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## Introduction

Congress amended the Federal Fair Housing Amendments Act ('Fair Housing Act') in 1988 "to end the unnecessary exclusion of persons with handicaps from the American mainstream."[1] To that end, Congress defined prohibited housing discrimination against people with disabilities as, among other actions, "a refusal to make reasonable accommodation in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[2]

As the United States Supreme Court has held, the Fair Housing Act has a "broad and inclusive" compass requiring a "generous construction."[3] However, many federal courts have narrowly interpreted the "reasonable accommodation" clause of the Fair Housing Act in conflict with both Congressional intent and the Supreme

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1. H.R. REP. NO. 711, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 [hereinafter HOUSE REPORT]. For other articles on the Federal Fair Housing Amendments Act, see Robert L. Schonfeld and Seth P. Stein, *Fighting Municipal "Tag-Team": The Federal Fair Housing Amendments Act and Its Use in Obtaining Access to Housing for Persons with Disabilities*, 21 FORDHAM URB. L.J. 299 (1994); Arlene S. Kanter, *A Home of One's Own, the FHAA of 1988 and Housing Discrimination Against People With Mental Disabilities*, 43 AM. U. L. REV. 925 (1994); Laurie C. Malkin, *Trouble at the Doorstep: The Fair Housing Amendments Act of 1988 and Group Homes for Recovering Substance Abusers*, 144 U. PA. L. REV. 757 (1995).

2. 42 U.S.C. § 3604(f)(3)(B) (1994).

3. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995).

Court's mandate that the statute be given a "generous construction."[4] Some courts have interpreted the terms "necessary" and "equal opportunity" in a manner that nullifies the "reasonable accommodation" clause of the statute.[5] These court decisions have permitted landlords and municipalities to exclude people with disabilities from housing.

This Article examines recent Federal court decisions interpreting the "reasonable accommodation" clause of the Fair Housing Act and proposes an interpretation of the clause that is consistent with both the language of the statute and the intent of its drafters. Part I explores the legislative history of the Fair Housing Act and, in particular, the "reasonable accommodation" clause of the statute. This Part also examines the 1995 United States Supreme Court decision *City of Edmonds v. Oxford House, Inc.* which explains how the statute should be interpreted as well as the Supreme Court's decision interpreting the phrase "reasonable accommodation." As this Part demonstrates, both Congress and the Supreme Court intended the statute be used to promote housing for people with disabilities and not be used as a barrier to housing. In addition, they intended that a "reasonable accommodation" be made except where the accommodation would constitute a substantial hardship, undue burden, or fundamental alteration of a program.

Part II examines the provisions of the Federal Fair Housing Act and the way they are used to attack housing discrimination against people with disabilities. This Part discusses in detail the "reasonable accommodation" clause of the statute and explores the earlier federal district court cases interpreting the "reasonable accommodation" standard.

Part III discusses some of the issues from recent cases brought under the "reasonable accommodation" prong of the statute. This Part examines whether people with disabilities and housing providers must exhaust administrative remedies before resorting to litigation, as well as which parties — people with disabilities and housing providers or municipalities and landlords — have the burden of proof in a "reasonable accommodation" case. This Part also explores the recent narrow Federal court interpretations of the terms "reasonable," "necessity," and "equal opportunity" that

4. *See, e.g.*, Bryant Woods Inn, Inc. v. Howard County, Maryland, 124 F.3d 597 (4th Cir. 1997); Gamble v. City of Escondido, 104 F.3d 300 (9th Cir. 1997); Elderhaven v. City of Lubbock, 98 F.3d 175 (5th Cir. 1996); Brandt v. Village of Chebanse, 82 F.3d 172 (7th Cir. 1996).

5. *Id.*

have hindered the use of the statute to fight housing discrimination against people with disabilities.

Part IV demonstrates how the "reasonable accommodation" clause of the statute can be interpreted so that it comports with the intention of its drafters and the United States Supreme Court. It also considers an expanded use of the other prongs of the Fair Housing Act as well as the use of the Americans With Disabilities Act in land use disputes.

## I. The History of the Fair Housing Act and "Reasonable Accommodation"

In 1968, Congress enacted the Fair Housing Act[6] to prohibit housing discrimination on the basis of race, color, religion and national origin[7] and, in 1974, expanded the law to cover sex discrimination.[8] Congress enacted the Rehabilitation Act of 1973[9] to prohibit discrimination against people with disabilities in federally-funded programs.[10] However, it was not until 1988 that Congress enacted the Fair Housing Act[11] which placed disability discrimination on the same footing as discrimination on the basis of race, color, religion, national origin, and sex.[12]

This Part first examines the report of the Judiciary Committee of the House of Representatives ("the Report"), especially as it relates to the concept of "reasonable accommodation." This part then explores the Supreme Court cases that have interpreted both the Fair Housing Act and the concept of "reasonable accommodation."

### A. Report of the Judiciary Committee of the House of Representatives

The Report supporting the Fair Housing Act enuciates a strong policy favoring the establishment of housing for people with disabilities in all residential areas. The Report states that the statute "is a clear pronouncement of a national commitment to end the

6. Pub. L. 90-284, § 804, 82 Stat. 73, 83 (codified as amended at 42 U.S.C. §§ 3601-3619 (1994)).

7. *See* 42 U.S.C. §§ 3604 (1994).

8. Pub. L. 93-383, § 808(b)(1), 88 Stat. 633, 729 (1993).

9. Pub. L. 93-112, § 504, 87 Stat. 355, 394 (codified at 29 U.S.C. §§ 701-797 (Supp. 1997)).

10. *See* 29 U.S.C. § 794 (Supp. 1997).

11. Pub. L. 100-430, § 6(a)-(b)(2), (e), 15, 102 Stat. 1620, 1622, 1623, 1636 (codified at 42 U.S.C. §§ 3601 - 3619 (1994)).

12. *See* 42 U.S.C. § 3604 (1994).

unnecessary exclusion of persons with handicaps from the American mainstream."[13] The Report specifically rejects the use of generalized perceptions about disabilities and unfounded speculations about threats to safety as grounds to exclude people with disabilities from residential neighborhoods.[14]

The Report recognizes several types of municipal ordinances that exclude people with disabilities. First, health, safety, or land-use requirements on congregate living arrangements among non-related persons with disabilities violate the statute since such requirements are not imposed on other families and non-related groups of similar size.[15] Similarly, the statute was intended to prohibit the use of special requirements through land use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of people with disabilities "to live in the residence of their choice in the community."[16] Finally, the Report states that neutral rules and regulations on health, safety and land-use may violate the statute whether they are based on false or over-protective assumptions about the needs of people with disabilities or on unfounded fears or difficulties about the problems their residency in the community may pose.[17]

The Report further notes that a reasonable accommodation must be made when necessary to permit people with disabilities to live in a dwelling of their choice.[18] The Report states that the concept of "reasonable accommodation" has a long history in regulations and case law dealing with discrimination on the basis of handicap, citing a Supreme Court decision interpreting the Rehabilitation Act of 1973.[19] According to the Report, a discriminatory rule is not defensible simply because it has become a tradition. The Report notes that the "reasonable accommodation" provision of the statute requires changes to traditional rules and practices if necessary to permit a person with disabilities an equal opportunity to use and enjoy a dwelling.[20]

As a whole, the Report expresses a policy prohibiting legal barriers that inhibits people with disabilities from residing in dwellings

13. HOUSE REPORT, *supra* note 1, at 2179.
14. *See id.*
15. *See id.* at 2185.
16. *Id.*
17. *See id.*
18. *See id.* at 2186.
19. *Id.* The HOUSE REPORT cited to *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and 45 C.F.R. § 84.12.
20. *See* HOUSE REPORT, *supra* note 1, at 2186.

of their choice. This policy also suggests that the statute be construed liberally in favor of housing for people with disabilities.

### B. The Supreme Court's Interpretation of the Fair Housing Act

In *City of Edmonds v. Oxford House, Inc.*[21], the Supreme Court interpreted the Fair Housing Act. This case may indicate how that Court will interpret future Fair Housing Act cases.

In *City of Edmonds* the issue for the Court was whether a municipal zoning ordinance limiting the number of unrelated people who could be considered a "family" for zoning purposes constituted "any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[22] If the municipal ordinance was a restriction on the "maximum number of occupants permitted to occupy a dwelling," the ordinance would have been exempt from the Fair Housing Act. The municipality could then have excluded a home for recovering alcoholics and substance abusers which housed more than five unrelated people.[23]

The United States Supreme Court held in *City of Edmonds* that the ordinance was not a restriction on the "maximum number of occupants permitted to occupy a dwelling" and thus was not exempt from the Fair Housing Act.[24] The Court held that the type of restriction exempt from the statute was rules aimed at preventing overcrowding. The exemption does not include family composition rules aimed at limiting the number of unrelated people living together in a residential neighborhood that are not applicable to all families.[25]

In reaching this decision, the Court noted that the statute had a "broad and inclusive" compass requiring a "generous construc-

21. 514 U.S. 725 (1995).

22. *Id.* at 728, 731 (Thomas, J. dissenting) (citing 42 U.S.C. § 3607(b)(1) (1994)). "The Fair Housing Act exempts from coverage "any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." *Id.*

23. Prior to the Supreme Court's decision in *City of Edmonds*, courts were split on the issue of whether a "family composition" ordinance was exempt under 42 U.S.C. § 3607(b)(1). In *Elliot v. City of Athens*, 960 F.2d 975 (11th Cir. 1992), the Eleventh Circuit held that such ordinances were exempt from the Fair Housing Act. On the other hand, the Ninth Circuit in *City of Edmonds*, 18 F.3d 802 (9th Cir. 1994), and the District Court for the Eastern District of Virginia in *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251 (E.D. Va. 1993), held that such ordinances were not exempt from the Fair Housing Act.

24. *City of Edmonds*, 514 U.S. at 734-35.

25. *See id.*

tion," and that the statute's exception was to be read "narrowly in order to preserve the primary operation of the [policy]."[26] The Court further recognized that the Fair Housing Act required reasonable accommodations to afford people with disabilities an equal opportunity to use and enjoy housing.[27] The Supreme Court's decision clearly comports with the intentions of the drafters of the statute.[28]

In confirming the findings of previous decisions, the Court noted in *City of Edmonds* that land use restrictions aim to prevent problems caused by "the pig in the parlor instead of the barnyard" and to encourage "family values, youth values, and the blessings of

26. *Id.* at 731 (citing Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209, 212 (1972)). While the Supreme Court does afford a "generous construction" to the Fair Housing Act, it did not find that the municipality's code or actions were themselves discriminatory. *City of Edmonds*, 514 U.S. at 731 n.4. Instead, the Court confined itself to the narrow issue before it. The decision in *City of Edmonds* should be compared to the Court's previous case involving zoning an group housing for people with disabilities. *See* City of Cleburne v. Cleburne Living Centers, 473 U.S. 432 (1985). There, the Supreme Court condemned the municipality's decision to zone out a home for people with mental disabilities as being discriminatory and prejudicially based. *See id.* at 450. Justice Marshall's concurrence in *City of Cleburne* also details the history of discrimination against people with disabilities in the Untied States. *See also id.* at 455-78. For other law review analysis of *City of Edmonds*, see Stephen C. Hall, *City of Edmonds v. Oxford House, Inc: A Comment on the Continuing Vitality of Single-Family Zoning Restrictions*, 71 NOTRE DAME L. REV. 829 (1996).

27. *See City of Edmonds*, 514 U.S. at 737.

28. The Supreme Court cited the HOUSE REPORT in support of its conclusion. *See City of Edmonds*, 514 U.S. at 734 n.8. The Supreme Court's decision also demonstrates the power of the Fair Housing Act and its ability to make uniform the rights of people with disabilities throughout the country. Had the Fair Housing Act not existed, a challenge to the ordinance under the Due Process Clause of the Constitution would have failed. *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (finding that a "family composition" ordinance did not violate Due Process Clause of the United States Constitution). Assuming that *City of Edmonds* is federally funded, there would have been a question as to whether the Rehabilitation Act of 1973 would have applied. *Compare* Knutzen v. Eben Ezer Lutheran Housing Center, 815 F.2d 1343 (10th Cir. 1987) *and* Brecker v. Queens B'nai Brith Housing Development Fund Co., 607 F. Supp. 428 (E.D.N.Y. 1985), *aff'd* 798 F.2d 52 (2d Cir. 1986) (holding that the Rehabilitation Act did not require reasonable accommodation to permit housing for people with disabilities) *with* City Wide Associates v. Penfield, 564 N.E.2d 1003 (Mass. 1992); Schuett Inn. Co. v. Anderson, 386 N.W.2d 249 (Minn. App. 1986) (holding that the Rehabilitation Act could require reasonable accommodation for people with disabilities in federally funded housing) *and* Crossroads Apartments Associates v. LeBoo, 152 Misc.2d 830, 578 N.Y.S.2d 1004 (N.Y. City Ct. 1991). In some states, the ordinances involved in City of Edmonds would have been deemed to be violative of the Due Process Clause of the Sate constitution. *See* City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980); Charter Township v. Dinolfo, 351 N.W.2d 831 (Mich. 1984); State v. Baker, 405 A.2d 368 (N.J. 1979); McMinn v. Town of Oyster Bay, 66 N.Y.2d 544 (1985).

quiet seclusion and clean air."[29] If the housing proposal does not constitute the proverbial pig and does not negatively impact on the abovementioned values, seclusion, and air, the housing must be permitted.

### C. The Supreme Court's Interpretation of "Reasonable Accommodation"

In its report, the House Judiciary Committee noted that the concept of "reasonable accommodation . . . has a long history in regulations and case law dealing with discrimination on the basis of handicap."[30] In writing this, the House cited[31] to *Southeastern Community College v. Davis*,[32] a Supreme Court case interpreting the expression "reasonable modification" under a regulation enacted to interpret the Rehabilitation Act of 1973.

Under this regulation, a school receiving federal funds was required to change its academic requirements to ensure such requirements do not discriminate against students on the basis of their disabilities.[33] In *Davis*, a student with a serious hearing disability challenged the requirements of a college's nursing program as violative of the Rehabilitation Act.[34] The student alleged that the college was required to undertake affirmative action that would dispense with the need for effective oral communication.[35]

The Supreme Court held that the student's request was not a reasonable modification of the school's nursing program, and that the school was not required to change its program.[36] The Court found that since the student was unable to function in clinical

29. *City of Edmonds*, 514 U.S. at 732-33.

30. HOUSE REPORT, *supra* note 1, at 2186.

31. *Id.*

32. 442 U.S. 397 (1979).

33. *See id.* at 408 n.9 (citing 45 C.F.R. § 84.44 (1978)). The Code of Federal Regulations requires a school receiving federal funding to "make such modification to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student." 45 C.F.R. § 84.44. While *Southeastern Community College* was brought under the Rehabilitation Act of 1973, the substantive portions of that statute do not refer to a requirement that a school make a "reasonable accommodation." *Southeastern Community College*, 442 U.S. at 400; *see also* 29 U.S.C. § 794 (Supp. 1997). However, the "remedies and attorneys fees" portion of the statute states that a court in fashioning a remedy "may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable an appropriate remedy." 29 U.S.C. § 794a (a)(1) (1985).

34. *See Southeastern Community College*, 442 U.S. at 407-09.

35. *See id.*

36. *See id.* at 410-12.

courses without close supervision, the college could only allow her to take academic classes and that such change would be a "fundamental alteration in the nature of a program," rather than a modification of the program.[37] The Court noted that in some instances, however, changes could be made in programs without imposing undue financial and administrative burdens on a State. In those situations, a refusal to modify an existing program might become unreasonable and discriminatory.[38]

Therefore, between *City of Edmonds* and *Davis*, the Supreme Court has spoken on how to interpret the Fair Housing Act and the expression "reasonable accommodation." In *City of Edmonds*, the Supreme Court has said that the Fair Housing Act should be given a generous interpretation. In *Davis*, the Supreme Court held that a reasonable modification is one that does not fundamentally alter a program or impose an undue financial and administrative burden on a government. Additionally, in *City of Edmonds*, the Supreme Court reaffirmed that the purpose of land use restrictions is to prevent the "pig in the parlor" and to promote "family values."

Interpreting *City of Edmonds* and *Davis* together, housing for people with disabilities may only fundamentally alter a zoning scheme where it causes substantial identifiable problems for a community or somehow destroys family and youth values, seclusion, and clean air. This interpretation is consistent with that of the drafters of the statute as enunciated in the House Report.

## II. The Elements of a Fair Housing Act Case

Courts use four tests to determine whether a violation of the statute has occurred. Under the first test, called either "intentional discrimination" or "discriminatory treatment," a person with a disability must prove that the alleged violator intentionally acted to deprive people with disabilities of housing because of their disabil-

37. *Id.*

38. *See id.* The sentence in the decision stating that "such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State," *id.* at 412, is the source for all subsequent cases that examined whether a "reasonable accommodation" or "reasonable requirement" is required. The "reasonable accommodation" requirement is also present in the Americans With Disabilities Act. That law requires employers, 42 U.S.C. § 12112(b)(5)(A)(1995), and public accommodation, 42 U.S.C. § 12182(b)(2)(A)(2) (1995), to make reasonable accommodations to people with disabilities unless they would impose "an undue hardship on the operation of the business of such covered entity" or would "fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations" or would result in "an undue burden." 42 U.S.C. § 12182 (b)(2)(A)(iii) (1995).

ity.[39] The second test, a form of intentional discrimination, is called "facial discrimination" and involves statutes and ordinances that on their face treat people with disabilities differently from other people.[40] The third test, known as the "disparate impact" test, requires a showing that the discriminatory conduct, though seemingly neutral, has had a "disparate impact" on a person because of their disability.[41] The fourth test is the "reasonable accommodation" test.[42]

This Part first presents an overview of the elements of an "intentional discrimination," "facial discrimination," and "disparate impact" cases. It then discusses the elements of a "reasonable accommodation" case in more detail and discusses some of the earlier federal district court decisions that applied the "reasonable accommodation" test. This Part demonstrates the significance of the "reasonable accommodation" test in assuring that people with disabilities are not excluded from the American mainstream.

### A. "Intentional Discrimination," "Facial Discrimination," and "Disparate Impact"

Intentional discrimination occurs when a municipality deprives people with disabilities of housing because of their disabilities. Thus, the disabilities of the residents form the basis for the decision.[43]

However, as one court has held, "clever men easily conceal their intentions."[44] While occasionally cases have been won based upon

39. *See, e.g.*, Smith & Lee Associates v. City of Taylor, 102 F.3d 781, 790 (6th Cir. 1996); United States v. Yonkers Bd. Of Educ., 837 F.2d 1181, 1221 (2d Cir. 1987); Epicenter of Steubenville v. City of Steubenville, 924 F. Supp., 845, 851 (S.D. Ohio 1996).

40. *See, e.g.*, Larkin v. Michigan Dep't of Soc. Serv., 89 F.3d 285, 289 (6th Cir. 1996); Bangerter v. Orem City Corp., 46 F.3d 1491, 1500-01 (9th Cir. 1995); Children's Alliance v. City of Bellevue, 950 F. Supp. 1491 (W.D. Wash. 1997); Alliance for the Mentally Ill v. City of Naperville, 923 F. Supp. 1057 (N.D. Ill. 1996); *see also* Marburnak v. City of Stow, 974 F.2d 43, 47-48 (6th Cir. 1992) (applying same rationale); ARC of N.J., Inc. v. State of N.J., 950 F. Supp. 637, 645 (D. N.J. 1996); Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1297-1300 (D. Md. 1993).

41. *See, e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934-36 (2d Cir.), *aff'd* 488 U.S. 15 (1988); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1182-83 (E.D.N.Y. 1993).

42. 42 U.S.C. § 3604(f)(3)(B) (1994). *See, e.g.*, Hovsons v. Township of Brick, 89 F.3d 1096, 1103-06 (3d Cir. 1996); Proviso Ass'n of Retarded Citizens v. Village of Westchester, 914 F. Supp. 1555 (N.D. Ill. 1996).

43. *See supra* note 39 and accompanying text.

44. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d at 934-36 (quoting United States v. Black Jack, 508 F.2d 1179, 1185 (1974)).

discriminatory statements made by town officials,[45] most intentional discrimination cases are proven by circumstantial evidence demonstrating that procedures or substantive criteria were changed by a municipality in response to neighborhood opposition for the purpose of limiting housing. In such cases, courts examine the historical background of the municipality, the sequence of events leading up to the challenged decision, departures from normal procedural sequences, and departures from substantive criteria.[46] Because of the need to rely upon circumstantial evidence, an intentional discrimination case is often difficult to prove.

Courts have considered challenges to laws placing special requirements on housing for people with disabilities to be a type of intentional discrimination action known as a "facial discrimination" action.[47] In a facial discrimination action, the burden of proof is on the municipality to demonstrate that the special and unique needs the individuals warrant the imposition of special safety requirements.[48] While several cases have succeeded in striking ordinances placing special safety requirements on people with disabilities, this cause of action does not apply to neutral statutes and ordinances challenged in many actions.[49]

With regard to "disparate impact" cases, a person with a disability or a housing provider must demonstrate that the challenged practice "actually or predictably results" in discrimination.[50] This

45. *See, e.g.*, United States v. Borough of Audubon, 797 F. Supp. 353, 360 (D.N.J. 1991), *aff'd*, 968 F.2d 14 (3d Cir. 1992) (quoting a municipal official who said that he wanted to "oversee a conference of the policy community . . . so that we tag-team the individual [owner of residence for people with disabilities] through the respective Borough officials); Baxter v. City of Belleville, 720 F. Supp. 720, 732-33 (S.D. Ill. 1989) (holding that a municipal decision to exclude home for people with AIDS based on undocumented statements about AIDS constituted intentional discrimination in violation of statute).

46. *See* United States v. Yonkers Bd. Of Educ., 837 F.2d 1181, 1221-24 (2d Cir. 1987); *see also* Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, 808 F. Supp. 120, 133-35 (N.D.N.Y. 1992) (finding that a village ordinance enacted for purpose of excluding housing for people with AIDS was a form of intentional discrimination); Stewart B. McKinney Foundation v. Town Plan and Zoning Comm'n, 790 F. Supp. 1197, 1210-16 (D. Conn. 1992) (finding intentional discrimination where municipality changed its substantive and procedural requirements in response to neighborhood opposition to stop housing for people with AIDS).

47. *See supra* note 40 and accompanying text.

48. *See id.*

49. *See Bangerter*, 46 F.3d at 1500-01 (holding that the disparate impact and reasonable accommodation tests apply to neutral ordinances and only intentional discrimination and facial discrimination apply to non-neutral laws).

50. *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir.), *aff'd in part*, 488 U.S. 15 (1988).

means that the conduct of the alleged discriminatory party is more harshly felt on people with handicaps than those without.[51] Once a prima facie disparate impact case has been established, a municipality must demonstrate that its actions furthered, in theory and in practice, a legitimate bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect.[52]

However, some courts have limited the use of the "disparate impact" test. One circuit court has held that the test cannot be applied to an individual instance of discrimination.[53] As most cases center around individual instances of discrimination, this interpretation virtually eliminates the use of the test.

The Ninth Circuit has suggested that statistics are required in a disparate impact case to demonstrate that the challenged practice has a greater impact on people with disabilities than non-disabled people.[54] Statistics are not always available, and this requirement makes it difficult to prove some cases involving people with disabilities.

Regardless, to demonstrate disparate impact, the plaintiff must show that a discriminatory practice has a greater detrimental effect on people with disabilities than non-disabled people. That level of evidence would appear to be considerably more than that required under the "reasonable accommodation" test.

### B. The "Reasonable Accommodation" Test and the Early Cases Interpreting "Reasonable Accommodation

To prevail on a "reasonable accommodation" claim, a person with a disability must demonstrate that (1) a request for an accommodation was made, (2) such request was either ignored or denied, (3) the accommodation was necessary to enable the person an equal opportunity to use and enjoy the dwelling of that person's choice, and (4) the accommodation was reasonable.[55] The "reasonable accommodation" test requires neither a showing of intent or facial discrimination, nor does it require proof that a discrimina-

51. *Cf.* Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993) (citing *Huntington Branch*, 844 F.2d at 933).

52. *See id.* at 936.

53. Bryant Woods Inn, Inc. v. Howard County Maryland, 911 F. Supp. 918, 931 (D. Md. 1996), *aff'd* 124 F.3d 597 (4th Cir. 1997) (citing Coe v. Yellow Freight Systems, Inc. 646 F.2d 444, 451 (10th Cir. 1981)).

54. *See* Gamble v. City of Escondido, 104 F.3d 300, 306 (9th Cir. 1997).

55. 42 U.S.C. § 3604(f)(3)(B) (1994); *see also Bryant Woods Inn, Inc.*, 124 F.3d at 597.

tory practice has a greater impact on people with disabilities than on non-disabled people. Therefore, it appears easier to prove a case under the "reasonable accommodation" standard than under the other standards.

In the earlier "reasonable accommodation" cases decided shortly after the enactment of the Fair Housing Act, courts largely examined whether the proposed housing would be harmful to either the neighborhood or the proposed residents. It is generally assumed that an accommodation was necessary to enable the residents an equal opportunity to use and enjoy the dwelling of that person's choice.[56] For example, in *United States v. City of Philadelphia*,[57] the court ordered a municipality to make a reasonable accommodation in its ordinance requiring that all rear yards must have a certain specified footage.[58] The court held as such because municipal officials admitted that the rear yard of the house in question did provide free access to light and air, access to firefighters, and room for recreation, and that there was no danger of substantial harm to the municipality.[59] The court in *City of Philadelphia* also determined that a nexus was not required between the barrier to proposed housing and the disability of the proposed residents.[60]

Similarly, in *Oxford House, Inc. v. Town of Babylon*,[61] a court applied the "reasonable accommodation" to enjoin a municipality from enforcing an ordinance prohibiting transients from living in a residential area.[62] The court found that since the residence did not have a negative impact on the area and did not cause an undue administrative or financial hardship on the municipality, the municipality had to make a reasonable accommodation and not enforce its ordinance.[63] The court in *Town of Babylon* only considered whether it was reasonable to permit the residence to continue its

56. *See, e.g.*, United States v. City of Philadelphia, 838 F. Supp. 223 (E.D. Pa. 1993), *aff'd*, 30 F.3d 1489 (3d Cir. 1994); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993).

57. 838 F. Supp. 223 (E.D. Pa. 1993), *aff'd*, 30 F.3d 1489 (3d Cir. 1994).

58. *See id.* at 228-30.

59. *See id.* at 228.

60. *See id.* at 229-30. Compare this decision to *Bryant Woods Inn*, 124 F.3d. at 604, where the Fourth Circuit held that there had to be a direct linkage between the proposed accommodation and the disability of the person, noting that the requirement "has attributes of a causation requirement." *See also* Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998) (holding that economic discrimination without regard to disability is not covered by the Fair Housing Act).

61. 819 F. Supp. 179 (E.D.N.Y. 1993).

62. *See id.* at 1185-86.

63. *See id.* at 1186.

operation and assumed that the accommodation was necessary.[64] Other decisions have similarly considered only the "reasonableness" of the housing involved in requiring municipalities to make a "reasonable accommodation," and likewise assumed that such accommodation was necessary to provide an equal opportunity.[65]

While these decisions may appear simplistic in their analysis of "reasonable accommodation," they are reflective of the intentions of Congress and the decisions of the Supreme Court than later decisions of several courts. If a municipal zoning law prevented housing for people with disabilities, an "accommodation" — either a waiver of the rule or an interpretation of the rule permitting the housing — was certainly necessary. Similarly, people with disabilities will often need accommodations in local rules to permit them to be able to live in non-traditional groups. Without such accommodations, people with disabilities would not have the same opportunities of non-disabled people to live in a residential neighborhood of their choice.

The aim of the Fair Housing Act was to promote housing for people with disabilities in residential neighborhoods. In looking largely to the reasonableness of such housing and presuming rightfully that the accommodations were necessary, the earlier "reasonable accommodation" decisions correctly gave the Fair Housing Act the "generous construction" endorsed by the Supreme Court in *City of Edmonds.*

## III. Analysis of Recent Circuit Court Decisions Interpreting the "Reasonable Accommodation" Clause of the Fair Housing Act

In the past several years, the majority of courts have considered cases involving whether a "reasonable accommodation" was made to permit housing for people with disabilities.[66] Unfortunately, a

64. *See id.*; *see also* United States v. California Mobile Home Park Management Comp., 107 F.3d 1374, 1381 n.3 (9th Cir. 1997) (noting that causation should pose no "independent hurdle" in cases where zoning ordinances are used to block housing for people with disabilities because "the city policies directly interfere with use and enjoyment because they prevent the housing from being built").

65. *See* North Shore-Chicago Rehabilitation, Inc. v. Village of Skokie, 827 F. Supp. 497 (N.D. Ill. 1993); Horizon House Dev. Servs. Inc. v. Township of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992); United States v. Village of Marshall, 787 F. Supp. 872 (W.D. Wis. 1991); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D.N.J. 1991); United Sates v. Commonwealth of Puerto Rico, 764 F. Supp. 220 (D. P.R. 1991).

66. *See* Bryant Woods Inn, Inc. v. Howard County, Maryland, 124 F.3d 597 (4th Cir. 1997); Gamble v. City of Escondido, 104 F.3d 300 (9th Cir. 1997); Smith & Lee

majority of these cases have taken a much more narrow view of the "reasonable accommodation" test than that of the earlier decisions.[67]

This Part examines and analyzes those decisions, particularly with regard to the following questions: (1) must a party exhaust administrative remedies before filing a court action using the "reasonable accommodation" test, (2) which party has the burden of proof in a reasonable accommodations case, (3) what evidence is required to demonstrate that an accommodation was "reasonable" or "unreasonable," (4) what evidence, if any, is required to demonstrate that an accommodation is "necessary," and (5) what evidence, if any, is required to demonstrate that an accommodation would provide an "equal opportunity" for housing for people with disabilities.

## A. Exhaustion of Remedies

The Fair Housing Act is clear that an aggrieved party does not need to exhaust parallel administrative remedies provided through the United States Department of Housing and Urban Development (HUD) before commencing a Federal action.[68] However, the courts are divided with regard to whether an aggrieved party must follow local and state zoning procedures before filing a Federal action.[69] It would seem logical that if an aggrieved party does

Assoc. v. City of Taylor, 102 F.3d 781 (6th Cir. 1996); Elderhaven v. City of Lubbock, 98 F.3d 175 (5th Cir. 1996); Hovsons v. Township of Brick, 89 F.3d 1096 (3d Cir. 1996); Brandt v. Chebanse, 82 F.3d 172 (7th Cir. 1996); *see also* United States v. California Mobile Home Park Management Co., 107 F.3d 1374 (9th Cir 1997) (discussing whether a trailer park had to waive a parking fee for an aide serving a person with a disability residing in the trailer park); Shapiro v. Cadman Towers, 51 F.3d 328 (2d Cir. 1995) (questioning whether an apartment complex had to make a reasonable accommodation to provide a parking space to a person with a disability).

67. *See, e.g.*, Bryant Woods Inn, Inc. v. Howard County, Maryland, 124 F.3d 597 (4th Cir. 1997).

68. Under 42 U.S.C. § 3613(B)(2) (1994), an aggrieved person may commence a civil action whether or not a complaint has been filed with the United States Department of Housing and Urban Development. Similarly, in "pattern or practice cases," the United States can immediately go to court to challenge an act of discrimination. *See* 42 U.S.C. § 3614(a) (1994).

69. *See Bryant Woods Inn, Inc.*, 124 F.3d at 597 (holding that administrative remedies need not be exhausted); Oxford House-C v. City of St.Louis, 77 F.3d 249 (8th Cir. 1996) (finding that in the guise of a "ripeness" analysis, administrative remedies must be exhausted); United States v. City of Palatine, 37 F.3d 1230 (7th Cir. 1994); Huntington Branch, NAACP v. Town of Huntington, 689 F.2d 391, 394 n.3 (2d Cir. 1982); *see also* Oxford House v. City of Virginia Beach, 825 F. Supp. 1251 (E.D. Va. 1993) (deciding administrative remedies must be exhausted).

not need to exhaust HUD remedies before filing a Federal action, he or she should not have to exhaust local remedies.

Both the Second Circuit in *Huntington Branch, N.A.A.C.P. v. Town of Huntington*[70] and the Fourth Circuit in *Bryant Woods Inn, Inc. v. Howard County*[71] correctly held that administrative remedies need not be exhausted before the commencement of a Fair Housing Act action in federal court, even where the "reasonable accommodation" test is invoked. Both decisions note that the drafters of the statute intended administrative remedies to be a primary and not an exclusive method for seeking redress.[72]

However, in two very similar cases, the Seventh and Eighth circuits under the guise of a "ripeness" theory have required housing providers for people with disabilities to exhaust administrative remedies before commencing a federal action. In *United States v. Village of Palatine*,[73] and *Oxford House-C v. City of St. Louis*,[74] municipalities had ordinances limiting the number of unrelated people who could live in a residential neighborhood, and requiring residences with a greater number of unrelated people to apply for a special use permit.[75] Residences for recovering alcoholics and substance abusers challenged the ordinances as being discriminatory under the Fair Housing Act.[76] The residences may have been permitted in the zoning district had they applied for a special use permit, but they did not apply for such permits.[77]

The courts in *Village of Palatine*[78] and *City of St. Louis*[79] dismissed the residences' actions, holding that the cases were not ripe because the residences did not exhaust their administrative remedy of seeking a special use permit. Although the Seventh and Eighth circuits couched their decisions in terms of the doctrine of "ripeness," in effect, both of these decisions required housing providers for people with disabilities to exhaust administrative remedies before filing a federal action.

The decisions of the Second and Fourth circuits represent the view more consistent with the drafters of the Fair Housing Act. By

70. *See Huntington Branch, NAACP*, 689 F.2d at 394 n.3.
71. *See Bryant Woods Inn, Inc.*, 124 F.3d at 599.
72. *See Bryant Woods Inn, Inc.*, 124 F.3d at 597; *Huntington Branch*, 689 F.2d at 394 n.3.
73. 37 F.3d 1230 (7th Cir. 1994).
74. 77 F.3d 249 (8th Cir. 1996).
75. *See Oxford House-C*, 77 F.3d at 251; *Village of Palatine*, 37 F.3d at 1231-32.
76. *See Village of Palatine*, 37 F.3d at 1231-32.
77. *See id.*
78. 37 F.3d at 1233-34.
79. 77 F.3d at 253.

their very nature, permit applications cause delays in access to housing. Accordingly, homeowners may decline to sell or rent their houses to people with disabilities if the sale or rental must await the outcome of the permit process. Additionally, permit applications often subject the applicant to public scrutiny and thus ultimately discourage people with disabilities from residing in neighborhoods with permit requirements.[80]

Not all permit requirements are necessarily discriminatory. However, the drafters of the Fair Housing Act intended that the statute be used to vigorously promote access to housing for people with disabilities in all residential neighborhoods. Therefore, as permit requirements could discourage access to housing in residential neighborhoods, it would appear that the drafters of the statute intended that permit requirements be scrutinized in federal court at the first instance.

It is not clear that the housing providers in *Village of Palatine* and *City of St. Louis* were able to demonstrate that people with disabilities needed to live in groups of unrelated people greater than that permitted as of right by the municipalities for therapeutic reasons because of their disabilities.[81] However, if a housing provider were able to show that its people with disabilities needed to live in groups of unrelated people for therapeutic or financial purposes, a permit requirement would clearly impede those people with disabilities from having an opportunity to live in the community. In such a circumstance, exhaustion should not be required as the imposition of such a permit requirement would be discriminatory *per se*.

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80. *See* Horizon House Dev. Servs. v. Township of Upper Southampton, 804 F. Supp. 683, 700 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993) (holding that provider of housing for people with disabilities did not have to apply for variance because procedures were too burdensome); Easter Seal Society of New Jersey v. Township of North Bergen, 798 F. Supp. 228, 236 (D.N.J. 1992) (holding that a provider of housing for people with disabilities did not have to apply for variance or permits before filing action under Fair Housing Act); Stewart B. McKinney Foundation v. Town Plan and Zoning Comm'n, 790 F. Supp. 1197, 1219-20 (D. Conn. 1992) (holding that provider of housing for people with AIDS need not follow municipal administrative procedures because of their burdensomeness and stigmatization of prospective residents).

81. Courts have noted that whether an accommodation is necessary for financial or therapeutic reasons will be considered by a court in determining whether to require such accommodation. *See, e.g., Bryant Woods, Inn, Inc.*, 124 F.3d at 605; Gamble v. City of Escondido, 104 F.3d 300, 307 (9th Cir. 1996); Smith & Lee Associates v. City of Taylor, 102 F.3d 781, 795 (6th Cir. 1996); Erdman v. City of Fort Atkinson, 84 F.3d 960, 962 (7th Cir. 1996); Brandt v. Village of Chebanse, 82 F.3d 172, 174 (7th Cir. 1996).

As housing discrimination against people with disabilities is now on an equal footing with housing discrimination on other bases, analogies can be made to these types of cases. For example, if a law had required that members of a particular race, religion, or national origin had to apply for a permit before residing in a community, no court would have required that a member of such particular race, religion or national origin apply for a permit before being able to challenge such a law.[82] Similarly here, exhaustion should not be required before the commencement of a Federal action.

### B. Burden of Proof

The courts are also split as to which party should have the burden of proof in a reasonable accommodation case.

In *Hovsons, Inc. v. Township of Brick*,[83] the Third Circuit held that the burden of proof was on the municipality to demonstrate that it could not make a reasonable accommodation to permit housing for people with disabilities.[84] In reaching this conclusion, the court followed its precedents interpreting the Rehabilitation Act, placing the burden of proving on the defendant.[85]

On the other hand, the Fourth Circuit in *Bryant Woods Inn, Inc. v. Howard County* held that the burden of proof in a reasonable accommodation should be on the proponent of housing because the burden of proof in an action is usually on a plaintiff and, in its view, the statute's text "evidences no intent to alter normal burdens."[86] The Fifth Circuit in *Elderhaven, Inc. v. City of Lubbock*,[87] had a similar view, and noted that in the Fifth Circuit, it is the plaintiff that has the burden of proof in a case brought under the Rehabilitation Act.[88]

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82. *See, e.g.*, Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1996 (D. Md. 1993) (holding that requirement that group homes for people with mental disabilities notify the neighborhood before their establishment was equally as offensive as a requirement that minority persons give notice before moving into a non-minority neighborhood). *See also* Epicenter of Steubenville, Inc. v. City of Steubenville, 924 F. Supp. 845, 851 (S.D. Ohio 1996) (noting that the municipality's imposition of a moratorium constituted discriminatory intent and that it was "like the hoods of Klansmen masking the faces of criminals" and equated a law excluding people with disabilities with laws excluding minorities).

83. 89 F.3d 1096 (3d Cir. 1996).

84. *See id.* at 1103.

85. *See id.*

86. *Id.*

87. 98 F.3d 175 (5th Cir. 1996).

88. *Id.* at 177. As discussed in detail in the Second Circuit's decision in *Borkowski v. Valley Central School District*, 63 F.3d 131 (2d Cir. 1995), there is a split in circuits

Generally, burdens of proof are allocated based upon which party has the possession of the most evidence necessary to prove the position.[89] In consideration of that principle, the decisions of the Fourth and Fifth circuits unreasonably place housing providers with the burden of proving that their housing would not cause and undue burden or substantial hardship on a community or that their housing would not fundamentally alter a neighborhood.

Remembering that a reasonable accommodation case has three elements- reasonableness, necessity, and equality- the burden of proof for these elements should be split between the parties. As a proponent of housing for people with disabilities knows more about its proposed housing than the municipality, the housing proponent should be required to demonstrate why it needs an accommodation from an ordinance or rule, and why such an accommodation would provide people with disabilities with an equal housing opportunity. On the other hand, a municipality, which would normally have more information about its own structure and finances and its neighborhoods, should bear the burden of proof of showing that housing for people with disabilities would cause an undue burden or hardship on the municipality.

The model for this standard is the Second Circuit's decision in *Borkowski v. Valley Central School District*,[90] an employment discrimination case brought under the Rehabilitation Act pursuant to a reasonable accommodation theory. In *Borkowski*, the Second Circuit placed the burden on the employee to show that she needed an accommodation to retain her employment and that such an accommodation existed to provide her with the opportunity to continue her employment.[91] As for the employer, the Second Circuit placed the burden on it to demonstrate that the accommodation sought by the employee was unreasonable; i.e., that it would create an undue hardship or substantial burden on the employer.[92]

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as to which party had the burden of proof in an employment action brought pursuant to he Rehabilitation Act. *See id.* at 135-37.

89. *See, e.g.*, Morgado v. Birmingham-Jefferson County Civil Defense Corps., 706 F.2d 1184, 1189 (11th Cir. 1983) (holding that employer relying in Equal Pay Act provision allowing pay differentials for reasons other than sex must prove entitlement to provision's protection because such facts are peculiarly within the knowledge of the employer); EEOC v. Radiator Specialty Co., 610 F.2d 178, 185 n.8 (4th Cir. 1979) (holding that "general principle of allocation of proof to the party with the most ready access to the relevant information" requires Title VII defendant to show in appropriate of labor pool statistics).

90. 63 F.3d 131 (2d Cir. 1995).

91. *See id.* at 138-39.

92. *See id.*

The *Borkowski* court correctly recognized both the purposes of the Rehabilitation Act and the reality of which party would have the most access to evidence in allocating the burden of proof in a reasonable accommodation case.

### C. Reasonableness

Obviously, a court must consider whether an accommodation sought by a proponent of housing for people with disabilities is "reasonable" under the "reasonable accommodation" test. Adopting the "reasonableness" test used under the Rehabilitation Act, an accommodation is reasonable if it does not cause an undue hardship or burden on a municipality or result in the fundamental alteration of the residential nature of an area.[93]

Whether an accommodation to permit a particular house in a particular neighborhood is "reasonable" must be examined on a case-by-case basis. The following are some of decisions that have examined whether a particular accommodation is "reasonable."

Three courts have ruled that requested accommodations for housing for people with disabilities were reasonable and required the provision of such accommodations. In *Shapiro v. Cadman Towers, Inc.*,[94] a resident of an apartment complex needed a nearby parking space within the building complex because of her disability. Even though the building allocated three spaces for building staff and another parking spot for a person that did not live in the building, the apartment complex refused to grant her a space, and put her on a waiting list.[95]

The Second Circuit ruled in favor of the resident, holding that it would not be unreasonable to permit that person to have the spot of one of the employees.[96] The court held that permitting the resident to have a spot in spite of the waiting list would not cause an undue hardship or substantial burden on the apartment complex.[97]

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93. *See* Smith & Lee Associates v. City of Taylor, 102 F.3d 781, 795 (6th Cir. 1996); Hovsons v. Township of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996); Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334-35 (2d Cir. 1995).

94. 51 F.3d 328 (2d Cir. 1995).

95. *See id.* at 331.

96. *See id.* at 335-36.

97. *See id.* The Court cited both the HOUSE REPORT and *Southeastern Community College v. Davis* in reaching its conclusion. *See id.* at 334. However, the Court, refused to determine the issue of whether the resident with a disability could have usurped the rights of other tenants on the ground that the Court found that the resident with a disability could be accommodated without burdening any other resident. *See id.* at 336.

In *Hovsons, Inc. v. Township of Brick*,[98] the issue was whether a municipality was required to permit a developer of a nursing home for people with disabilities to build the nursing home in a residential zoning district.[99] In *Hovsons*, the Third Circuit held that a municipality's refusal to permit a 210-resident nursing home in a residential neighborhood was unreasonable.[100]

In ruling in favor of the nursing home, the Third Circuit noted that granting a variance to the housing developer would not have placed undue financial and administrative burdens on the municipality, or have resulted in the imposition of an undue hardship on the community, or have changed the resdidential character of the area.[101] The court noted that the residents of the nursing home would be taxpaying members of the municipality, that the nursing home would arrange for its own garbage collection, street maintenance and snow removal, and that the nursing home would not be using municipal emergency services to any more than area retirement developments.[102]

Finally, in *Smith & Lee Associates v. City of Taylor*,[103] the Sixth Circuit held that requiring a municipality to permit an adult foster care home for nine residents in a neighborhood whose zoning only permitted adult foster care homes for six people was not unreasonable and directed the municipality to permit an adult foster care home for nine people.[104] The Sixth Circuit held that the addition of three additional residents to the neighborhood would not fundamentally alter the nature of the single-family neighborhood.[105]

In reaching its conclusion that the municipality was required to accept an adult foster care home for nine residents, the Sixth Circuit engaged in a cost-benefit analysis. The Sixth Circuit weighed the fact that three additional people would be moving into the neighborhood with the fact that the residents would likely not drive and cause traffic or parking problems for the neighborhood.[106]

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98. 89 F.3d 1096 (3d Cir. 1996).

99. *See id.* at 1098-99.

100. *See id.* at 1105-06.

101. *See id.*

102. *See id.*

103. 102 F.3d 781 (6th Cir. 1996).

104. *See id.* at 785.

105. *See id.* at 795-96. The Court also cited the House Report and the Supreme Court's decision in *Southeastern Community College*. *See id.* at 795.

106. *See id.* at 796.

While the decisions in *Shapiro*, *Hovsons*, and *Smith & Lee Associates* all resulted in services or housing being afforded to people with disabilities and comported with the intentions of the drafters of the statute, it could be argued these cases discriminate against people with disabilities. A non-disabled person can move into a community and cause an administrative and financial burden on a municipality. However, a non-disabled person would not be subject to court scrutiny or forced to leave a community if that person did cause an administrative and financial burden on a municipality or fundamentally alter a residential neighborhood provided that said person's actions were not illegal.

On the other hand, even under the most liberal interpretations of the Fair Housing Act, housing for people with disabilities can be excluded if they create an administrative and financial burden on a municipality or fundamentally alter a residential neighborhood. Whether people with disabilities who do create an administrative and financial burden or fundamentally alter a residential neighborhood should have the same right to do so as non-disabled people may well be the subject of future litigation.

Two cases have ruled that proposed accommodations for housing for people with disabilities were unreasonable.[107] In *Bryant Woods Inn, Inc. v. Howard County*,[108] the Fourth Circuit ruled that a request to increase housing for elderly people with disabilities from eight to fifteen people was unreasonable because a member of the municipal planning board observed vehicles parked "all over the place and also in the driveway."[109]

The Fourth Circuit's decision view of "reasonableness" in *Bryant Woods Inn* is too constrained and does not comport with the intentions of the drafters of the statute.[110] Even if it were observed that there were vehicles "all over the place and also in the driveway," the Court's decision failed to consider how often such parking problems occurred. Likewise, other cited problems such as minimal frontage of the site and the comparison of the size of the site with other group homes of similar size do not necessarily demonstrate that an accommodation here would have been unreasonable.

Moreover, the court failed to address the fact that a related family of fifteen non-disabled people could have moved into the house

107. *See Bryant Woods Inn, Inc.*, 124 F.3d at 597; *Brandt*, 82 F.3d at 172.

108. *See Bryant Woods Inn, Inc.*, 124 F.3d at 604-06.

109. *Id.*

110. Yet, the court does acknowledge the HOUSE REPORT and the dictates of *Southeastern Community College v. Davis*. *See id.* at 603.

in question. If fifteen non-disabled related people lived at the residence in spite of its minimal frontage and the size of other housing in the community for fifteen people, then why was it unreasonable to permit fifteen disabled people at the residence?

In *Brandt v. Village of Chebanse*,[111] the Seventh Circuit held that a municipality's denial of a variance to build a four-unit house in an area zoned for single families was not unreasonable because of the "loss of whatever tranquility single-family zoning offers to a neighborhood."[112] However, the Court's decision failed to describe in detail how construction of the four-unit house would increase the potential for noise, and did not consider that a large family in a single family house could have the same or greater impact noise.

In determining that various housing proposals for people with disabilities were unreasonable, the courts in both *Bryant Woods Inn* and *Brandt* made factually unsupported assumptions that housing for people with disabilities would be more deleterious for the community than housing for non-disabled people. Such assumptions were in conflict with the intent of the drafters of the statute.

### D. Necessity

The "reasonable accommodation" prong of the statute requires that an accommodation sought "be *necessary* to afford such person equal opportunity to use and enjoy a dwelling."[113] Considering that the statute was intended to increase access to housing for people with disabilities, the "necessary" clause should simply mean that if it is necessary to lift a barrier to permit housing, the barrier must be lifted.[114]

For example, in *Smith & Lee Associates v. City of Taylor*,[115] the Sixth Circuit found that a requested accommodation to permit nine unrelated people with disabilities to live in a residence was "neces-

111. 82 F.3d 172 (7th Cir. 1996).

112. *Id.* at 175.

113. Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B) (1994).

114. In *Bryant Woods Inn*, 124 F.3d at 604, the court equated this prong to a "causation requirement." However, in *United States v. California Mobile Home Park Management Company*, 107 F.3d 1374, 1381 n.3 (9th Cir. 1997), the court noted that in cases where zoning barriers impede housing for people with disabilities, "causation poses no independent hurdle" for housing providers because "city policies directly interfere with use and enjoyment because they prevent the housing from being built." *See also* United States v. City of Philadelphia, 838 F. Supp. 223 (E.D. Pa. 1993), *aff'd*, 30 F.3d 1489 (3d Cir. 1994) (holding that no nexis need be demonstrated between the barrier to the proposed housing and the disability of the residents).

115. 102 F.3d 781 (6th Cir. 1996).

sary" because there was a demonstrated need for the housing and that it was necessary to permit nine residents rather than the six permitted by the ordinance for financial reasons.[116]

However, several circuit courts have used the "necessary" clause as a barrier to housing for people with disabilities.[117] Such an interpretation of the clause conflicts with both the intention of the drafters of the Fair Housing Act and the mandate of the Supreme Court that the statute be given a "generous construction."

For example, in *Elderhaven, Inc. v. City of Lubbock*,[118] the Fifth Circuit held that the municipality did not have to make a reasonable accommodation to a housing provider to permit it to house two more residents with disabilities because the provider failed to allege or prove that the number of people it sought to house was a "critical number" to make housing sought economically feasible.[119] However, unlike the Sixth Circuit in *Smith & Lee*, the Fifth Circuit viewed the case from the point of view of the provider rather than the person with a disability. Even if the number of people in *Elderhaven* was not the "critical number" to make housing sought economically feasible, the Fifth Circuit's decision allowed a municipality to make housing unavailable to two people with disabilities. For those two people, an accommodation was certainly "necessary."

Some courts have suggested that an accommodation is not necessary when people with disabilities could live elsewhere. For example, in *Brandt*[120] the Seventh Circuit held that an accommodation to build four-unit housing for people with disabilities in a single-family zone was not "necessary" because the developer could have built his four-family unit elsewhere.[121]

The Seventh Circuit's decision in *Brandt* ignores the language of the statute stating that an accommodation may be necessary to afford such person equal opportunity "to use and enjoy a dwell-

116. *Id.* at 795-96.

117. *See Bryant Woods Inn, Inc.*, 124 F.3d at 605; Elderhaven v. City of Lubbock, 98 F.3d 175, 178 (5th Cir. 1996); *Brandt*, 82 F.3d at 175.

118. 98 F.3d 175 (5th Cir. 1996).

119. *See id.* at 179. The court in *Elderhaven* seemed to be impressed by the city's past record regarding housing for people with disabilities. *See id.* at 178. While a municipality's past record with regard to housing for people with disabilities may be relevant in an intentional discrimination case, it should have no relevance regarding whether a particular accommodation sought is reasonable and necessary to provide an equal opportunity.

120. 82 F.3d 172 (7th Cir. 1996).

121. *Id.* at 175.

ing."[122] "To use and enjoy a dwelling" logically would mean to use and enjoy a particular dwelling, and not some other configuration of the dwelling or a dwelling at another location. The latter concept, that a municipality could prevent housing for people with disabilities in some areas by permitting such housing in other areas, is particularly offensive. As a municipality certainly could not designate limited areas of a municipality for people of a particular race, religion, or national origin, it should not designate a limited area of a municipality for housing for people with disabilities.[123]

Perhaps the decision on the "necessity" of an accommodation that is most at variance with the intent of the statute's drafters and the Supreme Court's "generous construction" of the statute is the Fourth Circuit's recent decision in *Bryant Woods Inn*.[124] The issue before the Fourth Circuit there was whether the municipality should grant a variance to permit a housing provider to expand its residence for people with disabilities from eight to fifteen.[125] The court held that an accommodation was not "necessary" because: a) other group homes in the municipality housed eight people; b) there was no evidence that group homes were not financially or therapeutically viable with only eight people; and c) there were vacancies in other group homes in the municipality.[126]

In viewing the question of "necessity" from the point of view of the housing provider, rather than the point of view of the person

122. 42 U.S.C. § 3604(f)(3)(B) (1994).

123. In contrast, see *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1344 (D.N.J. 1991), which noted in rejecting a municipality's argument that it could exclude a housing for people with a disability in a given area because it permitted such housing in other areas that "anti-discrimination laws are designed to prevent just such discriminatory segregation." *See also* Elliot v. City of Athens, 960 F.2d 975, 982-84 n.12 (11th Cir. 1992) (holding that a municipality can exclude housing people with disabilities from some areas if it permits such housing in other neighborhoods).

In *Erdman v. City of Fort Atkinson*, 84 F.3d 960 (7th Cir. 1996), the Seventh Circuit again mused over whether the question as to whether the "reasonable accommodation" clause gives people a right to reside at a particular dwelling or within a particular municipality, implying that the municipality may have the right to restrict housing for people with disabilities to certain areas. Again, the answer to this should be simple. The drafters of the Fair Housing Act intended that people with disabilities have the right to reside in housing of their choice, and not housing in some part of the municipality they may not choose. *See also* City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 806 (9th Cir. 1994), *aff'd*, 514 U.S. 725 (1995); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1185 n.10 (E.D.N.Y. 1993) (citing courts that held that the Fair Housing Act gave people with disabilities right to live in housing of their choice).

124. 124 F.3d 597 (4th Cir. 1997).

125. *See id.* at 605.

126. *See id.*

with a disability seeking to live in a particular residence,[127] the court's decision on "necessity" in *Bryant Woods Inn* was erroneous. As a result of the municipality's determination, seven people with disabilities were prevented from living in a particular residence, regardless of whether other group homes housed eight people, whether group homes were financially or therapeutically viable with only eight people, or whether there were vacancies in other group homes in municipality. Since the municipality's determination barred seven people from living in a particular group home, the court should have determined that an accommodation was necessary for those seven people, and then proceeded to determine the reasonableness of the accommodation sought.

### E. Equality

An accommodation sought must be necessary "to afford such person equal opportunity to use and enjoy a dwelling."[128] As the Sixth Circuit correctly held in *Smith & Lee Associates v. City of Taylor*,[129] the "equal opportunity" clause prohibits the exclusion of people with disabilities from zoning neighborhoods or municipal decisions "that will give disabled people less opportunity to live in certain neighborhoods than people without disabilities."[130] Simi-

127. The issue is not one of standing, but rather one of perception. Housing providers clearly have the right to commence actions under the Fair Housing Act. *See, e.g.*, Horizon House Developmental Servs., Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 692-93 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993); Stewart B. McKinney Foundation, Inc. v. Town Plan & Zoning Comm'n, 790 F. Supp. 1197, 1208-09 (D. Conn. 1992).

128. *See* 42 U.S.C. § 3604(f)(3)(B) (1994).

129. 102 F.3d 781 (6th Cir. 1996).

130. *Id.* at 795. The court also correctly noted that the phrase "equal opportunity" under the Fair Housing Act involves "achieving equal results, not just formal equality" and an "affirmative duty." *Id.* at 795; *see also* Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1186 n.11 (E.D.N.Y. 1993) (finding that the Fair Housing Act required an affirmative action). In contrast, the Fourth Circuit in *Bryant Woods Inn, Inc. v. Howard County, Maryland*, 124 F.3d 597 (4th Cir. 1997), rejected the notion that the Fair Housing Act intended to require "equal results." *See id.* at 604. The court cited to *Alexander v. Choate*, 469 U.S. 287, 309 (1985), where the Supreme Court held that if a state reduced a benefit equally to both people with disabilities and non-disabled people, such action did not violate the Rehabilitation Act even though it had effectively had a greater impact on people with disabilities. *See Bryant Woods Inn, Inc.*, 124 F.3d at 605. However, the *Bryant Woods Inn* application of *Alexander* is erroneous. *See id.* The decision of the municipality in *Bryant Woods Inn* resulted in the exclusion of residents from the municipality, while the decision of the defendant state in *Alexander* did not result in an exclusion of services or denial of access. Indeed, the Supreme Court noted that it based its decision on the fact that there was no denial of access or exclusion from benefits involved in its case. *Alexander*, 469 U.S. at 309.

larly, the Seventh Circuit in *Erdman v. City of Fort Atkinson*[131] noted that where the issue is whether a number of unrelated people with disabilities can live in a single-family residence, "equal opportunity" can be demonstrated by showing that living in unrelated groups of a particular size is therapeutic and also is the only way most of the residents can live in a single-family home.[132]

In contrast, the Fourth Circuit in *Bryant Woods Inn* held that a request for a variance to expand a group home from eight to fifteen people would not provide an equal opportunity to the provider's residents but instead a financial advantage to the provider.[133] Again, the Fourth Circuit wrongfully viewed the Fair Housing Act through the eyes of the housing provider rather than the eyes of the person with a disability. If people with disabilities need to live in an unrelated group for therapeutic reasons, a deprivation of that right would deny them an equal opportunity to reside in a community. If fifteen related people can live in a residence, then inequality would exist if fifteen unrelated people could not live in the residence if they needed to live together because of their disability.

It has been argued that ordinances limiting group living such as fraternities and sororities constitute "equality" because it is applicable to both people with disabilities and non-disabled people.[134] However, non-disabled people do not need to reside in fraternities and sororities to be able to live in a residential neighborhood, while people with disabilities, because of their disabilities, may need to live in a group setting in order to be able to live in a residential zone.[135]

## IV. Recommendations

As was the case in the earlier district court "reasonable accommodation" cases, the focus in a "reasonable accommodation" case should be on whether a proposed accommodation is "reasonable." The issues of "necessity" and "equality" should be relatively easy to resolve in most cases. If a zoning barrier remains between a person with a disability and the housing the person desires, an ac-

131. 84 F.3d 960 (7th Cir. 1969).

132. *See id.* at 963.

133. *Bryant Woods Inn, Inc.*, 124 F.3d at 605.

134. *See* Elliot v. City of Athens, 960 F.2d 975, 982-84 (11th Cir. 1992).

135. *See* Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1183 (E.D.N.Y. 1993) (holding that recovering alcoholics and substance abusers need to live in group setting to encourage recovery).

commodation is "necessary" to remove the barrier. If a person with a disability, because of the disability, cannot live in housing or an area that a person without a disability can live in, inequality of opportunity has been proven. As the Seventh Circuit noted in *Erdman v. City of Fort Atkinson*,[136] the amount of proof necessary to show that equal opportunity does not exist "is slight," and, ordinarily, "inequality is fairly obvious."[137]

Therefore, the key question in a "reasonable accommodation" case should be whether a proposed accommodation is "reasonable." Since the municipality possesses the most information about its services, finances, and neighborhoods, it should be forced to bear the burden of proving that a reasonable accommodation cannot be made. Placing the burden on the housing provider to demonstrate that the municipality would not suffer an undue hardship or burden or would not substantially alter the nature of a residential neighborhood would illogically force the provider to have to prove a negative fact. Similarly, courts should not require housing providers to exhaust administrative remedies which are generally barriers to housing that the drafters of the statute sought to eliminate.

While some courts have placed a more cramped reading on the "reasonable accommodation" test than necessary, they have provided a more expansive reading of the "facial discrimination" standard, as well as the provisions of the Americans With Disabilities Act barring discrimination by zoning authorities against people with disabilities. These readings are more consistent with intentions of the drafters of the statutes, and correctly consider the impact on people with disabilities, rather than the impact on housing providers.

For example, in *Larkin v. State of Michigan Department of Social Services*,[138] the Sixth Circuit considered the question of whether a state statute placed a spacing requirement between group homes for people with disabilities violated the Fair Housing Act.[139] The Sixth Circuit held that the statute was facially discriminatory in violation of the statute, stating that a statute could only survive a challenge if it were "warranted by the unique and specific needs and

136. 84 F.3d 960 (7th Cir. 1996).
137. *Id.* at 963.
138. 89 F.3d 285 (6th Cir. 1996).
139. *See id.* at 288-89.

abilities of those handicapped persons."[140] Similarly, the Tenth Circuit in *Bangerter v. Orem City Corporation*[141] held that an ordinance requiring a certain level of supervision in residences for people with disabilities would violate the statute unless it was necessary to satisfy the unique and special needs of the people to whom applied.[142]

Both the *Larkin* and *Bangerter* decisions are significant because they considered the needs of people with disabilities in determining the validity of statutes. Similarly, in reasonable accommodation cases, courts should consider the needs of people with disabilities in determining whether an accommodation is reasonable and necessary to provide an equal opportunity for housing.

Finally, in *Innovative Health Systems, Inc. v. City of White Plains*,[143] the Second Circuit held that Title II of the Americans With Disabilities Act applied to zoning ordinances and that a zoning decision barring an alcohol and drug-dependency treatment center violated the Act.[144] If courts continue to interpret the "reasonable accommodation" prong of the Fair Housing Act in a restrictive fashion, housing providers should look to the Americans With Disabilities Act for relief.

The Fair Housing Act was aimed at removing barriers to housing for people with disabilities. The restrictive interpretation placed upon the "reasonable accommodation" test by several courts only creates new barriers to housing for people with disabilities not intended by either the drafters of the statute or the Supreme Court. The Court held in *City of Edmonds*, the statute should receive a "generous construction" to remove unnecessary barriers to housing for people with disabilities.

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140. *Id.* at 290. The court also cited to the House Report. *Id.* at 285. The court rejected two decisions by the Eighth Circuit: *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991), and *Oxford House-C v. City of St. Louis*, 77 F.3d 249 (8th Cir. 1996) (holding that facially discriminatory laws lacking a malevolent motive do not constitute intentional discrimination and that facially discriminatory laws must be upheld if they merely are rationally related to a legitimate government objective). *See Larkin*, 89 F.3d at 290.

141. 46 F.3d 1491 (10th Cir. 1995).

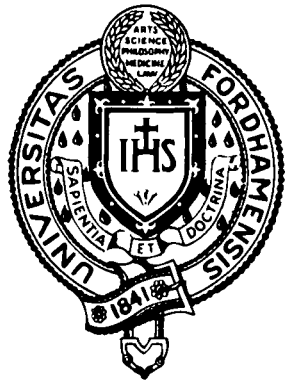
142. *See id.* at 1503-05.

143. 117 F.3d 37 (2d Cir. 1997).

144. *See id.* at 49. Unlike the Fair Housing Act, a provider can prevail under the Americans With Disabilities Act without proof of either a malevolent motive or a facially discriminatory ordinance, or that a particular accommodation is "necessary."

## Conclusion

In enacting the Fair Housing Act, Congress intended to remove land use barriers to housing for people with disabilities. The Supreme Court recognized this intent when it refused to exempt a land use restriction in *City of Edmonds*. However, more recent federal cases have wrongfully interpreted the language of the statute in ways that create new barriers for housing for people with disabilities. As the language of the statute can be easily interpreted in a manner which provides access to housing for people with disabilities, the cases placing a restrictive reading on the language of the statute wrongfully conflict with the intentions of the drafters of the statute.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