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HOUSING JUSTICE FOR ALL
DEBORAH KENN

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BOOK REVIEWS

- REVIEW OF *FAITH AND FREEDOM—RELIGIOUS LIBERTY
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CONTENTS

ARTICLES

- RESTRICTIONS ON EQUAL TREATMENT OF UNMARRIED
DOMESTIC PARTNERS *William V. Vetter* 1
- WAR ON DRUGS OR ON DRUG USERS? DRUG TREATMENT
AND THE NIMBY SYNDROME *Herbert A. Eastman* 15
- THE PROBLEMATIC STATUS OF EMPLOYEE COMPENSATION AND
RETIREE PENSION SECURITY: RESISTING THE STATE,
REFORMING THE CORPORATION *David L. Gregory* 37
- PARADISE UNFOUND: THE AMERICAN DREAM OF HOUSING
JUSTICE FOR ALL *Deborah Kenn* 69

NOTE

- USING DISCOURSE ETHICS TO PROVIDE EQUALITY
IN EDUCATION FOR AFRICAN-AMERICAN CHILDREN
FORTY YEARS AFTER *BROWN V.*
BOARD OF EDUCATION *Norman Williams, Jr.* 99

BOOK REVIEWS

- REVIEW OF *FAITH AND FREEDOM—RELIGIOUS LIBERTY IN
AMERICA* BY MARVIN E. FRANKEL 127
- REVIEW OF *BEYOND POLITICS: MARKETS, WELFARE, AND THE
FAILURE OF BUREAUCRACY* BY WILLIAM C. MITCHELL &
RANDY T. SIMMONS 131

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WAR ON DRUGS OR ON DRUG USERS? DRUG TREATMENT AND THE NIMBY SYNDROME

HERBERT A. EASTMAN*

Are the mentally retarded, homeless, elderly, disabled and incarcerated today's "parasites," or are they our children, brothers and sisters, aunts and uncles, parents and grandparents?

— Peter Salsich¹

Most of our people are older, some elderly. I'm against drugs, but why put it (drug treatment center) in a neighborhood? I think it could be dangerous.

— Minnie Ware²

Communities can't have it both ways. They can't tell us, as treatment agencies, to do something about "those addicts" and at the same time not be willing to provide the resources, the real estate, and the willingness to hire rehabilitated patients, which makes it possible to carry out effective rehabilitation.

— Herbert Kleber, M.D.³

I. INTRODUCTION

Americans' fear of drugs intensifies when they discover addicts living in the house next door. Fear has many victims, ravaging civil liberties and undercutting an effective, inexpensive, and humane approach to addiction: group recovery homes.

A slowly evolving detente has developed between cities and group homes for the disabled. Fear, however, may prevent addiction recovery homes from inclusion in this trend. Presently, fear also threatens those who have never used drugs but depend on the same law that protects the recovering drug user

* Professor of Law, Saint Louis University School of Law; J.D. Notre Dame Law School. The author acknowledges the comments of Ann Lever, his co-counsel in the Oxford House-C v. City of St. Louis litigation, his colleague at Saint Louis University School of Law Peter Salsich, and the contribution of Dr. Herbert Kleber to the definition of the dilemma and its resolution. Finally, the author thanks faculty fellow Lisa Tunick for all of her valuable help.

¹ Peter W. Salsich, Jr., *Group Homes, Shelters, and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP., PROB. & TR. J. 413, 417 (1986).

² Trish Martin, *Area Wants Drug Center to Relocate; Lake Opal Estates Residents Say the Facility Doesn't Belong in Their Neighborhood*, ORLANDO SENTINEL TRIB., August 4, 1991, at K10 (quoting a neighbor of a proposed drug treatment center).

³ Herbert D. Kleber, M.D., in *Interview—From Theory to Practice: The Planned Treatment of Drug Users*, 24 INT'L J. ADDICTIONS 123, 148 (1989).

from discrimination. One city opposed to group recovery homes within its boundaries has asked the Supreme Court to adopt a broad interpretation of the Fair Housing Act which, if adopted, would result in the elimination of the Act's protection for all group homes of disabled persons throughout the country.⁴

Group recovery homes are critical to the war on drugs. But the public's fear of addicts and frustration in waging a losing battle against drug use could shift society's target from fighting drug abuse to fighting drug abusers, making it impossible for them to recover without relapse.⁵

Drug treatment experts warn that national, state, and local policymakers must work to overcome "[c]ommunity obstacles and barriers to identifying and establishing new treatment program sites . . . to maximize the use of treatment as an effective strategy for reducing drug abuse and HIV."⁶ The legal protections, strategies, and arrangements in place for other kinds of group homes must be overhauled to accommodate the special challenges posed by drug recovery homes. Lawyers can devise strategies to protect the homes from local governments' attempts to close them. Lawmakers can reform national, state, and local laws to assure the homes' protection.

Professor Salsich's aspiration—to treat the different as we would treat those more familiar to us⁷—has inspired earlier efforts to achieve peaceful coexistence between group homes and communities. These efforts must acknowledge the differences between group homes for the elderly and disabled, for example, and group homes for drug addicts. Watching a mentally retarded child playing in the yard next door is perceived as one thing; however, a recovering cocaine addict washing his car is perceived as quite another.

The other introductory quotations⁸, from a neighbor of a group home and from Dr. Herbert Kleber, the former "Deputy Drug Czar" in the Bush

⁴ *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994), *cert. granted*, 63 U.S.L.W. 3337, 3346 (U.S. Oct. 31, 1994) (No. 94-23). The Supreme Court considered whether the traditional zoning definition of single family, established to limit use and occupancy of residences in single family residential zones, constitutes a reasonable occupancy limitation pursuant to the exemption created by the Fair Housing Act Amendments, 42 U.S.C. § 3607(b)(1) (1988), when the definition is neutral on its face and applied without any evidence of intent to discriminate against persons protected by the Fair Housing Act and the Fair Housing Act Amendments, 42 U.S.C. §§ 3601-31 (1968).

⁵ Examples of the war on drug users may be found in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (tenants who use drugs may be evicted from public housing (42 U.S.C. § 1437d-1 (1988)); persons convicted of drug offenses may be denied federal benefits (21 U.S.C. § 853a (1988)). Larry Gostin, *An Alternative Public Health Vision for a National Drug Strategy: "Treatment Works,"* 28 HOUS. L. REV. 285, 289 (1991).

⁶ Carl Leukefeld, *Recommendations for Improving Drug Treatment*, 27 INT'L J. ADDICTIONS 1223, 1234 (1992).

⁷ See *supra* note 1 and accompanying text.

⁸ See *supra* notes 2 and 3 and accompanying text.

Administration, suggest the different nature of the community conflict when some of the players are addicts. Communities want something done about drug addicts; they want addicts off the streets and may not be choosy about where they are put, provided they are out sight. We must address differences between community perceptions of mentally retarded persons and drug addicts in order for addicts to recover and for communities to conquer their drug abuse problems.

II. THE WAR ON DRUGS: DRUG RECOVERY HOMES

In the war against drugs, the battle to limit the supply of drugs through law enforcement may be lost. Yet, the battle to reduce demand through treatment remains to be won. Nationwide, local governments are switching battle plans to this more strategically effective field.⁹ The consensus grows that treatment of addiction promises a more effective¹⁰, although imperfect,¹¹ approach to addressing the nation's drug abuse problems. Not surprisingly, the demand for treatment services exceeds the supply, and waiting lists are long.¹²

The needed services for a treatment delivery system include detoxification, in-patient care, out-patient care, and halfway houses.¹³ Also critical to the continuum of care are drug-free recovery homes, sometimes called "therapeutic communities."¹⁴ Recovering addicts must live somewhere after they are discharged from the hospital and as they recover. Drug recovery homes offer the recovering addict a supportive, drug-free living environment with recovering peers, where behavior can change and the risk of relapse is reduced.¹⁵ Without supportive and drug-free living environments, the risk of relapse after discharge from a hospital treatment program is heightened.¹⁶ Marlatt and

⁹ Somini Sengupta, *County Drug Policy Shift Weighed*, L.A. TIMES, May 17, 1993, at A1; Ronald Smothers, *Miami Tries Treatment, Not Jail, in Drug Cases*, N.Y. TIMES, Feb. 19, 1993, at A10. See also Gostin, *supra* note 5.

¹⁰ Gostin, *supra* note 5, at 302. ROBERT L. HUBBARD, *DRUG ABUSE TREATMENT: A NATIONAL STUDY OF EFFECTIVENESS* (1989).

¹¹ Mark Schlesinger & Robert A. Dorwart, *Falling Between the Cracks: Failing National Strategies for the Treatment of Substance Abuse*, 121 DAEDALUS 195 (Summer 1992) (arguing that not all substance abusers get the treatment they need).

¹² See Gostin, *supra* note 5, at 298.

¹³ Constance Weisner, *The Merging of Alcohol and Drug Treatment: A Policy Review*, 13 J. PUB. HEALTH POL'Y 66, 67 (1992).

¹⁴ David Gates & Deborah Beck, *Prevention and Treatment: The Positive Approach to Alcoholism and Drug Dependency*, 24 CLEARINGHOUSE REV. 472, 477 (1990); Herbert Kleber, *Treatment of Drug Dependence: What Works*, 1 INT'L REV. PSYCHIATRY 81, 89 (1989); Leukefeld, *supra* note 6, at 1227; Weisner, *supra* note 13, at 67.

¹⁵ Margaret Allison, M.A. & Robert L. Hubbard, Ph.D., *Drug Abuse Treatment Process: A Review of the Literature*, 20 INT'L J. ADDICTIONS 1321, 1325-26 (1985). For a discussion of the effectiveness of drug recovery homes, see, for example, George De Leon, Ph.D. et al., *The Therapeutic Community: Success and Improvement Rates 5 Years After Treatment*, 17 INT'L J. ADDICTIONS 703 (1982).

¹⁶ G. ALAN MARLATT & JUDITH GORDON, *RELAPSE PREVENTION* 402, 404, 456

Gordon, in their classic study on the prevention of relapse, describe the recovery process in therapeutic communities:¹⁷

For patients who were neither married nor living with their family, attempts were made to arrange a synthetic or foster family Follow-up over a 6-month period indicated that the community reinforcement patients remained more sober than controls, spent more time gainfully employed, with their families and out of institutions, earned twice as much, and spent more time on weekends in socially acceptable activities Not only were external sources of reinforcement manipulated, but new skills and environments decreased the probability of exposure to situations in which drinking had previously occurred Although attempts to modify the alcoholic's posttreatment environment are difficult and expensive, for many clients, this may be a sine qua non of relapse prevention.¹⁸

Not all such communities are expensive. The fastest growing of these drug recovery homes are Oxford Houses, now numbering nearly five hundred houses nationwide.¹⁹ Only recovering addicts and alcoholics live in the houses; they share expenses, chores, and decisions like a family. Oxford Houses operate on certain principles: democratic governance, economic self-sufficiency, zero drug tolerance (e.g., one drink results in expulsion), and peer self-help. The houses aim to create a new, stable, and drug-free family.²⁰

Democratic self-governance in Oxford Houses means that although state governments may help establish a House, it is run democratically by the House members, who elect officers, make decisions about purchases for the House, and divide up chores. Economic self-sufficiency requires that all members work and contribute equally to the support of the House. The House finances are not subsidized by the government. Zero drug tolerance commands that if the House suspects a member is using drugs or drinking, the members hold an emergency meeting and vote on whether to expel the violator. Peer self-help means that the residents provide the treatment for each other.²¹

Self-governance is the primary distinguishing feature for Oxford Houses and other similar group homes for addicts. Unlike halfway houses, no professional staff live in or visit the Oxford Houses. They are run by the recovering addicts themselves through democratically elected officers and business meetings where the members decide issues. Each member is responsible for his own

(1985).

¹⁷ *Id.*

¹⁸ *Id.* at 404. Other components of the community reinforcement described include vocational activities. *Id.*

¹⁹ Testimony of Paul Molloy, *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556 (E.D. Mo. 1994) (transcript on file with author); Interview with Steve Polin, Executive Director of Oxford House, Inc., in Wash., D.C. (Mar. 1, 1995) (on file with author). Oxford Houses are not-for-profit groups.

²⁰ See Oxford House Manual (1988) (on file with author).

²¹ *Id.*

recovery and protection from relapse, monitors the behavior of other members, and confronts them when he detects the signs of relapse, for his own safety's sake.²²

Like other therapeutic communities, evidence suggests that group homes are effective in helping addicts to recover.²³ Dr. Herbert Kleber²⁴ has testified that Oxford Houses can reverse the relapse curve whereby eighty percent of addicts in recovery typically relapse.²⁵ Their success may be traced to the degree to which the homes replicate a stable and supportive family able to monitor the addict's behavior and modify it into that of a responsible member of a family and of society.²⁶

Yet despite the need for drug recovery homes, traditional treatment systems often overlook the aspects of drug recovery treatment that enables the addict discharged from hospital programs to integrate into the community. One observer explains:

[A]lcohol treatment programs, both federally funded and otherwise, have not been overly concerned with the post-treatment social and economic reintegration of alcohol abusers, apparently assuming, despite evidence to the contrary that once they are "dried out," recovered alcoholics make smooth transition back to the work world.²⁷

These problems were addressed in 1988 when the Congress reorganized the Alcohol, Drug Abuse and Mental Health Block Grant (ADAMHA) program to require that states, as a condition of receiving federal block grants, establish revolving loan funds to lend money to drug recovery homes which are drug-free, economically self-sufficient, and democratically governed by the addicts themselves.²⁸ If that sounds a lot like Oxford House, the resemblance is no accident; Oxford House founder Paul Molloy was instrumental in the design

²² Peter Carlson, *The Oxford House Experiment*, WASH. POST, Nov. 12, 1989, at W15.

²³ William Spillane, *Developmental Exploratory Study of Six Newly Formed Group Recovery Homes: Final Report (1991)* (unpublished study for Oxford House by Catholic University, National Catholic School of Social Service) (on file with author).

²⁴ Dr. Kleber is a former Deputy Director for Demand Reduction of the Office of National Drug Control Policy, or "Deputy Drug Czar," in the Bush Administration. He is now Director of the Division on Substance Abuse for the New York State Psychiatric Institute and for the Center for Alcohol and Substance Abuse and is also Professor of Psychiatry at the Columbia University School of Medicine.

²⁵ Testimony of Paul Molloy, *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556 (E.D. Mo. 1994) (transcript on file with author). See also H. Jane Lehman, *Supreme Court to Hear Case on Group Home*, WASH. POST, Dec. 17, 1994, at E1 ("The homes, which are run and supported by the residents and which expel relapsers, enjoy an 80 percent recovery rate . . .").

²⁶ MARLATT AND GORDON, *supra* note 16, at 402.

²⁷ Michael Forcier, *Unemployment and Alcohol Abuse: A Review*, 30 J. OCCUPATIONAL MED. 246, 250 (1988).

²⁸ 42 U.S.C. § 300x-4a (Supp. 1990).

and passage of the program.²⁹

III. THE WAR ON DRUG USERS: THE NOT-IN-MY-BACK-YARD SYNDROME

Oxford Houses extend from Washington, D.C., throughout the country. Similar models have sprung up as well. On occasion, they have encountered the opposition of neighbors who are fearful that the presence of addicts in their neighborhoods might affect the value of their homes and the safety of their streets. These neighbors typically complain to their local city council and mayor. The Not-In-My-Back-Yard (or NIMBY) Syndrome manifests itself through citizens asking their city governments to cite group homes for violations of local zoning ordinances (which commonly prohibit a certain number of unrelated persons from living in single family neighborhoods) and close them down.³⁰

This is not uncommon. Drug recovery homes are not alone in facing this kind of resistance. Other group homes established for the aging, homeless, mentally retarded, or mentally ill persons have also felt the heat of NIMBY opposition.³¹ Drug treatment facilities, however, attract some of the fiercest opposition.³² This is equally true when the center of the controversy is not a large drug treatment clinic but a group home of eight or twelve people.³³

The war continues to spread. The U.S. Council of Mayors has entertained a resolution calling upon the U.S. Department of Health and Human Services and the Justice Department to end their cooperation with the Oxford House program.³⁴

The following two quotes are typical of neighbor responses: "This [referring to an Oxford House] is perceived as a threat to property values. I'll admit to

²⁹ Carlson, *supra* note 22, at W17.

³⁰ Salsich, *supra* note 1, at 413. For an example, see Cerisse Anderson, *Drug-Care Unit Wins Fight on Zoning Curb*, N.Y.L.J., June 7, 1991, at 1.

³¹ Salsich, *supra* note 1, at 413.

³² Susan Jacobson, *Neighbors Oppose Health Clinic, Residents Fear Children Will Be in Danger*, ORLANDO SENTINEL TRIB., June 6, 1990, at F1; David Lindsey, *Split Facility Suggested in Arlington; Committee Wants Jail Unit Separate from Drug, Homeless Projects*, WASH. POST, August 21, 1990, at B5; Martin, *supra* note 2; Tom Precious, *Treatment Campuses Political Minefield*, TIMES UNION, March 11, 1990, at A1; Sam Verhovek, *In Flushing, Drug Center Allays Fears of Neighbors*, N.Y. TIMES, April 30, 1983, at B1; Bill Vogler, *Once Controversial Center Operating Quietly*, ST. LOUIS POST-DISPATCH, July 11, 1988, at 11.

³³ Mary Cooley, *Don't Let Fear Keep Treatment Center Away; Communities Such as the East House Should Welcome Facilities Like Phoenix House, Which Would Go a Long Way Toward Helping Troubled Youth Get Off and Stay Off Drugs*, L.A. TIMES, June 20, 1993, at 17 (regarding a Phoenix House); Sharon McBreen, *Ridgewood Staying Put—For Now Home for Recovering Addicts Awaiting Word from Orlando*, ORLANDO SENTINEL TRIB., March 3, 1988, at 1.

³⁴ Mayor Rita Mullins (Palatine, Ill.), *The Bell Tolls for Thee: Oxford House versus Municipal Rights*, statement to the U.S. Council of Mayors.

it, this is NIMBY—not in my back yard. It's going to attract an element of people that, frankly, we don't want here"³⁵ "Whether founded in fact or not, the facility is perceived as a threat to the neighborhood [C]hemical dependency is directly related to crime problems."³⁶

In fact, the evidence is to the contrary. The presence of group homes causes no impact on neighborhood crime rates or neighbors' property values,³⁷ even when the group homes are for recovering addicts.³⁸

Despite this evidence, city governments often acquiesce to the demands of their frightened constituents and try to enforce their zoning code against the drug recovery homes. In some communities, no amount of evidence can ease their fears. In one Massachusetts community, neighbors fought a drug treatment clinic so fiercely that the clinic operators could only win approval of a mobile clinic. However, even these temporary clinics, vans that drove out of the community at the end of each day, failed to please residents. One neighbor "would accept the van if it stopped only at a rest area on an interstate highway running through the town."³⁹

City officials often share these fears. In a recent Oxford House case in St. Louis, the chief zoning official announced that he "would not want them living next to him" for the very reasons cited by uninformed citizens—fear of a decline in property values and an increase in crime rates.⁴⁰ In a statement to the U.S. Council of Mayors, the Mayor of Palatine, Illinois, who has fought the Oxford House in that town, complained that,

without notice, and without seeking a special use required by the Palatine zoning ordinance, Oxford House unilaterally converted the single-family home to housing for up to 11 unrelated adult males recovering from alcohol and/or drug abuse. Oxford Houses also asserted the unilateral right to have any one of these adult males leave and be replaced by others at any time.

³⁵ Dan Berger, *Residents Oppose Oxford House*, SOUTHWEST CITY J., Aug. 21, 1991, at 1.

³⁶ Lois Kendall, *Officials Angry Over Oxford House Issue*, SOUTHSIDE J., Aug. 28, 1991, at 1A.

³⁷ Daniel Lauber, *Impacts of Group Homes on the Surrounding Neighborhood: An Evaluation of Research Findings* (Mar., 1982) (on file with author); Thomas Smith, *Good Neighbors: Trainer's Manual* (Governor's Planning Council on Developmental Disabilities, Illinois 1989); Patricia Pollak, *Zoning Matters in a Kinder, Gentler Nation: Balancing Needs, Rights and Political Realities for Shared Residences for the Elderly*, 10 ST. LOUIS U. PUB. L. REV. 501 (1991).

³⁸ *There Goes the Neighborhood* (Community Residences Information Services Program, White Plains, N.Y.), Jan., 1990. Unfortunately, one study was publicized as reporting the opposite. Lisa Linowes, *The Effect of Group Care Facilities on Property Values*, PAS MEMO (Am. Plan. Ass'n, Wash., D.C.), Nov., 1983. That interpretation was erroneous, however. PAS MEMO (Am. Plan. Ass'n, Wash., D.C.), Nov., 1985.

³⁹ Daniel Wroblewski, *Addicts Get Treatment at a Clinic on Wheels*, N.Y. TIMES, Dec. 25, 1988, at A43.

⁴⁰ *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556, 1576 (E.D. Mo. 1994).

Palatine notified Oxford House that the use was not permitted because Oxford House had not applied for and received appropriate zoning approval. Oxford House refused to apply saying, in effect, it has unfettered, unreviewable power to locate such an accommodation anywhere it chooses. And that Palatine was obligated to "accommodate" Oxford House in whatever it wanted and regardless of any existing local ordinances.⁴¹

IV. THE LAW THAT SHOULD GOVERN: THE FAIR HOUSING AMENDMENTS OF 1988

The same Congress that passed ADAMHA also amended the 1968 Fair Housing Act, prohibiting discrimination in the sale or rental of housing on the basis of race, by adding handicap to the list of prohibited bases for discrimination and requiring reasonable accommodations for the handicapped.⁴² The courts have construed the Fair Housing Act Amendments ("FHAA" or "Amendments") to prohibit discriminatory zoning and land-use regulations.⁴³ This includes zoning ordinances which exclude group homes from neighborhoods zoned for single family residences, where single family residences are defined as residences in which persons related by blood or marriage, or unrelated persons below a pre-determined number, such as three, cohabitate.⁴⁴

Similarly, both Congress⁴⁵ and the U.S. Department of Housing and Urban Development⁴⁶ have made clear that recovering addicts are included in the definition of "handicapped." The courts support this construction.⁴⁷

For the reasons outlined below, however, the application of the Amendments to drug recovery homes raises issues unanticipated by Congress. Though the

⁴¹ Mullins, *supra* note 34.

⁴² 42 U.S.C. §§ 3604(f)(1-3) (1988). The amendments make it unlawful to "discriminate in the . . . rental, or to otherwise make unavailable or deny a dwelling to any . . . renter" or to discriminate "in the terms, conditions, or privileges of . . . rental of a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap of that person" and to refuse "to make reasonable accommodation in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . ."

⁴³ *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Village of Marshall*, 787 F. Supp. 872, 876-78 (W.D. Wis. 1991).

⁴⁴ *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, N.Y.*, 808 F. Supp. 120 (N.D.N.Y. 1992); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 458 (D.N.J. 1992); *United States v. Borough of Audubon*, 797 F. Supp. 353, 357 (D.N.J. 1991), *aff'd without opinion*, 968 F.2d 14 (3rd Cir. 1992).

⁴⁵ See the legislative history of the Amendments. H.R. REP. NO. 100-711, 100th Cong., 2d Sess. 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1185, 2173.

⁴⁶ *Discriminatory Conduct Under the Fair Housing Act*, 24 C.F.R. § 100.201(a)(2) (1994).

⁴⁷ *United States v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992); *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991).

Amendments now protect addicts, Congress initially wrote the law intending to protect only certain other groups.⁴⁸ This creates a need for new strategies and amendments to the law to deal specifically with addicts, which also are discussed below.

The Mayor of Palatine insists that "[t]here's not a word in the amendments nor in the Congressional debates leading to their enactment that fairly suggests any such power grab."⁴⁹ In fact, some of the wording in the Fair Housing Amendments and in the legislative history suggests that Oxford Houses do not have to comply with all of a city's pre-established procedures for obtaining permission to live in a single-family neighborhood. Still, clarification is necessary.

More importantly, the Palatine Mayor's statement demonstrates the intensity of the conflict. The communities' fears and the insistence of local governments on local control of their neighborhoods unfortunately contradict the need of recovering addicts for a safe place to live and for protection from discrimination. Some accord is needed.

V. THE OLD DETENTE BETWEEN GROUP HOMES AND NEIGHBORHOODS

Even before the Fair Housing Amendments of 1988, policymakers and urban planners tried to reach a detente between the demands of municipalities and their residents for the integrity of their neighborhoods, on the one hand, and, on the other, the need of special populations to live in group homes. In 1991, the American Planning Association (APA) identified the source of the problem with community opposition as a "lack of adequate information about the true impacts of projects."⁵⁰ The APA recommended a public hearing process that included neighbors of prospective group homes in the initial planning process. The neighbors would be included on the theory that if the neighbors are informed and involved, they will be less likely to object.⁵¹ Unquestionably, the recommendation was premised upon a confidence that the neighbors would be impressed by the unanimity of studies that show that group homes pose no threat to the community around them.⁵²

⁴⁸ The examples of disabilities listed by Congress in the legislative history include mobility impairments requiring wheelchairs, visual and hearing impairments, mental retardation, and even AIDS, but not addiction. H.R. REP. NO. 100-711, *supra* note 45, at 2179.

⁴⁹ Mullins, *supra* note 34, at 1.

⁵⁰ *Policy Implementation Principles on Locally Unwanted Land Uses* (Am. Plan. Ass'n, Wash., D.C.), 1991, at 2.

⁵¹ *Id.* at 2-3.

⁵² Ann Kennedy Grossman, *Community Integration of Persons with Mental Illness: A Legislative Proposal to Combat the Exclusionary Zoning of Community Residential Programs*, 7 LAW & INEQ. J. 215, 220 (1989) (referring to 40 studies); Lauber, *supra* note 37 (summarizing nine studies); Smith, *supra* note 37 (reviewing 40 studies); *There Goes the Neighborhood*, *supra* note 38 (summarizing five studies). There is only one report of a study finding results to the contrary, but this study's results have been

Earlier, in 1988, the APA stated:

The impacts of group homes have probably been the subject of more research than the impacts of any other small land use. Over 25 studies have examined their impacts on property values, property turnover, and neighborhood safety. Every one of these independent studies has found that group homes have no effect on the value of neighboring property—even adjacent property—and do not cause any change in the rate of property turnover. Every study that examined neighborhood safety found that persons with physical disabilities, mental illness, or developmental disabilities living in group homes posed no threat to the safety of their neighbors.⁵³

In 1988, the APA proposed that permission for the operation of group homes in residential neighborhoods be conditioned upon satisfying spacing requirements (i.e., not permitting one group home within a defined distance of another) and complying with restrictions on the number of residents in the homes.⁵⁴ Interestingly, when the APA proposed that municipalities could restrict the number of residents in a group home, it referred to “persons and staff” living in the homes.⁵⁵

To overcome local opposition, mental health advocates proposed a strategy to enact state statutes to override local zoning codes. For example, the American Bar Association Commission on the Mentally Disabled drafted a model zoning statute that would permit group homes for the handicapped of six or fewer residents if the homes complied with spacing requirements and gave notice to the local government that they were intending to operate at a specific site.⁵⁶

Several state legislatures have adopted those recommendations, imposing distance requirements and preempting local zoning codes to permit, within single family zoning districts, group homes for the handicapped that have residents below a defined number. At least half of the states place the limit at six or eight.⁵⁷ Again, these statutes often speak in terms of residents and staff.⁵⁸ For example, the Missouri state group home statute enacted in 1985 requires that local governments include within their definition of single family group homes for the handicapped a maximum of eight or fewer residents plus two

misinterpreted. Linowes, *supra* note 38; Memo on Group Home Studies Found In Error, PAS MEMO (Am. Plan. Ass'n, Wash., D.C.), Nov., 1985.

⁵³ *Policy Implementation Principles on Planning and Zoning for Group Homes* (Am. Plan. Ass'n, Wash., D.C.), 1988.

⁵⁴ *Id.*

⁵⁵ *Id.* at 9.

⁵⁶ Robert Hopperton, *A State Legislative Strategy for Ending Exclusionary Zoning of Community Homes*, 19 URB. L. ANN. 47, 77-80 (1980).

⁵⁷ *Homes for the Developmentally Disabled*, ZONING NEWS (Am. Plan. Ass'n, Wash. D.C.), Jan., 1986.

⁵⁸ See *supra* note 53.

houseparents or guardians.⁶⁹

The American Civil Liberties Union's Mental Health Law Project (MHLP) offered as models the statutes of Idaho, Ohio, and Minnesota.⁶⁰ The Idaho statute defined group homes as having eight or fewer residents and which is supervised by no more than two persons.⁶¹ Ohio's statute, explicitly limited to homes for persons with developmental disabilities, allows homes with eight or fewer residents; homes with more than eight residents are permitted with local government approval.⁶² Minnesota's statute, again limited to persons with mental retardation or physical disabilities, sets the number of residents at six or fewer, and would permit exclusion of homes within three hundred feet of each other.⁶³

One of the most thoughtful and comprehensive attempts to outline the parameters for detente was proposed by Professor Peter Salsich,⁶⁴ who advocated that governments balance community interests and group home needs by adopting criteria that assess a proposed group home according to performance-based standards.⁶⁵ Still, thinking primarily of the elderly and the mentally retarded,⁶⁶ he recommended both limiting the number of residents (citing the "most popular" limitations as six or eight, again with mention of professional staff)⁶⁷ and establishing procedures for group homes to apply for a special use permit that would allow them to move into single family districts, give neighbors a chance to speak publicly, and offer mediation of disputes.⁶⁸

More recently, the American Bar Association's Section of Real Property, Probate and Trust Law published a set of new model zoning proposals recommending "almost certainly legal" distance limitations of six hundred feet between group homes, licensing requirements (which implies supervision by government or private operators rather than by the residents themselves as peers), and definitions of group home which include professional staff.⁶⁹

All of these proposals aim to find a way to allow group homes to locate in single family neighborhoods, where resistance is expected, while maintaining harmony with their neighbors. Quite possibly, the strategies outlined in these proposals work for the targeted clientele. Therein lies the problem. All of these

⁶⁰ MO. ANN. STAT. § 89.020.2 (Vernon 1993).

⁶¹ MENTAL HEALTH PROJECT, *COMBATting EXCLUSIONARY ZONING: THE RIGHT OF HANDICAPPED PEOPLE TO LIVE IN THE COMMUNITY* (Wash. D.C. 1979). The MHLP held them out as model statutes in the late 1970s.

⁶² IDAHO CODE §§ 67-6530 to 67-6532 (1979).

⁶³ OHIO REV. CODE ANN. § 5123.18 (Anderson 1977).

⁶⁴ MINN. STAT. §§ 252.28 and 452.357 (1975).

⁶⁵ See Salsich, *supra* note 1.

⁶⁶ *Id.* at 432.

⁶⁷ *Id.* at 434.

⁶⁸ See *supra* notes 53 and 63.

⁶⁹ See Salsich, *supra* note 1, at 432-34.

⁷⁰ Daniel Lauber & Donna Pugh, *The Fair Housing Act: A New Zoning Game for Group Homes, Halfway Houses, and Hospices*, 1991 A.B.A. SEC. REAL PROP. PROB. & TR. L. 4-5.

proposals were designed for group homes of persons with a developmental disability, such as mental retardation, autism, or mental illness; the proposals do not consider the group home for recovering addicts, the dreaded Frankenstein's monsters of our time.

Like most people and like these other "different" populations, addicts need a place to live. Unlike most other people, the right place to live can mean the difference between living in recovery or dying from drugs.

VI. THE PROBLEM WITH THE OLD DETENTE FOR GROUP RECOVERY HOMES

In at least three important respects, group homes for recovering addicts differ from group homes for the elderly, the mentally retarded or the mentally ill.

First, more than nondisabled persons and persons with other disabilities, addicts need a middle class neighborhood in order to recover and to live. Certainly, the mentally retarded benefit from a "normal" neighborhood where they move about safely. For the addict, though, more is at stake than the quality of a living environment. To recover and live, addicts must avoid the three triggers of relapse: people, places, and things which trigger the urge to use.⁷⁰ In many cases, the addict discharged from the hospital cannot return to live with family, either because family members use drugs or enable the addict's use, or because conflict over the addiction has severed the family relationship. Even when addicts can return to family, a neighborhood like the one they came from or a neighborhood frequented by old friends or new acquaintances who currently use drugs can cause relapse, a return to addiction or death. For that reason, Oxford Houses only locate in "good houses in good neighborhoods."⁷¹

Isolating group recovery homes in industrial or commercial areas can be deadly. So, too, can distance requirements that would push a drug recovery home out of a good neighborhood because of the presence of previously established group homes for the mentally retarded.⁷²

Second, addiction is shadowed by a stigma which invites fear and hostility.⁷³

⁷⁰ Kleber, *supra* note 3, at 144; James Maddux, *Residence Relocation Inhibits Opioid Dependence*, 39 ARCHIVES GENERAL PSYCHIATRY 1313 (1982).

⁷¹ Carlson, *supra* note 22.

⁷² See *supra* notes 53, 54, and 67 and accompanying text.

⁷³ Dean Gerstein, *Policy-Relevant Research on Drug Treatment*, 113 NIDA RES. MONOGRAPH 129, 138 (1991):

For those in treatment there is the question of the degree to which the illness has been chosen by them rather than visited upon them. Why should the public be asked to help pay for the consequences of their choices? If it is pointed out that alcoholics are not denied treatment for liver cirrhosis and other gastrointestinal ailments, nor smokers denied treatment for lung cancer and coronary heart disease, and that these, too, are the results the choices, the response is that alcohol and cigarettes are legal, and cocaine, heroin, and marijuana are not. This is not a medical distinction, but a moral one.

This stigma means that neighborhood resistance to a drug recovery home will be more intense than to a group home for a "safer" population such as the mentally retarded. Studies suggest that, even in the instance of the mentally retarded, notice of a home's intent to open followed by a public hearing will provoke opposition which declines once the home is established.⁷⁴ Oxford House has a policy of never seeking permission or giving notice, but rather moving into a neighborhood like any other family.⁷⁵ In part for this reason, only a handful of the over four hundred fifty Oxford Houses have encountered opposition.⁷⁶ Additionally, requiring group homes to endure public hearings and post notices and announcing that "addicts live here" can have a devastating effect on the acceptance and self-esteem which must be regained if the addicts are to recover.⁷⁷

Third, unlike group homes for the retarded, drug recovery homes' success requires a certain critical mass; in other words, a minimum base number of residents. Restrictions on the number of residents can mean the difference between a house failing or succeeding in its mission. In homes like Oxford Houses, the addicts are not supported by public welfare programs but are financially self-supporting. In decent neighborhoods, that means that a certain number of residents is needed to pay the higher rents. Since the houses often have vacancies as residents leave—involuntarily or to live even more normal lives in the community—the house budgets are often tight; this raises the level of critical mass needed for financial viability.⁷⁸

Further, the recovery of addicts in a group home depends on peer support, not the intervention of professional staff, houseparents or guardians.⁷⁹ That requires a certain number of residents to achieve the necessary mix of experience and progress in the recovery process for the house to screen new members, support each other at group meetings, and intervene when the signs of relapse appear. Given varying work schedules, larger numbers mean greater availability of housemembers to each other when peer support is needed.⁸⁰

⁷⁴ Martin Jaffe & Thomas P. Smith, *Siting Group Homes for Developmentally Disabled Persons*, 397 Planning Advisory Service Rep. 31-33 (Am. Plan. Ass'n, Wash., D.C.), Oct., 1986.

⁷⁵ Paul Molloy, *Self-Run, Self-Supported Houses for More Effective Recovery from Alcohol and Drug Addiction*, in U.S. DEP'T HEALTH & HUM. SERVICES PUB. HEALTH SERVICE 1992 (Technical Assistance Publication Series No. 5).

⁷⁶ Testimony of Paul Molloy, *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556 (E.D. Mo. 1994) (transcript on file with author).

⁷⁷ Testimony of Dr. Herbert Kleber, *Oxford House-C*, 843 F. Supp. 1556 (E.D. Mo. 1994) (transcript on file with author).

⁷⁸ Testimony of Charles Vanderburgh, Chief Financial Officer for Oxford House, *Oxford House-C*, 843 F. Supp. 1556 (E.D. Mo. 1994) (transcript on file with author). See also *United States v. City of Taylor*, 798 F. Supp. 442, 451 (E.D. Mich. 1992).

⁷⁹ In fact, the ADAMHA revolving loan fund is available only to homes which are run by the residents. See *supra* note 28.

⁸⁰ Testimony of Dr. Herbert Kleber, *Oxford House-C*, 843 F. Supp. 1556 (E.D. Mo. 1994) (transcript on file with author).

While there is no magic number for all group homes, arbitrary restrictions such as six or eight can hinder drug recovery homes. Eighty percent of Oxford Houses nationally have more than eight residents.⁸¹

In combination, these factors make the old detente useless and even dangerous to the group home for recovering addicts. Zoning provisions which limit the number of residents in each group home and provide a public notice and hearing procedure for those houses needing more than eight residents doom the house to failure. They doom the house because they place its members between the rock of reducing their membership below the critical mass necessary for financial and therapeutic success, and the hard place of submitting to near certain public rejection which can lead them straight to relapse into addiction.

VII. CONFLICTING PRESSURES FROM THE COURTS

The preceding section argued that imposing the old detente—with its distance restrictions, population limits, and public notice and hearing procedures—on drug recovery homes might make it impossible for the homes to open and stay open. Attempts to extend the old detente to include the recovering addict—for whom it was never intended—causes confusion in the law. The protections for drug recovery homes are illusory wherever the Fair Housing Amendments are interpreted to be implicitly premised on the old detente. As courts are now deciding the group home disputes, the legal issues are working toward resolution, and not always in a manner favorable to the drug recovery homes.

A. Population Limits

First, an Eleventh Circuit Court of Appeals decision expressly accepted the old detente's limitation on the number of residents, posing a substantial threat to the development of more homes. In *Elliott v. City of Athens*,⁸² the Eleventh Circuit upheld a zoning ordinance limiting the number of unrelated persons who could live together in a single family home. It did so despite the Fair Housing Amendments and other decisions striking down similar limitations as FHA violations.⁸³

The *Elliott* court based its opinion on an FHA exemption that permits "any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."⁸⁴ The legislative history is clear, however, that Congress intended this exemption to apply only to a building code's maximum occupancy provisions—which for safety reasons limit the

⁸¹ Testimony of Paul Molloy, Oxford House-C, 843 F. Supp. 1556 (E.D. Mo. 1994) (transcript on file with author).

⁸² 960 F.2d 975 (11th Cir. 1992).

⁸³ See, e.g., *Oxford House v. City of Plainfield*, 769 F. Supp. 1329, 1346 (D.N.J. 1991).

⁸⁴ 42 U.S.C. § 3607(b)(1) (1994).

number of people who can live in any dwelling, based upon the square footage in the building—and not to a zoning code's restriction on the number of unrelated persons who can live in a single family home of any size.⁸⁵

However wrongly decided, the *Elliott* court's analysis undermines FHA protections for group homes in a most profound way. If a restriction on the number of addicts who can live in a house can be considered "reasonable," then the FHA does not apply at all. As one indication of reasonableness, cities can cite to the popularity of a six- or eight- resident restriction suggested under the old detente. *Elliott's* analysis has been followed by only one district court⁸⁶ but more recently has been rejected on appeal of that decision by the Ninth Circuit Court of Appeals and all other lower courts.⁸⁷ That temporary comfort is jeopardized by the grant of certiorari by the United States Supreme Court in *City of Edmonds v. Washington Building Code Council*.⁸⁸

Before *Elliott*, two courts applied the FHA without reference to the exemption and found that population limitations violated the Amendments.⁸⁹ These decisions, however, are jeopardized by the Eleventh Circuit's analysis in *Elliott*. After *Elliott*, other courts either have adopted the Eleventh Circuit's use of the exemption or at least have reflected its deference to local decisionmaking. These courts have conflicting interpretations of the need for a particular group home to establish a certain level of number of residents.

For a notable example, the Sixth Circuit Court of Appeals found permissible a six-person limit on the number of unrelated handicapped persons living together.⁹⁰ The court found no particular number critical and reasoned that "[t]he premises can be used to house a handicapped group if there are six or fewer occupants and indeed is being used in that way."⁹¹ However, the population at issue, the elderly and Alzheimer's patients, presumably relied upon public subsidy and professional staff.⁹² The court explicitly distinguished its opinion from a case where such a limitation could "keep the handicapped out of residential districts entirely," like *Oxford House, Inc. v. Town of Babylon*,⁹³ which, as its caption suggests, dealt with recovering addicts. The Sixth Circuit

⁸⁵ Mullins, *supra* note 34.

⁸⁶ *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994), *cert. granted*, 63 U.S.L.W. 3337 (U.S. Oct. 31, 1994) (No. 94-23).

⁸⁷ *Id.*; *Oxford House-C*, 843 F. Supp. at 1556; *Cox v. Township of Upper St. Clair*, No. 93-1443 (W.D. Pa. 1994); *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251 (E.D. Va. 1993); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993) (arguably distinguishing, not rejecting, *Elliot*); *Parish of Jefferson v. Allied Health Care, Inc.*, Nos. CIV.A. 91-1199-91-3959, 1992 WL 142574 (E.D. La. 1992).

⁸⁸ *City of Edmonds*, 18 F.3d at 802.

⁸⁹ *United States v. City of Taylor*, 798 F. Supp. 442 (E.D. Mich. 1992); *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991).

⁹⁰ *Smith & Lee Assocs. v. City of Taylor*, 13 F.3d 920 (6th Cir. 1993).

⁹¹ *Id.* at 931.

⁹² *See id.* at 922.

⁹³ 819 F. Supp. 1179 (E.D.N.Y. 1993).

remanded for a determination whether more than six residents were needed to "supply a reasonable number of such homes."⁹⁴

Oxford Houses have had mixed results on this issue in other courts. In *Oxford House-C v. City of St. Louis*,⁹⁵ the court found that an eight-resident limitation could operate to exclude these group homes since eighty percent of Oxford Houses nationally and statewide had over eight residents.⁹⁶ Oxford Houses needed more than eight persons in order to be financially⁹⁷ and therapeutically viable.⁹⁸ Finally, the Court found the limitation of eight to be artificial:

The City presented no specific justification for the new ordinance's limit of eight persons, and stated no legitimate interest that allowing eight Oxford House residents, but not ten or twelve, would promote. Even the City's own zoning expert provided no rational explanation The ordinance is not rational in this regard⁹⁹

The magistrate in *United States v. Village of Palatine, Illinois*¹⁰⁰ was not convinced, however, and recommended this finding to the United States District Court:

Suffice it to say that it is clear on the record that all of Oxford House's rehabilitative purposes could be served with six or eight residents; it needs eleven residents solely to make the house it chose to rent economically affordable, an interest which this court would view as having relatively little weight under the Fair Housing Act.¹⁰¹

B. Distance Requirements

Second, courts have treated distance requirements in different ways. Under the FHA, at least one court has found that imposing a one thousand foot distance requirement—prohibiting one group home within one thousand feet of another—violated the FHA.¹⁰² The court rejected an old detente assumption

⁹⁴ Smith & Lee Assocs., 13 F.3d at 931.

⁹⁵ 843 F. Supp. 1556 (E.D. Mo. 1994).

⁹⁶ *Id.* at 1564 n.2.

⁹⁷ *Id.* at 1571.

⁹⁸ *Id.* at 1579.

⁹⁹ *Id.* at 1580.

¹⁰⁰ No. 93-C-2154, 1993 WL 586699 (N.D. Ill. Sept. 28, 1993), *recommendations adopted*, No. 93-C-2154, 1993 WL 462848, at *1 (N.D. Ill. Nov. 9, 1993), *vacated*, 37 F.3d 1230, 1233 (7th Cir. 1994).

¹⁰¹ No. 93-C-2154, 1993 WL 586699, at *18 (N.D. Ill. Sept. 28, 1993). Nevertheless, the magistrate recommended the issuance of a preliminary injunction. *Id.* at *19. The recommendation was eventually adopted by the District Court's Memorandum Opinion and Order. *United States v. Village of Palatine, Inc.*, No. 93-C-2154, 1993 WL 462848, at *1 (N.D. Ill. Nov. 9, 1993) (order granting preliminary injunction).

¹⁰² *Horizon House Developmental Servs. v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd without opinion*, 995 F.2d 217 (3rd Cir. 1993). *See*

that balanced the interests of the neighborhood against the interests of the group home in determining the home's right to locate in the neighborhood, and found that a community cannot "avoid the anti-discrimination mandate by accepting some sort of 'fair share' or apportionment of people with disabilities."¹⁰³ Another court, however, found that a one-quarter mile distance restriction furthered a de-institutionalization policy and was, therefore, permissible under the FHA.¹⁰⁴

The problem lies in the conflict between the need of drug recovery homes to be located in good neighborhoods and the concerns of residents. A few courts have recognized this special need of the recovering addict.¹⁰⁵

In *Oxford House v. City of St Louis*, the court understood the unique need for recovering addicts to live together and found that "[t]he evidence at trial showed that while groups of unrelated nondisabled may occasionally wish to live together in residential neighborhoods, recovering alcoholics and addicts in the early stages of sobriety need such housing as a result of their disability."¹⁰⁶ Furthermore, the court recognized the need for these homes to be outside of the addict's neighborhood of origin. The court stated that "Plaintiffs showed that they face a substantial risk of relapse from the isolation of living alone, the stress of living with enabling or using family members, and the peer pressure inherent in returning to their old neighborhoods."¹⁰⁷ Finally, acknowledging the important corollary of locating group recovery homes in good neighborhoods, the court found that "[t]he houses should not be isolated in industrial areas away from other neighbors, as location in good neighborhoods plays a crucial role in an individual's recovery and re-entry to society by promoting self-esteem and helping to create an incentive not to relapse."¹⁰⁸

also *Merritt v. City of Dayton*, No. C-3-91-448 (S.D. Ohio April 7, 1994) (striking down a three thousand foot requirement).

¹⁰³ *Horizon House Developmental Servs.*, 804 F. Supp. at 698. The court in the St. Louis *Oxford House* case, while not confronted with spacing requirements, expressed a similar view of the defense arguments, and stated, "Simply put, the complaint of 'no more in my back yard' is just as unacceptable an excuse for discrimination against the handicapped as the discriminatory cry of 'not in my back yard.'" *Oxford House-C v. City of St. Louis*, 843 F. Supp. at 1577.

¹⁰⁴ *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991). A lower court found a two thousand five hundred foot requirement in violation of the FHA. *United States v. Village of Marshall*, 787 F. Supp. 872, 879 (W.D. Wis. 1991).

¹⁰⁵ See, e.g., *Oxford House v. City of Albany*, 819 F. Supp. 1168, 1173 (N.D.N.Y. 1993) ("[I]f the residents are displaced of their recovery residences . . . the chances are greatly increased that they will relapse into a life of alcohol or chemical addiction.").

¹⁰⁶ 843 F. Supp. 1556 (E.D. Mo. 1994).

¹⁰⁷ *Id.* at 1578.

¹⁰⁸ *Id.* at 1564.

C. Variance Procedures

Third, cities usually insist that a group home apply for a variance or a special or conditional use permit as a condition of locating in a single family neighborhood. Sometimes cities require that group homes first exhaust administrative remedies before resorting to federal court. At other times a city merely finds that it can reasonably accommodate handicapped group homes by simply offering the city's conditional use or variance procedures to them.

The legislative history suggests that Congress intended the FHA to require that "changes be made to such traditional rules or practices [such as the variance process] if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling."¹⁰⁹ Consequently, many courts have found these procedures either unnecessary or as violative of the FHA.¹¹⁰ Yet another court has speculated, in entertaining a request for preliminary injunctive relief and in predicting the plaintiffs' success on the merits, that a neutral variance process did not violate the FHA and could be required of the group home.¹¹¹ In that case, the city apparently persuaded the court that a group home was reasonably accommodated where the home need only seek a variance when it wanted to house more than four residents, again drawing from the old detente.¹¹²

A few courts have recognized the limitations of the old detente even when applied to its intended population. For example, in assessing the requirement of procedures to notify neighbors that a group home for the elderly was opening up near them, the District Court for Maryland wrote:

The neighbor notification rule, and defendants' proffered justifications for it, necessarily assume that people with disabilities are different from people without disabilities and must take special steps to "become a part of the community." This requirement is equally offensive as would be a rule that a minority family must give notification and invite comment before moving into a predominantly white neighborhood Indeed, notices of this sort galvanize neighbors in their opposition to the homes.¹¹³

Courts are beginning to notice the greater difficulty in applying this feature of old detente to drug recovery homes:

Requiring compliance with those procedures in this situation would have

¹⁰⁹ H.R. REP. NO. 100-711, *supra* note 45, at 27.

¹¹⁰ *Horizon House Developmental Servs. v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd without opinion*, 995 F.2d 217 (3d Cir. 1993); *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1991); *Easter Seal Soc'y v. Bergen*, 798 F. Supp. 228 (D.N.J. 1992); *McKinney Found. v. City of Fairfield*, 790 F. Supp. 1197 (D. Conn. 1992).

¹¹¹ *Oxford House v. City of Albany*, 819 F. Supp. 1168 (N.D.N.Y. 1993).

¹¹² *Id.* The preliminary injunction was granted because of the irreparable harm which would result if denied. *Id.* at 1178.

¹¹³ *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296 (D. Md. 1993).

a discriminatory effect on plaintiffs. The procedures require a public hearing, public advertisement of the hearing, and the posting of a conspicuous notice on the block and on the House itself. Plaintiffs presented credible evidence that this process stigmatizes recovering alcoholics and addicts, perpetuates their self-contempt, and increases the stress which can so easily trigger relapse [H]ad plaintiffs participated in the procedures, they would have found their own recovery (and thereby their own self-worth) opened up for public debate and the additional airing of stereotypical fears and concerns¹¹⁴

The requested alternative, simple nonenforcement of a zoning ordinance which would exclude that particular group home, has been required at least once.¹¹⁵ In another case, the possibility of nonenforcement of a zoning ordinance as a reasonable accommodation was rejected out of hand by the Sixth Circuit. The court found a city could not simply ignore a zoning violation, but had to either amend its ordinance or rezone the area in which the House is located, both of which imposed unreasonable burdens on the city.¹¹⁶

More recently, the Seventh Circuit refused to excuse an Oxford House from compliance with special use approval procedures.¹¹⁷ The court deemed the claim unripe until the House applied for the special use permit and was denied.¹¹⁸ The Seventh Circuit seemed to understand the limits of the old detente but declined to alter its legal analysis. For example, while the court expressed sensitivity for the stigmatizing effect of an expected "firestorm of vocal opposition"¹¹⁹ from neighbors, it found no evidence that any House residents would have to appear at the public hearing if Oxford House's national employees could attend in their stead.¹²⁰ Similarly, the court appeared to understand that public hearings often have counterproductive effects of mobilizing opposition rather than educating the public; yet the court felt constituent input was an important city interest which a court must balance in favor of insisting upon the procedures.¹²¹

On the other hand, the Seventh Circuit did not require such procedures where applied only to the handicapped with a discriminatory intent or where futile.¹²² This exception provides a small comfort, however, considering the difficulty in proving intent, futility, and sole application to the handicapped in cases where the group homes are newly introduced into the community and, thus, no track record exists. Yet the harm done by such public exposure

¹¹⁴ Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1581-82 (E.D. Mo. 1994).

¹¹⁵ *Id.*

¹¹⁶ Smith & Lee Assocs. v. City of Taylor, 13 F.3d 920 (6th Cir. 1993).

¹¹⁷ United States v. Village of Palatine, 37 F.3d 1230, 1233-34 (7th Cir. 1994).

¹¹⁸ *Id.* at 1233.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 1234.

¹²² *Id.*

remains. In such cases, constituent input can doom the application where the prospective new residents are addicts and neighbors will hear only from national Oxford House representatives and not their new neighbors themselves.

VIII. STRATEGIES TOWARD A NEW DETENTE

Drug recovery homes need to reach a new detente with city governments if the homes are to survive. The old detente serves no real purpose for the cities. The courts have accepted the results of studies which have demonstrated that the presence of group homes does not negatively impact communities. After a full trial, with competing experts on zoning and land use issues, the United States District Court for the Eastern District of Missouri analyzed the evidence in this manner:

The zoning experts presented by the parties testified about the impact that group homes such as the Oxford Houses at issue here have on neighborhoods. Numerous studies have been done on the impact of group homes on their surrounding neighborhoods Those data show that group homes with nine or more residents do not have a negative impact on residential character The experts for both sides agreed that group homes are residential uses compatible with residential neighborhoods.¹²³

The new detente can be negotiated in the courts. Cities may argue against federal courts serving as boards of zoning appeals.¹²⁴ Yet it is unlikely that federal courts will permit local zoning boards to serve as federal courts, deciding which federal laws to obey and in what manner. Thus, lawyers representing drug recovery homes need to confront the old detente and demonstrate through medical, planning, and financial experts that the drug recovery homes differ from group homes. They must prove that distance requirements will drive drug recovery homes from good neighborhoods which may have already taken on their "fair share" of group homes by permitting such a facility for the retarded.

Lawyers must also prove that population limits have no relevance to drug recovery homes and undermine the critical mass needed for their survival. The courts must come to understand that addicts hang onto their recovery like a house sitting atop an eroding slope. Every added pressure, including financial stress, pushes the house further down the slope toward the abyss. Finally, lawyers must show the court the likely harm done by public variance and conditional use proceedings and argue their impropriety by showing what happens when group homes simply move in and the residents meet their neighbors informally, without conflict or stigma, like any other family.

¹²³ Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1570 (E.D. Mo. 1994).

¹²⁴ Petition for Writ of Certiorari at 24, City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 802 (9th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3337 (U.S. June 9, 1994), *cert. granted*, 115 S.Ct. 417 (Oct. 31, 1994) (No. 94-23).

Without waiting for incremental and inconsistent tinkering by the courts, Congress could legislate a new detente by further amending the Fair Housing Amendments to make clear beyond argument that Congress does not intend the exemption of maximum occupancy standards to extend beyond square foot per person requirements for health and safety reasons. A clarification of the reasonable accommodation provision to make certain that variance procedures are not sufficient would help the cause as well.

State governments can begin the negotiation toward a new detente by recognizing that if their group home statutes contain a numerical limitation, that limitation is borrowed from a different context. They can amend their statutes. Missouri, functionally speaking, has done that already by limiting ninety percent of its developmental disabilities group homes to eight or less and developing eighty percent of its Oxford Houses with populations over eight.¹²⁵ The state of Washington has passed a new statute which precludes cities from enacting or maintaining any zoning regulation which treats a residential structure for the handicapped differently than a similar building occupied by a family or other unrelated individuals.¹²⁶

Ideally, municipalities would eliminate the need for state and national legislation and federal court litigation by enacting new zoning codes which permit in single family districts families and unrelated persons who live together as a single housekeeping unit.¹²⁷ A city with a problematic zoning code could simply ask drug recovery homes operating in a single family district for information about their purpose and manner of operation, but without public disclosure of this information and without any request for private information on the residents themselves.

With that information supplied, a city could grant the home an exception to the code and reasonably accommodate the home without asking for any formal, futile, stigmatizing, and provocative variance request. With an exception granted, the city's zoning code would remain intact.

IX. CONCLUSION

This new detente recognizes the right of communities to limit residential neighborhoods to residential use and to keep their overall zoning scheme. At the same time, it recognizes the emerging realities that, at least for drug recovery homes, population limits and distance requirements are fatal to the

¹²⁵ Like a few other states, Missouri itself sets up the Oxford Houses in its borders with contractual help from Oxford House, Inc.

¹²⁶ WASH. REV. CODE § 35A.63.240 (1994). Respondents before the Supreme Court argued that this moots the Edmonds case. Brief for Respondents at 12, *City of Edmonds v. Washington State Bldg. Council*, 18 F.3d 802, 802 (9th Cir. 1994) (No. 94-23).

¹²⁷ A few cities have done this already, including the city of St. Charles, Missouri. The city of Edmonds' new code, which would permit group homes in multi-family or commercial districts, misses the point. See *City of Edmonds*, 18 F.3d at 803.

homes and public variance proceedings may be deadly to the addicts.¹²⁸ This new detente will preserve the residential nature of the single family neighborhoods of a community without restricting the right of recovering addicts, in the words of the FHA's legislative history, "to live in housing of their choice."¹²⁹

The alternative is a continued war. Like most wars, it could expand, spilling beyond zoning battles into conflict over which building and fire safety codes to apply. The battle could spread to inflated insurance rates for group homes, again borrowing from institutions, dormitories, or fraternity houses, all foreign and inapposite to group residences which live as a single housekeeping unit for both financial and therapeutic reasons.

The court in the St. Louis Oxford House case described the choice too often made by cities:

Completely absent from the City's reaction was any attempt to assuage the fears expressed by the citizens: that is, rather than attempting to explain the benefits of the Oxford House program and the laws governing nondiscrimination against the handicapped, the various city officials fanned the unfounded fears of the residents by assuring them that they would fight the presence of the Oxford Houses.¹³⁰

In such a fight, recovering addicts are not the only casualties.¹³¹ As former Deputy Drug Czar Dr. Herbert Kleber has warned:

The community has a very important role in terms of prevention. Drug abuse exists in a community, to a certain extent, because the community permits it The area that is good enough to have a program in, that community doesn't want you Space is our single most serious problem. If I had adequate space, I could probably treat 50% more patients than I am treating now and probably save the community money.¹³²

A treaty could allow local communities to focus their scarce resources on a war against drug use through prevention, education, treatment, and even law enforcement, once they end their war against recovering drug users.

¹²⁸ Group homes for other disabilities may also want to argue that the old detente is outdated. My point is just that the argument is more compelling for drug recovery homes.

¹²⁹ H.R. REP. NO. 100-711, *supra* note 45, at 24-25.

¹³⁰ Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1576 (E.D. Mo. 1994).

¹³¹ An expansive construction of the Fair Housing Amendments' exemption in the City of Edmonds case can eviscerate the law for all other handicapped groups as well. Still, the Rehabilitation Act, 29 U.S.C. § 794 (1973) and the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.) contain no such exemption.

¹³² Kleber, *supra* note 14, at 149.