Directors Meeting

Monday, August 1st, 2022

555 S 10th Street, Luxford Studio

I. Approval of Directors Minutes from July 18th, 2022

II. City Council Agenda & City Clerk Advisories

III. Mayoral Advisories

IV. Directorial Advisories
   i. BP220726 - 1 Weekly Administrative Approval - Jennifer McDonald
   ii. PC220728 - 1 PC Final Action Notice - Shelli Reid

V. Boards, Committees, and Commission Reports

VI. Constituent Correspondence
   i. Hahn House/1923 B Street/Oxford House - Carmen Maurer
   ii. MISC 22010 - Peggy Hart
   iii. Budget-infrastructure/streets - Deanna McClintick
   iv. Babies, books and visitations - Jane Holt
   v. Verification - Jamie Mohr
   vi. MISC 22010 - Why didn't more people testify on 7/25/22?? - Peggy Hart
   vii. 1923 B Street/Oxford House - Cathie Bailey

VII. Adjournment

Memorandum

Date: July 26, 2022

To: City Clerk

From: Alexis Longstreet, Planning Dept.

Re: Administrative Approvals

cc: Shelli Reid, Planning Dept.

This is a list of City administrative approvals by the Planning Director from July 19, 2022, through July 25, 2022:

Administrative Approval 22048 to Special Permit #18021 Hillcrest Community Unit Plan was approved on July 19, 2022, to revise one of the rear yard setbacks for Lot 4, Block 10 on property generally located at 1180 East Hillcrest Drive.

City/County Planning Department
555 S. 10th Street, Ste. 213 • Lincoln NE 68508
(402) 441-7491

PLANNING COMMISSION FINAL ACTION NOTIFICATION

TO: Mayor Leirion Gaylor Baird
Lincoln City Council

FROM: Shelli Reid, Planning

DATE: July 28, 2022

RE: Notice of final action by Planning Commission: July 27, 2022

Please be advised that on July 27, 2022, the Lincoln City-Lancaster County Planning Commission adopted the following resolutions:

Resolution PC-01816, approving SPECIAL PERMIT 19032A, to renew or extend an existing soil excavation Special Permit for three more years, generally located at North 112th and Havelock Ave.

Resolution PC-01817, approving SPECIAL PERMIT 22020, to allow for an AGR (Agricultural Residential District) CUP (Community Unit Plan), for seven single family lots, generally located at 7433 SW 27th Street.

The Planning Commission action on these applications is final, unless appealed to the City Council by filing a notice of appeal with the Planning Department within 14 days of the action by the Planning Commission

The Planning Commission Resolution may be accessed on the internet at www.lincoln.ne.gov (search for "PATS"). Click on "Planning Application Tracking Service (PATS)" at the top of the page, click "Selection Screen" under "PATS Tools" on the right side of the screen, type in the application number (i.e. SP19032A, SP22020), click on "Search", then "Select", and go to "Related Documents".

F:\devreview\final action notices\cc\2022\072722

From: Carmen Maurer
To: Council Packet; Mayor
Subject: Hahn House/1923 B Street/Oxford House
Date: Thursday, July 21, 2022 11:41:38 AM
Attachments: Oxford House, Inc. v. City of Wilmington[39].pdf

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Dear Mayor Gaylor-Baird and Members of the City Council:

Please accept this e-mail and the attachment in relation to the Council's meeting of July 25, 2022, and the agenda item related to 1923 B St.

Attached is a case from the Eastern District of North Carolina, which does an excellent job of discussing the history of Oxford House, as well as how this matter should be addressed. I believe you have a letter from Oxford House's legal counsel, essentially a legal brief, arguing Oxford House's position. It's important to recognize that the matter is not so clear as Oxford House's brief advocates. While reading caselaw may not be loads of fun, I think you'll find this case interesting, as *you could virtually replace the City of Wilmington with the City of Lincoln* and be presented with the matter we address at 1923 B. I urge you to review the attached.

In reading this case, you would learn from Judge James Fox:

- Oxford House's method of acting first, and then fighting compliance with the law, by demanding the law bend to its actions is well-established. This is its approach across the entire US. Oxford House essentially conducts itself, as if it is above the laws with which the rest of us abide.
- It is Oxford House's obligation and burden to show and prove that the requested accommodation is backed by legitimate evidence. I have asked, but not received an answer, with respect to how the City of Lincoln's process incorporates evidence into its disability evaluation. The City, before granting the request must ask: why is 14 the right number of residents in a house, not 6 or 8 or 35? According to Judge Fox, simply accepting Oxford House's unsupported request for reasonable accommodation is not how the Fair Housing Act is implemented. If one is going to ask that the law be bent to their favor, then the requester must show with **solid evidence** and logic (not broad-based statements and opinions), that such bending of the law is **reasonable**. Reasonable accommodation is not something broadly applied to large groups; it is strategically designed for the needs of a specific disabled individual.
- Of great importance, reasonable accommodation is not a function of maximized rental revenue for the property owner. Reduced rent for individual tenants (as a result of more tenants in one facility) is not an element to be considered when granting disability accommodation. Every renter, regardless of circumstances, benefits from cheaper rent if we'd pack more persons into a property.
- And finally, and maybe most importantly, the Fair Housing Act does not require local government to abandon its legitimate interest in strategic land use planning. Accommodation may be appropriate; it may be granted, but there is no requirement for a city to ignore reasonableness.

I respectfully request that you read and consider the wisdom of Judge Fox.

Thank you, Carmen Maurer

P.S. I note that a recent request, where Oxford House is now required to comply with Wilmington, NC, ordinances prior to facility occupation, resulted in an approval of 8 tenants over Oxford's request for 10. These requests to waive zoning laws are not a fait complete.

No: 7:07-CV-61-F
United States District Court, E.D. North Carolina, Southern Division

Oxford House, Inc. v. City of Wilmington

Decided Oct 28, 2010

No: 7:07-CV-61-F.

October 28, 2010

ORDER

JAMES FOX, Senior District Judge

This matter is before the court on Plaintiffs' Motion for Partial Summary Judgment [DE-22] and Defendant's Motion for Summary Judgment [DE-20]. The parties also have filed a joint Motion to Continue [DE-76] the trial and pretrial proceedings. The motions have been fully briefed and are ripe for disposition.

Plaintiffs, Oxford House, Inc. and Harold Laing (collectively, "Oxford House"), brought this action against the Defendant, City of Wilmington, North Carolina ("the City"), to enforce the provisions of the Fair Housing Act, as amended, 42 U.S.C. § 3601, *et seq.* ("FHA")[1], the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* ("ADA"), and the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.* Oxford House alleges that the City violated the FHA by failing to grant Oxford House a "reasonable accommodation" when the City denied Oxford House's request for a zoning ordinance text amendment to permit Oxford House to operate two "large" group homes for recovering alcoholics and drug addicts in certain single-family residential districts where such homes are prohibited. In the Complaint [DE-1], Oxford House seeks *2 injunctive relief, compensatory damages and attorney's fees. The City filed an Answer [DE-8], and demanded a trial by jury. After filing its motion for summary judgment, the City filed a Withdrawal of Request for Jury Trial [DE-29], and indicates the withdrawal is with Oxford House's consent.

[1] The Fair Housing Amendments Act of 1988 ("FHAA"), P.L. 100-430,102 Stat. 1619, amended the Fair Housing Act of 1968 to extend its coverage to housing discrimination on the basis of handicap and familial status. The core of the amended statute's provisions relating to housing discrimination on the basis of handicap appear in § 804(f), codified at 42 U.S.C.A. § 3604(f), which includes a subsection, 42 U.S.C.A. § 3604(f)(3)(B), making it unlawful to refuse to make reasonable accommodations to afford a handicapped person equal opportunity to use and enjoy a dwelling. For ease of reference, "FHA" as used herein encompasses the FHA and the applicable amendments.

The parties have filed cross-motions for summary judgment on the sole issue whether the City violated the FHA by refusing to grant Oxford House's "reasonable accommodation" request. In support of their respective motions, the parties separately have filed a Joint Record [DE-21, DE-23], a copy of which is attached to the parties' respective motions for summary judgment. The parties stipulate that the exhibits contained in the joint record constitute the complete evidentiary basis for this action. *See* [DE-21], Ex. 2 (Joint Record of the Parties). The parties do not dispute the authenticity of the documents comprising the Joint Record. Accordingly, for ease of reference,

all factual citations herein are to Exhibits constituting the Joint Record appended to the Oxford House Memorandum at [DE-23].

I. STATEMENT OF THE FACTS

A. Oxford House, Inc.

Oxford House, Inc., is a non-profit corporation founded in 1975 that serves as the umbrella organization for a national network of Oxford House group homes that provide housing and rehabilitation for individuals recovering from alcoholism and drug addiction. Oxford House Memorandum [DE-23], Ex. C, Part 2, at p. 6. Congress provided for the establishment of a revolving funds loan program in order to provide federal monies to nonprofit private entities such as Oxford House under the alcoholism, drug addiction and mental health block grant funds. *See* 42 U.S.C. § 300x-25.

Individual Oxford Houses operate in a family atmosphere in which groups of recovering individuals rent a home to live together in a supportive environment of recovery from addiction. Each individual house obtains a charter from Oxford House, Inc. In order to secure a
3 charter, *3 an individual house must meet three basic requirements: (1) it must be democratically self-run; (2) it must be financially self-supporting; and (2) it must immediately expel any resident who returns to using alcohol or drugs. An individual house also must consist of at least six persons. Oxford House represents that, in developing a system of operation, however, it has learned that an individual Oxford House with 8 to twelve residents provides the most effective therapy for recovering individuals.

The Oxford House model also requires operation in a residential neighborhood which is free from the outside influences that degrade recovery, such as the presence of drugs or alcohol, and which offers access to recovery programs like Alcoholics Anonymous and Narcotics Anonymous. Oxford House has developed this standardized system in an attempt to ensure that recovering individuals have the best opportunity to live a clean and sober life. Ex. C, Part 2, at pp. 6-9.[2]

[2] This reference, provided by Oxford House, is to an undated document designated as Attachment A — apparently to Oxford House's Application for the text amendment — and entitled "Group Home Supportive Conditional Permit." It appears to be a standard document used by Oxford House to support applications for zoning permits and variances in North Carolina. It, in turn, cites the abstract of a 2001 article prepared by Oxford House's "expert," Dr. Leonard Jason ("Dr. Jason"), of DePaul University, who reports to have studied Oxford House operations for 14 years.

It is well-established, however, and the court takes judicial notice of the fact, that Oxford House's typical method of establishing itself in a city consists of locating a house in a single-family neighborhood, obtaining a lease, and making the house as available to recovering alcoholics and drug addicts to live there according to the Oxford House model. It is not the practice of Oxford House initially to seek any permit required by local ordinances for operating a group home, because Oxford House considers residents of its homes to be a "family," notwithstanding definitions contained in local zoning ordinances. Therefore, a new Oxford House operates until it eventually is cited by the municipality for zoning
4 or other local violation, *4 at which time Oxford House begins the local administrative process to obtain a special use permit or variance, or institutes a legal proceeding alleging failure to accommodate under federal law. In his concurring opinion in *United States v. Village of Palatine, Ill.*, 37 F.3d 1230 (7th Cir. 1994), Circuit Judge Daniel A. Manion wrote:

> The Oxford House is an organization with a lofty and impressive goal; it seeks to assist recovering alcoholics and drug abusers. That honorable goal, however, does not put the Oxford House above the law. Yet, the Oxford House has adopted a rather high-handed policy: "As a matter of practice, Oxford House, Inc. does not seek prior approval of zoning regulations before moving into a residential neighborhood." Apparently, the Oxford House believes that if members of the group move in quietly without notice it will be harder to evict them. This strategy is evident throughout this appeal.

Id. at 1234-35 (footnote omitted); *see also Oxford House-A v. City of University City*, 87 F.3d 1022, 1023 (8th Cir. 1996). Oxford House seems to have followed a similar pattern as to the subject homes, according to statements by Assistant City Attorney Delores M. Williams to the City's Planning Commission during the public hearing conducted on December 6, 2006. Exh. E, p. 22.

A review of some reported cases confirms also that Oxford House ordinarily does not seek an accommodation from the city before filing suit in federal court against the municipality for violation of the FHA, ADA and Section 504 of the Rehabilitation Act. Often, as here, the federal action will be dismissed as un-rip because Oxford House did not first exhaust its administrative remedies by seeking an accommodation. *See, e.g., Oxford House-A v. City of University City*, 87 F.3d 1022 (8th Cir. 1996); *Oxford House-C v. City of St. Louis*, 77 F.3d 249 (8th Cir. 1996); *Village of Palatine*, 37 F.3d at 1234; *Oxford House v. City of Wilmington*, No. 7:04-CV-134-FL (E.D.N.C. May 25, 2006) (hereinafter " *Oxford House I*"); *see also Tsombanidis v.City of West Haven, Conn.*, 129 F. Supp. 2d 136, 160-61 (D. Conn. 2001); *Oxford House, Inc. v. City of Virginia Beach, Va.*, 825 F. Supp. 1251, 1260-61, 1264 (E.D. Va. 1993) (differentiating between "exhaustion" and "ripeness," and holding that "plaintiffs' claim that

5 the City's unrelated *5 persons restriction, as applied to them, violates the Fair Housing Act is not ripe for adjudication until plaintiffs apply for conditional use permits and afford the City an opportunity to act on those applications"); *but see United States v. Town of Garner*, ___ F. Supp. 2d ___, No. 5:09-CV-216-FL, 2010 WL 2541094, slip op. *7 (E.D.N.C. June 22, 2010) (Oxford House applied for text amendments on three occasions but Town never granted requested accommodation).

Usually, Oxford House will return to the state level and make proper application for accommodation through the correct administrative channels. If its proper request is denied, Oxford House returns to federal court, suing the city for violation of federal civil rights housing statutes, and seeking injunctive relief and attorney's fees. Oxford House followed this pattern with regard to the OH-Camden and OH-Market houses in Wilmington, North Carolina. *See* detailed account of Oxford House's methodology in *Oxford House I.*

B. Wilmington Oxford Houses

C. City enacts the LDC

6 *inter alia* *6 [3]

[3] Chief Judge Louise Flanagan, in *Oxford House I*, described the events that led to the enactment of the LDC. *See* Ex. B. To summarize, a non-Oxford House group home was cited for operating in violation of the Zoning Code. The owner of the group home complained that many other group homes were operating illegally in the city, and that the Zoning Code should be enforced fairly and equally, resulting in a city-wide investigation and citations being issued to both OH-Camden and OH-Market. The City formed a task force to study and update the City's zoning regulations to comply with the ADA and FHA. Over the course of nine months, eight public meetings were held to develop a new ordinance, and on March 18, 2003,

> the City Council unanimously adopted the new ordinance regulating group homes and other care facilities for the disabled.

Additionally, the LDC provided that a group home falling within any one of the foregoing categories (small, medium or large) may not be located closer than a half-mile from another group home, except there is no spacing requirement for group homes supportive small or *7 medium located in any Multi-Family Residential or Commercial district or for group homes supportive large located in any Commercial district. Ex. A, at Sec. 18-287. The Ordinance also required that each group home obtain a certificate of occupancy, which is granted as a matter of right upon satisfaction of certain prescribed conditions, such as compliance with the Minimum Housing Code, off-street parking requirements, and architectural compatibility of new construction with the existing streetscape. Ex. F., Part 1, at pp. 9-10, 20; Ex. A, at § 18-286.

D. Enforcement of the LDC and the first federal action

Shortly after the LDC provisions became effective in 2003, the City sent "Notice of Violation" letters to over twenty group homes that had been operating unlawfully under the old Ordinance, including four Oxford Houses: the OH-Camden and OH-Market homes, and the OH-Covil and OH-Smith Creek homes. Both OH-Covil and OH-Smith Creek brought themselves into compliance with the LDC, but the OH-Camden and OH-Market homes violated the half-mile separation requirement because of their proximity to two other group homes that also submitted permit applications to operate in the area. Ex. F, Part 1, at p. 11. To resolve that situation, the City had the four houses in violation of the separation restriction engage in a random drawing to determine which would be granted permits. Both the OH-Camden and OH-Market homes lost the lottery and their applications were denied. Ex. F, Part 1, 11-12.

Oxford House then sought a "reasonable accommodation" under the FHA and ADA from the City's Board of Adjustment through a request for a variance from the half-mile separation requirement to operate the OH-Camden and OH-Market homes as group homes "medium." The Board denied the request, and the denial was affirmed on Oxford House's appeal to the New Hanover County Superior Court. Ex. B, at p. 8.

Oxford House then filed a new application with the City, this time abandoning its effort to have the OH-Camden and OH-Market homes approved as "medium group homes," and revising its request to seek "group homes supportive *large*" designation to permit between nine *8 and 12 unrelated disabled persons to live in each home. Ex. B, at p. 8; Ex. C, Part 1, at pp. 19-20. The City informed Oxford House that because the LDC did not permit group homes "large" under any circumstances in the R-15 and R-10 single family residential districts, Oxford House would have to seek approval from the City Counsel of a text amendment to the LDC. Ex. F, Part 1, at p. 12. Rather than do so, however, Oxford House instituted *Oxford House I* in this court on June 30, 2004, challenging the LDC, the lottery, and the City's refusal to grant a reasonable accommodation as violating the FHA, ADA and the Rehabilitation Act, as well as the equal protection and due process clauses of the United States Constitution.

On May 25, 2006, Chief Judge Flanagan issued an order ruling on the parties' cross-motions for summary judgment in *Oxford House I.* That order upheld the lottery and most of the provisions of the LDC. Chief Judge Flanagan dismissed without prejudice Oxford House's claims that the City failed to grant a reasonable accommodation regarding the permit applications to operate OH-Market and OH-Camden as "group home supportive large uses." The court held that the "large" applications were not ripe for adjudication because Oxford House and the other plaintiffs had not exhausted their administrative remedies as to

that designation. Specifically, the court found that Oxford House failed to pursue a text amendment of the LDC. *See generally Oxford House I*, No. 7:04-CV-134-FL(1) (E.D.N.C. May 25, 2006). Exh. B.

E. Text amendment application

Oxford House returned to the City and submitted applications for "group home supportive large" permits for both OH-Camden and OH-Market, and applied for a text amendment of the LDC. Ex. C. Part 1, at p. 18. The proposed text amendment would allow the OH-Camden and OH-Market homes to operate as large group homes in their existing locations in the R-15 and R-10 single-family residential districts, but would not allow any other group home large to be located in that or any other R-15 or R-10 district. Specifically, the
9 text *9 amendment application sought the following amendments to the LDC:

> Add the following language to both Sections 18-178. R-15 and 18-878. R-10 of Chapter 18, Article 5, Division II:
>
> "Notwithstanding anything to the contrary in this Code, the properties located at 3528 Camden Circle and 2803 Market Street are allowed to operate as "group home supportive large" uses as long as the homes are chartered members of Oxford House, Inc. and are operated consistent with the Oxford House, Inc. model for persons recovering from alcoholism and/or drug addiction."

Ex. C, Part 2, at p. 16. Thus, the proposed text amendment sought an accommodation not only to eliminate the prohibition against "group homes supportive large" in a residential district, but also to circumvent the one-half mile spacing requirement, [4] as to OH-Camden and OH-Market, only.

> [4] Oxford House notes that OH-Camden is located within .439 miles of another group home supportive, and OH-Market is located within .171 miles of another group home supportive.

In support of its applications, Oxford House submitted a packet of materials, including the following "Explanation of the Impacts on the City as a Whole" and statement of the amendment's "Consistency with City's Plans and Policies":[5]

> Explanation of Impacts on the City as a Whole:
>
> Adoption of the proposed text amendment will have no impact on the City as a whole. The Oxford House at Camden Circle has been in existence and continuous operation for over twelve years, since 1994. The Oxford House on Market Street has been in existence and continuous operation for over eleven years, since 1995.
>
> These two Oxford Houses have served the City without incident, and without any financial or administrative burden to the City. During this time these Oxford Houses have provided a home to and facilitated the
10 recovery of over *10 an estimated one hundred individuals recovering from alcoholism and or drug addiction. These two Oxford Houses have conferred an invaluable benefit, free of charge to the City, for over a decade. The proposed text amendment seeks to allow the continuation of this benefit and the continued operation of these two Oxford Houses. The proposed text amendment affects only the two Oxford Houses located at 3258 Camden Circle and 2803 Market Street.
>
> Consistency with City's plans and policies
>
> The proposed amendment is consistent with the City's plans. Oxford Houses are permitted uses under the City's code as "Group Home Supportive." The Code permits these types of uses which provide housing for recovering alcoholics and drug addicts.

The proposed amendment is also consistent with the City's policies. The City maintains a stated policy in its Code to allow for a reasonable accommodation pursuant to the Federal Fair Housing Act to disabled persons such as those residing in an Oxford House. Oxford House operates a unique program that is not the same as other providers of community based residential care for persons recovering from alcoholism and/or drug addiction. Although there are "group homes" operating in the City, because Oxford House offers a unique program these other "group homes" do not provide the ameliorative benefit that Oxford House provides. Based on thirty years of experience and over one thousand homes across the country, Oxford Houses with 8 to 12 residents have proven to provide the optimal ameliorative benefit for their residents. Finding a home of the necessary size is a challenge in the City. Not all homes available for rent in the City are able to accommodate this number of residents. The properties located at Camden Circle and Market Street are uniquely qualified in this respect, and the proposed text amendment only affects these two properties.

[5] The authorship of these documents and the source of the representations contained therein is not revealed, although John Fox of Oxford House executed the amendment application, which designated attorney Gregory Heafner as Oxford House's agent for purposes of the proceedings. Dr. Jason's report, also contained in the collection of materials submitted by Oxford House in this litigation, is its sole source of "evidence" supporting its application for a text amendment and its contention that the City failed to provide a reasonable accommodation in violation of the FHA.

Ex. C., Part 2, at unnumbered p. 17.

The text amendment application also contained other information, including descriptive materials about the Oxford House model and the "opinion" of Dr. Jason. *See* Ex. C, Part 2, at pp. 18-42. Dr. Jason expressed his impressions of the efficacy of Oxford Houses, generally, their impact on the community, and how characteristics of the Oxford House model relate to the therapeutic benefits for and needs of its residents.

F. The application process

The City's text amendment application process entailed two public hearings: the first before the City's Planning Commission, and the second
11 before the City Council. The Planning *11 Commission's role was to make a recommendation to the City Council, to either grant or deny the application. The City Council's role was to make the final decision on the application. At the respective hearings, the Planning Commission and the City Council members had before them the materials described above, and they heard from Oxford House's lawyer, the City's staff, and members of the public.

On December 6, 2006, the Planning Commission voted 7-0 to recommend denial of the application. On January 9, 2007, the City Council also voted unanimously to deny the application.

The format and evidence at both hearings essentially were the same. Oxford House's attorney summarized his contentions on behalf of the OH-Camden and OH-Market homes. The City staff presented a "Case Summary," which concluded with the recommendation that the text amendment be denied. A handful of residents primarily from the respective neighborhoods spoke in opposition to the amendment at each hearing. Members of the Planning Commission and the City Council asked questions and offered observations and opinions.

G. The parties' positions

(1) Oxford House

Most importantly, Oxford House contends that the burden of proof in this FHA lawsuit is the City's to carry. Oxford House explains that the City has failed to do so.

The record before the court indicates that Oxford House argued that its proposed amendment is "necessary" because:

> • There is a demonstrated and proven therapeutic need for allowing the requested nine residents in the Oxford Houses. Ex. C Part 2, p. 18-42; Ex E, pp. 4:8-19; Ex. H, pp. 9:25-10:8.
>
> • There "is a financial benefit to having more residents". . . . "because if the residency drops low because of normal vacancies" in a smaller house, "the house isn't going to function as well monetarily because they're self-supporting." Ex. H, pp. 10:14-11:-2.

12 *12

> • Without the amendment, OH-Market and OH-Camden would have to close, causing the residents to lose their homes. The closure would work a hardship on each resident because Oxford House cannot guarantee a new home to each resident. According to Oxford House, some of the residents would likely relapse, resulting in harmful consequences, including death. Ex. E, at pp. 10:22-11:14, 14:10-15:1-5; Ex H, at pp. 11:15-19.
>
> • The need extends not only to the present residents, but also to future residents. Ex. E, at p. 14:13-15; Ex. H, at pp. 9:16-23.

With regard to the "reasonableness" of the amendment, Oxford House pointed out that:

> • The proposed text amendment is worded in a manner to ensure that it affects only the OH-Market and OH-Camden properties. Ex. E, at p. 6:8-18; Ex. H, p. 8:3-6.
>
> • The amendment is limited to these two specific properties as they currently are used. If Oxford House ceases to operate at either property, no other person or entity could take advantage of amendment. *Id.*
>
> • Therefore, the text amendment is designed not to be "precedent setting." *Id.*
>
> • Oxford House is not seeking a new use of these properties, but rather seeks to continue the same use of the properties it has made of them over the past decade. Ex. E, at p. 7:2-12; Ex. H, P. 8:3-6.

The court notes that the first, second and third points are the same.

Furthermore, Oxford House argued that the amendment is reasonable in that it would create "no financial burden" on the City or "fundamentally alter the City's zoning scheme." Specifically, it explained:

> • Each Oxford House has been its present location for eleven and twelve years respectively. Ex. E, at p. 6:19-21; Ex. H at p. 7:22-25.
>
> • Each Oxford House confers a benefit on the City by providing free of charge to the City housing to men recovering from alcoholism and or drug addiction. Ex. E at p. 7:16-18; Ex. H at p. 9:16-23.
>
> • Both Oxford Houses pre-date the 2003 LDC. Ex. E at p. 7: 6-9; Ex. H, at p. 7:5-25.

The first and third points are the same, and are the same as the fourth "reasonableness" point, above. Except for the "free benefit" point, Oxford House's

13 "reasonableness" argument can be *13 distilled to the following proposition: the two subject Oxford Houses have been operating illegally in their present locations in violation of the half-mile proximity restriction, and housing nine or more residents for over ten years, so the requested accommodation *must* be reasonable.

(2) The City

The City, relying on Fourth Circuit precedent, contends that the burden of proof is on the plaintiffs — Oxford House — and explains that Oxford House has failed to demonstrate that it can produce evidence to support the three essential elements of its FHA claim. The City points out that the two residences at issue here always have been in violation of the City's zoning ordinances and codes, and that the undisputed facts of this case show Oxford House cannot prevail.

II. STANDARD OF REVIEW

Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Essentially, "the moving party is `entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

This civil rights action is an original action, filed pursuant to federal statutes and is not an appeal from an administrative proceeding. Both parties have filed motions under Fed.R.Civ.P. 56 for summary judgment. The types of materials appropriate for consideration in summary judgment analyses generally are presented under oath, and they include "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." FED. R. CIV. P. 56(c); *Celotex Corp.*, 477 U.S. at 323

The parties' "Joint Record," which they stipulate constitutes the sole factual basis for their respective motions, contains no "depositions, answers to interrogatories, . . . admissions *14 on file, . . . or affidavits." Neither the Complaint [DE-1] nor the Answer [DE-8] is sworn. Indeed, the Joint Record contains little, if any, "evidence" of the nature and quality upon which a fact-finder generally would be required to render a verdict.

The court construes the parties' stipulation in this case to be an admission of the authenticity of documentary materials contained in the administrative record, *see Lewis v. Draper City*, ___ F. Supp. 2d ___, No. 2:09-CV-589-TC, 2010 WL 3791404, slip op. at *4 n. 3 (D. Utah Sept. 22, 2010); *Tillery v. Borden*, No. CIV.A. CBD-07-1092, 2010 WL 2132226 (D. Md. May 25, 2010), and of the fact that neither party can (or wishes to) produce anything else to support its position. The absence of competent evidence upon which to base a summary judgment ruling has not, however, hindered other courts in this context, and the undersigned will not belabor the point. [6] *But see Jama Investments, L.L.C. v. Incorporated County of Los Alamos*, No. CIV 04-1173 JB/ACT, 2006 WL 1228771, slip op. at *12 (D.N.M. Feb. 16, 2006) (UP) (concluding that the district court "may consider any evidence that the parties submit so long as that evidence conforms to the Federal Rules of Evidence; its review of the Defendants' actions are not circumscribed by what occurred in the legislative proceedings before this lawsuit commenced); *see Evans v. UDR, Inc.*, 644 F. Supp. 2d 675, 677, n. 3 (E.D.N.C. 2009) (noting that an unsworn affidavit presented on motion for summary judgment in an FHA "reasonable accommodation" case not treated as sworn testimony).

[6] Moreover, where, as here, the party seeking accommodation elects to forego an appeal of the municipal tribunal's decision, that party is bound by the tribunal's findings. *See Bryant Woods Inn, Inc. v. Howard County, Md.*, 124 F.3d 597, 604 (4th Cir. 1997).

III. ANALYSIS

In its examination of the law of necessary and reasonable accommodation and zoning codes, the Fourth Circuit has stated the following:

> In enacting the FHA, Congress clearly did not contemplate abandoning the deference that courts have traditionally shown to such local zoning codes.

15 *15

> And the FHA does not provide a "blanket waiver of all facially neutral zoning policies and rules, regardless of the facts," *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1261 (E.D. Va. 1993), which give the disabled "carte blanche to determine where and how they would live regardless of zoning ordinances to the contrary." *Thornton v. City of Allegan*, 863 F. Supp. 504, 510 (W.D. Mich. 1993). Seeking to recognize local authorities' ability to regulate land use and without unnecessarily undermining the benign purposes of such neutral regulations, Congress required only that local government make "reasonable accommodation" to afford persons with handicaps "equal opportunity to use and enjoy" housing in those communities. 42 U.S.C. § 3604(f)(3)(B).

Bryant Woods, 124 F.3d at 603. Accordingly, the FHA "requires an accommodation for persons with handicaps if the accommodation is (1) reasonable and (2) necessary (3) to afford handicapped persons equal opportunity to use and enjoy housing." *Id.* (citing 42 U.S.C. § 3604(f)(3)).

There is no dispute among the federal courts that the plaintiff bears the burden of proving the "necessity" of a requested accommodation. However, a circuit split exists as to which party has the burden of proof as to "reasonableness." In *Bryant Woods*, the Fourth Circuit determined, with little discussion, that the plaintiff bears the burden of proving each of the elements by a preponderance of the evidence. *See id.* at 603-04 ("Because the FHA's text evidences no intent to alter normal burdens, the plaintiff bears the burden of proving each of these three elements by a preponderance of the evidence") (citing *Elderhaven v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996)). Likewise, the Sixth Circuit Court of Appeals concluded that "the plaintiff in a Fair Housing Act case has the burden of proof to establish the reasonableness of a proposed accommodation." *Groner v. Golden Gate Gardens Apts.*, 250 F.3d 1039, 1045 (6th Cir. 2001); *accord Loren v. Sasser*, 309 F.3d 1296, 1302 (11th Cir. 2002).

The Third Circuit in *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3d Cir. 1996), however, held that "the burden should have been placed on the [defendant] [t]ownship . . . to prove that it was either unable to accommodate [the plaintiff] or that the accommodation . . . proposed was unreasonable." In doing so, *Hovsons* relied on
16 precedent interpreting § 504 of *16 the Rehabilitation Act. *See, e.g., Juvelis v. Snider*, 68 F.3d 648, 653 n. 5 (3d Cir. 1995). Finding it was bound by *Hovsons* concerning the burden to prove reasonableness, the Third Circuit Court of Appeals held in *Lapid-Laurel, L.L.C. v. Zoning Bd. Of Adjustment of Township of Scotch Plains*, 284 F.3d 442 (3d Cir. 2002), that "a burden-shifting approach in which the plaintiff would first have the burden of demonstrating that the requested accommodation is necessary to create an equal opportunity, at which point the burden would shift to the defendant to show that the accommodation is unreasonable, makes sense from a policy standpoint." *Id.* at 458.

This court is bound by the Fourth Circuit's declaration that the plaintiff bears the burden of proving all three elements of its FHA failure to accommodate claim by a preponderance of the evidence. *Bryant Woods*, 124 F.3d at 604.

A. Unchallenged half-mile separation restriction

As described above, upon enactment of the LDC both Oxford House homes were located within the reduced half-mile radius of two other group

homes. In its attempt to reach a fair resolution, the City conducted a neutral lottery to determine which two of those four non-complying group homes would be permitted to remain. Both these Oxford Houses homes lost to the other two homes. Notwithstanding the lottery result, these Oxford Houses remain in non-compliance. Oxford House does not deny these facts; it simply has chosen not to draw attention to them.

Since 2003, the one-half mile proximity restriction repeatedly has been upheld against Oxford House's challenges. The City's Planning Board, the Superior Court in New Hanover County, North Carolina, and Chief U.S. District Judge Louise W. Flanagan[7] have rejected Oxford House's efforts to avoid lift the proximity restriction. Whether an Oxford House is characterized as "small" (up to six residents), "medium" (up to eight residents), or "large" (up to 12 residents), it may not be located in any single-family residential district within one-half mile of another group home of any size in any single-family residential district. *See* Exh. F, Part 1, at pp. 9-10, 20; Exh. A at §§ 18-178 -18-179. The viability of the one-half mile proximity restriction was not a focus of the most recent round of municipal hearings, and is not a point of contention in this litigation. Oxford House has offered no new evidence why it is "necessary" or "reasonable" that the Camden and Market Street Oxford Houses be permitted to continue operating illegally within one-half mile of other group homes, in disregard of the outcome of the City's lottery and in continued violation of the LDC.

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7 Judge Flanagan held that "collateral estoppel operates to preclude plaintiffs from re-litigating the issue of whether [the City] denied them a reasonable accommodation from the half-mile separation requirement with respect to a group home supportive medium." *Oxford House I*, No. 7:04-CV-134-FL(1) at p. 40.

The LDC's approved half-mile separation requirement prevents either Oxford House from being eligible for a certificate of occupancy, regardless of the number (above three) of unrelated recovering alcoholics and drug addicts living there. Because compliance with the LDC has both a proximity and an occupancy component, failure to satisfy either defeats the effort.

Even absent the Houses' violation of the separation requirement and their failure to advance any reason for waiving it, Oxford House has failed to demonstrate that it could prove, by a preponderance of the evidence, that "necessity" and "reasonableness," as those terms are used in the FHA, require the City to enact a text amendment to its LDC as an accommodation to these two consistently non-compliant group homes.

B. "Necessity" and "Reasonableness"

(1) "Necessity"

Oxford House insists throughout its various memoranda that the City has the burden of proof in the "reasonable accommodation" analysis. As noted above, the Fourth Circuit Court of Appeals has stated otherwise. *Bryant Woods*, 124 F.3d at 603-04. The only "evidence" offered by Oxford House in its pursuit of an accommodation is Dr. Jason's report which, although purportedly prepared specifically for this litigation, *see* Plaintiffs' Memorandum [DE-23] p. 17, includes no observations of either the Camden or the Market Street Oxford House. In fact, the only mention of Wilmington, North Carolina, in Dr. Jason's report is contained in the introductory sentence thereto: "Thank you for this opportunity to present my expert report for the current court case involving an [sic] Oxford House in Wilmington, North Carolina." Exhibit C, Part 2, Jason's Report.

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Stripped of its rhetoric and unsupported declarations, Oxford House's theory of "necessity" is this: in terms of maximum resident capacity in Oxford House homes, "more is better." Here, the "evidence" Oxford House proffers in support of its burden to show the necessity of the proposed text amendment accommodation consists of Dr. Jason's report and the statements of Oxford House's counsel, Mr. Heafner.

Dr. Jason's opinion is that the accommodation (permitting occupancy by nine to 12 residents and waiving the half-mile radius restriction) is "necessary" because the greater the number of residents per house, the lighter the financial burden on each and the greater the opportunity for "counseling" and peer support. In its entirety, the substance of Dr. Jason's report purporting to address an accommodation is as follows:

> Oxford Houses with 9 or more residents have several advantages over limiting the size to 8 or fewer residents. As you would expect, with more individuals in an Oxford House, it is easier for the members to pay the rent as there are more people to split the cost of the monthly rent. Typically, residents of Oxford House do not have the financial means to pay for the cost of living and rent on their own due to the stage of their addiction when they became a resident of Oxford House, so need to pool these resources from a larger group. In addition, having more individuals allows members to learn from each other, and the more people with different types of backgrounds, the great ability for benefits from diversity. In our national data set, we found that larger houses establish themselves longer, suggesting that larger houses are more stable over time. Compared to smaller houses (8 or fewer members), individuals living in larger Oxford Houses (9 or more members) spent more time working; spent more time in school or in training; were less likely to be on parole or probation; had fewer charges of disorderly conduct, vagrancy, or public intoxication; spent less time in jail; reported less lying, stealing, fighting; had fewer problems controlling violent behavior; reported fewer psychiatric, psychological, or emotional problems; had
> 19 *19 less severe alcohol or drug problems before moving into an Oxford House; and had longer lengths of cumulative sobriety. Overall, these findings indicate that compared to smaller houses, residents of larger Oxford Houses are better adjusted and more productive members of society. With larger number of residents in houses, Oxford House residents are more likely to get the types of therapeutic benefits that they need.

Ex. C, Part 2, p. 1. The remainder of the report extols the Oxford House model, generally.

Except for the single introductory sentence mentioning "an" Oxford House in Wilmington, North Carolina, Dr. Jason's report and the opinions contained therein are generic to the Oxford House model, and purport to be based on eight publications dated between 1988 and 2006, in three of which he is listed as an author, and none of which purports to examine the "necessity" of nine or more residents living in an Oxford House home for purposes of justifying an accommodation or variance from a Wilmington, North Carolina, zoning code or ordinance. After studying Oxford House operations for 14 years, Dr. Jason was able to express the "professional opinion" that "Oxford Houses with more residents can provide more sustainable therapeutic benefits and can remain financially viable." *Id.*

Dr. Jason does not explain *why* a minimum of nine members rather than a maximum of eight members in the two subject Oxford Houses would result in the advantages to the residents he reports. Where, as here, Oxford House insists it needs nine, not eight, residents at each of the Camden and Market Street houses, the rationale for its selecting that minimum number is an especially critical factor to the court in analyzing the "necessity" for the requested accommodation. No such rationale has been offered. *See Smithers v. City of Corpus Christi*, No. CC-06-133 (S.D. Tex. March 19, 2008) (observing that although "the Court does not deny that group living has therapeutic value, [plaintiff] failed to produce any evidence that a group of eighteen to twenty people in a single home constitutes a critical mass for effective recovery from addiction. . . .").

The bare opinion that nine residents are "necessary" to the successful operation of *20 Oxford Houses is not helpful without some explanation *why* nine, but not eight, are "necessary." In fact, Oxford House's position as to the minimum number of residents per house appears to vary. For example, Oxford House argued in *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168, 1176 (N.D.N.Y. 1993) that its residents' handicaps required them to live in close proximity in groups of *six* or more to provide the necessary moral support and counseling during their road to recovery. Dr. Jason opined in *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 252 (8th Cir. 1996), that *eight* residents can provide "significant therapeutic benefits" for Oxford House members.

Here, as in *Bryant Woods*, Oxford House simply asserts that it "needs" to house more residents than it currently does. Here, however, while the supposed critical minimum number is only one more than the present status quo, it bumps the facilities into a different category which is not permitted in single family residential neighborhoods *at all*. Again, nothing in the record suggests *why* the additional resident is required. Indeed, Oxford House acknowledges the Fourth Circuit Court of Appeals' observation that, "[i]f Bryant Woods Inn's position were taken to its limit, it would be entitled to . . . hous[e] 75 residents, on the rationale that the residents had handicaps." *Bryant Woods*, 124 F.3d at 605 (cited by Oxford House in its Memorandum [DE-23] at p. 18). Oxford House contends that Bryant Woods is distinguishable in this respect in that here, Oxford House "presented considerable undisputed and specific evidence of why the requested accommodation is `necessary' for therapeutic reasons." Plaintiffs' Memorandum at p. 18. The undersigned has not yet located that "considerable undisputed and specific evidence" in this record why nine, rather than eight, residents are necessary for "therapeutic reasons."

Nor is there any evidence that the Camden and Market Street Oxford Houses are failing or even floundering financially or therapeutically because each houses only eight and not nine, 10 or 12 men. The only "financial viability" advantage of a greater number of residents *21 mentioned by Dr. Jason is the obvious smaller per-resident share of

the costs. Of course, that fact would hold true for any number of any population of persons pooling resources to cover communal living expenses. *See Hemisphere Bldg. Co., Inc., v. Village of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999) (observing that the FHA bars discrimination against "handicapped people by reason of their handicap, rather than . . . by virtue of what they have in common with other people, such as a limited amount of money to spend on housing").

Dr. Jason's report suggests no special nexus between the disability shared by drug addicts and alcoholics and the necessity that each be responsible for a smaller share of expenses. *See Bryant Woods*, 124 F.3d at 597 (commenting that "if the proposed accommodation provides no direct amelioration of a disability's effect, it cannot be said to be `necessary'"). Jason's report contains no prediction of rising costs or rents that might necessitate an additional source of income to meet common expenses; in fact, Oxford House has offered no evidence at all concerning any fiscal aspect of the subject homes. At the public hearings, Oxford House's attorney avoided questions and deflected citizens' comments concerning their understanding of Oxford House residents' costs in light of otherwise very modest property values in the neighborhoods. Oxford House's position is that because of its non-profit status, property values and income from rents are matters irrelevant to its application for a text amendment.

The court recognizes that Oxford House is a "not for profit" organization. However, it is not the sole plaintiff. Indeed, based on the "evidence" of record, the only fiscal impact an additional resident or two would have on the Camden and Market Street Oxford Houses' "financial viability" would be an increase in rental income to the common landlord, plaintiff Harold Laing, whose interests may not be entirely altruistic.

Most telling with regard to Oxford House's burden to show "necessity" i[s Mr. Heafner's response to a Planning Commissioner's question, "In your
22 opinion, how many individuals *22 presently go unserved in Wilmington"? Exhibit E, p. 13-14. Mr. Heafner responded, "I honestly don't know. . . . [T]he Oxford House worker] could probably tell you how many calls they get on the average a month or so; you know, Do you have a vacancy?" That might be some indication at least, but I don't know the answer that you're asking [sic]." *Id.* p. 14. When asked what would happen to the 16 present residents of the two facilities, Mr. Heafner offered his personal opinion.

> Those two homes, my experience with the occasional times that homes have had to — and [the Oxford House worker] could probably tell you with more detail — some of those 16 people who are probably new to sobriety, new residents, would probably go and live somewhere else and probably return to using the drugs or alcohol that they did and may end up in your jail or breaking into your neighbor's house. Most of them though, hopefully, would either be absorbed into other Oxford Houses that had vacancies or move somewhere else on their own. Bust some of them — it's been Oxford House's experience that out of ten maybe one relapses and doesn't make it.

Exhibit E, p. 14-15. The Oxford House worker did not, in fact, provide detail, and the factual basis for Mr. Heafner's observations is not a matter of record.

In short, Oxford House has not forecast the nature, quality or quantity of "evidence" supporting its "necessity" argument that would satisfy its burden of proof. The record is devoid of any competent evidence that an accommodation to permit more than eight residents is "necessary," as that term is used in this context.

(2) "Reasonableness"

Contrary to the rule of law that controls resolution of this case, Oxford House insists that the City must lose because the City has failed to demonstrate that Oxford House's requested accommodation is "unreasonable." Again, throughout its arguments, Oxford House reassigns the burden of proof to the City in direct contradiction to the Fourth Circuit's directive in *Bryant Woods*, which explicitly places that burden on the plaintiff. *See Bryant Woods*, 124 F.3d at 604. It is Oxford House, like *Bryant Woods*, that has "failed as a matter of law, to establish in this case that its requested accommodation is reasonable." *Id.* at 604-05. *23

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The gravamen of Oxford House's position that its text amendment is "reasonable" is that the two group homes have continuously been in operation for more than a decade with nine or more residents with no cost to the City, and that adopting the text amendment in no way would effect a fundamental alteration in the City's zoning scheme. The impression conveyed by Oxford House's attorney, Mr. Heafner during his presentations to both the Planning Commission and the City Council was that these Oxford House facilities had been legal uses before enactment in 2003 of the LDC. For example, he told the Planning Commission:

> There's — I don't know how much information you have with the prior history of litigation. I understand you have a summary. I haven't seen that. But Oxford House has made several attempts to come into compliance. These two homes were here long before this code was enacted that applied to group homes.

Exhibit E, p. 7; *see also id.* pp. 9-10, 39.

At the public hearing before the City Council on January 9, 2007, Mr. Heafner told the Council members and attendees that both OH-Camden's and OH-Market's operations "pre-dated" the LDC "by a long time," and that upon enactment of the LDC, the homes reduced their occupancy limits in compliance:

> And in fact, prior to the code that we're seeking to amend, these Oxford Houses did operate with, I believe, ten residents apiece.
>
> They dropped down to eight when the code — when the group home ordinance was adopted by the city about three years ago. And this amendment would allow them to return to the level of nine or ten at its most desirable.
>
> And the fact that they have been there for over a decade is proof that they're not going to fundamentally alter the city zoning scheme or the neighborhoods that they're in.

Exhibit H, p. 7; *see also* Exhibit E, p. 13. Neither house applied for, or ever was granted, a certificate of occupancy. In fact, the City Attorney observed, *inter alia*, "The Oxford House Market Street and Camden Circle are not legally permitted and never have been legal in the city of Wilmington. When they established themselves, they did not come in for the special use *24 permit, so they never received one. Other group homes around them have come into compliance, have opened homes, and have their operating permits, Oxford House does not." *Id.* p. 22.

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Oxford House's only "evidence," — Dr. Jason's report — does not address any factors pertinent to a determination of the "reasonableness" of the requested accommodation, presumably because Oxford House insists that it is the City's burden to prove unreasonableness. Rather, the gravamen of Oxford House's position is that continued operation of both the Camden and the Market Street Oxford Houses *must* be "reasonable," because both houses have operated in violation of municipal codes and ordinances without being shut down for more than a decade. Oxford House fails to acknowledge that the City has, by agreement, foregone enforcement of its municipal zoning code during the lengthy pendency of this litigation.

The illegality of the Oxford Houses' operations at their present location does not render their requested accommodations *per se* unreasonable. But neither does the fact that the Houses have managed to evade enforcement of the City's zoning regulations for so long prove that the custom-crafted accommodation is *per se* reasonable. To hold otherwise would encourage organizers of group homes to establish such homes without attempting to comply with local zoning ordinances or the process for seeking an accommodation, in the hopes of evading enforcement "long enough" to show that the use is "reasonable."[8] *25

25

[8] Again, Oxford House in some instances has been known to have "adopted a rather high-handed policy: `As a matter of practice, Oxford House, Inc. does not seek prior approval of zoning regulations before moving into a residential neighborhood.'" *Village of Palatine*, 37 F.3d at 1235 (Manion, J. concurring).

Reversing a district court's award of attorney's fees to Oxford House, the Eighth Circuit Court of Appeals reasoned,

> Oxford House argues that its lawsuit was necessary to stop the City from intentionally discriminating against residents by threatening them with eviction. There are two obvious answers to this contention. First, it is premised upon a self-inflicted wound. Oxford House signed a lease, moved two residents into the home without obtaining an occupancy permit, and declared its intent to violate the zoning ordinance by moving a total of ten unrelated residents into the home. Apparently, this is part of a nationwide Oxford House strategy to ignore local laws that treat its residents differently than members of a biological family, and to present local zoning officials with *a fait accompli* by moving into a residential neighborhood without seeking prior approval. Having provoked the City into taking action to enforce its facially neutral laws, Oxford House cannot bootstrap itself into a prevailing party because the City later granted an administrative accommodation when Oxford House eventually sought it.
>
> *City of University City*, 87 F.3d at 1025 (citing *Village of Palatine*, 37 F.3d at 1234-35 (Manion, J. concurring) (footnote omitted)).

Oxford House states, "[a]gain looking to *Bryant Woods*, the City must point to specific facts that demonstrate that the requested accommodation would impose unreasonable burdens on the City or neighborhood that would actually and predictably affect the surrounding neighborhood." Plaintiffs' Memorandum [DE-23] at p. 22. Besides again applying the incorrect burden of proof, Oxford

House completely disregards statistical and anecdotal evidence offered by the City at both municipal hearings.

For instance, the uncontroverted evidence of record is that both group homes house more than twice the average number of occupants per residence in their respective neighborhoods, and, according to the evidence of record, both generate considerably more traffic and parking issues than their neighbors, as well as attention from the law enforcement community.

An exchange between a Planning Commission member and Mr. Heafner at the public hearing on December 6, 2006, sheds some light on Oxford House's efforts to demonstrate the reasonableness of its proposed text amendment:

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Commissioner: These two houses were found to be out of compliance and the lottery was drawn and they happened to lose, and that was back three and a half years ago, right? Mr. Heafner: Correct. Commissioner: Can you tell me what — why you've had no success in finding new residences during that period of time? You've had three and a half years to do it. Mr. Heafner: You're asking me why Oxford House didn't just decide to close those two houses down at some point as they lost decisions before board or whatever and just "let's go find some place to move"? Is that what you're asking? Commissioner: I think that was the intent of the ruling when the lottery — when you didn't win the lottery; then it was close or find another place, and you chose to stay there and sort of fight it, and — Mr. Heafner: Right. Commissioner: — commend you for that. However, have you been searching for other places and what sort of obstacles have you found in your search? Mr. Heafner: To my understanding, I can't say for sure. I don't believe that Oxford House has searched for other places. They — prior to the lottery, they closed one house, then absorbed those residents which is as much as they could do. Exhibit E, pp. 16-17. Mr. Heafner went on to explain that Oxford House could not have broken the leases without incurring a penalty, and therefore decided to exercise its rights. *Id.* p 17.

While Oxford House most assuredly is within its rights to challenge the City's denial of its proposed text amendment, it cannot prevail in this action because it has not carried its burden of proof. The transcripts of the public hearings conducted by the municipal tribunals contain the statements of citizen after citizen expressing respect and support for Oxford House's mission but explaining in very real terms how and why Oxford House's persistent violation of city zoning codes and ordinances adversely has impacted their quality of life in the respective "single-family neighborhoods." The record speaks most eloquently for itself. In contrast, the party with the burden of proof has offered no evidence to support its theory that, since its two homes have been operating (illegally) for over a decade, it is reasonable for them to continue to operate in their Camden and Market Street locations in violation of the half-mile separation requirement, only with *more* residents.

27 *27

IV. Conclusion

Oxford House understandably argues from a narrow perspective — that of an organization that receives state funding through federal block grants to organize group housing in a rehabilitative environment for a specific classification of "disabled" individuals protected by the FHA. Congress has determined that this class of persons needs legislative protection from discrimination in obtaining equal housing opportunities. The Oxford House model is successful and has enabled hundreds of recovering alcoholics and drug addicts to assimilate back into their communities.

The City, which also is interested in the services Oxford House provides, must approach Oxford House's request for accommodation from a far more comprehensive perspective, in this context represented by the LDC, which was enacted after extended study and multiple public hearings.

Municipal zoning laws must weigh the rights and freedoms of its individual citizens against the concerns of all that combine synergistically to require a delicate balance of the physical, aesthetic, safety, environmental, fiscal, and health aspects of organized community. "Although the procedures of a zoning board may limit an application for a permit to one particular use, it has been said that the board cannot, in a proper and reasonable discharge of its function, ignore the total picture, of which it has personal knowledge, and act on a piecemeal basis." MCQUILLIN, 25 THE LAW OF MUNICIPAL CORPORATIONS § 179.39 (3d ed. 2010) (citation omitted). For these reasons, a request to alter that balance must be supported by a preponderance of the evidence, according to controlling law.

Here, that controlling law, *Bryant Woods*, places the burden squarely on Oxford House, which simply has not offered a preponderance of the evidence to show that recovering alcoholics and drug addicts in Wilmington require the proposed accommodation in order for them "to obtain equal opportunity to use and enjoy housing." While there may be no genuine issues of material fact between the parties, the party to which the burden
28 of proof has been *28 assigned has not demonstrated that it can produce competent evidence of each element of its claim that the City has violated the FHA.

For the reasons stated herein, together with those additional reasons cogently set forth in the City's memoranda submitted in support of its position, the City's Motion for Summary Judgment [DE-20] is ALLOWED and Oxford House's Motion for Summary Judgment [DE-22] is DENIED. The Clerk of Court is DIRECTED to enter judgment in favor of the City of Wilmington, and to remove this matter from the court's trial and pretrial calendars. The City's Motion to Continue [DE-76] is DENIED as moot.

SO ORDERED.

This, the 28th day of October, 2010.

From:	Peggy Hart
To:	Council Packet
Cc:	JohnJohn Mercier
Subject:	MISC 22010
Date:	Friday, July 22, 2022 1:22:50 PM
Attachments:	image.png City of Edmonds v. Oxford House Inc. A Comment on the Continuin.pdf

July 22, 2022

Dear City Council Members,

We are residents at 1930 B Street, directly across the street from the new Oxford House at 1923 B. We have done our homework regarding this case: talked to three lawyers, spent time reading zoning laws and precedent-setting court rulings regarding FHAA protections of Oxford Houses. We have no beef with the residents of the Oxford House - we have chosen to live in a diverse neighborhood and are appreciative of people trying to improve their lives. However, we would like you to consider whether it is reasonable to accommodate such a large number of men housed within two highly profitable businesses within one residential neighborhood. There are now two, housing at least 20 men, within ½ block of our home (see photo attachment).

Make no mistake, this is a *business* for this property owner. Here's the math with the proposed zoning change (and we were very conservative with our numbers*):

Income: Assume 10 men live in this Oxford House (their goal is 14).
This home charges $500/month, so the income will be **$60,000 per year.**

Expenses: $33,000

- Mortgage payment* (bankrate.com with 4.97% interest rate and minimum downpayment): $15,000
- Property taxes*: $5000
- Insurance*: $3000
- Upkeep*: $10,000

Profit: $27,000 per year.

If this home were rented as a single-family home (zoning we fought for) only three non-related adults could live there. Therefore, the home would need to rent for about $2750 per month to break even. However, as the Oxford House loophole -- whereby up to 20 men may rent -- allows this property owner to make a HUGE profit. Without a doubt -- although the law considers the Oxford House residents a "family", these men write checks to a business owner making a larger profit than any other landlord through this loophole.

In addition, this is a neighborhood with small children. And, we did indeed witness a Cass County Sheriff's vehicle pull up, and a man in handcuffs get out with the deputy. They argued for a while, and then the man was released to the Oxford House. We are curious as to whether the property owner is advertising in jails. These businesses are not only housing needy persons from our city. There are at least 20 such men being housed within ½ block of our home, forever changing the population density and character of this historic, family-oriented block.

Indeed, there are a variety of types of court decisions for AND against Oxford House's requests for exceptions to city zoning ordinances based on the FHAA's "reasonable accommodation" clause. Attached below you will find *City of Edmonds v. Oxford House, Inc.: A Comment on the Continuing Vitality of Single Family Zoning Restrictions* (Notre Dame Law Review) for your consideration. I assume the *City of Edmonds* case is the precedent setting case that most consider since it went to the Supreme Court, but the more recent 1998 *City of St. Louis* case, also outlined in this article, came to the opposite conclusion, upholding a city's maximum occupancy statute.

Thank you for your service to our city and county, and we welcome your questions and comments. I look forward to attending Monday's meeting.

Sincerely,
Peggy Hart & John Mercier
1930 B Street
402-580-1200 (Peggy Hart)

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City of Edmonds v. Oxford House, Inc.: A Comment on the Continuing Vitality of Single-Family Zoning Restrictions

Stephen C. Hall

CASE COMMENT

City of Edmonds v. Oxford House, Inc.: A Comment on the Continuing Vitality of Single-Family Zoning Restrictions

I. INTRODUCTION

In *City of Edmonds v. Oxford House, Inc.*,[1] the Supreme Court decided the scope of an important exemption under the Fair Housing Amendments Act (FHAA).[2] At issue was a zoning ordinance that banned more than five unrelated people from living together in a single-family dwelling. The ordinance was challenged by a group home for recovering alcoholics and drug addicts; the group argued that by enforcing the regulation the city had violated the FHAA. The group home contended that the city was required to make an exception for it because the FHAA requires cities to make a "reasonable accommodation" in policies and rules for persons with handicaps. The city's position was that reasonable governmental restrictions on the maximum number of occupants of a dwelling are exempted from the Act's coverage. Thus, the issue for the Court was whether such a restriction was exempt from the FHAA.

Many believed that a ruling by the Court in *City of Edmonds* that the regulation did not fall within the exemption would herald the end of single-family zoning.[3] In a six to three decision, the Court did indeed rule that the exemption was not applicable. A careful reading, however, shows that the decision does not sound the death-knell of single-family zoning. In fact, the Court's pronouncement is only a limited victory for advocates of group homes because it only decides a threshold issue. Moreover, the Court's opinion gives tacit approval of reasonable restrictions on single-family dwellings.

The Court's ruling does not settle the matter of whether such ordinances actually discriminate against people with handicaps under the FHAA. That issue was remanded by the Supreme Court to the lower courts. A recent case from the Eighth Circuit, discussed below, indicates that ordinances similar to the one at issue in *City of Edmonds* may be "reasonable" within the meaning of the FHAA.

Part II of this Comment examines the state of the law prior to the Court's decision. Part III addresses the procedural and background facts and the majority and dissenting opinions in *City of Edmonds*. Part IV analyzes Congress's intent in enacting § 3607(b)(1), the protected status of the family, and the difference between an equal right and a preferred right to housing. Part V considers the state of the law post-*City of Edmonds*, includ-

1 115 S. Ct. 1776 (1995).

2 42 U.S.C. §§ 3601-3631 (1994).

3 *See, e.g.*, Petitioner's Brief at 11, 25, *City of Edmonds* (No. 94-23) (contending that subjecting single-family zoning to FHA scrutiny would "overturn Euclidian zoning" and "destroy the effectiveness and purpose of single-family zoning").

ing the public reaction to the case and the application of the holding in subsequent lower court cases. Part VI concludes that while the Court ruled that zoning restrictions such as those at issue in *City of Edmonds* are not exempt from the FHAA, single-family zoning restrictions remain viable.

II. STATE OF THE LAW PRIOR TO *CITY OF EDMONDS V. OXFORD HOUSE, INC.*

A. *The Fair Housing Amendments Act of 1988*

The FHAA was enacted to "extend[ ] the principle of equal housing opportunity to handicapped persons."[4] The Act amended Title VII of the Civil Rights Act of 1968, also known as the Fair Housing Act, which prohibits housing discrimination based on race, color, religion, national origin, and sex.[5] The FHAA was specifically aimed at the "unnecessary exclusion of [handicapped] persons" as well as "misperceptions, ignorance, and outright prejudice."[6] The definitions and concepts of the Rehabilitation Act of 1973, which had been the first legislation to protect the handicapped from discrimination, were incorporated into the FHAA.[7] The FHAA defined handicap,[8] with respect to a person as

> (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 defined in § 802 of Title 21.[9]

Recovering drug addicts and alcoholics are considered handicapped within the meaning of the FHAA.[10]

The FHAA makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with such dwelling, because of a handicap."[11] Discrimination is defined as including "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal oppor-

4 H.R. REP. No. 711, 100th Cong., 2nd Sess. 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2174.

5 42 U.S.C. § 3601-3631 (1994).

6 H.R. REP. No. 711, *reprinted in* 1988 U.S.C.C.A.N. at 2179.

7 *Id.* at 2178.

8 The FHAA's definition of handicap was adopted from section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701-794 (1976), which was amended by the Rehabilitation, Comprehensive Services, and Developmental Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (codified at titles 29, 32, and 42 U.S.C.). The definition of handicap adopted by the FHAA became effective after 1978.

9 42 U.S.C. § 3602(h) (1994).

10 See United States v. Southern Management Corp., 955 F.2d 914, 919 (4th Cir. 1992) (holding that recovering drug addicts are "handicapped" under 42 U.S.C. § 3602(h); 24 C.F.R. § 100.201(a)(2)(1994) (interpreting "[p]hysical or mental impairment" in § 3602(h)(1)-(3) of the FHAA to include "drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism").

11 42 U.S.C. §3604(f)(2) (1994).

tunity to use and enjoy a dwelling."[12] A failure to do so constitutes discrimination. Although the FHAA does not mention the Act's applicability to zoning, the legislative history of the FHAA specifically mentions zoning.[13]

B. Section 3607(b)(1)

Despite its broad scope, the FHAA exempts certain housing restrictions.[14] Section 3607(b)(1) provides: "Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[15] This seemingly straightforward language gave rise to two competing interpretations, discussed more completely below.

The legislative history of § 3607(b)(1) is somewhat ambiguous in that it fails to specify whether the exemption applies only to maximum occupancy restrictions that are based on numerical formulas such as square footage or number of bedrooms or whether it extends to any reasonable limitation on the number of occupants. As a result, both interpretations have found support from it. According to the House Judiciary Committee Report,

> [t]hese provisions are not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. 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, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.[16]

C. Judicial Interpretation of the Maximum Occupancy Exemption: The Restrictive View

Prior to the Court's decision in *City of Edmonds*, the majority of courts held that the exemption applies only to building and occupancy codes designed to prevent overcrowding.[17] According to these decisions, a zon-

12 *Id.*

13 "The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." H.R. REP. No. 711, 100th Cong., 2nd Sess. 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185. Of course, given the Court's holding in *City of Edmonds*, the FHAA now unquestionably applies to zoning.

14 Besides the exemption for maximum occupancy restrictions, the FHAA exempts regulations pertaining to religious organizations and private clubs, housing for older persons, and regulations aimed at persons convicted of the manufacture or distribution of controlled substances. 42 U.S.C. § 3607 (1994).

15 *Id.* at §3607(b)(1).

16 H.R. REP. No. 711, at 31, *reprinted in* 1988 U.S.C.C.A.N. at 2192.

17 *See* City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994); Oxford House v. City of St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994); Oxford House v. City of Virginia Beach, 825 F. Supp. 1251 (E.D. Va. 1993).

ing ordinance that only applies to unrelated persons is not exempted. This position relies upon the inclusion in the House Judiciary Committee's Report of the finding that a number of jurisdictions limit the number of occupants by mathematical formula, without regard to status of occupants.[18] These courts interpreted the report to indicate that Congress intended this to be the only permissible restriction.[19] Accordingly, because the five-person limitation in *City of Edmonds* only applied to unrelated occupants, the ordinance would not be exempted under the restrictive view.

D. Judicial Interpretation of the Maximum Occupancy Exemption: The Nonrestrictive View

The nonrestrictive view, followed in the Eleventh Circuit,[20] concludes that any reasonable limitation on the number of people that can occupy a dwelling is exempt. This analysis assumes that Congress was aware of judicial precedent concerning restrictions on maximum occupancy and enacted § 3607(b)(1) and that the House Judiciary Committee Report was written with that precedent in mind.[21] Since the Supreme Court had upheld a maximum occupancy restriction that only applied to unrelated persons in *Village of Belle Terre v. Boraas*,[22] Congress knew that the Supreme Court approved of zoning restrictions that apply only to unrelated persons. Additionally, in *Moore v. City of East Cleveland*,[23] the Court had declared unconstitutional an ordinance that made it illegal for a woman to live with her grandson under a narrow construction of the definition of "family." A synthesis of the two cases produces a rule that permits restrictions on maximum occupancy that apply only to unrelated persons, but forbids restrictions on maximum occupancy that apply to families.[24] In this context, § 3607(b)(1) is interpreted as exempting ordinances that limit maximum occupancy, ordinances which are in themselves limited to regulating unrelated persons.[25] With respect to the House Judiciary Committee Report, the Eleventh Circuit believed that the discussion of the square-footage method of regulating occupancy was merely illustrative of one reasonable means of regulation and not meant to exclude other potentially reasonable regulations.[26] Additionally, the word "reasonable" in the Act is emphasized.[27] The Act prohibits unreasonable restrictions having a disparate impact upon people with handicaps; it does not prohibit maximum occupancy restrictions that apply only to unrelated persons.[28]

18 H.R. REP. No. 711, at 31, *reprinted in* 1988 U.S.C.C.A.N. at 2192.
19 *Edmonds*, 18 F.3d at 805.
20 Elliott v. City of Athens, 960 F.2d 975 (11th Cir. 1992), *cert. denied*, 506 U.S. 940 (1992).
21 *Id.* at 980.
22 416 U.S. 1 (1974).
23 431 U.S. 494 (1977).
24 *Elliott*, 960 F.2d at 980.
25 *Id.*
26 *Id.*
27 *Id.* at 981.
28 *Id.* at 981-84.

III. *CITY OF EDMONDS v. OXFORD HOUSE, INC.*

A. Background and Procedural History

In 1990, Oxford House, Inc.[29] leased a residence in Edmonds, Washington in order to establish a group home for ten to twelve recovering alcoholics and drug addicts in a single-family residential zone.[30] Because of the large number of occupants, the group home was in violation of the city's zoning ordinance.[31] Although the city's zoning ordinance permitted group homes within single-family residential zones, it limited the number of unrelated occupants who could occupy a single-family dwelling to five.[32] Once the city became aware of the presence of the group home, it issued criminal citations for violation of the zoning code.[33]

Oxford House responded by asking Edmonds to make an exception, allowing it to continue to operate the home.[34] The city refused the request, but it did pass an ordinance listing group homes as permitted uses in multi-family and general commercial zones.[35] Edmonds brought a declaratory judgment action in a federal district court seeking a ruling that its zoning ordinance was consistent with the FHAA.[36] Oxford House brought a counterclaim maintaining that the city had violated the FHAA by not making a "reasonable accommodation."[37] The United States filed a similar action and the two cases were consolidated.[38]

The district court granted summary judgment in favor of Edmonds. The court held that the zoning ordinance was exempted from the FHAA because it was a "reasonable restriction[ ] regarding the maximum number of occupants permitted to occupy a dwelling"[39] and therefore did not violate the FHAA.

On appeal, the Ninth Circuit reversed.[40] The court concluded that Edmonds' zoning ordinance was not exempted by § 3607(b)(1) because it

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29 Oxford House, Inc. is a non-profit corporation that has chartered over 375 individual group homes for recovering drug addicts and alcoholics. Joint Appendix at 116-19, *City of Edmonds* (No. 94-23).

30 *City of Edmonds*, 115 S. Ct. at 1779.

31 *Id.*

> [T]he Oxford House has adopted a rather high-handed policy: "As a matter of practice, Oxford House, Inc. does not seek prior approval of zoning regulations before moving into a residential neighborhood." Apparently, the Oxford House believes that if members of the group move in quietly without notice it will be harder to evict them. This strategy is evident throughout this appeal. United States of America v. Palatine, 37 F.3d 1230, 1234-35 (1994) (Manion, J., concurring).

32 Edmonds Community Development Code § 21.30.010 (1990) (limiting occupancy in single-family dwelling units to "families," which are defined under the city's code as "an individual or two or more person related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage").

33 *City of Edmonds*, 115 S. Ct. at 1779. The city, however, agreed to suspend enforcement of the zoning ordinance pending outcome of the litigation. City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 803 (1994).

34 *City of Edmonds*, 115 S. Ct. at 1779.

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 42 U.S.C. §3607(b)(1) (1994).

40 City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994).

only applied to unrelated people.[41] The court construed the legislative history as limiting the § 3607(b)(1) exemption to maximum occupancy restrictions that apply to both related and unrelated occupants.[42] Edmonds appealed to the Supreme Court, which granted certiorari to resolve the split between the circuits.

B. The Majority

Justice Ginsburg wrote for the Court. She was joined by Chief Justice Rehnquist and Justices Stevens, Souter, O'Connor, and Breyer. As a preliminary matter, the Court declined an opportunity to dismiss the case as moot because of a recent Washington law.[43]

The Court emphasized that the only issue before it was whether Edmonds' ordinance qualified for the § 3607(b)(1) exemption.[44] Significantly, the Court did not decide whether the ordinance in question constituted discrimination under the FHAA.[45]

The focus of the Court's analysis was whether a restriction on the number of unrelated individuals that could occupy a dwelling constituted a "reasonable . . . restriction[ ] regarding the maximum number of occupants permitted to occupy a dwelling."[46] There are, concluded the Court, two kinds of restrictions that place limits on the number of people that may occupy a dwelling: municipal land use restrictions and maximum occupancy restrictions. The Court explained the difference:

> Land use restrictions aim to prevent problems caused by the "pig in the parlor instead of the barnyard." In particular, reserving land for single-family residences preserves the character of neighborhoods securing "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." To limit land use to single-family residences, a municipality must define the term "family"; thus family composition rules are an essential component of single-family residential use restrictions. Maximum occupancy restrictions, in contradistinction, cap the number of occupants per dwelling, typically in relation to available floor space or the number and type of rooms. These restrictions ordinarily apply uniformly to all residents of all dwelling units. Their purpose is to protect health and safety by preventing dwelling overcrowding.[47]

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41 *Id.* at 807.

42 *Id.* at 805.

43 *City of Edmonds*, 115 S. Ct. at 1780 n.3. Washington's law provided:

> [n]o city may enact or maintain an ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure differently than a similar residential structure occupied by a family or other unrelated individuals. As used in this section, 'handicaps' are as defined in the federal fair housing amendments act of 1988 (42 U.S.C. § 3602). WASH. REV. CODE § 35.63.220 (1994).

44 *City of Edmonds*, 115 S. Ct. at 1780.

45 *Id.* at n.4.

46 42 U.S.C. § 3607(b)(1) (1994).

47 *City of Edmonds*, 115 S.Ct. at 1781 (citations omitted).

The Court found support for its distinction in an earlier case, *Moore v. City of East Cleveland*,[48] and in the legislative history of the FHAA.[49] Having made the distinction between land use restrictions and maximum occupancy restrictions, the Court concluded that only the latter are within the exemption.[50]

Under the Court's analysis, Edmonds' ordinance easily fell into the nonexempt category. Edmonds argued that the ordinance was a maximum occupancy restriction because it capped at five the number of unrelated people that could occupy a single-family dwelling. The majority rejected the argument that the ordinance was not a maximum occupancy statute because it did not answer the question "What is the maximum number of [related and unrelated] occupants permitted to occupy a house?"[51]

According to the Court, Edmonds' contention that "subjecting single-family zoning to FHA scrutiny will 'overturn Euclidian zoning' and 'destroy the effectiveness and purpose of single-family zoning'" was misplaced because it "both ignores the limited scope of the issue before us and exaggerates the force of the FHA's antidiscrimination provisions."[52] Here, the Court underscores that its holding is limited to whether Edmonds' ordinance is exempt under § 3607(b)(1) and that the FHA's antidiscrimination provisions are limited to unreasonable restrictions. Thus, the Court deliberately leaves the door open for reasonable single-family zoning restrictions. By limiting the scope of its decision and emphasizing the reasonableness standard, the Court denied group home advocates a decisive victory.

C. The Dissent

Justice Thomas wrote the dissent and was joined by Justices Scalia and Kennedy. Justice Thomas's basic argument was that the majority's opinion failed to "give effect to the plain language of the statute."[53] According to the dissent, Edmonds' ordinance was a "reasonable . . . restriction[ ] regarding the maximum number of occupants permitted to occupy a dwelling" because it set a limit on the number of unrelated persons that could occupy a dwelling in a single-family neighborhood. In the dissent's view, the ordinance did not have to set an equivalent limit on the number of related occupants because the statute did not specify that only restrictions applying to both related and unrelated people qualified for the exemption.[54] "[Section] 3607(b)(1) does not set forth a narrow exemption only for 'absolute' or 'unqualified' restrictions regarding the maximum number of occupants. Instead it sweeps broadly to exempt *any* restrictions regarding such maximum number."[55]

48 431 U.S. 494 (1977).
49 *See supra* note 16 and accompanying text.
50 *City of Edmonds*, 115 S.Ct. at 1782.
51 *Id.*
52 *Id.* at 1783.
53 *Id.* at 1783 (Thomas, J., dissenting).
54 *Id.* at 1784 (Thomas, J., dissenting).
55 *Id.* (emphasis added).

The dissent disagreed with the majority's conclusion that the ordinance failed because it did not specify the absolute number of persons permitted to occupy a house.[56] On the contrary, the ordinance "establish[ed] a specific number—five—as the maximum number of unrelated persons permitted to occupy a dwelling in the single-family neighborhoods of Edmonds, Washington."[57] "In other words, petitioner's zoning code establishes for certain dwellings 'a five-occupant limit, [with] an exception for [traditional] families.'"[58]

Again, referring to the language of the statute, the dissent pointed out that § 3607(b)(1) exempts "*any* reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[59] The ordinance falls within the exemption because it is a restriction on maximum occupancy, albeit limited to unrelated people. The exemption does not require that both unrelated and related occupants be affected. "It is difficult to imagine what broader terms Congress could have used to signify the categories or kinds of relevant governmental restrictions that are exempt from the FHA."[60]

Justice Thomas gave two examples to illustrate that the Edmonds ordinance is a maximum occupancy restriction: First, if a real estate agent who had just been assigned to the city of Edmonds were to ask whether the city had *any* restrictions on the maximum number of occupants permitted to occupy a building, the answer would have to be yes; "the maximum number of unrelated persons permitted to occupy a dwelling in a single-family neighborhood is five."[61] The second example involves the Autobahn in the Federal Republic of Germany. Assume that the German government imposed no restrictions on the speed of 'cars' driving on the Autobahn, but limited the speed at which 'trucks' could travel. If someone were to ask whether there were any restrictions on the maximum speed of motor vehicles on the Autobahn, the answer would be yes, that there is a maximum restriction on the speed at which trucks can drive on the Autobahn.[62]

The majority, according to Justice Thomas, misinterpreted the exemption: The majority's mistake is that it asks "What is the maximum number of occupants permitted to occupy a house?"[63] The majority believes that for an ordinance to satisfy the exemption it must impose a limit on the absolute maximum number of occupants. When the majority submits the Edmonds ordinance to this higher standard, it fails. In contrast, the dissenters state that the statute only requires the ordinance to impose a restriction "regarding" the maximum number of occupants. "Surely, a restriction can 'regar[d]'—or 'concern,' 'relate to,' or 'bear on'—the max-

56 *Id.* at 1782.
57 *Id.*
58 *Id.* at 1784 (quoting from the Tr. of Oral Arg. 46) (Thomas, J., dissenting).
59 42 U.S.C. § 3607(b)(1) (1994) (emphasis added).
60 *City of Edmonds*, 115 S. Ct. at 1784 (Thomas, J., dissenting).
61 *Id.*
62 *Id.*
63 *Id.* (quoting from *Id.* at 1782).

imum number of occupants without establishing an absolute maximum number in all cases."[64]

The dissent also criticizes the majority's example of a "prototypical maximum occupancy restriction."[65] The housing ordinance that would satisfy the requirements of § 3607(b)(1), according to the majority's point of view, "caps the number of occupants a dwelling may house, based on floor area."[66] This ordinance, explains Justice Thomas, does not satisfy the majority's test of "What is the absolute maximum number of occupants that are permitted to occupy a house?"[67] The ordinance cannot answer the majority's question because the answer depends upon the floor area of a house. A large house could accommodate more people than a smaller one. Thus, "the answer to the majority's question is the same with respect to both § 503 (b) and ECDC § 21.30.010: 'it depends.' With respect to the former, it depends on the size of the house's bedrooms; with respect to the latter, it depends on whether the house's occupants are related."[68]

Furthermore, the dissent objects to the majority's "interpretive premise," which "regard[s] this case as an instance in which an exception to 'a general statement of policy' is sensibly read 'narrowly in order to preserve the primary operation of the [policy].'"[69] The disagreement is on two grounds: First, the "policy" of the FHA does not justify an atypical interpretive premise because all statutes have a "policy."[70] Second, the majority's interpretive premise encroaches on Congressional power.

> Nor could the reason be that a narrow reading of s[ection] 3607(b)(1) is necessary to preserve the primary operation of the FHA's stated policy "to provide . . . for fair housing throughout the United States." 42 U.S.C. s[ection] 3601. Congress, the body responsible for deciding how specifically to achieve the objective of fair housing, obviously believed that section 3607 (b)(1)'s exemption for "any . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling" is consistent with the FHA's general statement of policy. We do Congress no service—indeed, we negate the "primary operation" of s[ection] 3607(b)(1)—by giving that congressional enactment an artificially narrow reading.[71]

Additionally, Supreme Court precedent requires that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States."[72] Accordingly, since zoning is an area of regulation that has traditionally been left to state and local governments,

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64 *Id.*

65 *Id.* at n.2 (quoting from *Id.* at 1782).

66 *Id.* at 1782.

67 *Id.* at 1784 n.2. (Thomas, J., dissenting).

68 *Id.* (citations omitted).

69 *Id.* at 1780 (quoting Commissioner v. Clark, 489 U.S. 726 (1989)).

70 *Id.* at 1785 (Thomas, J., dissenting).

71 *Id.*

72 *Id.* at 1786 (Thomas, J., dissenting) (quoting Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) (citations omitted)).

the dissent states "even if it might be sensible in other contexts to construe exemptions narrowly, that principle has no application in this case."[73]

The dissent also criticizes the majority's conclusion that "maximum occupancy restrictions" was a phrase in use prior to the enactment of the FHAA. It rejects the majority's distinction between maximum occupancy restrictions and municipal land use restrictions or "family composition" rules.[74] Claiming that the majority's categorization of "maximum occupancy restrictions" was "simply invented," the dissent argues that the statute does not make the same distinction that the majority does.[75] Moreover, since no state or judicial opinion used the term prior to 1992, it is unlikely that Congress "enacted section 3607 (b)(1) against the backdrop of an evident distinction between municipal land use restrictions and maximum occupancy restrictions."[76]

IV. ANALYSIS

A. *Congress Never Contemplated This Issue*

Prior to passage of the FHAA, the legality of restrictions on the maximum number of unrelated persons who could occupy a house within a single-family residential zone had been upheld by the Supreme Court in *Village of Belle Terre v. Boraas*.[77] That such restrictions were permitted prior to passage of the FHAA does not itself provide much of an argument for their continuing legality. But given the prevalence of such restrictions, and the impact that outlawing them would have upon ordinances in thousands of cities, it seems likely that if Congress had truly intended to forbid restrictions such as those upheld in *Belle Terre*, the language of the Act and the House Judiciary Committee Report would have been less equivocal. In other words, because there is no discussion of the effect of the FHAA upon a very common type of zoning restriction, it stands to reason that no effect was intended.

The type of discrimination sought to be prevented by the FHAA was discrimination against persons based solely upon the existence of a handicap. Congress was concerned about the type of discrimination that arose in *City of Cleburne v. Cleburne Living Center*.[78] In *City of Cleburne*, the Court ruled that a zoning ordinance requiring special use permits for group homes for the mentally retarded but not for other group homes violated the Equal Protection Clause. The Court concluded that the reason permits were required for the group home was because of the "irrational fears of the property owners."[79]

It was noted in the House Judiciary Committee Report that,

73 *Id.* at 1786.
74 *Id.* at 1786-87 (Thomas, J., dissenting).
75 *Id.* at 1787 (Thomas, J., dissenting).
76 *Id.* at 1787 (quoting from 1780) (Thomas, J., dissenting).
77 416 U.S. 1 (1974).
78 473 U.S. 432 (1985).
79 *Id.* at 432.

> [w]hile state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment . . . of . . . land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.[80]

This passage of the Report included a footnote to the *Cleburne* case indicating that legislative intent was focused on eradicating the kind of discrimination forbidden in that case three years earlier. That Congress intended to codify the *Cleburne* decision is also shown by the concern, in the text above, that requirements were imposed upon persons with handicaps and not on similarly situated individuals. Furthermore, the only kind of discrimination mentioned in the House Judiciary Committee Report was the type of discrimination addressed in the *Cleburne* case.

Congress intended to prevent disparate treatment of persons with handicaps; e.g., situations where families or groups of unrelated persons could live in a certain zone, but individuals with handicaps could not because of restrictions based on stereotypes and ignorance.

The foregoing scenario is different from the one presented in *City of Edmonds*. The Edmonds ordinance did not discriminate between persons with or without handicaps, but between related and unrelated persons. As long as group homes complied with the occupancy limitations applied to all other unrelated individuals living in shared housing, they were allowed to operate within the single-family residential. Maximum occupancy restrictions, such as Edmonds', do not single out the handicapped for discriminatory treatment. They apply to all unrelated individuals, without regard to handicap, race, sex, or religion.

B. Protected Status of the Family

Despite the Court's disparagement of the Edmonds ordinance as a "family values preserver,"[81] the Court has previously recognized the role of zoning to protect family values.

Beginning with the seminal case of *Village of Euclid v. Amber Realty Co.*,[82] the Supreme Court has upheld the exclusion of uses inappropriate to residential districts by way of zoning. The Supreme Court established the protected status of the family in *Village of Belle Terre v. Boraas*.[83] In *Belle Terre*, the Court upheld the constitutionality of a zoning ordinance that limited the occupancy of single-family dwellings to traditional families or to groups

80 H.R. REP. No. 711, 100th Cong., 2nd Sess. 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185.

81 *City of Edmonds*, 115 S. Ct. at 1783.

82 272 U.S. 265 (1926).

83 416 U.S. 1 (1974).

of two or less unrelated individuals.[84] According to the Court, the police power extended beyond the mere prevention of nuisances.

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[85]

The family's status was reaffirmed two years later in *Moore v. City of East Cleveland.*[86] In *Moore,* an East Cleveland housing ordinance restricted occupancy of single-family dwellings to certain categories of related individuals such that a grandmother who lived with her son and two grandsons was found to be in violation of the ordinance. *Belle Terre's* expansion of the police power did not control here, explained the Court, because of the "overriding factor" that the ordinance in *Belle Terre* only affected unrelated individuals.[87] "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[88] Thus, in *Moore,* the Court concluded that the extended, as well as nuclear, family was entitled to constitutional protection.[89] These decisions establish ample precedent for the protection of families through zoning.

C. *Equal Access to Housing Does Not Mean a Preferred Right to Housing*

The FHAA guarantees the handicapped the right to equal housing opportunity, not a right to preferred housing opportunities.[90] At the same time, however, the rights of the handicapped must be balanced with those of the rest of the community. Group homes have the same effect on neighborhoods that any house with a large number of unrelated adults would: more cars, more noise, and more people.[91] The Supreme Court has held

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84 *Id.* at 7.
85 *Id.* at 9.
86 431 U.S. 494 (1976).
87 *Id.* at 498.
88 *Id.* at 503-04.
89 "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id.* at 504-05.
90 The FHAA guarantees the handicapped an "equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B) (1994). Courts disagree whether the FHAA guarantees the right to live in a specific dwelling. Bryant Woods Inn, Inc. v. Howard County, 911 F. Supp. 918, 945 (D.Md.1996) ("The Act does not require that people with disabilities be given preferential access to housing, unless that access is necessary to accommodate their special needs."). *Contra* Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1185 n.10 (E.D.N.Y. 1993) ("s[ection] 3604 (f)(3)(B) dictates that a handicapped individual must be allowed to enjoy a particular dwelling, not just some dwelling somewhere in the town.").
91 "These institutional uses are not only inconsistent with the single-housekeeping-unit concept but include many more people than would normally inhabit a single-family dwelling." *Moore,* 431 U.S. at 517 (Stevens, J., concurring).

that zoning restrictions which further family values by restricting cars, housing density, and population density are "legitimate guidelines."[92]

Reasonable restrictions, such as those at issue in *City of Edmonds*, do not prohibit persons with handicaps from living in single-family residential zones. Persons with handicaps may live as of right in group homes which adhere to zoning regulations or with relatives or by themselves. Rather, persons with handicaps are only restricted if they choose to live in a group home with more than the permissible number of occupants. This restriction, however, does not single out people with handicaps; it applies to all unrelated persons. The restriction, then, is not discriminatory and does not come within the scope of the FHAA. Treating individuals with handicaps in a non-paternalistic manner also helps to dispel the myth that they are inferior.[93]

V. POST-*CITY OF EDMONDS*

A. *Public Reaction to* City of Edmonds

The media reaction to the *City of Edmonds* decision was interesting because the perception of the scope of the decision was far from uniform. A common misconception was that the *City of Edmonds* court had invalidated the city's ordinance. According to the *Los Angeles Times*, the Court "gave the law a liberal interpretation so as to invalidate local ordinances that bar five or more unrelated persons from living together in a neighborhood of single-family homes."[94] The editorial from another newspaper criticized the Court's ruling that "local governments may not use zoning restrictions to bar group homes for alcoholics and drug addicts from neighborhoods of single-family homes."[95] The *San Francisco Chronicle* reported that cities were now forbidden from setting occupancy limits unless the limits applied to both unrelated and related people.[96] Similarly, one editorial proclaimed that the *City of Edmonds* decision said that "the Fair Housing Act exempts group homes for the disabled from local zoning codes that limit the number of occupants in single-family homes."[97] It is remarkable that the *City of Edmonds* decision would be so consistently misinterpreted, especially in light of the Court's explicit statement of the limited nature of its holding.

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92 Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

93 "[A] genuinely evenhanded, non-paternalistic policy towards people with disabilities recognizes that 'individuals with disabilities are entitled to the cultural opportunities, surroundings, experiences, risks, and associations enjoyed by people without disabilities.'" Bryant Woods Inn, Inc. v. Howard County, 911 F. Supp. 918, 945 (D. Md. 1996) (citations omitted).

94 David G. Savage, *Court Says Cities Can't Bar Homes for Ex-Addicts*, LOS ANGELES TIMES, May 16, 1995, at A1.

95 *Court Rejects Notion of Family*, HARRISBURG PATRIOT, May 19, 1995, at A14.

96 Linda Greenhouse, *Group Homes For Disabled Win Protection/Supreme Court limits the use of zoning laws*, SAN FRANCISCO CHRON., May 16, 1995, at A1.

97 *Group Homes Win Big in Court*, SEATTLE POST-INTELLIGENCER, May 21, 1995, at E2.

B. The Application of City of Edmonds *in Subsequent Cases*

The sweep of *City of Edmonds* has proved to be much narrower than group home advocates had predicted. Instead of wiping out single-family zoning, *City of Edmonds* has merely added a judicial gloss to the meaning of "reasonable accommodation."

The most recent case to apply the holding of *City of Edmonds* to similar facts is *Oxford House-C v. City of St. Louis*.[98] This case is significant, if for no other reason, because it dispels the apparent belief of group home advocates that any restriction on group homes was per se unreasonable under the FHAA. In *City of St. Louis*, the city's zoning code included group homes of eight or fewer unrelated handicapped individuals within the definition of single-family dwelling.[99] Oxford House established a group home in a single-family residential area with more than eight occupants. Once the city realized the violation, it cited the group home. Oxford House refused to apply for a variance from the eight-person limitation and sued the city alleging that the city had violated the Fair Housing Act.[100] The district court ruled that the city had violated the Fair Housing Act by enforcing its zoning code against Oxford House.[101] The court also enjoined the city from enforcing its zoning code against the group homes.[102]

The Eight Circuit, however, reversed the district court, finding that the city had not "unlawfully discriminated against, failed to accommodate, [or] interfered with the housing rights of the handicapped men."[103] Even though the court acknowledged *City of Edmonds*, it held that the ordinance did not violate the FHAA. The court noted that the ordinance actually favored handicapped people because it allowed group homes to have up to eight residents, while otherwise permitting only three unrelated people to live together in a single-family zone.[104]

The financial viability argument, which Oxford House and other group home advocates have consistently relied upon as a basis for the alleged unreasonableness of restrictions on group homes,[105] did not persuade the court. Accordingly, the court rejected the district court's finding that the city's zoning ordinances discriminated against the group home because an eight-person limit would destroy the financial viability of many Oxford Houses.[106] "Even if the eight-person rule causes some financial hardship for Oxford House, however, the rule does not violate the Fair

98 Nos. 94-1600, 94-3073, 1996 WL 75685 (8th Cir. Feb. 23, 1996).

99 ST. LOUIS, MO., REV. CODE tit. 26, § 26.20.020(a)(1) (1994).

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

101 *Id.* at 1584.

102 *Id.*

103 City of St. Louis, 1996 WL 75685, at *2.

104 City of St. Louis, 1996 WL 775685, at *2 (citing ST. LOUIS, MO., REV. CODE tit. 26, § 26.20.020(a)(1) (1994)).

105 City of Edmonds v. Oxford House, Inc., 115 S. Ct. 1776, 1779 (U.S. 1995) ("Group home users, Oxford urged, need 8 to 12 residents to be financially . . . viable."); Elliott v. City of Athens, 960 F.2d 975 (11th Cir. 1992) ("The only evidence of disparate impact was . . . the testimony that a group home for recovering alcoholics . . . could not be economically feasible with fewer than 12 residents.").

106 *Id.*

Housing Act if the City had a rational basis for enacting the rule."[107] Thus, the court concludes that the negative financial impact of an ordinance on a group home does not necessarily make that ordinance unreasonable. This reaffirms that the Fair Housing Act only requires a city to make reasonable accommodations in its zoning code when necessary to give handicapped people an "equal opportunity to use and enjoy a dwelling."[108]

The city was justified in its zoning restriction, opined the court, because "[c]ities have a legitimate interest in decreasing congestion, traffic, and noise in residential areas, and ordinances restricting the number of unrelated people who may occupy a single-family residence are reasonably related to these legitimate goals."[109] Furthermore, explained the court, "[t]he city does not need to assert a specific reason for choosing eight as the cut-off point, rather than ten or twelve."[110]

The court also expressed its disapproval with Oxford House's tactic of using the federal courts as a first step instead of trying to work with the local zoning board by applying for a variance. "Congress did not intend the federal courts to act as zoning boards by deciding fact-intensive accommodation issues in the first instance."[111] The court insisted that Oxford House could not claim that St. Louis had failed to make a reasonable accommodation when the group home had failed to apply for a variance. "Their refusal is fatal to their reasonable accommodation claim."[112]

The Eighth Circuit's decision in *City of St. Louis* indicates that single-family zoning is far from dead. Cities can make reasonable regulations that preserve the character of single-family residential areas, while still accommodating group homes.

Although cities still risk litigation if they try to enforce restrictions such as those in *City of Edmonds*, the holding in *City of St. Louis* gives group homes and cities some post-*City of Edmonds* guidance. First, unless a group home applies for a variance, a city will not likely be deemed to have failed to make a "reasonable accommodation." Group homes should not use the courts as first-resort zoning boards. Second, group homes cannot rely on a financial viability argument. The mere fact that a larger number of occupants in a group home would increase revenue will not suffice for a showing of unreasonableness.[113] Finally, cities can argue the Eighth Circuit's holding in *City of St. Louis*, along with similar holdings,[114] to justify reason-

107 *Id.* (citing Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 94 (8th Cir. 1991)).

108 42 U.S.C.A. § 3604(f)(3)(B) (1994).

109 *City of St. Louis*, 1996 WL 75685, at *2 (citing Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)). Oxford House states that the average length of stay for a resident is about thirteen months. Brief for Respondents Oxford House, Inc. at 6, *City of Edmonds* (No. 94-23).

110 *City of St. Louis*, 1996 WL 75685, at *2.

111 *Id.* at *3 (citing Oxford House v. City of Virginia Beach, 825 F. Supp. 1251, 1261 (E.D. Va. 1993)).

112 *Id.*

113 On the other hand, if the permitted number of occupants was so low as to be unable to sustain any group home, even one operated by a non-profit organization, that would seem to indicate that the ordinance was unreasonable.

114 *See* Bryant Woods Inn, Inc. v. Howard County, 911 F. Supp. 918 (D. Md. 1996) (holding that a refusal to permit a group home to increase its number of residents from eight to fifteen is not a failure to make a reasonable accommodation).

able restrictions designed to maintain the integrity and character of single-family neighborhoods.

VI. CONCLUSION

City of Edmonds, despite its potential for becoming an important decision, ultimately decided a narrow legal issue. The ordinance at issue in the case was not invalidated, the Court held only that it was not exempt from the Act's coverage. The Court remanded the issue of whether the ordinance discriminated against the handicapped to the lower court. After *City of Edmonds*, cities are still free to establish and regulate single-family neighborhoods; the only difference is that now cities with restrictions like those at issue in Edmonds may not claim the protection of § 3607(b)(1).

Perhaps the most significant dimension of the *City of Edmonds* Court's decision is its weak support for the FHAA. From the majority's narrow textual reading of the statute, it appears that in order to garner a majority Justice Ginsburg had to chart a narrow course between the Scylla of civil rights, on one hand, and the Charybdis of family values, on the other. By failing to champion either civil rights, as the Court did in *City of Cleburne v. Cleburne Living Center, Inc.*,[115] or family values, as it did in *Village of Belle Terre v. Boraas*[116] and *East Cleveland v. Moore*,[117] the Court ultimately disappointed both sides.

Stephen C. Hall

115 473 U.S. 432 (1985) (holding that requiring a special use permit for a group home for the retarded, while not requiring a similar permit for similar uses, violated the Equal Protection Clause).

116 416 U.S. 1 (1974) (upholding a maximum occupancy restriction in a single family zone that only applied to unrelated people).

117 431 U.S. 494 (1977) (holding that a narrow definition of "family" that did not permit a grandmother to live with her grandson violated Due Process).

From: Jim & Deanna McClintick
To: Mayor
Cc: Council Packet
Subject: Budget-infrastructure/streets
Date: Saturday, July 23, 2022 8:55:44 AM

Hello,

Thank you for the budget info in the paper today.

To be more specific--what percentage is devoted to infrastructure--or which part included that?

What is the break down for the extra tax collected to be devoted to street repair? How much was or is expected to be collected and how will it be used?

Thank you.
Deanna McClintick

From: Jane Holt
To: Council Packet
Subject: Babies, books and visitations
Date: Sunday, July 24, 2022 9:41:26 AM

Dear City Council Members,
Recently, an East High sophomore, after learning about the importance of books in babies' lives, secured a grant to help Lincoln hospitals provide books to all parents of newborns. That grant will provide books for the next three years, an astounding result of smart thinking and financial generosity.

I can't imagine a better partner to this program than the Universal Home VIsitation amendment currently being considered by the council. What a boost the books and home visits would provide to newborns and their parents, a boost that would benefit them for years to come.

I understand that the amendment comes with a relatively small price tag, in terms of the city's budget. I'm a taxpayer that happily supports good government ideas that serve the broader public. Certainly, the Universal Home Visitation amendment would be a win for all.

Thank you for your time and consideration.

Jane Holt
3448 Woods Avenue
Lincoln
jane.holt429@gmail.com

From: Jamie lynne Mohr
To: Council Packet
Subject: Verification
Date: Monday, July 25, 2022 6:58:50 PM

So I was just wanting to clarify that my claim was denied…. Thanks for your time

Sent from my iPhone

From:	Peggy Hart
To:	Council Packet
Cc:	Vish Reddi; JohnJohn Mercier
Subject:	MISC 22010 - Why didn"t more people testify on 7/25/22??
Date:	Wednesday, July 27, 2022 12:16:26 PM
Attachments:	image.png

Dear City Council Members,

Regarding the B Street Oxford House proposal: many members of our neighborhood association did not attend the hearing on Monday, July 25, 2022, because of the following email a few of us received from Staff Planner Steve Henrichsen:

To All

The attorney for the applicant has requested the hearing on 1923 B Street be postponed two weeks to Monday, August 8th at 3:00 p.m. We anticipate the Council will grant the request. So you don't need to attend this evening. Sorry for the late notice, but the request came in late on Friday and I just found out myself.

Steve

Now we have become aware that INDEED there was testimony about this issue on Monday night, testimony which the Council now can mull over for the next several weeks without a balanced presentation of all viewpoints and evidence.

This is unacceptable way of running city government which states as "Organizational Values", *We are committed to …an environment that encourages problem solving, by both ourselves and the community,* and as a part of the *"Goal Statement", Develop and maintain open relationships and communications with other agencies, organizations, and the public at large.*

Sincerely,

Peggy Hart

1930 B St.

Lincoln, NE 68502

402-580-1200

Peggy Hart
Associate Professor -- Mathematics & Data Analytics
Faculty Athletics Representative
DOANE UNIVERSITY 1014 BOSWELL AVE • CRETE, NE 68333
402.826.8603 | C: 402.580.1200 | PEG.HART@DOANE.EDU
https://doane.zoom.us/j/93766872460

On Fri, Jul 22, 2022 at 1:19 PM Peggy Hart <peg.hart@doane.edu> wrote:

> July 22, 2022
>
> Dear City Council Members,
>
> We are residents at 1930 B Street, directly across the street from the new Oxford House at 1923 B. We have done our homework regarding this case: talked to three lawyers, spent time reading zoning laws and precedent-setting court rulings regarding FHAA protections of Oxford Houses. We have no beef with the residents of the Oxford House - we have chosen to live in a diverse neighborhood and are appreciative of people trying to improve their lives. However, we would like you to consider whether it is reasonable to accommodate such a large number of men housed within two highly profitable businesses within one residential neighborhood. There are now two, housing at least 20 men, within ½ block of our home (see photo attachment).
>
> Make no mistake, this is a *business* for this property owner. Here's the math with the proposed zoning change (and we were very conservative with our numbers*):
>
> **Income:** Assume 10 men live in this Oxford House (their goal is 14).
> This home charges $500/month, so the income will be **$60,000 per year.**
>
> **Expenses: $33,000**
>
> - Mortgage payment* (bankrate.com with 4.97% interest rate and minimum downpayment): $15,000
> - Property taxes*: $5000
> - Insurance*: $3000
> - Upkeep*: $10,000
>
> **Profit: $27,000 per year.**
>
> If this home were rented as a single-family home (zoning we fought for) only three non-related adults could live there. Therefore, the home would need to rent for about $2750 per month to break even. However, as the Oxford House loophole -- whereby up to 20 men may rent -- allows this property owner to make a HUGE profit. Without a doubt -- although the

law considers the Oxford House residents a "family", these men write checks to a business owner making a larger profit than any other landlord through this loophole.

In addition, this is a neighborhood with small children. And, we did indeed witness a Cass County Sheriff's vehicle pull up, and a man in handcuffs get out with the deputy. They argued for a while, and then the man was released to the Oxford House. We are curious as to whether the property owner is advertising in jails. These businesses are not only housing needy persons from our city. There are at least 20 such men being housed within ½ block of our home, forever changing the population density and character of this historic, family-oriented block.

Indeed, there are a variety of types of court decisions for AND against Oxford House's requests for exceptions to city zoning ordinances based on the FHAA's "reasonable accommodation" clause. Attached below you will find *City of Edmonds v. Oxford House, Inc.: A Comment on the Continuing Vitality of Single Family Zoning Restrictions* (Notre Dame Law Review) for your consideration. I assume the *City of Edmonds* case is the precedent setting case that most consider since it went to the Supreme Court, but the more recent 1998 *City of St. Louis* case, also outlined in this article, came to the opposite conclusion, upholding a city's maximum occupancy statute.

Thank you for your service to our city and county, and we welcome your questions and comments. I look forward to attending Monday's meeting.

Sincerely,
Peggy Hart & John Mercier
1930 B Street
402-580-1200 (Peggy Hart)

~~~~~~~~~~~

Peggy Hart
Associate Professor -- Mathematics & Data Analytics
Faculty Athletics Representative
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From: Cathie Bailey
To: Council Packet; Mayor
Subject: 1923 B Street/Oxford House
Date: Wednesday, July 27, 2022 3:18:40 PM

Dear Mayor Gaylor-Baird & City Council Members:

I write this letter with regards to the August 15 City Council hearing and zoning application for Oxford House at 1923 B Street. I strongly oppose the zoning change request.

I am not against Oxford House residents - but I do object to the way Oxford House conducts their business. They do not respect our current zoning laws. Neither Oxford House nor the new property owner have engaged and been willing to work with Near South Neighborhood Association members. In fact, they have been hostile and threatened to escalate the conflict and purchase more homes in our neighborhood. They act as if they are above the law.

During my daily walk, I pass 4 of the Oxford Homes within 3 blocks of my home. I feel anxious each time I see a For Sale sign in the yard of one of our large historic homes. We are a wonderfully diverse neighborhood but our density is at a saturation point. Allowing 14 single people to occupy a single family home exacerbates the density issue.

We should require from Oxford House and our City Attorney's office **evidence** that "Reasonable Accommodation" is applicable to this request. To vote in favor of this zoning request before more research is done will give Oxford House the green light to conduct their business in many other locations in Lincoln with little to no regard for the neighborhood and it's property owners.

Thank you for your careful consideration of this matter.

Cathie Bailey
1921 C Street

Cathie Bailey