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Protecting Group Homes for the Non-Handicapped:
Zoning in the Post-Edmonds Era

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I. INTRODUCTION

Few land use issues have drawn more recent attention from both courts and legislatures than those concerning zoning and group homes. At the heart of the problem lie the obvious cross-purposes of “family” zoning ordinances intended to maintain neighborhood tranquility and stability on the one hand, and the variety of statutes aimed at protecting handicapped persons and other group home dwellers from intentional discrimination on the other hand.

While ordinances aimed at protecting “family” areas from invasion by other residential uses have been explicitly condoned by the Supreme Court of the United States, the United States Congress and virtually every state legislature have enacted statutes that either directly or indirectly prevent local governments from excluding group homes from single-family zones. Some of these, particularly the federal statute, are aimed at preventing discrimination against “handicapped” persons and regulate group homes only because that is where many handicapped persons reside. Other statutes are broader, prohibiting zoning that excludes group homes of any stripe. While these two types of statutes existed in harmony with each other and with their constitutional base for several years, a recent Court decision interpreting the federal statute has seriously disrupted that harmony. City of Edmonds v. Oxford House, Inc.1 straightforwardly reduced the freedom of political units to exercise zoning power to protect family areas. It also raised questions under the Supremacy Clause about many of the state statutes by drawing distinctions between homes for the handicapped and other group homes. That distinction, in turn, has raised its own constitutional issues regarding the legitimacy of the distinction between group homes for handicapped persons and those for other disadvantaged persons.

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This Article attempts to untangle some of the crossed-wires in the broad area of group home zoning. Part II describes the constitutional underpinning of both non-family and group home zoning. It then examines the federal act, the 1988 amendments to the Fair Housing Act (FHAA), and a series of federal court interpretations of those amendments culminating in the Edmonds decision. After a review of Edmonds and later, lower federal court interpretations of the FHAA, Part II ends with a description by category of the great variety of state statutes regulating group home location.

Part III moves from the law to the homes themselves. The Part first describes, analyzes, and categorizes the various kinds of group homes existing in a typical community, emphasizing ideal population sizes and locations. These descriptions are then folded into existing definitions of "handicapped" to determine which homes are protected under the federal act and which are not.

Part IV lays out the two principal legal issues arising from the statutes and Edmonds. The first is whether any of the state statutes purporting to protect group home location are now in conflict with the FHAA and thus ripe for attack under the Supremacy Clause. The second is whether the differential treatment of group homes for handicapped persons and group homes for others dictated by FHAA and Edmonds can, given the differences in the types of homes, be justified under prevailing constitutional standards.

Part V finishes the circle by offering changes in state statutes that will insulate them from the attacks suggested in Part IV. Furthermore, the suggested changes will result in broader protection for group homes of all types and, therefore, avoid the seemingly irrational and unfair differential treatment among group homes that the law currently affords.

II. The Constitutional and Statutory Bases

A. The Constitutional Limits of Group Home Zoning

Zones created by local legislatures to insulate single-family housing from more intrusive kinds of land uses have been a central focus of American zoning ordinances from the beginning. Indeed, Village of Euclid v. Ambler Realty Co., the historic decision upholding the authority of local governments to enact zoning ordinances under the

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police power, emphasized almost exclusively the constitutional legitimacy of isolating single-family homes from all other uses. 4 Yet it was almost half a century after Euclid that the Court first offered an opinion on exactly what limits, if any, the Constitution placed on how local governments defined the critical term "family." In Village of Belle Terre v. Boraas, 5 the Court held constitutional an ordinance defining the term to include any number of persons "related by blood, adoption or marriage, living . . . as a single housekeeping unit" while limiting to two the number of unrelated individuals living the same way. 6 The opinion was sweeping, holding that drawing defining lines between related and unrelated persons was "a legislative, not a judicial, function" and concluding that creating places "where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people" was well within the police power. 7 A subsequent decision refining what divisions could be constitutionally created among related individuals left the essence of the Belle Terre holding intact. 8

In the years since Belle Terre, several states have reached an opposite conclusion, holding that under their own constitutions, legal distinctions drawn solely on the basis of relationship by blood or marriage cannot be made in the land use context. 9 But the Belle Terre holding that state and local governments have broad discretion to differentiate between residences housing families and residences housing unrelated persons still governs federal constitutional law.

Though Belle Terre makes clear that as a matter of federal constitutional law local governments are not required to permit group homes in single-family residential zones, a later Court decision substantially restricts governmental authority to exclude certain group homes from a zone that allows other residences housing unrelated persons. In City of Cleburne v. Cleburne Living Center, Inc., 10 the Court held unconstitution- al a requirement that developers of a group home for mentally retarded

4. Industrial uses could be excluded from single-family areas because they were potentially "offensive and dangerous." See id. at 388-89. Commercial and multi-family uses could be excluded for a variety of health and safety reasons, see id. at 390-93, and apartments were singled out for special obloquy as coming "very near to being nuisances." Id. at 394-95.
6. Id. at 2.
7. Id. at 8, 9.
8. The plurality opinion in Moore v. City of East Cleveland, 431 U.S. 494 (1977), struck down a municipality's attempt to limit "family" to a traditional grandparents, parents, and children grouping.
persons obtain a special use permit to locate in a zone that allowed many other kinds of group homes and unrelated-person living facilities as a matter of right.\footnote{See id. at 448-50.} While the Court rejected the developer's assertion that retarded persons were a quasi-suspect class that merited a heightened degree of constitutional protection,\footnote{See id. at 442.} it nevertheless held that the municipality's distinction could not survive even the minimal "rational basis" standard of equal protection review.\footnote{See id. at 450.} And while the issue in \textit{Cleburne} concerned a particular kind of home locating in a multiple-family area, lower federal courts since have had no difficulty applying its reasoning to other kinds of group home uses in single-family areas.\footnote{See, e.g., Bannum, Inc. v. City of Louisville, 958 F.2d 1354 (6th Cir. 1992).}

Lacing \textit{Euclid}, \textit{Belle Terre}, and \textit{Cleburne} together summarizes federal constitutional law regarding group home zoning in single-family areas. \textit{Euclid} holds that single-family areas can be insulated from all other uses.\footnote{See Village of Euclid v. Amber Realty Co., 272 U.S. 365, 388-95 (1926).} \textit{Belle Terre} adds that local governments have broad authority to define "family" in a way that excludes all group homes.\footnote{See Village of Belle Terre v. Boraas, 416 U.S. 1, 2, 8-9 (1974).} \textit{Cleburne} limits the first two only by holding that if some types of homes for unrelated persons are permitted, a municipality must have at least a rational basis for excluding others.\footnote{See \textit{Cleburne}, 473 U.S. at 449-50.}

\textbf{B. Protection of Housing for Handicapped Persons Under the FHAA}

The Court's unwillingness in \textit{Cleburne} to extend special constitutional protection to handicapped persons prompted Congress later the same year to amend the Fair Housing Act of 1968 to cover such individuals. The Fair Housing Amendments Act of 1988\footnote{Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601-3631 (1994)).} prohibits discrimination "against any person . . . because of a handicap"\footnote{42 U.S.C. § 3604(f)(2).} in the sale or rental of housing, as well as refusing "to make reasonable accommodations in rules, policies, practices or service" when those are necessary to permit handicapped persons "to use and enjoy a dwelling."\footnote{Id. § 3604(f)(3)(B).} There is no question these prohibitions apply to state and local governmental actions or inactions in the exercise of their zoning powers.\footnote{See City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995); Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988).} "Handicapped" is defined within the statute to encompass: "(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.\footnote{22}

The Act excludes several kinds of persons and one kind of existing law from its coverage. Excluded persons are those currently using or addicted to controlled substances\footnote{23} and those who "ha[ve] been convicted . . . of the illegal manufacture or distribution of a controlled substance."\footnote{24} More mysterious is an exclusion of certain kinds of laws: "Nothing in this [title] limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."\footnote{25}

It was this maximum occupancy exemption ("the exemption") that became the first and most important focus in the post-FHAA battles between those attempting to protect the purity of "family" zoning areas constitutionally protected by \textit{Belle Terre}, and those who wished to use the FHAA as a lever to open such neighborhoods to group homes for handicapped persons. Many group homes for the handicapped require eight to twelve persons to be viable entities, and the politics of local zoning generally favor excluding such homes from single-family neighborhoods.\footnote{26} The future usefulness of the FHAA to those promoting the "mainstreaming" of handicapped individuals in single-family neighborhoods, therefore, would turn substantially on whether the federal courts read the exemption as continuing to permit local governments to exclude households comprising unrelated persons above a certain, low number of occupants from single-family zones. It would also determine whether state laws requiring inclusion of group homes but permitting a stated cap on occupancy would avoid scrutiny under the Supremacy Clause.\footnote{27}

The first victory went to those arguing that the kind of occupancy limits constitutionally approved in \textit{Belle Terre} remained lawful despite passage of the FHAA because of the exemption. \textit{Elliot v. City of Athens}\footnote{28} concerned a typical ordinance limiting to four the number of unrelated adults who could lawfully constitute a "family" in a single-family zone.\footnote{29} A group home for twelve recovering addicts and one staff member challenged its exclusion from the zone, based on the anti-

\footnotesize\addcontentsline{toc}{section}{Footnotes}

\footnote{22}{42 U.S.C. § 3602(h).}  
\footnote{23}{See id.}  
\footnote{24}{\textit{id.} § 3607(4).}  
\footnote{25}{\textit{id.} § 3607(b)(1).}  
\footnote{26}{See, e.g., infra notes 46-50 and accompanying text.}  
\footnote{27}{See infra Part IV.B.}  
\footnote{28}{960 F.2d 975 (11th Cir. 1992).}  
\footnote{29}{See id. at 976.}
discrimination language in the FHAA. As became usual in such cases, the parties stipulated that the potential group home occupants were "handicapped" under the federal definition, thereby triggering the Act's protections.

The group home claimed the narrow definition of "family" in the ordinance had a disparate impact on handicapped persons, thereby violating the anti-discrimination provision of the FHAA. It also claimed that leaving the ordinance unamended after their request to broaden it violated the municipality's obligation of reasonable accommodation. The city defended on a number of grounds, chiefly the exemption.

The trial court found for the city. It based its decision on the failure of the plaintiff to establish a prima facie case of discrimination and addressed neither the reasonable accommodation, nor the exemption arguments. The court of appeals upheld the judgment for the municipality but grounded its opinion solely on the exemption and thus avoided the somewhat tangled discrimination issues.

The home argued that the exemption did not apply because (1) the definition of "family" in the ordinance could not be a maximum occupancy limit because it applied to less than all the population, and (2) the ordinance was not "reasonable" as was required by the plain language of the exemption. The appellate court rejected both arguments.

The home's claim that the exemption did not apply because the ordinance failed to limit the number of related persons living together was based on the logic of the proposition itself, as well as on a House Report on the FHAA, which suggested that the exemption was aimed solely at state and local housing codes setting square footage per resident minimums. The court relied heavily on Belle Terre and its successors.

30. See id. at 977.

31. See id. at 977 n.2.

32. See id. at 981.

33. See id. at 977-78.

34. See id. at 978, 982-83.

35. See id. at 978.

36. See id.

37. See id. at 983-84. The closest the court came to addressing those issues was during its discussion of the ordinance's reasonableness when it noted both that "[t]here was no attempt to establish that the ordinance had a harsher effect on handicapped persons ... than on college students or other non-handicapped persons desiring to live in group homes," id. at 981, and that the line the city had drawn was not between handicapped and non-handicapped, but rather at the Belle Terre approved point of related and unrelated. See id. at 982.

38. See id. at 979.

39. See id. at 981, 983.

40. "A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants ... ." Id.
to reject both bases. It held that there was nothing evident in either the language or the legislative history of the FHAA that reflected a congressional intent to remove the authority state and local governments had been granted in *Belle Terre* to distinguish between related and unrelated persons.

The exemption only covers "reasonable" restrictions, but the court also rejected the home's argument that the ordinance was unreasonable. In doing so, it weighed what it found was the city's "very substantial interests" in preserving single-family residential districts from density, traffic, and noise against what it considered the "extremely weak" evidence that the ordinance had a disparate impact on the handicapped. It also considered as relevant that at least eight other zones existed in the city where the group home could locate and also that the ordinance did not differentiate among the kind of group homes it excluded from single-family areas.

Those supporting this broad reading of the exemption had little time to enjoy the *Elliot* decision, however, because all around the country an aggressive new opponent was challenging similar ordinances under the FHAA. Oxford House was the country's largest developer of unsupervised addiction recovery homes. In 1975 Paul Molloy, a lawyer and recovering alcoholic, started the Oxford House chain. The chain consists of a series of halfway houses with simple, straightforward living rules. The houses also "need 8 to 12 residents to be financially and therapeutically viable." Between 1988 and 1994 more than 500 unsupervised houses were established, many of them in single-family zoned areas from which they were legally excluded. After a number of attacks on such exclusions in United States district courts, Oxford House successfully appealed a case to a different United States Court of Appeals.

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41. See id. at 980.
42. See id.
43. See id. at 983.
44. See id. at 982.
45. See id.
47. See id.
48. See id.
than had decided *Elliot*, thereby setting up a request for certiorari that gave the Court its chance to decide the issue.

In *City of Edmonds v. Washington State Building Code Council,* the Ninth Circuit openly disagreed with the *Elliot* court’s reading of the exemption. Having held the legislative history of the exemption reflected a narrow intent related solely to minimum square footage, the court found direct fault with the reasoning in *Elliot*: “[T]he question is not whether Edmonds’ ordinance could withstand a constitutional challenge brought by unrelated persons as in *Belle Terre.* It is whether Congress intended to apply the substantive standards of the FHAA to the ordinance.”

The city sought a writ of certiorari, which was granted. The Court was now in a position to determine the reach of the exemption, particularly as it applied to group home exclusions from single-family zones. The Court did not disappoint. In a clear, straightforward opinion written by Justice Ginsburg, a six to three majority upheld the Ninth Circuit’s view that the exemption should be read narrowly, thus rendering it useless to those attempting to exclude group homes for handicapped persons from single-family zones. Unlike the Eleventh Circuit in *Elliot*, the Court found the “sole question” was whether the Edmonds ordinance “qualifies as a ‘restriction regarding the maximum number of occupants permitted to occupy a dwelling’” within the exemption.

In its most critical holding, the Court found the definition of “family” in the Edmonds ordinance was not a “restriction regarding the maximum number of occupants permitted to occupy a dwelling” and thus did not fall within the exemption. Noting the FHAA was to be given a “‘generous construction,’” the Court found that ordinances defining family were “in contradistinction” with ordinary housing code limitations on occupancy per square foot of floor space. The Court noted that the problem with the city’s position that the exemption removed the ordinance from the FHAA’s anti-discrimination provisions was that it did

52. 18 F.3d 802 (9th Cir. 1994), aff’d, City of Edmonds v. Oxford House, 514 U.S. 725 (1995).
53. See id. at 806.
54. See id.; see also supra note 40.
58. Id. at 731 (quoting 42 U.S.C. § 3607(b)(1) (1994)).
59. Id.
60. See id. at 738.
61. Id. at 731 (quoting *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972)).
62. Id. at 733.
63. See id. at 738.
not limit the maximum number of family members who could occupy either a residence or a particular square footage of residence.\textsuperscript{64} The ordinance was "designed to preserve the family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants."\textsuperscript{65} The Court also made short shrift of the city's assertion that its cap of five unrelated persons constituted the kind of limitation that brought the ordinance within the exemption: "It is curious reasoning indeed that converts a family values preserver into a maximum occupancy restriction once a town adds to a related persons prescription 'and also two unrelated persons.'"\textsuperscript{66}

Justice Thomas dissented for himself and Justices Scalia and Kennedy.\textsuperscript{67} His basic point was a simple one—that the ordinance, by limiting to five the number of unrelated persons who could live in a single-family zone house, was a "restriction[] . . . regarding the maximum number of occupants permitted to occupy a dwelling."\textsuperscript{68} Recognizing the ordinance did not restrict everyone, Justice Thomas noted the exemption only required a restriction to be "regarding" occupancy, a loose authorization that covered an ordinance that spoke to less than everyone.\textsuperscript{69} The dissenters also chastised the majority on federalist grounds for failing to interpret broadly an exemption for state and local activity in an area generally left to those bodies.\textsuperscript{70}

\textit{Edmonds} thus ended the years of uncertainty concerning the relationship of the exemption and local definitions of "single-family." The upshot seemed to be that because the exemption did not apply to definitions regarding less than the entire population, and because the "reasonableness" provision was in the exemption, the FHAA anti-discrimination and accommodation provisions now applied to all state and local restrictions on group home occupancy limits, regardless of whether the restriction in question was "reasonable."

Post-\textit{Edmonds} decisions in the lower federal courts have tended to agree that the group home issue under the FHAA is now reduced simply to whether the statute or ordinance at issue violates either the discrimination or accommodation provisions.\textsuperscript{71} A significant exception is \textit{Oxford}
House-C v. City of St. Louis. In a typical Oxford House challenge, the plaintiff alleged the city's eight-person limit on group home residents violated the FHAA. The city originally defended on the basis of the exemption, but dropped that position after Edmonds. Overturning a district court decision that the limit violated the FHAA, the Eighth Circuit found the ordinance valid because it was "rational."

Oxford House claimed, as it had in many cases, that the eight-person limit rendered its homes financially nonviable. But, the court responded, "[e]ven if the eight-person rule causes some financial hardship for [plaintiff] . . . the rule does not violate the [FHAA] if the City had a rational basis for enacting the rule." The court determined that there was a rational basis because of the city's "legitimate interest in decreasing congestion, traffic, and noise in residential areas." The court also concluded the city had not violated the accommodation provision, because Oxford House, which had established homes in excess of the eight-resident limit before challenging the ordinance, had failed to give the city an opportunity to accommodate.

The other significant victories for municipalities after Edmonds involved denials of specific requests to waive numerical caps, rather than broader attacks on underlying statutes or ordinances. The more important of these was the Ninth Circuit's decision in Gamble v. City of Escondido, holding that denial of a conditional use permit to construct a complex for physically disabled elderly adults in a single-family zone violated neither the anti-discrimination nor the reasonable accommodation provisions of the FHAA. The second win came in Bryant Woods Inn, Inc. v. Howard County, where the developer of group homes for handicapped elderly asked the defendant County for the right to expand an existing facility from eight to fifteen residents. The County denied the application, determining that the increase would create serious problems in the neighborhood and that the eight-person cap was "a
reasonable break point.”\textsuperscript{85} The court agreed, holding that the refusal did not violate the FHAA.\textsuperscript{86} Its decision that the refusal did not violate the accommodation provision was particularly significant. It rejected at least one other federal district court decision, which held that the integrity of a local government’s zoning scheme cannot withstand a challenge by handicapped persons who wish to “enjoy a particular dwelling.”\textsuperscript{87}

Developers and users of group homes for the handicapped have also recorded post-\textit{Edmonds} wins. As previously discussed, in \textit{Oxford House-C v. City of St. Louis},\textsuperscript{88} the Eighth Circuit held that Oxford House’s financial difficulties with an eight-resident cap could be overcome by the city’s rational basis for the limitation.\textsuperscript{89} The Sixth Circuit matched the Eight Circuit’s opinion with one of its own.\textsuperscript{90} It held that a Michigan municipality’s six-person occupancy limit violated the accommodation provision of the FHAA because it “guarantees a negligible or negative rate of return for investors” in a for-profit home for the elderly disabled.\textsuperscript{91}

In the only challenge thus far to state statutes, a New Jersey district court struck down sections of that state’s zoning enabling act in \textit{ARC of New Jersey, Inc. v. State}.\textsuperscript{92} This decision upheld a previous district court decision that the several enabling statutes were contrary to the FHAA anti-discrimination and accommodation provisions.\textsuperscript{93} The offending sections (1) required that homes for the developmentally disabled and shelters for domestic violence be treated as permitted uses in all residential zones; (2) allowed municipalities to treat as conditional uses any such use with seven or more residents; (3) permitted denial of any conditional use request if another home or shelter was located within 1,500 feet of the proposed use; and (4) permitted denial whenever the number of residents in existing homes or shelters exceeded the greater of fifty persons or 0.5% of the municipal population.\textsuperscript{94} The court agreed that all of these statutes violated the FHAA anti-discrimination provision because they offered disparate treatment to handicapped persons.\textsuperscript{95} Such

\textsuperscript{85} \textit{Id.} at 924-25.
\textsuperscript{86} See \textit{id.} at 947.
\textsuperscript{87} \textit{Id.} at 945 (citing \textit{Oxford House v. Town of Babylon, 819 F. Supp. 1179, 1185 n.10 (E.D.N.Y. 1993))}.
\textsuperscript{88} 77 F.3d 249 (8th Cir. 1996).
\textsuperscript{89} See supra note 75 and accompanying text.
\textsuperscript{90} See Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d 781 (6th Cir. 1996).
\textsuperscript{91} Id. at 796.
\textsuperscript{94} See \textit{ARC of New Jersey, 950 F. Supp. at 640-41.}
\textsuperscript{95} See \textit{id.} at 644.
treatment could not be adequately justified as state policy. The court rejected the position, holding that there was no evidence to establish the state policy and that the policy would have been inadequate to justify the discrimination anyway. It ultimately invalidated all three relevant enabling statutes.

The final, and in many ways most interesting, victory for developers and users of group homes for handicapped persons in the post-Edmonds era came in Children's Alliance v. City of Bellevue. This case foreshadows the battles likely to emerge in the years ahead. At issue was a mildly complicated ordinance making several distinctions among types of group homes. Class I homes, which included those for handicapped persons, domestic violence victims, and foster families, could locate in residential zones as a matter of right, provided that they had six or fewer residents plus two caretakers and their minor children. Class II homes, which were all other kinds, could not operate in residential zones if they (1) were not operated by residential staff, (2) took occupants for fewer than thirty days, and (3) took non-handicapped individuals who were dangerous. Area residents were also allowed to comment on proposed Class II facilities, and no two such facilities could be located within 1,000 feet of one another.

The court invalidated the entire scheme, finding that the ordinance was facially discriminatory against both families and handicapped persons. When the city countered with a justification based on safety concerns regarding Class II residents, the court chose the Sixth and Tenth Circuits' mode of analysis. This analysis holds that the only valid rebuttals to facial discrimination establish either (1) preferential treatment for the protected class, or (2) legitimate safety concerns based on facts rather than stereotypes. Acknowledging that the justification might suffice under a more tolerant standard of scrutiny, the court nevertheless found

96. See id.
97. See id. at 645-46.
98. See id.
99. See id. at 644.
100. 950 F. Supp. 1491 (W.D. Wash. 1997).
101. See id. at 1493-94.
102. See id.
103. See id. at 1494.
104. See id.
105. See id. at 1501.
106. See id. at 1498.
107. See id. The court specifically rejected a lesser standard of review it attributed to the Eighth Circuit, which only requires a rational basis for facial discrimination. See id. at 1497-98.
the city's evidence did not meet the stricter standard, because "[the city's] interests are only sufficient if they are threatened by the individuals burdened by the Ordinance." 108

It is clear that since Edmonds, courts carefully have been feeling their way through the issues created by the application of the FHAA to state and local group home regulation. While they have scratched the surface of the issues the confluence of these two forces brings, there remains a variety of serious issues awaiting judicial attention. Before those can be addressed in this Article, however, it is necessary to offer a brief look at the bases of state and local regulation—the state enabling statutes regarding group home restrictions.

C. State Statutes Regulating Group Homes

1. The Kansas Statute and Representative Statutes from Other States

States address the issue of group homes and their relation to single-family residential zones in a variety of ways. Some have detailed statutes, complete with definitions and cross-references while others have single sections with a brief, cursory, and often ambiguous treatment of the subject. This section starts with a discussion of the Kansas statute and then explores the differences and similarities among a sampling of other state statutes, highlighting what may prove to be questionable regulations and provisions.

The Kansas statute 109 asserts a policy that "persons with a disability shall not be excluded from the benefits of single family residential surroundings by any municipal zoning ordinance, resolution or regulation." 110 The act defines "group home" as "any dwelling." 111 The definition of "disability" tracks the definition for "handicap" laid out in the FHAA. 112 Zoning ordinances are deemed invalid if they subject group homes to different regulations than those applicable to single-family residences. 113

The statute has a varying numerical cap, with "disabled" residents given a lower cap than others. 114 Specifically, Kansas places an occupancy limit of not more than ten residents 115 unless those residents have disabilities, in which case the maximum number is eight, with an

108. Id. at 1498.
110. Id. § 12-736(a).
111. Id. § 12-736(b)(1).
112. Id. § 12-736(b)(3); see 42 U.S.C. § 3602(b) (1994).
113. See KAN. STAT. ANN. § 12-736(e).
114. See id. § 12-736(b)(1).
115. See id.
additional allowance of up to two staff residents.\textsuperscript{116} This statutory regulation could easily result in the exclusion of one type of group home from a single-family residential zone while allowing another type of group home. A group home consisting of ten persons classified as having disabilities\textsuperscript{117} would be excluded from a single-family residential zone\textsuperscript{118} while a group home consisting of ten persons who do not have classified disabilities would not be excluded from the same zone.\textsuperscript{119}

Several other states have policy statements on group homes similar to Kansas—that homes for persons with disabilities cannot be excluded from single-family residential zones.\textsuperscript{120} Others pass by the preliminaries and immediately present the regulatory language of the statute. For states that start with a statement, the statements span from short and concise to lengthy and promising. Some are straightforward and others promise more than they ultimately deliver. Idaho begins its treatment with a lengthy “declaration of purpose.”\textsuperscript{121} The declaration calls for the implementation of a statewide policy ensuring that residents of group homes are “entitled to live in normal residential surroundings and should not be excluded therefrom because of their disability or advanced age.”\textsuperscript{122} Indiana has similar but more elaborate language. The Indiana statute establishes the bureau of developmental disabilities services to plan, develop, and oversee community-based residential options for the developmentally disabled.\textsuperscript{123} The goal of the programs developed by this bureau is to create residences that “simulate, to the extent feasible, a homelike atmosphere with patterns and conditions of everyday life that are as close as possible to normal.”\textsuperscript{124} Closely akin to Indiana, Illinois promises “an array of community-integrated living arrangements . . . intended to promote independence in daily living and economic self-sufficiency.”\textsuperscript{125} Arkansas purports to ensure “availability of community residential opportunities” to the disabled,\textsuperscript{126} and California envisions

\begin{footnotesize}
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  \item 116. See id.
  \item 117. See id. § 12-736(b)(3).
  \item 118. See id. § 12-736(b)(1).
  \item 119. See id.
  \item 122. Id.
  \item 123. See Ind. Code Ann. § 12-11-1-1(a), (b) (Michie 1997).
  \item 124. Id. § 12-11-1-1(b).
\end{itemize}
\end{footnotesize}
“normal” settings for residences for the mentally and physically handicapped.\textsuperscript{127}

2. Qualifying Residents

One critical question addressed by most statutes is the types of residents covered or protected. This also differs greatly from state to state. Some statutes are so vague that they seem to cover virtually everyone. Arizona provides an excellent example. The statute covers “unrelated persons living together . . . [in] a residential facility.”\textsuperscript{128} The statute does not define “persons.”\textsuperscript{129} The only qualification is that these persons be “unrelated,”\textsuperscript{130} but even this qualification changes throughout the statute.\textsuperscript{131} The Montana statute also identifies its protected class as “persons.”\textsuperscript{132} The statute subsequently sheds a little light on this ambiguity by specifying that the homes are for “foster or youth group home[s],”\textsuperscript{133} but then fails to define that limitation.\textsuperscript{134}

Other statutes are only slightly less ambiguous. These specify general, protected population groups, but never define qualifications for inclusion in these groups. Virginia covers a mystery population entitled “developmentally disabled persons,” along with the “mentally ill,” mentally retarded, and aged.\textsuperscript{135} Among other groups left undefined by various statutes are: “mentally disordered,”\textsuperscript{136} “otherwise handicapped,”\textsuperscript{137} “dependent and neglected children,”\textsuperscript{138} “mentally retarded,”\textsuperscript{139} “mentally ill,”\textsuperscript{140} “mentally and/or physically handicapped,”\textsuperscript{141} and “elderly.”\textsuperscript{142}

More helpful and more explicit statutes contain definitions, and sometimes add cross-references to protected population groups. The

\begin{itemize}
  \item\textsuperscript{127} See CAL. WELF. & INST. CODE § 5115(a) (West 1984).
  \item\textsuperscript{128} ARIZ. REV. STAT. ANN. § 36-582(A) (West 1993).
  \item\textsuperscript{129} See id. § 36-582.
  \item\textsuperscript{130} See id. § 36-582(A).
  \item\textsuperscript{131} See id. § 36-582(I) (addressing residential facilities that house seven or more persons absent requirement that these persons be unrelated).
  \item\textsuperscript{132} See MONT. CODE ANN. § 76-2-412 (1997).
  \item\textsuperscript{133} Id. § 76-2-412(1).
  \item\textsuperscript{134} See id. § 76-2-412.
  \item\textsuperscript{135} See VA. CODE ANN. § 15.2-2291(A), (B) (Michie 1997); see also OHIO REV. CODE ANN. § 5123.19 (Anderson Supp. 1997) (protecting “developmentally disabled persons” but failing to define the term).
  \item\textsuperscript{136} CAL. WELF. & INST. CODE § 5115(b) (West 1984).
  \item\textsuperscript{137} Id.
  \item\textsuperscript{138} Id. § 5116.
  \item\textsuperscript{139} CONN. GEN. STAT. ANN. § 8-3e(a) (West Supp. 1997); see also ALA. CODE § 11-52-75.1 (1994); OHIO REV. CODE ANN. § 5123.19.
  \item\textsuperscript{140} ALA. CODE § 11-52-75.1.
  \item\textsuperscript{141} IDAHO CODE § 67-6531 (1995).
  \item\textsuperscript{142} Id.
\end{itemize}
Hawaii statute allows persons who are mentally ill, elderly, handicapped, developmentally disabled, and totally disabled to occupy its adult residential care homes. Each of these populations is carefully defined in an identified section. An example is the statute’s definition of an “elderly person.” An elderly person is a person who:

1. Has attained the age of 62; or
2. Is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long, continued, and indefinite duration; or
3. Has a physical impairment expected to be of long, continued and indefinite duration which substantially impedes the person’s ability to live independently and which could be improved by more suitable housing and conditions.

Other states that include adequate definitions of the protected population groups include Arkansas, Colorado, Delaware, Florida, and New Jersey.

One aspect obvious in many of the statutes is the narrowness of their scope. Specifically, by protecting only certain population groups, they leave other groups unprotected or, at best, questionably protected. Connecticut has two statutory sections dealing with protection of group homes, but the only population groups afforded protection are “mentally retarded persons” and “mentally ill adults,” leaving many deserving populations without help.

3. Location of the Home

The location of the home can be very important to the goal and the success of the group home. Some states address this issue generally—by
permitting the homes in "all zones." Other statutes do not reference specific zones and still other statutes explicitly refer to single-family residential zones or multi-family residential zones as the protected areas.

The Hawaii statute provides that its appropriately licensed group living facilities cannot be prohibited as long as the facilities "meet all applicable county requirements,"\textsuperscript{154} apparently allowing the group homes in any and all residential zones. In Maryland, a state that classifies its group homes according to size, "small private group homes" are "permitted to locate in all residential zones."\textsuperscript{155} Likewise, Michigan allows "state licensed residential facilities" in "all residential zones."\textsuperscript{156}

Other states do not specify in their statutes where the homes are allowed to locate. New Jersey, for example, outlines several different types of group homes, defines the residents of each of those types, and includes occupancy limitations; yet it never states where the homes may be located.\textsuperscript{157} Similarly, Illinois speaks of community-integrated living arrangements\textsuperscript{158} and community living facilities,\textsuperscript{159} but never outlines what constitutes the "community."\textsuperscript{160} The Indiana statute uses broad, sweeping statements about goals to "simulate, to the extent feasible, a homelike atmosphere with patterns and conditions of everyday life that are as close as possible to normal,"\textsuperscript{161} but the statute fails to include the location of this normal and homelike atmosphere.\textsuperscript{162}

Many statutes are specific about the location of the protected group homes. For example, in Florida, "[h]omes of six or fewer residents which otherwise meet the definition of a community residential home shall be deemed a single-family unit and . . . shall be allowed in single-family . . . zoning . . . ."\textsuperscript{163} Idaho has a similar classification for homes of eight or fewer residents—"single family dwelling"\textsuperscript{164} —and these homes are also permitted in single-family residential zones.\textsuperscript{165} Ohio also

\textsuperscript{154} HAW. REV. STAT. § 46-4(d) (Supp. 1992).
\textsuperscript{156} MICH. COMP. LAWS ANN. § 125.583b(2) (West 1997); see also ARK. CODE ANN. § 20-48-604 (Michie 1991) (permitting a Family Home I in all residential zones or districts).
\textsuperscript{157} See N.J. STAT. ANN. § 30:11B-2 (West 1997).
\textsuperscript{158} See 210 ILL. COMP. STAT. ANN. 135/2 (West Supp. 1997).
\textsuperscript{159} See id. 35/1.
\textsuperscript{160} See id. 135/2, 35/1.
\textsuperscript{161} IND. CODE ANN. § 12-11-1-1(b) (Michie 1997).
\textsuperscript{162} See id. § 12-11-1-1.
\textsuperscript{163} FLA. STAT. ANN. § 419.001(2) (West 1993).
\textsuperscript{164} IDAHO CODE § 67-6531(a) (1995).
\textsuperscript{165} See id.
allows its "family homes" in "any single-family residential district or zone." Other statutes list group homes which, although not prohibited from single-family residential zones, are delegated to multi-family residential zones. In Minnesota, "a licensed residential program with a licensed capacity of seven to [sixteen] persons shall be considered a permitted multifamily residential use for the purposes of zoning and other land use regulations." In Arkansas, a Family Home II, consisting of eight to sixteen residents, is considered a multi-family residential use. Arizona allows for group homes of seven or more persons "in any zone in which residential buildings of similar size . . . are a permitted use.

4. Occupancy Limits

All statutes referenced in this subpart contain provisions outlining how many residents are allowed in a home. All the statutes specify a maximum number of residents, with some states having different categories of homes, each with their own cap. The Illinois statute has the highest cap. A community living facility may house "no more than [twenty] residents, excluding staff." The Illinois statute also has the lowest maximum—"home individual programs" are living arrangements.

167. Id. § 5123.19(K); see also ARIZ. REV. STAT. ANN. § 36-582(A) (West 1993) (allowing group homes of six or fewer in all residential zones); COLO. REV. STAT. ANN. § 31-23.303(2)(a) (West 1997) (allowing group homes of eight or fewer in all zones, including single-family residential zones); CONN. GEN. STAT. ANN. § 8-3e(a) (West Supp. 1997) (affording group homes of six or fewer the same treatment as any single family residence); DEL. CODE ANN. tit. 22, § 309 (1997) (allowing group homes of ten or fewer in single-family residential zones); MICH. STAT. ANN. § 245A.11(2) (West Supp. 1998) (allowing group homes of six or fewer in single-family residential areas); MONT. CODE ANN. § 76-2-412(3) (1997) (allowing specified facilities serving eight or fewer persons in all residential zones, including single-family areas); VA. CODE ANN. § 15.2-2291(A), (B) (Michie 1997) (allowing group homes of eight or fewer to be considered a single family for zoning purposes).

170. See id. § 20-48-604(b).
171. ARIZ. REV. STAT. ANN. § 36-582(J) (West 1993); see also CONN. GEN. STAT. ANN. § 8-3g (West Supp. 1997) (prohibiting zoning which excludes community residences for mentally ill adults from zones with two or more dwelling units); FLA. STAT. ANN. § 419.001(3)(a) (West 1993) (allowing for community residential homes in multifamily zones); OHIO REV. CODE ANN. § 5123.19(L) (Anderson Supp. 1997) (allowing group homes as a permitted use in any multiple-family residential district or zone).
for two unrelated adults.\textsuperscript{173} More typical caps are somewhere between six,\textsuperscript{174} eight,\textsuperscript{175} and ten residents.\textsuperscript{176}

A few states also require a minimum number of residents. For example, in Indiana "supervised group living programs" house a minimum of four residents and a maximum of eight residents.\textsuperscript{177} The District of Columbia also requires at least four residents for a "group home for mentally retarded persons."\textsuperscript{178}

Aside from the specifications as to the number of residents, some statutes address the permitted number of staff residents with this number sometimes affecting the total number of permitted occupants. Idaho, which allows for eight or fewer residents in its homes, allows no more than two additional live-in staff.\textsuperscript{179} Alabama also allows for two staff persons, above the allotted maximum of ten residents.\textsuperscript{180} Other statutes, however, do not place a cap on the allowable number of staff.\textsuperscript{181}

\begin{flushleft}
\textsuperscript{173} See id. 135/3(4)(d)(4); see also HAW. REV. STAT. § 321-15.6 (1985 & Supp. 1992) (placing a cap of five residents on "type I" group homes); MINN. STAT. ANN. § 245A.11(2a), (2b) (West 1994 & Supp. 1998) (placing cap of five residents on adult foster care facilities).
\textsuperscript{174} See ARIZ. REV. STAT. ANN. § 36-582 (West 1993) (setting cap at six); CAL. WELF. & INST. CODE §§ 5115(a), 5116 (West 1984) (setting cap at six); FLA. STAT. ANN. § 419.001(2) (West 1993) (setting cap at six in order for community residential homes to be allowed in single-family residential zones); IND. CODE ANN. § 12-11-1-1(b)(2) (Michie 1997) (setting cap at six for "alternative family programs"); MICH. COMP. LAWS ANN. § 125.583b(1) (West 1997) (setting cap at six); MINN. STAT. ANN. § 245A.11(2) (West Supp. 1998) (setting cap at six for residential programs allowed in single-family zones).
\textsuperscript{176} See ALA. CODE § 11-52-75.1(b) (1994); DEL. CODE ANN. tit. 22, § 309 (1997); KAN. STAT. ANN. § 12-736(b)(1) (Supp. 1997).
\textsuperscript{177} See IND. CODE ANN. § 12-11-1-1(b)(1) (Michie 1997).
\textsuperscript{178} D.C. CODE ANN. § 32-1301(a)(5) (1993); see also FLA. STAT. ANN. § 393.063(25) (West 1993) (requiring at least four residents for "group home facilities").
\textsuperscript{179} See IDAHO CODE § 67-6531(c) (1995).
\textsuperscript{180} See ALA. CODE § 11-52-75.1(b).
\textsuperscript{181} See CONN. GEN. STAT. ANN. § 8-3(e)(a) (West Supp. 1997) (allowing for "necessary staff persons" above the limit of six residents); see also VA. CODE ANN. § 15.2-2291(A), (B) (Michie 1997) (allowing for one or more staff persons above the limit of eight residents).
\end{flushleft}
5. Supervision in the Home

Many states have statutes that specifically require some supervision in the group home. The Illinois statute is the most explicit in this area. The Illinois facilities have varying degrees of required supervision, depending on the type of home.\(^{182}\) For example, the community-integrated living arrangements are broken down into subcategories.\(^{183}\) Among the subcategories are "assisted residential care" homes that are required to be "intermittently supervised by off-site staff;"\(^{184}\) "crisis residential care" homes that are required to be "supervised by on-site staff [twenty-four] hours a day;"\(^{185}\) and "supported residential care" homes that are allowed to provide supervision for less than twenty-four hours per day.\(^{186}\) While some statutes are vague as to the extent of supervision required,\(^{187}\) many do explicitly require twenty-four hour per day supervision.\(^{188}\)

III. GROUP HOMES

A. Exploration of the Different Types of Group Homes

Often reflecting the economic and moral status of the country at the time, numerous changes have occurred in the housing options for "less desirable" population groups. The most illustrative population in the exploration of the progression of residential facilities is the population group labeled mentally retarded or developmentally disabled.

In the mid-nineteenth century, the United States was primarily an agricultural and rural society, although the change towards industrialization was already well on its way.\(^{189}\) The mentally retarded were commonly referred to as "imbeciles" and "idiots," but they had value and use on the family farm because any physical labor was at a premium.\(^{190}\)

Between 1850 and 1900, the shift from an agrarian society to an

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183. See id. 135/3(d).
184. Id. 135/3(d)(2).
185. Id. 135/3(d)(3).
186. See id. 135/3(d)(5).
188. See ARIZ. REV. STAT. ANN. § 36-582(A) (West 1993); CAL. WELF. & INST. CODE § 5116 (West 1984); DEL. CODE ANN. tit. 22, § 309(a) (1997); MICH. COMP. LAWS ANN. § 125.286a(1) (West 1997); MONT. CODE ANN. § 76-2-412(1) (1997).
190. See id.
industrialized society continued to gain momentum. As this shift progressed, society's emphasis on education and vocational training grew. In general, however, public education was not available to the mentally retarded. The initial efforts to develop homes particularly geared towards the disabled were met with resistance because they were seen as futile. In spite of the resistance, schools for the mentally retarded were established that educated as well as housed the students. The justifications for housing the students at the school included the belief that education for the mentally retarded was more effectively achieved if the school had control over the students' environment as a whole. The housing aspect of the schools also evolved as a result of the assumption that people were afflicted with "feeblemindedness" as a result of the poor moral character of one or both of their parents. Therefore, the purpose was to remove the affected students from their unhealthy family influences.

The initial institutions were small in number and viewed as successes—the records of the first school established in the United States . . . found that, during the first 20 years of operation, 465 individuals had been admitted and 365 discharged, with the majority of these being self-supporting in the community. The optimistic view of specialized schools declined, however, as it became evident that many of the mentally retarded could not be educated and trained to a level that allowed them to re-enter the mainstream community. This, in turn, led to fewer schools focusing on training and releasing residents, and more institutions focusing on housing residents indefinitely.

As urbanization surged forward, the number of persons with mental conditions and other handicaps who did not "fit" in society increased. As a result of these individuals ending up in jails, poorhouses, or on the streets, the movement towards institutionalization progressed.
demand increased, so did the size of the schools and institutions.\textsuperscript{204} Other factors influencing this increased institutionalization included the lengthened life span of the handicapped and the broadening definition of those eligible for admittance into an institution.\textsuperscript{205} "[B]y 1930 the number of persons in public institutions for the mentally retarded had increased to 68,035."\textsuperscript{206} The number of residents in institutions continued to climb until it reached its all-time high of 194,650 in 1967.\textsuperscript{207}

A change occurred in the 1970s when the deinstitutionalization movement began.\textsuperscript{208} This new movement was stemmed partially by a recognition of the rights of the mentally retarded as well as by a growing dissatisfaction with the quality of institutional care.\textsuperscript{209} This led to a class action lawsuit, which culminated in the affirmation of the mentally retarded person's constitutional right to receive appropriate care.\textsuperscript{210} The new philosophy of normalization and least restrictive settings emerged and further encouraged the deinstitutionalization movement.\textsuperscript{211}

With the deinstitutionalization movement came the need for residential alternatives for the newly discharged.\textsuperscript{212} The range of alternatives was broad and included the natural family, family care homes, group homes, nursing homes, and board and care facilities.\textsuperscript{213} The group homes became the most popular of the residential alternatives in the 1970s.\textsuperscript{214}

The group home gained popularity as a housing option because of its close association with the normalization ideology.\textsuperscript{215} One author describes the principle of normalization as "train[ing] mentally retarded people 'to live in normal community settings.'"\textsuperscript{216} Behavior is directly affected by environment,\textsuperscript{217} and if the goal is "normative" behavior, the most suitable and conducive setting is a "normative" environment.\textsuperscript{218}

\begin{thebibliography}{99}
\bibitem{204} See id.
\bibitem{205} See id. at 8.
\bibitem{206} Id.
\bibitem{207} See id. at 9.
\bibitem{208} See id. at 13.
\bibitem{209} See id. at 13, 15.
\bibitem{210} See id. at 13.
\bibitem{211} See id. at 13-14.
\bibitem{212} See id. at 16.
\bibitem{213} See id. at 16-17.
\bibitem{214} See id. at 17.
\bibitem{215} See id. at 79.
\bibitem{218} See id.
\end{thebibliography}
The definition of normalization has not been static. As it has evolved, it has assumed a more operational and practical slant, including specific factors necessary to a successful residential program. Among these factors is setting. An optimum setting is one that is not identifiable as a group home to passers-by in an area within easy access to community services. Another author cites three main principles derived from the theory of normalization: (1) residents have a right to be treated as individuals, (2) residents have a right to participate in regular patterns of life within the community, and (3) in order to achieve their full potential, residents have a right to assistance from their surrounding community. "Normalization has come to mean a great deal more than just a concern for attention to the rights of mentally retarded persons. It has come to mean placement in a group home." Above all and across the board, residential settings should be homelike and located within the community.

1. Homes for Children and Adolescents

Group homes are small housing units located within the community, often with a purpose of serving as a transitional setting between an institution and reintegration into the family home. Group homes blend in with other family homes in the neighborhood, making the home "indistinguishable from other typical homes in a neighborhood that contains a variety of potentially beneficial influences." The home's location within the community is key to the youths' utilization of community services. This gives the residents the opportunity to learn the necessary skills to become fully functioning members of the community. Group homes that are closely connected to the community permit the residents to use typical community services—educational, religious, and interpersonal—which allow the youths to achieve greater

219. See Willer & Intagliata, supra note 189, at 80-81.
220. See id. at 80.
222. Willer & Intagliata, supra note 189, at 81.
223. The following discussion covers group homes for children and adolescents generally. It should be noted that these group homes encompass various types for different sub-populations—orphans children, foster children, abused and neglected children, emotionally disturbed children, juvenile delinquents, pregnant adolescents, and teenaged mothers.
225. See id. at 5.
226. Id. at 37.
227. See id. at 5.
228. See id. at 6.
daily living satisfaction. Use of community services and resources can also strengthen the adolescents' self-reliance and social skills.

Residential care facilities for children have been criticized. The facilities have been criticized because they carry with them the obvious conclusion that the child residents have been removed from their natural home environments. Other concerns have been centered around the dislike of large institutional settings as housing for children, the isolation of children's residential facilities from their original communities, and the stigma associated with children who reside in a care facility. As a result of these criticisms, strong preference has been placed on smaller residences.

One alternative to large institutional settings is the "family group" approach. The family group approach strives to model a family setting. The home is a small residence with a head who is the main care provider and lives on the premises with the children. The home is located within the community and usually houses between seven and ten children. The majority are run by a married couple who often have children of their own who also reside in the home.

Location is a key element to the family group homes. "Family group' homes are designed to merge with their surrounding environment rather than to stand out as institutions." This is achieved through the use of dwellings that are visually in tune with the surrounding neighborhood. The inside of the house also resembles an ordinary family home.

The family group home has traditionally provided long-term substitute care for unproblematic children; however, there has been pressure for the homes to also accept troubled adolescents. These homes may not be the most appropriate setting for adolescents with behavior problems,

229. See id.
230. See id. at 22.
232. See id.
233. See id. at 15.
234. See id. at 9.
235. See id. at 17.
236. See id. at 16.
237. See id. at 69.
238. See id. at 70.
239. See id. at 69.
240. See id. at 70.
241. See id.
242. Id. at 71.
243. See id.
244. See id.
245. See id. at 73.
246. See id.
because the homes do not tend to have strict structure and control.\textsuperscript{247} Children are free to come and go, and behavior is kept in check through a "system of mutually held expectations and values."\textsuperscript{248} 

One criticism of the family group home model is that the residents cannot really be a "family."\textsuperscript{249} Others argue that the homes are never intended to be replacement "families," but rather the word is used to describe the make-up and staffing structure of the home.\textsuperscript{250} Perhaps more important than trying to discern how close to a real family the model can come is determining the quality of care the residence can provide to children in need. Admittedly, the quality of care in these homes can be at either extreme—they are either very effective or very poor, depending primarily on the head of the home.\textsuperscript{251} 

With an increase in the number of youths who cannot live at home and who also do not mesh well in a substitute family, group homes have become a very popular alternative.\textsuperscript{252} Although this type of group home was initially considered only for adolescents, the use of group homes for school-age children has increased.\textsuperscript{253} 

Aside from the benefits derived from the surrounding community, group homes are also therapeutically beneficial just by virtue of providing a group setting.\textsuperscript{254} "The influence of a group of peers, particularly adolescents, on each other in a group setting cannot be overestimated."\textsuperscript{255} Peer pressure and group authority can be invaluable and influential tools for encouraging various positive behaviors, such as involvement and socialization, which could be otherwise unattainable in an individual setting.\textsuperscript{256} 

The number of youths or children in a group home is an important factor that should not be overlooked. It is recommended that homes have no fewer than five, but no more than twelve residents, with six to eight residents being the optimum.\textsuperscript{257} Variables that weigh upon the appropriate number for a specific home include developmental levels of the residents, treatment needs of the residents, staffing and administrative

\textsuperscript{247} See id. at 72.
\textsuperscript{248} Id.
\textsuperscript{249} See id. at 73. The term "family group" is meant to describe the structure of the home only and not the viewpoints of the resident children. See id.
\textsuperscript{250} See id.
\textsuperscript{251} See id.
\textsuperscript{252} See CHILD WELFARE LEAGUE, supra note 224, at 1.
\textsuperscript{253} See id.
\textsuperscript{254} See id. at 25-26.
\textsuperscript{255} Id. at 25.
\textsuperscript{256} See id. at 25-26.
\textsuperscript{257} See id. at 27.
structure, conditions of the surrounding neighborhood, and the physical allowances of the home itself.\textsuperscript{258}

Another author who advocates for group homes versus institutional settings for children with learning difficulties also points to the importance of "a homely setting in the midst of an 'ordinary' community"\textsuperscript{259} as well as placing emphasis on actual integration into the community.\textsuperscript{260} One reason for the preference of group home settings over institutions is the ability to focus on individuals in a group home.\textsuperscript{261} The flexibility of a group home allows for subtle niceties based on individual needs and wants, such as bedtimes, weekend schedules, eating times, and allowance for all residents to eat together.\textsuperscript{262}

Meal time and meal preparation can take on a very significant treatment role in a group home. In an institution meal time becomes a process of waiting, lines, and cafeteria-style serving, whereas in a group home the quality and variety of the food is improved, individual likes and dislikes can be taken into account, and residents can even help with shopping and meal preparation.\textsuperscript{263} Better diet often leads to improved health and height and weight gain.\textsuperscript{264} Furthermore, some of the highest quality interaction among staff and residents takes place during meal time when everyone sits down to eat together.\textsuperscript{265}

Another benefit of group home living as opposed to institutional living is the increased visits and contact that group home residents have with their families.\textsuperscript{266} Whereas visiting can be an ordeal at an institution, in the group homes visiting is basically unrestricted, families feel more comfortable during visits, and families are encouraged to join activities as well as have a part in resident reviews.\textsuperscript{267} This increased family contact is beneficial to the residents not only during their stays at the group home, but also because it encourages and provides for a smoother transition back home if that should become an option.\textsuperscript{268}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{258} \textit{See id.}
\item \textsuperscript{259} \textit{Leonard, supra note 221, at 22.}
\item \textsuperscript{260} \textit{See id. at 37.}
\item \textsuperscript{261} \textit{See id. at 41.}
\item \textsuperscript{262} \textit{See id. at 42.}
\item \textsuperscript{263} \textit{See id.}
\item \textsuperscript{264} \textit{See id. at 54.}
\item \textsuperscript{265} \textit{See id. at 43.}
\item \textsuperscript{266} \textit{See id. at 52-53.}
\item \textsuperscript{267} \textit{See id.}
\item \textsuperscript{268} \textit{See id.}
\end{enumerate}
\end{footnotesize}
2. Homes for the Mentally and Physically Disabled/Retarded

In the past, professionals encouraged parents of the mentally retarded to place their children in institutions, claiming that such a placement was best for the family as well as the child. But mental health professionals now believe they underestimated the mentally retarded child’s ability to develop and misconstrued the child’s disability as destructive to family living. Today, placement in an institution is a rare recommendation and placement in the home with the natural family is preferred and beneficial. When residing with the natural family is not an option, a close alternative is the group home model—“a small residence within a neighborhood.”

Size is a very important characteristic for group homes for the mentally retarded. On average these group homes house 9.2 residents, and ninety-one percent of group homes surveyed had fifteen or fewer residents. Size is important, not just in relation to the number of beds in the home, but in relation to the physical location of the home. Large institutions are often located in rural areas, which are not conducive to accessing urban-based, outside services. Remote or rural locations also discourage visits from family and volunteer services. Group homes, on the other hand, if located in typical neighborhoods in urban areas, can avoid some of these institutional problems. Furthermore, location within the heart of the community is seen as beneficial for the residents, because it allows for “[f]ull participation for mentally retarded persons in the life in their communities and the opportunity to share its responsibilities.”

3. Homes for the Elderly

The elderly population faces increasing problems as they grow older, including financial problems, poor housing conditions, declining health, unavailability of services, family conflicts, loneliness, bereavement, and the desire for companionship. One way that many elderly persons have

270. See id.
271. See id.
272. Id.
273. See id.
274. See id.
275. See id. at 26.
276. See id.
277. See id.
278. Id. at 164.
279. See LAURA Z. MALAKOFF, HOUSING OPTIONS FOR THE ELDERLY 20-21 (1991); SHEILA M.
chosen to deal with these problems is through group living arrangements. Of those living arrangements, one response has been to organize group homes for the elderly.280

The size of group homes for the elderly varies greatly—from three to twenty-five residents.281 Many of the homes employ staff to help with meal preparation and housekeeping and to provide other services.282 While all of these services and benefits are also available for the elderly through other arrangements such as nursing homes and family placements, group homes tend to be more cost effective than institutionalization and are therefore often a prime solution for the elderly with financial difficulties.283 Group homes are also inviting because they allow the elderly to maintain a sense of valued independence.284 Group homes for the elderly strive to provide “continuing independence through interdependence.”285

Another important benefit of group home living is continued connection with and integration into the surrounding community.286 Shared living in a small family-like setting can be particularly conducive to this goal.287 An important aspect of a group home, which is linked to fostering community integration, is the size of the home.288

The size of the group home is also important in connection with other psychological benefits to the residents.289 As the elderly population grows more dependent on their immediate environment to provide for all of their needs, the result is often an environment where the convenience of an institution in meeting those needs overtakes any hope of individualized and personal care.290 A group home provides an ideal arrangement for capitalizing on the benefits of shared living without losing sight of the individual.291 The home further allows for group security while avoiding any feeling of being just another number.292 In addition, a smaller home

280. See MALAKOFF, supra note 279, at 21.
281. Id. 23.
282. See id.
283. See id.
284. See PEACE & NUSBERG, supra note 279, at 1.
285. Id.
286. See id.
287. See id.
288. See id. at 2.
289. See id.
290. See id.
291. See id.
292. See id.
better lends itself to emulating a family-like atmosphere and a feeling of continuity.293

4. Homes for Adults

The category of group home living for adults often overlaps with either the category of homes for the mentally retarded or homes for the elderly. In fact, “[t]he majority of people in community residences for persons with mental retardation are adults.”294 Group homes for adults, sometimes coined “adult foster homes,”295 serve a variety of populations, including the elderly, mentally retarded adults, and former psychiatric patients.296 Adult foster homes are preferable to hospitalization for appropriate residents because they are considerably less expensive.297

Adult group homes are very similar to the other group homes previously discussed in terms of physical features. Like other homes, size is important and usually ranges between three to fifteen residents per home.298 Also important is the home’s site. Because one of the goals of adult group homes is integration of the residents into the surrounding community, it is imperative that the home be located within the community to foster this goal.299

One significant benefit of an adult group home is the development of resident self-determination.300 “[P]rolonged hospitalization helps produce patient dependence on the hospital and weakens their motivation to leave. Thus, becoming institutionalized is not believed to be in the best interest of client self-determination.”301 Adult group homes have been found to be particularly helpful for residents discharged from psychiatric hospitals. Residents who had been in these hospitals and who had been living in an adult foster home for up to fifteen years scored significantly lower on measures of alienation and social isolation.302

One particular type of adult group home, homes for recovering addicts and alcoholics, have existed since 1958.303 The most common of these

293. See id.
296. See id. at 29, 69.
297. See id. at 149.
298. See id. at 103-06.
299. See id. at 150.
300. See id. at 149.
301. Id. at 149-50.
302. See id. at 150.
303. See Miller, supra note 46, at 1475 (citing Lewis Yablowsky, The Therapeutic Community 17 (1989)).
homes is the Oxford House. Oxford Houses are self-governing, unsupervised group homes that often serve as “half-way houses” after attendance at a treatment facility. Oxford Houses require their residents to abstain from drinking and using drugs, and members must pay their share of the rent. Size is of particular importance to Oxford Houses. In order to maintain their self-sufficiency and financial stability, each facility must house eight to twelve residents.

B. Definition of “Handicap” and Which Group Homes Are Covered

As discussed in Part II, the FHAA prohibits discrimination with regard to housing “because of a handicap.”

“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.

As a general rule, states have adopted this definition, although some may use a different term, usually “disability.” Thus, only group homes for qualified, handicapped persons are afforded the protection of the FHAA and the corresponding state enabling statutes. Accordingly, in states where statutes protect only the “handicapped” or the “disabled,” residents of other group homes can apparently be lawfully banned from residential zones. Some group homes obviously fall under the FHAA’s protection. Among those are homes for the mentally and physically disabled and for recovering addicts. Others, such as group homes for orphans, clearly are not protected.

Cases that involve homes for emotionally disturbed children and juvenile delinquents are less clear. It is questionable if one or more of these children’s major life activities are substantially impaired. Arguably, in some instances the answer is yes, particularly for the emotionally disturbed children. Although such children may not actually have one or more of their major life activities impaired, society may view them as having such an impairment. The same may be true for some juvenile delinquents.

304. See id. at 1468.
305. See id.
306. See id. at 1476.
309. Id. § 3602(b).
Current case law seldom addresses the term “handicap” and whether certain individuals fit within the definition. Usually the parties to suits claiming discrimination under the FHAA have stipulated to the handicapped status of the group home residents at issue and instead have litigated the issue of whether the home has been discriminated against under the statute. An important exception is *Sunderland Family Treatment Services v. City of Pasco*.\(^{311}\) In *Sunderland*, the Washington Supreme Court addressed whether abused and neglected children are “handicapped” according to the definition in the FHAA.\(^{312}\) Because the case was on appeal, the court was limited to the record created at an earlier administrative hearing, which included the children’s impairments.\(^{313}\) Although the home attempted to introduce on appeal evidence of the children’s emotional disabilities, the record stated only that “the children... [were] abused, homeless, neglected, or [had] nowhere else to go.”\(^{314}\) As a consequence, the court declined to consider whether emotionally disturbed children are handicapped and limited its determination to abused and neglected children.\(^{315}\) In making its determination, the court noted that the Rehabilitation Act of 1973 has an identical definition of “handicap,” and, therefore, the regulations implementing the Rehabilitation Act could be considered.\(^{316}\) Relying on the Code of Federal Regulations, which states that environmental, cultural, and economic disadvantage are not covered as part of “handicap,” the court concluded that abused and neglected children “are not handicapped because abuse and neglect are environmental and cultural factors.”\(^{317}\)

It seems that litigation regarding the “handicapped” status of group home residents will grow. As this happens, courts will have the task of interpreting the definition and perhaps broadening the term to include residents of differing types of group homes. This, in turn, will affect which group homes are afforded protection under the FHAA and related state statutes, and which are not.

A first likely battleground may involve homes for juvenile delinquents. The express definition of handicap would not seem to include juvenile delinquents, leaving group homes for such youth unprotected. This result may change, however, if the courts begin to look elsewhere for interpretation of the triggering definition. The term “handicap” has an identical definition to the term “disability” as used in the Americans with

\(^{311}\) 903 P.2d 986 (Wash. 1995).
\(^{312}\) See *id.* at 990.
\(^{313}\) See *id.* at 991.
\(^{314}\) *Id.*
\(^{315}\) *See id.*
\(^{316}\) *See id.*
\(^{317}\) *Id.*
Disabilities Act (ADA), a similarity that already has been recognized in FHAA cases. Although these holdings have not concerned group homes, "cases explaining the term 'disability' under the ADA may therefore be used to interpret the word 'handicap' under the FHAA."

In ADA cases, courts have looked to the Code of Federal Regulations (CFR) for help in interpreting the term "disability." Among the CFR definitions is an interpretation of "major life activities" that includes "learning." This inclusion, if adopted by reference under the FHAA, could transform juvenile delinquent homes to protected facilities. Juvenile delinquents who are unable to stay in school are arguably unable to "learn," and group homes for juvenile delinquents would be protected under the FHAA.

Group homes for the mentally and physically disabled clearly fall under the FHAA definition of handicap and should, therefore, be afforded protection from discrimination. Not only do the residents of these homes have a substantial impairment that likely hinders more than one of their major life activities, but they also are likely to have a record of having such an impairment and be regarded as having such an impairment.

Group homes for the elderly may or may not house handicapped residents under the FHAA. The outcome depends on the abilities of each home's residents. Some homes may house fully-functioning elderly people who choose to live in organized living for financial or social reasons. Others may house residents who choose to live in organized living for health and practical reasons, because they can no longer perform one or more of their major life functions unassisted. These latter homes fall under the protections of the FHAA.

Group homes for adults often house handicapped residents. As noted earlier, the majority of homes for adults house persons who are mentally and physically disabled. A significant number of adult group homes house former psychiatric patients. These residents are often restricted in their ability to work, which is a major life activity, and are therefore also considered handicapped.

Last, group homes for recovering drug and alcohol addicts are clearly protected. The FHAA definition explicitly excludes persons with a

320. Id.
322. 29 C.F.R. § 1630.2(i) (1997).
323. Cf. supra note 294 and accompanying text.
324. Cf. supra note 296 and accompanying text.
“current, illegal use of or addiction to a controlled substance.” 325 By negative inference, persons recovering from illegal use of, or addiction to, substances are covered under the FHAA provided they are no longer current users. Furthermore, numerous courts have held that homes for recovering addicts are covered. 326

Regardless of whether the breadth of the “disability” definition in the CFR influences the FHAA definition of “handicap,” there is no question that some group homes will not fit within even the wide bounds of the statute. What is left, therefore, is the awkward and messy result of some kinds of group homes receiving powerful protection and others receiving no protection at all.

IV. PENDING LEGAL PROBLEMS

A. Statutes That May Be in Violation of the FHAA After Edmonds

Prior to Edmonds, the exemption in the FHAA was a state or local government’s primary defense to a numerical cap on group homes. After Edmonds held that the exemption is inapplicable to such caps, however, these governments must defend their ordinances on different grounds, at least those ordinances capping residents of homes covered by the FHAA.

As stated in Part II, many state statutes impose ceilings on the number of residents permitted to live in a group home that is located in a single-family zone. 327 After Edmonds, it is clear that the exemption will not authorize such a cap—for instance, a cap of six residents—unless it is applied uniformly to all homes in the zone. Obviously, a uniform application is unrealistic, because it would force a family of six that later had another child out of the zone. But if the cap does not apply to all homes, the restricted group home has a colorable claim under the FHAA and local governments wanting to preserve such caps will have to defend against discrimination claims.

Such claims could come in two possible varieties. First, challengers could claim that the cap renders the statute discriminatory on its face. If the reviewing court agrees, the challengers are in a strong litigating, or negotiating, position. If, on the other hand, the court finds that the statute is neutral on its face, the challenger faces an uphill battle.

If the statute is found to be neutral on its face, the challenger would be required to establish a disparate impact on the handicapped, a burden at

327. See supra notes 172-81 and accompanying text.
least one court found daunting for the plaintiffs. But only one court reviewing a post-Edmonds cap has found the measure neutral on its face, and this counter-intuitive outcome seems an unlikely direction for future decisions.

On the other hand, at least two circuits have already held that post-Edmonds caps automatically raise a claim of facial discrimination, thereby considerably raising the stakes for the enacting government. In any jurisdiction adopting the "facial" rule, the burden of defending a cap begins and ends with the imposing government. The outcome depends wholly on the nature and extent of justification that government must bring forward as a basis for the ceiling. If, as the Eighth Circuit has held, the government needs only to provide a rational basis for the cap, there remains a decent chance that the ordinance will survive.

But the Eighth Circuit test is a minority view. The Sixth and Tenth Circuits have adopted a more demanding test, under which a defending government must show either of the following to rebut a finding of facial discrimination: "(1) that the ordinance benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes." In these jurisdictions, and others adopting the same analysis, few ordinances with caps will survive. Few caps "benefit" the protected class. Few ordinances have caps favoring protected residents, the model the first rebuttal apparently envisions. Also, many group homes require a certain number of residents in order to be financially viable or to encourage therapeutic benefits; therefore, caps harm rather than "benefit" protected residents.

Most governments in jurisdictions finding caps facially discriminatory, thus, will be relegated to defending on the second basis—that the caps are necessary to guard against legitimate safety concerns raised by the individuals affected rather than by stereotypes. This is a tall order in several regards. First, the government will often not be able to identify the "individuals" who will occupy the group home in question. Even if that is possible, it seems unlikely the government can establish the individually-based safety concern the test requires. In Children's Alliance v. City of Bellevue, the city attempted to defend its statute, which

328. See supra note 44 and accompanying text.
329. See Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996).
330. See Larkin v. Department of Soc. Servs., 89 F.3d 283 (6th Cir. 1996); Bangertner v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995).
331. See Oxford House-C, 77 F.3d at 249.
333. Id.
distinguished homes for families from those for unrelated individuals and distinguished among classes of group facilities. The city’s rationale for the statute was “general interests in public safety, stability, and tranquility.” The court held that although these reasons may have satisfied a rational basis test, they were insufficient to meet the stricter level of scrutiny required by the test.

In addition to statutes imposing a numerical cap not applicable to all homes in the zone, other statutes exist that appear to be facially discriminatory and should, therefore, also be subject to a disparate treatment analysis. For example, statutes that require a minimum number of residents are facially discriminatory. Clearly, the state is not also mandating that all families residing in the zone have at least a certain number of members. Thus, on their face, these statutes treat related residents differently than non-related residents, therefore making the statutes discriminatory.

Other examples include statutes that have varying caps. Under this type of statute, a group home may be allowed eight residents, or eight residents and two live-in staff members. Again, this statute may be found to be facially discriminatory. A state with such a statute might have to defend this statute under the stricter level of scrutiny imposed by the Sixth and Tenth Circuits, meaning the state would have to present a reason beyond a rational basis for restricting some homes in the zone to eight residents while allowing ten residents in other homes in the same zone. Homes in which the residents do not require live-in staff, but rather benefit from the autonomous nature of the home, would be discriminated against because they would not be allowed as many residents as homes in which the residents do require live-in staff. Furthermore, statutes that impose supervision requirements, statutes that dictate the geographical spacing of group homes within a city or municipality, and statutes that dictate different treatment for group homes, depending on which class or category they fall under, are all examples of statutes that may be ripe for attack under the FHAA and post-Edmonds case law.

B. Potential Constitutional Problems

State statutes or local ordinances that are found to violate the FHAA’s provisions protecting “handicapped” persons from discrimination are unconstitutional under the Supremacy Clause. This is true even if the law

335. Id. at 1497.
336. See id. at 1498.
338. See supra notes 105-07 and accompanying text.
in question simply enables later legislative choices that may prove to be discriminatory. A perfect example is *ARC of New Jersey*,\(^{339}\) in which the federal district court invalidated three parts of New Jersey's zoning enabling act on the basis that it facially authorized local actions, which, if taken, would violate the FHAA.\(^{340}\)

Beyond the Supremacy Clause, many issues can arise from the combined circumstances of *Edmonds*’ removal of the exemption as a defense to state and local restrictions on group home residents on the one hand, and the crazy-quilt pattern of those restrictions on the other. The obvious constitutional issue these circumstances can produce is whether it is now constitutional for local zoning and related provisions to permit, as they must, group homes for “handicapped” persons in residential zones while denying group home entry in such zones for other kinds of residents. This is quite possible in states where the enabling statute for group home protections mirrors the FHAA and only protects “disabled” residents. It is also possible in states that have even-handed statutes but are forced by FHAA and *Edmonds* to offer preferential treatment (e.g., freedom from certain numerical caps) only to group homes for the handicapped.

The question in a less abstract form is whether it is now constitutional for a city, following a state enabling statute, to permit group homes for mentally handicapped children in a single-family zone or to have no numerical cap on the number of residents in such homes, while in the same ordinance barring group homes for orphans in those zones or subjecting them to strict numerical ceilings. The following analysis will assume an ordinance that protects group homes for mentally handicapped children, but not homes for orphans.

The constitutional protections for those seeking protection for the orphan home are far fewer than the question might imply. The most obvious basis for attacking such a scheme would be that used in *Cleburne*,\(^{341}\) which held that disparate treatment for group homes in residential areas is constitutional only if the local government has a rational basis for the discrimination.\(^{342}\) Superficially, this holding would seem to render the scheme unconstitutional—it is difficult to imagine economic, social, safety, or therapeutic reasons for allowing a home for six to ten mentally handicapped children in a single-family zone, while excluding an identical home for an identical number of orphans.

But the simple existence of the FHAA and any related state enabling statute may, by themselves, preserve the constitutionality of such an


\(^{340}\) *See supra* notes 92-99 and accompanying text.

\(^{341}\) *473 U.S. 432* (1985).

\(^{342}\) *See supra* notes 10-13 and accompanying text.
ordinance. That federal, and perhaps state, law requires the local government to permit group homes for handicapped persons may, by itself, be a sufficiently rational basis to justify the discrimination. It seems to be no stretch to assert that obedience to a federal statute, and perhaps a state statute as well, is a rational basis for drawing a legislative line that excludes persons not targeted for legislative protection. 343 A closely-related basis on which a local government might rely is the federal or state policy to protect certain persons from discrimination. Both the FHAA and related state statutes are grounded in findings that handicapped persons have special problems securing and retaining appropriate housing. 344 These legislative findings more than justify special and specific treatment for handicapped group home occupants, but do not exist for group home occupants who are not handicapped.

If either of these important and related “rational bases” is accepted by a court adjudicating a Cleburne-based claim brought by a group home developer (or potential resident) challenging favorable treatment of group homes for mentally handicapped children, there would seem to be few constitutional alternatives remaining. Belle Terre, with its broad grant of authority to local governments, 345 offers no higher basis of scrutiny. A claim grounded on the equal protection clause would be decided by the exact same rationale. 346 None of the usual categories of non-handicapped group homes residents, including orphans, fall into specially protected classes.

The upshot, then, is that in whatever legal straits the FHAA, Edmonds, and state statutes have left groups such as orphans or dependent and neglected children, current constitutional law is not likely to rescue them. It may be difficult to imagine that the present law of many states allows local governments to blatantly discriminate against certain, or all, non-handicapped group homes by keeping them from single-family zones in which group homes for handicapped persons are permitted. However, that is the case. That possibility was the initial inspiration for this

343. The idea that meeting a constitutional obligation can serve as a rational basis for conduct that might otherwise be discriminatory has been raised before. A recent example was in Capitol Square Review Board v. Pinette, 515 U.S. 753 (1995), where the Supreme Court faced the argument that compliance with the Establishment Clause of the First Amendment was the compelling interest the state had in limiting the content of certain speech. While ultimately holding that the Establishment Clause was not implicated by the private speech in question, the Court explicitly acknowledged that “[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify [the restrictions].” Pinette, 515 U.S. at 761-62. If the basis is sufficient to meet a “compelling state interest” test, it seems quite likely that it would meet the rational basis test as well.


346. Cleburne was an equal protection case. See supra notes 10-13 and accompanying text.
Article. And, it provides the predicate for the final section, which looks to help the law escape from such a mess of its own collective making.

V. THE STATE SOLUTION

The final aspect of the group home/single-family quandary is how to fix what is so obviously broken. Certainly the statutory efforts at enhancing the housing opportunities for handicapped Americans, as reflected in the FHAA and comparable state statutes, are admirable advances in the housing anti-discrimination campaign of the past thirty years. They cannot be, and should not be, rolled back to bring the law of group homes in single-family areas into a state of equilibrium. So from whence cometh a solution so badly needed?

It is highly unlikely that the United States Constitution will provide any help. The broad constitutional authority granted state and local governments in Belle Terre has sometimes been questioned, but never attacked in the Supreme Court of the United States. Even if Belle Terre were perchance overturned, the result would not necessarily mean that all local governments would thereafter have to allow any and all residential uses in any and all residential zones. Beyond Belle Terre lies only Cleburne and its refusal to expand the list of suspect classes to include special groups seeking housing, and there is simply no evidence in the decade that has passed since that decision indicating any interest by the Court in revisiting its holding. Together, the Belle Terre and Cleburne legacies leave federal constitutional law on the sidelines of any battle to improve the jurisprudence of group home zoning.

The United States Congress is on the sidelines, too. In 1988 it added handicapped persons to the list of those protected under Title VIII of the Civil Rights Act, thereby taking a major step toward protecting a class of persons the Court had offered little protection in its Cleburne decision. Since that time, it has shown little interest in expanding the protected groups of the statute, especially toward those non-racial, non-religious, non-gender, non-handicapped groups needing protection in group home zoning. Furthermore, recent developments in federal constitutional law bring into question whether, even if Congress chose to enter the issue of group home zoning, it would have constitutional authority to reach so deeply into what is, in virtually every instance, a purely local effort to house a certain type of resident from within the local community.

347. See supra note 9 and accompanying text.
349. As a purely local activity with little, if any, effect on commerce as such, any attempt by Congress to open single-family zones to group homes for non-handicapped persons would take some
Nor is this problem one susceptible to effective local control and reform. First, the "transaction costs" and limitless variety of outcomes derived from leaving the issue to local attention render the idea as overwhelmingly bad on a purely policy level. In many places reform would never come, and, in those cases where it did, the solutions would often likely be worse than the problem.

More important to this analysis is a serious legal issue entwined with looking to local governments for a cure. Most states have both a statute dealing with group home zoning for handicapped persons and either statutory or constitutional home rule. Kansas is a perfect example. The Kansas "group home" statute limits coverage to "persons with a disability."\(^{350}\)

The Kansas home rule provision is constitutional and gives local governments considerable police power to deal with all legislative affairs, except those related to "enactments of the legislature of statewide concern applicable uniformly to all cities."\(^{351}\) The obvious question, then, is whether a Kansas local government could constitutionally expand coverage of its group home zoning efforts to encompass homes not housing "persons with a disability." To the obvious question there is no obvious answer. The Kansas Supreme Court has wavered back and forth on the breadth of home rule authority, but its last significant holding on the subject raises serious doubts about whether Kansas municipalities could effect a legislative solution to the group home problem.\(^{352}\) Other states have had similar difficulties delimiting the bounds of home rule authority.\(^{353}\)

Solving this problem is, thus, best left to the state legislatures in enacting their enabling statutes. It is up to the state legislatures to enact enabling statutes that are both broad and narrow. These statutes should be broad in the sense that cities and municipalities will allow group homes in single-family residential zones without the resultant and unfair disparity in treatment between group homes for mentally retarded children and group homes for orphans when, clearly, each population deserves the same protections. The statutes should be narrow, however, in the sense that they still allow cities and municipalities to set reasonable restrictions on the homes allowed in these zones. For example, the statute should

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\(^{352}\) Kan. Const. art. 12, § 5.
preclude a group home of ten college students from claiming a protected "group home" status.

As noted earlier, the current state statutes have various problems. Some statutes contain definitions of qualifying residents that are so vague or broad that virtually any and all persons could claim group home status merely by forming a group and living in the same home. 354 Other statutes are either specific in their coverage or incomplete in their coverage and, therefore, leave many groups unprotected. 355

The best solution is for states to enact enabling statutes that require local governments to protect group homes for: (1) "handicapped" adults, as defined in the FHAA, 356 (2) all children; and (3) any additional adult groups the local government wishes to protect. This solution would give local governments authority to meet the requirements of the FHAA, while avoiding the pitfalls of protecting only group homes for the handicapped and while also enabling localities to protect whomever it sees fit.

In enacting new legislation, state legislatures must address not only which populations qualify for the statute's protection but also how many residents should qualify. In other words, legislatures must confront the recurring problem of occupancy caps. Because caps have been shown to be acceptable, at least as long as they are applied uniformly to group homes and families in the same zone, it is reasonable to expect that states will continue to implement some sort of maximum occupancy limit. As a starting point, the state enabling statute should provide for one cap that applies to all homes in the zone, whether a group home or a family home. Statutes with varying caps will be subject to attack as facially discriminatory. Furthermore, this uniform cap should be high enough that group homes wishing to locate in single-family zones will be able to house enough residents to achieve financial and therapeutic viability. A number between eight and twelve is the recommended cap in order to achieve these goals.

VI. CONCLUSION

Although the FHAA and the resulting state statutes were created with the intent to solve single-family zoning problems and afford better protection for group homes, application of these statutes has resulted in irrational outcomes and fresh discrimination. Surely these statutes were not meant to create differential treatment between group homes for mentally retarded children and group homes for orphans. And yet, this is clearly the direction in which the current law is headed. In order to

354. See supra notes 128-34 and accompanying text.
355. See supra notes 151-53 and accompanying text.
circumvent these problems, new legislation should be proposed which maintains necessary compliance with the FHAA and also results in fair and reasonable protection for those who need it.