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FAIR HOUSING MODIFICATIONS AND ACCOMMODATIONS IN THE '90s

F. WILLIS CARUSO*

INTRODUCTION

The 1988 amendments to the 1968 Fair Housing Act extended the protections of the Act to discrimination because of handicap.1 Prior to the amendments, the Fair Housing Act provided effective relief to individuals denied housing because of race, color, religion, national origin and sex. Such relief has included various forms of injunctive relief, significant actual and punitive damages and attorneys' fees.2 One may commence action under the federal act, in state or federal court, by filing an administrative complaint with the Department of Housing and Urban Development (HUD).3 Many state and local laws also prohibit discrimination based on handicap or disability such as the provisions found in the Illinois Human Rights Act.4

This Article will review the way the courts have used and interpreted the Fair Housing Act's provisions prohibiting discrimination based on handicap. Additionally, this Article will consider how the law may be implemented in the future. This analysis recognizes that three categories of handicap-based discrimination exist.

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1. The 1988 Amendments use the term "handicap" instead of the more often used and accepted term "disabilities." It is clear that these terms are meant to be interchangeable. 42 U.S.C. § 3604(f) (1988).

2. The Court has broad powers of mandatory injunctive relief allowing it to: order execution of a specific lease, Williamson v. Hampton Management Co., 339 F. Supp. 1146, 1150 (N.D. Ill. 1972); award substantial damages including economic, emotional distress and punitive, Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184, 189 (7th Cir. 1982); and nullify zoning actions that have a racial impact under certain circumstances, Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1291 (7th Cir. 1977).


The first category is what might be called "straight out" discrimination. For example, "I won't rent to you because of your physical or mental disability." Although not as common as refusals to rent based upon race, in some instances landlords have refused to rent or sell to individuals or tried to evict them because of a handicap. Because these cases mimic race and national origin cases in many aspects, they will not be discussed here.

The second category is a refusal to provide a reasonable modification as specifically required by the Fair Housing Act and as explained in the Fair Housing Regulations. Under most circumstances, a modification request is made to allow changes such as adding grab bars to the bathroom. The landlord may not deny such a request unless the circumstances support such a denial. In certain circumstances, the line between a modification and an accommodation may be blurred.

The third category is the landlord's refusal of an individual's request for a reasonable accommodation to enable him or her to acquire or enjoy a unit. In some situations this could involve changing the general policies of an apartment complex regarding the use of facilities, the dress code or even rules with regard to support animals. Additionally, a reasonable accommodation request can relate to zoning rules and procedures of a city or county as applied to group homes for persons with mental or physical handicaps.

5. For example, The John Marshall Law School Fair Housing Legal Clinic defended a chancery case in state court involving a person with "Terrets Syndrome." The landlord's effort to force out the handicapped person and his family succeeded because of the problems of living there during the suit. A federal damages case is pending.


8. The regulations include two examples of reasonable modifications to which the landlord must consent when the request is made by the handicapped tenant. 24 C.F.R. § 100.203(c)(1)-(2). The first example is the installation of grab bars in the bathroom. Id. A landlord's requirement that the tenant remove the grab bars when they vacate the premises is reasonable. Id. However, a requirement that the tenant remove the inner wall reinforcements is unreasonable. Id. The second example involves widening the bathroom doorway to make it wheelchair accessible. Id.

9. See, e.g., Hodges v. Schmoeller, No. 94 C 4907 (N.D. Ill. filed Aug. 12, 1994). Hodges involves one instance at the Law School Clinic in which the landlord would allow cats but not dogs. Id. The compromise reached allowed support dogs that weighed less than the average cat. Id. In another situation, the Condominium board said the no pet policy prohibited "hearing cats" for the hearing impaired. Heller v. 3950 N. Lake Shore Condominium Ass'n, No. 95 C 6528 (N.D. Ill. filed Nov. 9, 1994). Assigning parking places out of order for a person with a disability was the subject matter of another action.

10. For example, in United States v. Village of Marshall, 787 F. Supp. 782 (W.D. Wis. 1991), the court found the Village's denial of an exception to the spac-
I. THE IMPETUS FOR THE 1988 HANDICAP AMENDMENTS

In 1985, the Supreme Court handed down a negative decision for group home advocates. In *City of Cleburne v. Cleburne Living Center*, the Supreme Court held that the disabled are not a suspect class. The City of Cleburne had refused to grant a special use permit to an organization to establish a group home for mentally handicapped persons. The complaint alleged that a rational basis did not exist for the belief that the proposed group home for disabled persons posed a threat to the community. If the acts of the municipality were subject to strict scrutiny, the proponents of the home would prevail. However, by its ruling, the Supreme Court refused to apply strict scrutiny to discrimination against disabled people. Advocates for the disabled believed the *Cleburne* case was a signal that the disabled would have to turn their efforts to legislative remedies. As a result, there was a concerted effort to pass the fair housing amendments geared towards protecting the disabled.

The Fair Housing Amendments Act (FHAA) provides broad protections for persons with disabilities. The FHAA prohibits discrimination against persons with handicaps in all areas of housing, public and private. For example, it encompasses discrimination in the sale, rental, financing, brokering, appraising, making and purchasing of loans for dwellings and local land-use decisions. The intent of Congress is clear from the House Report:

> ing requirements of the zoning ordinance to constitute a failure to make a reasonable accommodation. *Id.* at 788; *see also* Judy B. v. Borough of Tioga, 889 F. Supp. 792, 796 (M.D. Pa. 1995) (reversing the borough's decision to deny a variance to a residential treatment facility); North Shore-Chicago Rehabilitation Inc., v. Village of Skokie, 827 F. Supp. 497, 506 (N.D. Ill. 1993) (invalidating a village ordinance requiring permanent occupancy in group homes due to its discriminatory effect on handicapped persons).

12. *Id.* at 446.
13. *Id.* at 447-48.
14. *Id.* at 448.
15. Strict scrutiny is the test applied by the Supreme Court in cases of discrimination involving a suspect class such as race or national origin. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984).
17. *Id.*
19. *Id.*
The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.\(^2\)

The FHAA protects handicapped persons by broadly defining the term "handicapped."\(^2\) The FHAA adopted the definition of "handicapped" from the Rehabilitation Act of 1973,\(^2\) in which handicapped is defined as "any person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such impairment; or is regarded as having such an impairment."\(^2\) The regulations list "mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities" as examples of handicaps.\(^2\) This list is by no means exclusive. The Supreme Court held in \textit{School Board of Nassau Co. v. Arline}\(^2\) that persons with Human Immunodeficiency Virus (HIV) are considered "individuals with handi-

\begin{itemize}
\item \textit{Fair Housing Amendments Act Committee Report, H.R. Rep. No. 711, 100th Cong., 2d Sess. 3355 (1988).}
\item The regulations divide physical and mental impairment into two areas. The first includes:
  \begin{itemize}
  \item Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic skin; and endocrine.
  \end{itemize}
\item 24 C.F.R. § 100.201(a)(1) (1988). The second area is any mental or psychological disorder, including but not limited to:
  \begin{itemize}
  \item mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities . . . orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.
  \end{itemize}
\item 24 C.F.R. § 100.200. See generally 24 C.F.R. § 100.200.
\item See supra note 24 and accompanying text for a discussion of the definition of "handicap."
\item 480 U.S. 273 (1987).
\end{itemize}
The FHAA also expands protection for handicapped individuals by the nature of transactions it covers. For example, the handicapped person who experiences discrimination can sue as well as any person associated with the handicapped individual. This provision provides for a greater number of persons having standing to sue under the FHAA, which in turn results in a greater enforcement of its provisions.

II. REASONABLE MODIFICATIONS

The FHAA provides that handicapped individuals shall be allowed to make reasonable modifications necessary to allow them full enjoyment of a unit. This means that the landlord or other housing provider is required to permit a tenant, at the tenants expense, to make reasonable modifications to the premises (which includes more than just the unit) if necessary in order to have full use and enjoyment of the unit. The regulations give guidance in this regard:

For example, if a laundry room is inaccessible, the only option open to the tenant is to pay for physical modifications necessary to make the room accessible. On the other hand, if the tenant chooses to ask a friend to do his or her laundry in the laundry room, the landlord must accommodate this situation by waiving any rule that prohibits non-tenants from gaining access to the laundry room.

Unlike reasonable accommodation issues which deal with a range of actions relating to housing, the issue of reasonable modification usually arises when some type of landlord/tenant relationship already exists. Furthermore, in most situations reasonable accommodations are accomplished by the prospective tenant rather than by a current owner.

28. Id. at 284.
29. The Fair Housing Act prohibits discrimination against an individual in “the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . any person associated with that buyer or renter.” 42 U.S.C. § 3604(f)(1)(C). This suggests a non-handicapped person who is discriminated against because he or she is associated with a handicapped individual has a cause of action under § 3604(f)(1)(C). 24 C.F.R. § 100.202(a)(3).
31. Id.; 24 C.F.R. § 100.202(a). Premises is defined in the regulations to include the interior or exterior parts, components or elements of a building or dwelling unit, including the public and common areas of the building.” 24 C.F.R. § 100, commentary at 3247.
32. 24 C.F.R. § 100, commentary at 3247.
33. The comments to the regulations use the phrase “it is illegal to refuse to permit a tenant with disabilities to make reasonable modifications.” Id. (emphasis added). However, when discussing the reasonable accommodations provisions of the Act, the comments to the regulations use the phrase “person with handicaps.” Id. at 3249 (emphasis added). See Kanter, supra note 23, at 957 (stating “reasonable modification” differs from “reasonable accommodation” in that it is accomplished by the prospective . . . tenant . . . rather than by a current owner”).
modifications are done at the handicapped individual’s expense, merely requiring consent from the landlord, rather than some affirmative action as in reasonable accommodation situations. Reasonable modifications usually relate to specific needs of an individual based on his or her handicap. For example, a person confined to a wheelchair may need to have the bathroom door widened or have kitchen cabinets moved or lowered.

The handicapped individual can make modifications such as: installing ramps, grab bars, exercise equipment, alarms, audible and visual call mechanisms, widening doors, lowering cabinets and providing assistance for the hearing impaired. Such modifications are not limited to the apartment itself and can include changes in the garage, the outside entrance to the building and common areas such as halls, the laundry room and recreational areas. When such changes affect more than one person and/or the public at large, the change may, in fact, be an accommodation. The rules are fairly fact driven and require reasonable actions by the landlord.

The tenant is required to seek the landlord’s or provider’s consent to the modification in advance. In most cases the landlords will likely consent and may even finance the modifications. However, the landlord may only deny the request for modification if he or she can show that the proposed modification is unreasonable because it imposes an undue financial or administrative burden on the landlord.

24 C.F.R. § 100.203(a).
24 C.F.R. § 100.203(c)(1).
Id.
Id.
24 C.F.R. § 100.203(a).
Id.
Id.
24 C.F.R. § 100.203(c)(2).
Id.
44. See comments to § 100.203 for a discussion of the definition of premises as including the common areas of a building as well as the individual dwellings. 24 C.F.R. § 100.203. The Comments explain that premises is defined in this manner because that was the intention of Congress when the word was included in the statute. Id.
24 C.F.R. § 100.203.
46. See United States v. California Mobile Home Park Management Co., 29 F.3d 1413, 1421 (9th Cir. 1994) (describing how the undue burden test used in accommodation cases under § 504 of the Rehabilitation Act of 1973 applies to reasonable modification requests and the landlord must prove some “undue burden” to prevent the tenant from making the modification); see also United States v. Freer, 864 F. Supp. 324, 326 (W.D.N.Y. 1994) (stating that a modification request is to be considered unreasonable when it imposes an undue financial or administrative burden on the landlord).
administrative burden justifying denial is difficult for the landlord, he or she may set reasonable conditions on the modifications to ensure the modifications are properly made and arrangements are made for restoration.\(^47\) For example, a landlord may require a tenant to deposit the cost to restore the premises to its original condition at the end of the lease term.\(^48\) However, the issue of restoration is also a question of fact which depends upon the type of modification made by the tenant. According to the regulations, if the modification would not interfere with the landlord’s or the next tenant’s use and enjoyment of the premises, then the tenant is not required to restore the premises.\(^49\) One example of this is the widening of doors to make them wheelchair accessible.\(^50\)

If the landlord refuses to consent to the modification the tenant may have a cause of action. Furthermore, the tenant may also have a cause of action if he believes the landlord unreasonably withheld consent for a modification.\(^51\)

Unlike actions under reasonable accommodation, not many cases are brought solely on the issue of reasonable modification. This is likely due to the fact that the modifications usually do not financially burden the landlord or other housing provider. However, a few cases exist where a landlord has flat out refused to consent to the modification. In one such case, United States v. Freer,\(^52\) the owner of a trailer park refused to allow a handicapped resident to construct a wheelchair ramp to the door of her trailer. The trailer park owner asserted that the ramp would impede trailer removal and would indirectly obstruct the trailer park’s access road and, therefore, would not allow it.\(^53\) The court stated that the owner’s refusal to permit installation of the ramp denied

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47. The regulations state:
[t]he landlord may, where it is reasonable to do so, condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification,[the landlord may also]... where it is necessary in order to ensure with reasonable certainty that funds will be available to pay for the restorations at the end of the tenancy, the landlord may negotiate as part of such a restoration agreement a provision requiring that the tenant pay into an interest bearing escrow account, over a reasonable period, a reasonable amount of money not to exceed the cost of the restorations...[the landlord may also] condition permission for a modification on the renter providing a reasonable description of the proposed modifications as well as reasonable assurances that the work will be done in a workmanlike manner and that any required building permits will be obtained.
24 C.F.R. § 100.203(a)-(b).
49. 24 C.F.R. § 100.203(c)(1).
50. 24 C.F.R. § 100.203(c)(2).
51. Kanter, supra note 24, at 957.
53. Id. at 326.
the plaintiff equal opportunity to use and enjoy her home.\textsuperscript{54} The court then proceeded to find that the owner failed to rebut the presumption of discrimination by demonstrating that the plaintiff’s proposed modifications imposed an undue financial or administrative burden.\textsuperscript{55} The court then issued an injunction permitting the plaintiff to install her wheelchair ramp.\textsuperscript{56}

A similar more recent case involves the owner of a condominium. In \textit{United States v. Country Club Garden Owners Ass'n},\textsuperscript{57} the owner of the condominium suffered from osteoarthritis which severely restricted her ability to walk without assistance. For this reason, she requested permission to use a handicapped parking space immediately behind her unit.\textsuperscript{58} She also requested permission to modify the terrace behind the unit at the owner's expense so that a gate and steps could provide her immediate access to the parking space.\textsuperscript{59} The co-op association refused to allow the plaintiff to make the requested modifications.\textsuperscript{60}

An important note in the context of reasonable modifications is that the FHAA also included provisions for the handicap accessible design of covered multifamily dwellings.\textsuperscript{61} This provision applies to structures which had first occupancy a year and a half after the enactment of the FHAA in 1991.\textsuperscript{62} The FHAA requires full handicap accessibility of the common areas of such structures and specifically that the main entrance is accessible and that all

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\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} 159 F.R.D. 400 (E.D.N.Y. 1995).
\textsuperscript{58} Id. at 401.
\textsuperscript{59} Id.
\textsuperscript{60} Id.

\textsuperscript{61} 42 U.S.C. § 3604(f)(3)(C). According to the regulations “covered multi-family dwelling” are defined as “buildings consisting of four or more dwelling units if such buildings have one or more elevators; and ground floor dwelling units in other buildings consisting of four or more dwelling units.” 24 C.F.R. § 100.201.

\textsuperscript{62} The exact cut-off date for first occupancy is March 13, 1991. 24 C.F.R. § 100.205(a). There is an exception if the building permit was issued on or before January 30, 1990 and building is completed. Accessibility Preamble Guidelines, 24 C.F.R. § 100.305. The regulations also state that the newly constructed covered multi-family dwellings must be handicap accessible unless “it is impractical to do so because of the terrain or unusual characteristics of the site.” \textit{Id.} The burden of proving impracticability is on the person who “designed or constructed the facility.” \textit{Id.} The regulations go on to provide an example of when compliance with § 3604 (f)(3)(C) would be impractical:

A real estate developer plans to construct six covered multifamily dwelling units on a site with a hilly terrain. Because of the terrain, it will be necessary to climb a long and steep stairway in order to enter the dwellings. Since there is no practical way to provide an accessible route to any of the dwellings, one need not be provided.

24 C.F.R. § 100.205(b).
entrances are wheelchair accessible. With respect to individual units, the FHAA requires accessibility to all switches and environmental controls, reinforcement of bathroom walls as to allow for any future installation of grab bars and sufficient widths in kitchens and bathrooms to allow for wheelchair maneuverability. The FHAA states that a building's compliance with the American National Standards Institute (ANSI) standards for buildings and facilities providing accessibility and usability for physically handicapped people (ANSI A117.1) satisfies the requirements set out in the FHAA.

The ANSI standards provide specific architectural guidelines that developers should follow to assure any newly constructed multi-unit dwellings are fully handicap accessible. The standards are highly detailed and technical and an in depth discussion of its provisions is outside the scope of this article. However, the significance of these provisions and their relation to reasonable modification requirements is important to note. If a multifamily dwelling constructed after the FHAA took affect does not conform to these requirements, the owner or developer may be subject to an action for failure to design properly.

Although not cited as often as reasonable accommodations, the reasonable modifications requirement of the FHAA is just as important. As previously mentioned, the small amount of litigation over modifications is probably due to the negligible burden placed on the landlord. Furthermore, the requirements placed on multifamily dwellings constructed after the amendment to the FHAA will likely remove the need for later modifications if such provisions are followed.

However, for structures existing before the FHAA, one should always keep the modifications provision in mind when handicapped individuals are faced with the need to make changes to their living unit to allow full enjoyment of it. Before an agreement is reached with respect to a needed change, the parties should

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63. 24 C.F.R. § 100.205(c)(2).
64. 24 C.F.R. § 100.205(c)(3)(ii).
65. 24 C.F.R. § 100.205(c)(3)(iii).
66. 24 C.F.R. § 100.205(c)(3)(iv).
67. 42 U.S.C. § 3604(f)(4); 24 C.F.R. § 100.205(e).
69. For further information, contact your applicable state agency regarding design management to determine whether the particular state follows the ANSI standards or has its own standards.
70. The John Marshall Fair Housing Clinic is currently handling a case in federal court. One count of the plaintiff's complaint is against the developer of the building in which she lives. The complaint alleges failure to design properly and comply with the Fair Housing Act.
71. 24 C.F.R. § 100.305.
address the question of whether the change is a modification or, in fact, an accommodation.

III. REASONABLE ACCOMMODATIONS

A. Individual and Tenant Accommodations

The FHAA requires a landlord or other housing provider to make reasonable accommodations in rules, policies, practices or services when such accommodations are necessary for the handicapped individual to enjoy the unit. Unlike reasonable modifications, a request for a reasonable accommodation may require the landlord or housing provider to take affirmative steps to ensure that the handicapped individual has an equal opportunity to use and enjoy their dwelling. Reasonable accommodation can encompass a myriad of actions or non-actions on the part of the landlord or housing provider. The type and extent of the modification depends on the particular needs of the handicapped individual. However, since the enactment of the provision, a clear set of recurrent situations involving reasonable accommodations has arisen. A brief discussion of reasonableness under the FHAA and the Regulations is necessary before proceeding.

The Regulations note that "[t]he concept of 'reasonable accommodation' is also used in regulations and case law interpreting § 504 of the Rehabilitation Act of 1973." This suggests that interpretation and case law surrounding § 504 applies to the parameters of reasonable accommodation under the FHAA. The key case incorporated into the § 504 regulations is Southeastern Community College v. Davis. In that case, a nursing school denied admission to a deaf applicant because she was hearing impaired. The court held that the requested changes in the nursing training program to accommodate the hearing impaired applicant were too expensive and burdensome for an educational insti-
tution to make. However, the Court did note that in certain circumstances failure to accommodate may rise to the level of "unreasonable and discriminatory."

Reasonable accommodation most often requires a change in rules, policy, practice and/or provision of services when necessary to afford equal opportunity to the use and enjoyment of housing. More recent cases brought under the Fair Housing Act give guidance regarding what is a reasonable accommodation in housing. In the context of accommodations in rules and policies, several major areas generate the most litigation.

The first major area involves the use of support animals. An example of a reasonable accommodation is a landlord allowing a blind man to have a support animal in spite of the building's no pet policy. However, landlords are not always willing to grant exceptions for support animals. In *Hall v. Becoviv*, the building had a no pet policy and the landlord refused to grant an exception to a blind tenant with a support animal. The hearing officer held that the refusal was unlawful and in violation of the Chicago Human Rights Ordinance. Similarly, *Bronk v. Ineichen* dealt with a no-pet policy. However in this instance the support animal was a "hearing dog" for two hearing impaired tenants. Although the plaintiffs lost because they failed to show that the dog was properly trained as a hearing dog, the court addressed the issue of reasonable accommodation. The court stated "a deaf individual's need for the accommodation afforded by a hearing dog

79. *Id.* at 402.
80. *Id.* Courts use this language when deciding whether a particular accommodation is reasonable. See *infra* notes 82-101 for a discussion of how courts use this language.
82. The example as given in the regulations is:
A blind applicant for rental housing wants to live in a dwelling unit with a seeing eye dog. The building has a "no pets" policy. It is a violation of § 100.204 for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.
24 C.F.R. § 100.204(b)(1).
84. *Id.*
85. *Id.*
86. 54 F.3d 425 (7th Cir. 1995). At trial the defense brought in an expert on hearing dogs who testified that two factors distinguish a hearing dog from a normal dog: intensive professional schooling and isolation from other animals. *Id.* at 428. The defense also illustrated that the plaintiffs lived at other residences without the assistance of a hearing dog. *Id.*
87. *Id.* at 427.
88. *Id.* at 429.
is, we think, per se reasonable within the meaning of the statute.\footnote{Id.}

The second major area of cases involves reasonable accommodations in miscellaneous other building policies and rules. This line of cases involves various building policies which impede the handicapped individual's use or enjoyment of the building as a whole, as well as their respective unit. One subset of this area is rules and regulations involving parking spaces. This situation is covered in the Regulations which state that providing a parking space close to the dwelling to someone who has a mobility related handicap is a reasonable accommodation.\footnote{24 C.F.R. § 100.204(b)(2).} Similar to this example, a first-come/first-served policy for awarding indoor parking spaces was at issue in \textit{Shapiro v. Cadman Towers, Inc.}\footnote{844 F. Supp. 116 (E.D.N.Y. 1994). See HUD v. Dedham Hous. Auth., Fair Housing - Fair Lending Rep. (BNA) ¶ 25,023 (1992) (describing a parking policy very similar to that in \textit{Shapiro}).} In \textit{Shapiro}, a tenant with multiple sclerosis asked for a reasonable accommodation in the policy so that she might have an indoor parking space.\footnote{Id. at 125.} The court not only found that a change in the parking policy would be a reasonable accommodation, it fully included the regulation example in the opinion.\footnote{Id.} The court also went on to say that it was a reasonable accommodation regardless of whether enough parking spaces were available for all residents of the complex.\footnote{Id. at 1416.}

In \textit{United States v. California Mobile Home Park Management Co.},\footnote{29 F.3d 1413 (9th Cir. 1994).} a policy requiring fees for long term guests and long term guest parking was at issue.\footnote{Id. at 118. The plaintiff was only able to walk by herself for short distances on level ground. \textit{Id.} She was also subject to periodic episodes in which she would experience total paralysis, like most people who suffer from multiple sclerosis. \textit{Id.} All of this information was conveyed to the building owners and management company and they still refused to give her the parking spot. \textit{Id.}} The plaintiff's daughter suffered from a respiratory disease which required her to have a home health care aide.\footnote{Id.} The defendant management company demanded guest fee payment for the presence of the home care aide.\footnote{Id.} The court stated that facially neutral policies and rules which may "require landlords to assume reasonable financial bur-
dens in accommodating handicapped residents" are nonetheless reasonable accommodations that the landlord must make. 99

The courts utilize a type of balancing test when dealing with reasonable accommodation cases. The courts appear to use this approach regardless of the type of rule, policy or practice involved. In such cases the courts will ask "[whether the accommodation being requested will] not impose an undue hardship or burden upon the entity making the accommodations and [will] not undermine the basic purpose which the requirement at issue seeks to achieve." 100 The courts have expanded on this test by stating that "[a]lthough the defendant should not be required to assume 'undue financial burdens' that does not mean that a defendant cannot be required to incur reasonable costs." 101 In the context of § 504, the courts have even gone as far as to state that a landlord or housing provider has an "affirmative obligation" to provide a requested accommodation when doing so would not "impose such undue burdens." 102

In the context of reasonable accommodations in the rules, policies and practices of landlords or housing providers, the two key concepts are the specific needs of the individual making the request and the burden such a request imposes on the landlord. 103 Based on the foregoing case law, the courts seem to tip the scales in favor of the handicapped residents except in the most extreme circumstances, most often citing to Congress' intent to have the provisions of the Fair Housing Act broadly construed. 104 Therefore, handicapped residents possess a powerful tool in the reasonable accommodation provision of the Act when dealing with an inflexible landlord or other housing provider. The reasonable accommodations provision can insure that landlords provide handicapped residents with the services or concessions

99. Id. at 1418. In reversing and remanding, the Court was quick to note "[t]he reasonable accommodation inquiry is highly fact-specific, requiring case-by-case determination." Id. The Court suggested in dealing with a case such as this:

[A] reviewing court should examine, among other things, the amount of fees imposed, the relationship between the amount of fees and the overall housing cost, the proportion of other tenants paying such fees, the importance of the fees to the landlord's overall revenues, and the importance of the fee waiver to the handicapped tenant.

Id.

101. United States v. California Mobile Home Park Management Co., 29 F.3d 1413, 1418 (9th Cir. 1994).
102. Id.
103. See supra notes 90-102 and accompanying text for a discussion of cases where courts balanced the needs of handicapped individuals against the burdens those needs imposed on landlords.
104. See supra notes 90-102 and accompanying text for a discussion of examples of how courts tend to favor the needs of handicapped residents.
they need to enjoy their unit to the same extent as non-handicapped residents.

B. Group Home Accommodations

The area of reasonable accommodations for group homes has developed at a fast pace over the past five years. Congress recognized that private restrictive covenants and discriminatory local government ordinances, rules and regulations could have the purpose and/or effect of excluding or restricting group home congregate living facilities and other similar facilities for the disabled. Congress' intentions are clear:

[1] to bar local government from applying laws and regulations in a discriminatory manner against "congregate living arrangements among non-related persons with disabilities." The FHA 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 disabled individuals to live in the residence of their choice in the community."  

In Huntington Branch, NAACP v. Town of Huntington, the Supreme Court held that municipal zoning ordinances are subject to the Fair Housing Act's reasonable accommodation requirement. The Court went on to state that:

A discriminatory rule, policy, practice or service is not defensible simply because that is the manner in which such rule or practice has traditionally been constituted. This section would require that changes be made to such traditional rules or practices if necessary to permit a person which handicaps an equal opportunity to use and enjoy the dwelling.

In the context of group homes, the courts have defined a reasonable accommodation as "changing some rule that is generally applicable so as to make its burden less onerous on the handicapped individual."

In most cases, the municipal ordinance in question is a facially neutral zoning provision such as a restriction on multi-family housing in a single-family zone or an occupancy requirement.

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105. This fast pace is mainly due to the Oxford House cases which are discussed infra notes 125-38.
107. Id.
109. Id.
110. Id.
112. For examples of cases involving neutral zoning provisions, see Robinson v.
Modifications and Accommodations

More common cases occur where the municipality has enacted a zoning provision which applies specifically to group homes such as spacing requirements\(^\text{113}\) or special procedures which a group home must complete before they can begin occupancy.\(^\text{114}\) In the former, the handicapped individual normally asks for a reasonable accommodation from the facially neutral provision. An example of such an accommodation is a special use permit or variance to locate a group home in a zone where such a use is not normally permitted.\(^\text{115}\) In the latter, the litigation has concentrated both on the issue of the validity of such restrictions under the Fair Housing Act and reasonable accommodations relating to such restrictions.

In cases involving zoning adjustment mechanisms such as variances, amendments, building permits or use permits, the courts have utilized a balancing test similar to that used in the individual reasonable accommodation cases.\(^\text{116}\) That is, the court will ask if the accommodation imposes undue hardship upon the municipality.\(^\text{117}\) Specifically, in the context of zoning decisions, the courts will look to several variables when conducting the balancing test including: crime and safety concerns; adverse impacts on the value of real estate; alternative solutions or sites for the group home; and the financial burdens involved for both parties.\(^\text{118}\) These factors are most often listed in municipal zoning ordinances for determining whether municipalities should grant variances or other zoning adjustment mechanisms.\(^\text{119}\)

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114. One example is requiring that a group home obtain a conditional use permit before operating the home. Association for the Advancement of the Mentally Handicapped v. City of Elizabeth, 876 F. Supp. 614, 618 (D.N.J. 1994). Another example is requiring residents of group homes to have 24 hour supervision. Bangerter v. Orem City Corp., 46 F.3d 1491, 1494 (10th Cir. 1995).

115. See cases cited supra note 112.

116. See cases cited supra notes 113-14 and infra note 135.


119. See DAVID R. MANDELKER & ROGER A. CUNNINGHAM, PLANNING AND CON-
In many cases involving group homes, tremendous community opposition to the location of the proposed group home exists. Normally, the municipality conducts public hearings and council meetings to determine whether the group home may be established. In most instances, the community opposition is based on unfounded fears of the unknown and stereotypes of the mentally and physically handicapped or recovering alcoholics or drug abusers. These fears are often loudly expressed in the public hearings. In such cases, the courts take these issues into consideration when determining whether the zoning or rule change requested was wrongly denied. Judges have held, for example, that where the municipal governing body made its decision based on the unfounded fears of the community, the decision is properly overturnable.

Many municipalities have added provisions to their zoning ordinances which specifically apply to group homes. One example is occupancy restrictions. Maximum occupancy restrictions limit the number of residents in a particular dwelling. They usually relate to the number of rooms in a particular dwelling. The Fair Housing Act contains an exemption for "restrictions regarding the maximum number of occupants permitted to occupy a dwelling." The courts have held that only those occupancy re-

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TROL OF LAND DEVELOPMENT 3 (1990) (discussing the general requirements set out in most zoning ordinances for whether a municipality should grant a variance).

120. See, e.g., United States v. Village of Marshall, 787 F. Supp. 872, 878-89 (W.D. Wis. 1991) (describing the community opposition to a proposed group home and how the court examined the opposition and held that such opposition was the true reason for city's denial of the group home's variance).

121. In most cases the public hearings will contain discussion about security and supervision of the members of the group homes. Id. In a case currently being handled by The John Marshall Fair Housing Legal Clinic, the group home attempted to get a variance from the R-2 zone in which the proposed site is located. Tri-City Community Mental Health Centers, Case No. 2:95 CV-199RL(1) (N.D. Ind. filed Nov. 30, 1995). When word of the group home spread, a petition was circulated describing the residents as being victims of sexual abuse. Id. Although this was correct, the petition went on to state that these residents (who are teenage girls) may be predisposed to sexually abusing children in the surrounding community. Id. This petition circulated even after Tri-City presented evidence that these girls posed no threat to the surrounding community. Id.

122. In Village of Marshall, the audience at the public hearing denying the group home's variance petition clapped and cheered when the petition was voted down. 787 F. Supp. at 875.

123. Id.

124. Id.

125. The Supreme Court recently addressed the issue of occupancy requirements in City of Edmonds v. Oxford House, 115 S. Ct. 1776 (1995). The Court made a distinction between occupancy requirements based solely on numerical restrictions and those based on a definition of family. Id. at 1781. The Court found the former fitting under the exemption contained in the Fair Housing Act. Id.

stricitions relating solely to the number of persons permitted to reside in a dwelling will pass muster.\textsuperscript{127} Furthermore, the Supreme Court has stated that those occupancy restrictions which attempt to define "family" and equate restrictions with that definition do not fall under the Fair Housing Act exemption.\textsuperscript{128}

Spacing requirements are another example of restrictions on group homes. Many municipalities now include such provisions in their zoning ordinances. These sections require that any group homes within the boundaries of the municipality be a certain distance apart.\textsuperscript{129} In *Horizon House Development Services, Inc. v. Township of Upper Southampton*,\textsuperscript{130} the court found that a 1000 foot minimum spacing requirement was facially invalid under the Fair Housing Act because the requirement, "creates an explicit classification based on handicap with no rational basis or legitimate government interest."\textsuperscript{131} However, this issue is not fully resolved because the courts have also upheld similar spacing requirements as a legitimate zoning concerns.\textsuperscript{132}

The U.S. Commission on Civil Rights has reported that between December 1993, and September 1994, the United States Department of Justice filed fourteen cases alleging discrimination in zoning, building code, occupancy and/or land use laws.\textsuperscript{133} Of the cases filed, twelve alleged discrimination based on disability status.\textsuperscript{134} The growth in litigation of group home cases is demonstrated more so by the large volume of "Oxford House" cases.\textsuperscript{135} Oxford House facilities are self-run, self-supporting homes for persons recovering from alcohol and/or drug addiction.\textsuperscript{136} As of 1993, 375 Oxford Houses existed throughout the United

\begin{itemize}
  \item \textsuperscript{128} Id.
  \item \textsuperscript{129} The statute in dispute in *Village of Marshall* required that group treatment facilities be spaced 2500 feet apart. 787 F. Supp. 872, 883 (W.D. Wis. 1991).
  \item \textsuperscript{130} 804 F. Supp. 683 (E.D. Pa. 1992).
  \item \textsuperscript{131} Id. at 697.
  \item \textsuperscript{132} In *Village of Marshall*, the court did not hold that the spacing requirement itself was invalid. 787 F. Supp. at 879. The court did hold that in the factual situation presented (the new group home was to be located across a river from an existing group home and was just under the minimum spacing requirement), the municipality failed to make a reasonable accommodation for the group home. Id.
  \item \textsuperscript{133} U.S. COMM'N ON CIV. RTS., THE FAIR HOUSING AMENDMENTS ACT OF 1988: THE ENFORCEMENT REPORT 205 (1994).
  \item \textsuperscript{134} Id.
  \item \textsuperscript{136} City of St. Louis, 843 F. Supp. at 1664.
\end{itemize}
States.\textsuperscript{137} Oxford House, Inc. and other similar entities have asserted the rights of the disabled under the FHAA and have litigated "group home" issues in a large number of cities.\textsuperscript{138}

Group homes continue to be an increasingly popular method of treatment and care for persons with physical and mental disabilities. At the same time, the amount of litigation arising from these homes will increase proportionally as long as municipalities fail to make zoning decisions in accordance with the Fair Housing Act. Furthermore, subtle zoning provisions designed to exclude group homes will also fail to pass muster unless the provision is a maximum occupancy requirement based solely on numerical restrictions. The courts recognize the importance of group homes and will continue to construe the FHAA broadly to afford its protections to the handicapped residents of group homes.

\textbf{CONCLUSION}

Congress passed the Fair Housing Amendments Act of 1988 to ensure that handicapped members of society have an equal opportunity to reside and enjoy their living environment in the same manner as all members of society. The FHAA recognizes that sometimes landlords and other housing providers have to take affirmative steps to ensure that handicapped individuals have an equal opportunity to enjoy their living environment. The FHAA acknowledges that changes in long-standing rules and the imposition of reasonable financial burdens are not unreasonable means for providing equal opportunity housing for handicapped individuals.

In a broader sense, the Fair Housing Act requires communities as well as individual landlords to recognize equal opportunities for handicapped members of group homes or handicapped individual homeowners. Communities can no longer rely on unfounded fears and stereotypes about handicapped individuals as a basis for excluding them from their respective communities in much the same way communities cannot exclude because of race. Therefore, municipalities as well as individuals can save a tremendous amount of time and cost by simply complying with the provisions of the FHAA while at the same time assuring that handicapped individuals have the opportunity to assimilate into their respective communities.

\textsuperscript{137} Town of Babylon, 819 F. Supp. at 1181.

\textsuperscript{138} See supra note 135 for a list of cases where Oxford Houses or similar entities have asserted the rights of the disabled under the FHAA.