for the women in connection with a grant offered by the Ohio Department of Mental Retardation and Developmental Disabilities.²⁵² They bought a house in a single-family zoned district and were required by the city to apply for a conditional use permit.²⁵³ They were also asked to make extensive renovations to comply with special zoning regulations which applied only to homes for the developmentally disadvantaged.²⁵⁴

The families of the future residents challenged the ordinance in the district court, where it was held to be unlawfully discriminatory on the basis of resident’s handicaps.²⁵⁵ The court

246. 42 U.S.C. §3604(f)(9) (1988). This portion of the Act provides: “(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.” *Id.*

247. *Baxter*, 720 F. Supp. at 733.

248. *Id.* at 735.

249. See *supra* notes 204-40 and accompanying text.

250. *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43, 44-45 (6th Cir. 1992).

251. *Id.* at 43.

252. *Id.* at 44-45.

253. *Id.* at 45.

254. *Id.* The city required that they provide a fire sprinkler system, alarms, fire-retardant floor and wall coverings, lighted exit signs above all doors, push bars on the doors, fire extinguishers every thirty feet, and smoke alarms. In contrast, single family homes only required smoke alarms. *Id.* at n.1.

255. *Id.* at 45.

held that requiring the plaintiffs to obtain a variance violated the Act,²⁵⁶ and while it was permissible to create regulations requiring additional safeguards for the developmentally disadvantaged, such standards must be justified by the special needs of the residents.²⁵⁷

According to the court, no attempt was made by the City of Stow to particularize the requirements to each different group of residents.²⁵⁸ For example, under the ordinance, a group of hearing impaired persons would be subject to the same regulations as blind persons, or those unable to walk or speak.²⁵⁹ As a result, the court found the ordinance to be overly burdensome because it failed to differentiate between the specific needs of people with vastly disparate disabilities.²⁶⁰

Furthermore, the existence of a variance procedure, in the court's view, did little to soften the impact of the ordinance.²⁶¹ The fact that the procedure was not even mentioned in the ordinance indicated that it was not intended to tailor the safety requirements to each different group of applicants.²⁶² The held that the ordinance was over-broad and over-inclusive, and limited the ability of developmentally impaired persons to live in an area of their choosing.²⁶³ The judgment of the district court that the ordinance violated the Fair Housing Act was affirmed.²⁶⁴

Recovering substance abusers have also been found to be handicapped under the Act. In *Easter Seal v. North Bergen*,²⁶⁵ town officials were held to have blatantly discriminated against the handicapped²⁶⁶ by denying a construction permit to persons seeking to establish a home for mentally ill, recovering substance

256. *Id.* at 47; *See also* 42 U.S.C. 3604(f)(3)(B) (1988).

257. *Marbrunak*, 794 F.2d at 47.

258. *Id.*

259. *Id.* at 47-48.

260. *Id.* at 48.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. 798 F. Supp. 228 (D.N.J. 1992).

266. *Id.* at 234.

abusers.²⁶⁷ The plaintiffs brought suit in the district court, alleging discrimination on the basis of their handicaps.²⁶⁸ The court issued a preliminary injunction requiring the Town of North Bergen to issue a construction permit, and enjoined any further interference with the plaintiff's attempts to provide a residence for the recovering substance abusers.²⁶⁹

In *Easter Seal*, the plaintiffs had submitted a proposal to operate a halfway house in response to a request for proposal (RFP) by the New Jersey Division of Mental Health and Hospitals (DMH & H).²⁷⁰ In accordance with the RFP, plaintiffs were required to choose a site located in a single family neighborhood, but weren't required to give notice to town officials of the nature of their intended use.²⁷¹ Before the DMH & H would grant the plaintiffs a license to operate the home, certain improvements and renovations were required.²⁷² The Town initially denied a construction permit because the plans included office space in the basement. When the intended purpose of the dwelling became known, however, town officials claimed that a halfway house was not permitted in the single family zoning district.²⁷³ The plaintiffs appealed the denial to the North Bergen Board of Adjustment (the Board).²⁷⁴ The Board required the plaintiffs to jump through a variety of procedural hoops, and finally dismissed the appeal without comment.²⁷⁵

267. *Id.* at 230. The proposed residents all would have "a primary diagnosis of a psychiatric disorder and a secondary diagnosis of substance abuse, a status sometimes referred to as a Mentally Ill Chemical Abuser (MICA)." *Id.*

268. *Id.* at 233.

269. *Id.* at 238.

270. *Id.* at 230.

271. *Id.* at 231.

272. *Id.*

273. *Id.* Defendants argued that New Jersey Construction Code Officials rely on the BOCA National Building Code, wherein section 307.2 classifies halfway houses as "residential use groups." North Bergen Town officials maintained that such a use was impermissible in the single family zoned district. *Id.* at 231. See BUILDING OFFICIALS AND CODE ADMINISTRATORS NATIONAL BUILDING CODE § 307.2 (1990).

274. *Easter Seal*, 798 F. Supp. at 231.

275. *Id.* at 232.

One of the more striking aspects of the case was the myriad of statements made by Mayor Nicholas Sacco that demonstrated an intentional policy of discrimination, in clear violation of the Fair Housing Act.²⁷⁶ In addition, town officials tried to stir up community opposition to the home, and even provided buses to ferry irate residents to a zoning board meeting concerning the residence.²⁷⁷ Then, after denying the appeal, town officials adopted a new ordinance which in essence gave them a discretionary power to deny any conditional use permit.²⁷⁸

The court chose to grant the injunctive relief sought by the plaintiffs under the Fair Housing Act.²⁷⁹ The plaintiffs were held to be handicapped as defined by the Act, because they were not *current* drug users.²⁸⁰ Therefore, it was impermissible for the town to deny a construction permit for the residence.²⁸¹ The court held that the town was required to make "reasonable accommodations" to afford the plaintiffs an opportunity to

276. *Id.* Statements made by Mayor Sacco included the following:

[Easter Seal has] absolutely no right to come here. [I will] turn the lawyers loose [on them] to stop the project. . . . [Easter Seal] are not getting any permits from this township. They will probably bring us to court, but that's okay. We will fight them in court. *Id.*

277. *Id.*

278. *Id.* at 232-33.

279. *Id.* at 238. See 42 U.S.C. 3613(c)(1); In order to obtain a preliminary injunction, plaintiffs must show that:

- (1) Plaintiff is likely to succeed on the merits;
- (2) Plaintiff is subject to irreparable harm while the litigation is pending.
- (3) Defendant will not suffer substantial harm as the result of the requested injunctive relief; and
- (4) The requested relief is in the public interest.

Easter Seal, 798 F. Supp. at 233 (citing *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 181 (3d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987)).

280. *Id.* at 233. See 42 U.S.C. § 3602(h)(3), which provides that a "handicap" "does not include *current*, illegal use of or addiction to a controlled substance" (emphasis added).

281. *Easter Seal*, 798 F. Supp. at 233. See 42 U.S.C. § 3604(f)(1), which provides in relevant part: [I]t shall be 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" *Id.*

establish the dwelling.²⁸² In the court's view, the concept of reasonable accommodation included some relaxation of zoning decisions and rules.²⁸³ Because the plaintiffs intended to use the dwelling "in much the same way as would a traditional family,"²⁸⁴ such accommodation was required.²⁸⁵

Equally important in the court's decision was the determination that the plaintiffs were suffering irreparable harm by the town's refusal to accommodate the home.²⁸⁶ According to the court, each day the litigation continued, individuals who sought to live in the proposed home were forced to seek housing in areas which endangered their recovery.²⁸⁷ The health and safety of the proposed residents were in danger, and the court deemed this an ongoing, irreparable injury.²⁸⁸

The court believed that the defendants, in contrast, would suffer no harm if the plaintiffs were granted relief. Furthermore, since halfway houses provided means for recovering drug and alcohol abusers to re-assimilate themselves into the larger community, they served the public interest.²⁸⁹ So, the court required the Town of North Bergen to issue the plaintiffs a construction permit, and cease any further interference with the operation of the home.²⁹⁰ The court concluded by condemning the Mayor's proclamation of "victory" when the permit was denied.²⁹¹ The court stated that the town official's actions amounted to "a defeat for compassion and understanding, and only a victory for discrimination and despair."²⁹²

282. *Easter Seal*, 798 F. Supp. at 234. See 42 U.S.C. § 3604(f)(3)(B).

283. *Easter Seal*, 798 F. Supp. at 234.

284. *Id.*

285. *Id.*

286. *Id.* at 237. See *supra* note 279.

287. *Easter Seal* 798 F. Supp. at 237.

288. *Id.*

289. *Id.* at 238.

290. *Id.*

291. *Id.*

292. *Id.* at 238.

The elderly have also been protected as handicapped under the Fair Housing Act. *United States v. City of Taylor*,²⁹³ presented another case involving the "reasonable accommodations" provision of the Act. The plaintiff claimed that the City of Taylor made housing unavailable to them on the basis the handicaps of their intended tenants by failing to make "reasonable accommodations" in their zoning plan.²⁹⁴ Plaintiff Smith & Lee Associates had purchased a home to be used as a residence for six elderly, disabled persons.²⁹⁵ When they sought to expand the facility to accommodate twelve residents, the city declined to issue a building permit for renovations, claiming that the property was zoned only for single family use.²⁹⁶

The City of Taylor's zoning ordinance made provisions for nontraditional families when a household was of a "continuing nontransient domestic character," and the members lived and cooked as a "single non-profit housing unit."²⁹⁷ The City maintained that the plaintiff's residence failed under this definition of "family" because the home was operated for profit.²⁹⁸ The town board felt that granting an exception for the home would undermine the city's "Master Land Use Plan."²⁹⁹

The court pointed out that twelve unrelated adults could live in a house together without violating the definition of "family," and therefore the regulation was not rationally related to the stated policy goals.³⁰⁰ Furthermore, the elderly residents suffered from

293. 798 F. Supp. 442 (E.D. Mich 1992). The opinion is based on two consolidated cases and plaintiff Smith & Lee Associates owns the home in question. *Id.* at 443.

294. *Id.* See *supra* note 183 and accompanying text.

295. *City of Taylor*, 798 F. Supp. at 443.

296. *Id.* at 444.

297. *Id.* The City of Taylor Zoning ordinance included the following section defining the word "family": "A collective number of individuals domiciled together in one (1) dwelling unit whose relationship is of a continuing non transient domestic character and who are cooking and living as a single non-profit housekeeping unit" *Id.*

298. *City of Taylor*, 798 F. Supp. at 444.

299. *Id.* at 445.

300. *Id.* at 447.

a variety of ailments³⁰¹ which rose to the level of limiting "major life activities," therefore they were handicapped under the Act.³⁰² In conclusion, the ordinance, as applied, was held to violate the Act.³⁰³ The most important aspect of the case that the elderly were considered handicapped under the Act, because this was a significant expansion of the protective category.

Further evidence of the inclusive nature of the provisions protecting the handicapped under the Act was provided in *Oxford House, Inc. v. Township of Cherry Hill*.³⁰⁴ The district court directly contradicted a state court decision³⁰⁵ that a group home for recovering alcohol and drug abusers did not meet the definition of "family" contained in a town zoning ordinance.³⁰⁶

The plaintiffs in *Oxford House* were attempting to open a group residence for persons recovering from alcohol and drug addiction.³⁰⁷ Oxford House operated over 400 similar residences throughout the country,³⁰⁸ with two previously opened in the Town of Cherry Hill.³⁰⁹ When the two existing homes were unable to handle the volume of prospective residents in the area,

301. *Id.* at 446. "The residents suffer from Alzheimer's Syndrome, senile dementia, and organic brain syndrome, along with physical problems associated with the elderly, such as hypertension and hip replacements." *Id.*

302. *Id.* See 42 U.S.C. § 3602(h)(1).

303. *Marbrunak*, 974 F.2d at 47.

304. 799 F. Supp. 450 (D.N.J. 1992).

305. *Township of Cherry Hill v. Oxford House*, (N.J. Super. Ct. Ch. Div. April 27, 1992) (holding that Oxford House residents did not constitute a family, that they were not handicapped under the Fair Housing Act, and that the definition of family in the town zoning ordinance was not applied in a discriminatory manner), *rev'd*, *Cherry Hill Township v. Oxford House, Inc.*, A-5572-91T3, 1993 WL 88248 (N.J. Super. Ct. App. Div. Feb. 18, 1993) (holding that Cherry Hill's definition of family violated state constitution because it distinguished between related and unrelated persons; and that recovering substance abusers were protected as handicapped under the Fair Housing Act).

306. *Oxford House*, 799 F. Supp. at 458. The court found that a state court ruling on whether a zoning regulation had been complied with was completely irrelevant to a determination under the Fair Housing Act since the issue of compliance with the definition of family was not before the court. *Id.*

307. *Id.* at 453.

308. *Id.* at 452.

309. *Id.* at 457.

Oxford House sought to open a third location.³¹⁰ The Town denied a certificate of occupancy on the grounds that Oxford House did not meet the definition of a "single family" contained in the Cherry Hill zoning ordinance.³¹¹ What was unique about Cherry Hill's interpretation of the "single family" provision was not the wording of the ordinance itself, but the manner in which it was applied.³¹²

When a family related by either blood or marriage applied for a certificate of occupancy, the presumption was that they conformed to the definition of family within the ordinance.³¹³ A group of unrelated people, on the other hand, was forced to rebut a presumption that they *did not* meet the definition of "family."³¹⁴ Unrelated individuals were required to prove that their household would be permanent and stable, even though this requirement did not appear anywhere in the zoning code.³¹⁵ Related individuals were automatically granted a certificate of occupancy, but unrelated individuals were denied a certificate and forced to prove that they met the "permanency and stability" standard at a public hearing.³¹⁶ The playing field was skewed against unrelated individuals in these situations.

The *Oxford House* court first addressed the issue of whether the plaintiffs were handicapped under the Act,³¹⁷ and found that there was evidence that Congress intended to protect recovering

310. *Id.* at 453.

311. *Id.* at 454. The Cherry Hill Zoning Ordinance defined a "family" as follows:

[A] single individual doing his own cooking and living upon the premises as a separate housekeeping unit, or a collective body of persons doing their own cooking and living together upon the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bond. *Id.* at 455.

312. *Id.* at 455-56.

313. *Id.* at 455.

314. *Id.*

315. *Id.*

316. *Id.*

317. 42 U.S.C. § 3602(h) (1988).

drug and alcohol abusers from discrimination under the Act.³¹⁸ Since major disruptions and limitations in life result from such addictions, the court viewed these negative effects as sufficient to meet the Act's definition of "handicapped."³¹⁹

Moving to the issue of discrimination, the court held that the town had failed to make "reasonable accommodations"³²⁰ to give handicapped persons an opportunity to establish a home.³²¹ The court reasoned that the uneven application of the zoning ordinance caused a "disparate impact" on the Oxford House residents.³²²

Furthermore, the defendant could not point to any legitimate reason why the plaintiff's application was denied.³²³ The court pointed out that while stability and permanency are legitimate criteria in determining whether a group of residents constitutes a family,³²⁴ the standard must be applied equally to both related and unrelated persons.³²⁵ According to the court, unrelated status was not a legitimate reason for denial.³²⁶ Additionally, no evidence was brought forward by the defendant to show that the residential character of the neighborhood would be adversely affected by the proposed use.³²⁷

The plaintiffs, on the other hand, had suffered irreparable harm each week that they were prevented from moving into Oxford

318. *Oxford House*, 799 F. Supp. at 459. See *supra* note 280 and accompanying text.

319. *Id.* at 460, 42 U.S.C. § 3602(h) (1988).

320. 42 U.S.C. § 3604(f)(3)(B) (1988).

321. *Oxford House*, 799 F. Supp. at 461.

322. *Id.* at 461. See *Doe v. City of Butler*, 892 F.2d 315, 323 (3d Cir. 1989) (violation of Fair Housing Act requires plaintiff to show either discriminatory treatment or effect); see also *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1343 (D.N.J. 1991); *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989) (stating plaintiffs must show either intentional discrimination or a discriminatory impact to make out a prima facie case of a Fair Housing Act violation).

323. *Oxford House*, 799 F. Supp. at 462.

324. *Id.* (citing *Berger v. New Jersey*, 364 A.2d 993 (N.J. 1976)).

325. *Id.* (citing *Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 894 (N.J. 1990)).

326. *Id.*

327. *Id.*

House.³²⁸ The court pointed to testimony which showed that persons recovering from drug and alcohol addictions had a far greater chance of success when living in a controlled environment and determined that shutting down the residence would increase the plaintiffs' chances of relapse.³²⁹ Additionally, policy considerations demanded that institutions such as Oxford House be supported by the public in order to address the epidemic of drug and alcohol abuse in the United States.³³⁰ The Town of Cherry Hill was therefore enjoined from all further interference with the operation of the Oxford House residence.³³¹

When one looks at these cases as a whole, the one item that stands out is the all-inclusive definition of "handicapped" in the Act. Persons with AIDS,³³² recovering substance abusers,³³³ mentally ill persons,³³⁴ and the elderly³³⁵ have all been held to be within the definition of handicapped under the Act. The two-prong test of discriminatory intent or disparate impact is an easier threshold for plaintiffs to reach than overcoming the presumption of validity encountered when challenging a zoning ordinance on

328. *Id.* at 464.

329. *Id.* at 463-64. According Riley Reagan, executive director of the Governor's Council on Alcoholism and Drug Abuse for the State of New Jersey: "Recovery is a very tenuous thing; and unless recovering addicts and alcoholics are very careful to follow a rigid regime of attending support groups like Alcoholics Anonymous, and avoiding associations with people who may encourage them to drink or use drugs, they can easily fall back into relapse." *Id.* at 456 n.10.

330. *Id.* at 465.

331. *Id.*

332. *See* Stewart B. McKinney v. Town Plan & Zoning Comm'n, 790 F. Supp. 1197 (D. Conn. 1992); Baxter v. Belleville, 720 F. Supp. 720 (S.D. Ill. 1989).

333. *See* Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992); Easter Seal v. North Bergen, 798 F. Supp. 228 (D.N.J. 1992).

334. *See* Marbrunak, Inc. v. City of Stow, 974 F.2d 43 (6th Cir. 1992); Cason v. Rochester Hous. Auth., 748 F. Supp. 1002 (W.D.N.Y. 1990).

335. *See* United States v. City of Taylor, 798 F. Supp. 442 (E.D. Mich. 1992); Cason v. Rochester Hous. Auth., 748 F. Supp. 1002 (W.D.N.Y. 1990).

constitutional grounds.³³⁶ A particular aspect of Fair Housing Act litigation which is of great concern to local officials is the application of 42 U.S.C. § 3615, which provides a mechanism for invalidating discriminatory ordinances.³³⁷ The wording of this provision leaves no doubt that any state or local law that permits discrimination in housing can be invalidated under the Act.³³⁸ Finally, the inclusiveness of the Act's definition of "handicapped" should give pause to local zoning board officials seeking to block residences for the disadvantaged. The decisions discussed above will have great impact on "group home" litigation in the State of New York.

IV. ANALYZING THE IMPACT OF THE FAIR HOUSING ACT AMENDMENTS AND DECISIONS ON NEW YORK STATE COURT LITIGATION.

The Fair Housing Act will have tremendous impact on New York State litigation for several reasons. The New York judiciary, which has broken away from the restraints of *Belle*

336. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 326 (1987) ("the strong presumption of constitutionality that applies to legislative enactments certainly requires one challenging the constitutionality of an ordinance . . . to allege some sort of improper purpose or insufficient justification in order to state a colorable federal claim for relief"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1984) ("the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest).

337. 42 U.S.C. § 3615 (1988). Section 3615 provides in pertinent part: "[A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid." *Id.*

338. See *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp at 458 (D.N.J. 1992). See also *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp 1329 (D.N.J. 1991) (modifying state court order limiting number of residents in drug and alcohol rehabilitation center pending outcome of state proceeding); *Baxter v. City of Belleville*, 720 F. Supp 720 (SD. Ill. 1989) (town zoning board compelled to issue special use permit for residence to house persons with AIDS).

Terre,³³⁹ in such cases as *Ferraioli*,³⁴⁰ *McMinn*,³⁴¹ and *Group House*,³⁴² has changed the way municipalities define the word "family" as used in zoning ordinances. The end result of this evolution will be that localities will be forced to make provisions for "functionally equivalent families."³⁴³ Taken together with the 1988 Amendments to the Fair Housing Act,³⁴⁴ this framework provides handicapped plaintiffs with an added advantage when challenging restrictive zoning ordinances.

Since many municipalities have changed their zoning ordinances to accommodate functionally equivalent families, it is very difficult to deny housing to handicapped groups without violating the Act.³⁴⁵ In other words, handicapped individuals must be treated exactly like other unrelated families.³⁴⁶ This is a far more stringent prohibition against discrimination than was employed by the Supreme Court in *City of Cleburne*,³⁴⁷ or by the New York State Court of Appeals in *Group House*³⁴⁸ and

339. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

340. *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

341. *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985).

342. *Group House of Port Washington v. Board of Zoning and Appeals*, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978).

343. *See McMinn*, 66 N.Y.2d at 550, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131; *Group House of Port Washington*, 45 N.Y.2d at 272, 380 N.E.2d at 209, 408 N.Y.S.2d at 379-80.

344. 42 U.S.C. §§ 3601-3619 (1988).

345. *See Stewart B. McKinney Found., Inc. v. Town Planning and Zoning Comm'n*, 790 F. Supp. 1197 (D. Conn. 1992); *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002 (W.D.N.Y. 1990).

346. *McKinney Foundation*, 790 F. Supp. at 1213; *Cason*, 748 F. Supp. at 1008.

347. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). The Cleburne Court found that the classification of handicapped may be relevant in certain situations, not suspect. "[T]he appropriate method of reaching such instances is not to create a new quasi-suspect classification . . . [r]ather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us." *Id.* at 446.

348. *Group House of Port Washington, Inc. v. Town Planning and Zoning Comm'n*, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978).

Genesis of Mount Vernon.³⁴⁹ Furthermore, it is easier for plaintiffs to prevail under the Fair Housing Act than under a constitutional challenge to a zoning ordinance. It is more palatable for courts to declare an ordinance invalid under the Act than to hold it facially unconstitutional.

Another reason why more handicapped residents may pursue their claims under the Fair Housing Act is that the legislation offers several major incentives for plaintiffs. The possibility of recovering attorney's fees,³⁵⁰ and having costs and fees waived³⁵¹ will make it easier for non-profit plaintiffs to prevail against municipalities. The provisions even out the playing field, since most group home plaintiffs have enough trouble trying to survive on the money they have without litigation. It is important to note, however, that there is no requirement under the Act that a plaintiff have financial problems in order to recover attorney's fees; instead, attorney's fees may be awarded at the discretion of the court.

These savings might have made a difference to plaintiffs in a case like *Genesis of Mount Vernon*,³⁵² which went up to New York Court of Appeals. The costs involved in pursuing the case alone would deter many plaintiffs from filing suit against a municipality endowed with vast financial and legal resources. With these recoupment provisions, however, more group homes and analogous non-traditional families may be willing to enter

349. *Genesis of Mount Vernon, Inc. v. Zoning Bd. of Appeal*, 81 N.Y.2d 741, 609 N.E.2d 122, 593 N.Y.S.2d 769 (1992).

350. 42 U.S.C. § 3613(c)(2) (1988). Section 3613 (c)(2) provides in pertinent part: "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." *Id.*

351. 42 U.S.C. § 3613(b) (1988). Section 3613(b) provides in pertinent part:

Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may . . . authorize the commencement or continuation of a civil action . . . without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

Id.

352. 81 N.Y.2d 741, 609 N.E.2d 122, 593 N.Y.S.2d 769 (1992).

into litigation to assert their rights in federal court under the Fair Housing Act rather than in New York State courts.

One particular aspect of Fair Housing Act litigation which is of great concern to local officials is the application of 42 U.S.C. § 3615, which provides a mechanism for invalidating discriminatory ordinances.³⁵³ Any law or practice, state or local, which permits discrimination against the handicapped in housing can be invalidated for the purposes of the Act.³⁵⁴ Furthermore, as the cases suggest, the inclusiveness of the Act's definition of "handicapped" should give pause to town zoning boards who seek to block group homes and halfway houses for the disadvantaged.³⁵⁵

Additionally, the guarantees provided in federal Article III courts may induce handicapped plaintiffs to seek redress in federal court. While state courts are certainly competent to hear these claims, Article III courts were created to resolve conflicts such as these. The Article III guarantees, which protect judges from being fired or having their salaries cut, make a great deal of sense in cases involving sensitive, hotly contested local land use disputes.³⁵⁶ The political implications of these cases on the local

353. 42 U.S.C. § 3615 (1988). Section 3615 provides in pertinent part: [A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid.

Id.

354. *See Oxford House, Inc. v. Cherry Hill*, 799 F. Supp 450, 458 (D.N.J. 1992). *See also Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp 1329 (D.N.J. 1991) (modifying state court order limiting number of residents in drug and alcohol rehabilitation center pending outcome of state proceeding); *Baxter v. City of Belleville*, 720 F. Supp. 720 (SD. Ill. 1989) (town zoning board compelled to issue special use permit for residence to house persons with A.I.D.S.).

355. *See* 42 U.S.C. § 3602(h) (1988).

356. U.S. CONST. art. III provides, in relevant part:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at

and state level make the district court a more attractive option for plaintiffs under the Fair Housing Act.

On the other hand, litigation in federal court subjects plaintiffs to challenges based upon standing,³⁵⁷ mootness,³⁵⁸ and ripeness.³⁵⁹ Furthermore, challenges can be brought by defendants pursuant to various abstention doctrines.³⁶⁰ While the intention of Congress to create a private cause of action mitigates against these factors,³⁶¹ litigating in federal court raises a variety of hurdles for plaintiffs.

Furthermore, it may be hard to distinguish the disparate impact/discriminatory effect test from the traditional "mere rationality" standard employed by both federal and New York State Courts. How is an assertion that a zoning ordinance creates a disparate impact on a group different from saying it is not "rationally related" to legislative goals? One familiar way courts decide whether a rational relationship exists is by examining whether the ordinance is susceptible to arbitrary application.³⁶² If

stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Id.

357. *See supra* note 9 and accompanying text.

358. *See* *Headwaters, Inc. v. Bureau of Land Management*, 893 F.2d 1012 (9th Cir. 1989) (environmental organization's request for a permanent injunction preventing logging was rendered moot when the trees were cut, and half had been hauled away from the site).

359. *See* *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331 (9th Cir. 1990) (in case where plaintiff may escape economic injury entirely if a variance is granted, case will not be ripe for adjudication unless government has previously denied at least one request).

360. *See* *Oxford House-Evergreen v. Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991) (where owner, operator, and residents of home for recovering substance abusers claimed violation of Fair Housing Act, the court found Pullman, Younger, and Burford abstention doctrines inapplicable, and enjoined City of Plainfield from limiting number of residents pending outcome of state proceeding).

361. 42 U.S.C. § 3612 (1988). Section 3612 provides in relevant part: "The rights granted by section 803, 804, 805, and 806 [42 U.S.C. §§ 3603-3606] may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction." *Id.*

362. *See supra* note 13 and accompanying text.

an ordinance is arbitrarily applied, it must cause a "disparate impact" on the group it is applied to. Therefore, the inquiry is similar under the Act to the inquiries conducted previously in New York State Courts.

But there is one crucial difference. Using mere rationality, there is a strong presumption of constitutionality of the zoning ordinance.³⁶³ As a defense, the government entity need merely show the existence of the rational relationship. To prove the negative, that no such relationship exists, is an extremely high burden for plaintiffs. The two pronged "discriminatory intent/disparate impact" test of the Fair Housing Act offers an easier path for plaintiffs.

Another open issue involves the interaction between the Fair Housing Act and the Padavan Law,³⁶⁴ which governs the selection of group home sites in the state of New York. The Padavan Law requires that entities seeking to establish group homes for the disabled notify municipalities when a site has been chosen.³⁶⁵ The municipality then has the option to approve the site,³⁶⁶ suggest alternative sites,³⁶⁷ or object to the home on the grounds that granting the application would result in an unfair concentration of such homes in the area, and the "nature and character" of the municipality would be "substantially altered."³⁶⁸ If the organization seeking to establish a group home

363. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 548, 488 N.E.2d 1240, 1242, 498 N.Y.S.2d 128, 130 (1985).

364. N.Y. MENTAL HYG. LAW § 41.34 (McKinney 1988 & Supp. 1993).

365. N.Y. MENTAL HYG. LAW § 41.34(c)(1) (McKinney 1988 & Supp. 1993). Section 41.34(c)(1) provides in relevant part: "When a site has been selected by the sponsoring agency, it shall notify the chief executive officer of the municipality in writing and include in such notice the specific address of the site, the type of community residence, the number of residents and the community support requirements of the program." *Id.*

366. N.Y. MENTAL HYG. LAW § 41.34(c)(1)(A) (McKinney 1988 & Supp. 1993).

367. N.Y. MENTAL HYG. LAW § 41.34(c)(1)(B) (McKinney 1988 & Supp. 1993).

368. N.Y. MENTAL HYG. LAW § 41.34(c)(1)(C) (McKinney 1988 & Supp. 1993).

and the municipality cannot agree on a site, the final decision is made at a public hearing by the commissioner of the agency responsible for granting permits for group residences.³⁶⁹ A conflict between the Padavan provisions of the Mental Hygiene Law and the Fair Housing Act raise issues which invoke the Supremacy Clause of the United States Constitution.³⁷⁰

It is conceivable that a practice or ruling under the law could be declared invalid "for the purposes of the act."³⁷¹ It does not seem from the legislative history of the Act, and the traditional deference to zoning as a "local concern," that Congress has preempted the legislative field of housing for the handicapped. The express preemption provision of the Act, however, leaves no room for any laws, state, local, or federal, which are held to violate the Act. Any selection of a group home site must now be undertaken with consideration of the requirements of the Fair Housing Act. If a particular site is denied, and that ruling is found to violate the Act, the ruling would be invalidated. What will be the result if handicapped plaintiffs seek to bring suit against the State of New York?

A situation such as this recently arose in Blue Point, Long Island, providing an illustrative example.³⁷² A plan was announced to convert an existing Adult Home into a group residence for mentally ill substance abusers,³⁷³ a group protected

369. N.Y. MENTAL HYG. LAW § 41.34(c)(1)(C)(5) (McKinney 1988 & Supp. 1993).

370. U.S. CONST. art. VI, § 2. The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

371. *See supra* note 337.

372. Josephine Jahier, *Mental-Home Site Rankles Residents*, *NEWSDAY*, Feb. 6, 1993, at 29.

373. *Id.*

by the handicapped provisions of the Fair Housing Act.³⁷⁴ Predictably, Neighbors formed a group in opposition to the home.³⁷⁵ The final decision on the approval of the proposed site rests with the New York State Office of Mental Health.³⁷⁶ Apparently in response to community opposition, State Assemblyman I. William Bianchi made public a state audit which he claimed showed that the New York State Office of Mental Health had paid too much for group homes in the past,³⁷⁷ and that an inordinate number of group homes were already located in the Town of Brookhaven.³⁷⁸

If this obvious pressure on the State Office of Mental Health results in a denial of the application, the proposed residents could bring an action against the municipality and the State Office of Mental Health. If a finding in this hypothetical action was made that the residents were denied housing on the basis of a handicap,³⁷⁹ the decision could have enormous implications. The validity of the Padavan Law would certainly be called into question as it relates to the Fair Housing Act, Since different requirements are applied to handicapped families than to other families of unrelated individuals.³⁸⁰ Because land use has always been considered to be within the scope of local regulation, the defendants would logically counter by pointing to the broad police power to legislate in the area of land use supported by *Belle Terre*.³⁸¹ The constitutional conflict between *Belle Terre*,

374. 42 U.S.C. § 3602(h) (1988). See *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992); *Easter Seal Society of N.J., Inc. v. Township of North Bergen*, 798 F. Supp. 228 (D. N. J. 1992).

375. *Jahier*, *supra* note 372; at 29. See *Stewart B. McKinney Found. Inc. v. Town Plan & Zoning Comm'n*, 790 F. Supp. 1197, 1203 (D. Conn. 1992),

376. *Jahier*, *supra* note 372; at 29.. N.Y. MENTAL HYG. LAW § 41.34(c)(1)(C)(5) (McKinney 1988 & Supp. 1993).

377. Rick Brand, *State Overpaid for Group Homes*, *NEWSDAY*, Feb. 9, 1993, at 7.

378. *Id.*

379. 42 U.S.C. § 3602(h) (1988).

380. See generally, *Stewart B. McKinney Found., Inc. v. Town Plan & Zoning Comm'n*, 790 F. Supp. 1197 (D. Conn. 1992).

381. See *supra* notes 36-37 and accompanying text.

and more recent decisions which support a more flexible definition of family may be renewed in this context.

In conclusion, an increase in group home litigation under the Fair Housing Act will not mean that there is no area involving the definition of "family" left to be litigated in New York State courts. It just means that handicapped plaintiffs, who have initiated much of the litigation involving the definition of "family," now have substantial incentives to bring their disputes to federal courts. There are, of course, other non-traditional families who may challenge such definitions on constitutional grounds because they would not be considered handicapped under the Act. Perhaps one day the issue presented in *Belle Terre* will arise again, and the conflict between the New York Court of Appeals and the United States Supreme Court will be resolved. But the handicapped amendments to the Fair Housing Act are changing the face of group home litigation in New York State.

CONCLUSION

While the Supreme Court's holding in *Belle Terre* represents a broad interpretation of local police power to regulate land use, the New York judiciary has shifted towards a more liberal stance. Rather than giving wide deference to local zoning determinations, the courts of New York state have exhibited an increasing tolerance of "functionally equivalent families." Furthermore, the handicapped amendments to the Fair Housing Act have been interpreted in an expansive manner, allowing group home plaintiffs to litigate their claims without raising constitutional challenges. While the inconsistency between the Supreme Court and the New York judiciary remains unresolved, the alternatives presented by the Fair Housing Act may prevent a definitive, constitutional determination of the meaning of "family" from being reached.

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