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Community Housing Trust: A Fair Standard for the Fair Housing Amendments Act

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COMMUNITY HOUSING TRUST: A FAIR STANDARD FOR THE FAIR HOUSING AMENDMENTS ACT

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INTRODUCTION

Few people would argue with the notion that "a person's quality of life depends largely on where he or she lives."[1] Indeed, one's home is generally the source of present contentment, past memories, and future expectations. Yet for many individuals, a quality home is no more than an improbable dream. This stark reality is of particular relevance to those who live with a major mental illness. People who suffer from mental illnesses have a long history of inadequate housing options, a trend that continues to the present.[2] People who live with mental illnesses of any kind are often relegated to the least attractive areas, where conditions are typically unpleasant and downright dangerous.[3] Often times, however, these individuals are the more fortunate members of the mentally ill community. Faced with inadequate community-based health systems, exclusionary zoning policies, and a lack of financial resources, many mentally ill people end up in substandard housing or even homeless. A recent study reveals that roughly twenty to twenty-five percent of the single adult homeless

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1. Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 928 (1994).

2. *Id.* at 929.

3. Nancy K. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J. 375, 388 (1982).

population suffers from some form of severe, chronic mental illness.[4] This figure indicates that there are disproportionate numbers of mentally ill people among the homeless population,[5] as only four percent of the total U.S. population suffer from a mental illness.[6]

The fact that so many mentally ill individuals are either homeless or live in substandard housing is a serious public health concern. Just as retro-viral medication is vital to individuals with HIV for their medical well-being, proper housing resources are likewise essential to the health of the mentally ill.[7] Quality housing in reasonably safe neighborhoods is arguably just as important, if not more so, than any other therapy they may receive. In fact, some experts on homelessness "have observed that the mentally ill need decent shelter as much or more than they need additional mental health services, because their therapeutic and survival needs are inseparable and because 'pathologies of place compound disorders of mind.'"[8] Housing, therefore, is an issue of significant importance when addressing the health concerns of the mentally ill.

The problem of homelessness and generally inadequate housing for the mentally ill is an enormous issue with tremendous subtlety and complexity. It is an issue that defies comprehensive answers and complete resolution, yet there is always progress to be made. One such development is illustrated by a recent case, *Community Housing Trust v. Department of Consumer & Regulatory Affairs*.[9] In this decision, the U.S. District Court for the District of Columbia held that rational basis review is an insufficient standard for discrimination cases that fall under the auspices of the Fair Housing Amendments Act (FHAA).[10] In doing so, the court made a conscious decision to follow a growing majority of federal circuits that require a more searching scrutiny in deciding cases that fall under the FHAA.[11]

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4. NAT'L RES. AND TRAINING CTR. ON HOMELESSNESS AND MENTAL ILLNESS, GET THE FACTS, *at* http://www.nrchmi.samhsa.gov/facts/facts_question_3.asp (last visited April 22, 2005).

5. *Id.*

6. *Id.*

7. Indeed, "The rise in homelessness among the mentally ill graphically illustrates the fact that their need for housing cannot be divorced from their need for mental health treatment." Rhoden, *supra* note 3, at 415.

8. *Id.* at 415, 416 (quoting Baxter & Hopper, *Pathologies of Place and Disorders of Mind*, HEALTH PAC/BULL., Mar.-Apr. 1980, at 21).

9. 257 F. Supp. 2d 208 (D.D.C. 2003).

10. *Id.* at 229.

11. *Id.*

This Note will analyze the *Community Housing Trust* decision and the historical context in which it arose. The analysis will begin with a discussion of the deinstitutionalization movement of the mid-twentieth century and how inadequate planning and exclusionary zoning policies have frustrated the goals of this movement. The Note will then examine the *Community Housing Trust* decision and compare it with various circuit court opinions that have addressed the issue. Finally, through an analysis of the legislative history and Supreme Court jurisprudence regarding the Fair Housing Act (FHA)[12] and FHAA[13] and a discussion of mental illness and perceived dangers to the community, this Note will conclude that the D.C. District Court's decision to employ a more rigorous standard is both good law and good policy, and should be followed by the various circuits as they continue to face this question.

I. THE DEINSTITUTIONALIZATION MOVEMENT AND ITS CONSEQUENCES

For centuries, humanity has struggled with the question of caring for its mentally ill population. Historically, strategies for dealing with the "insane" or the "feeble-minded" were heavily colored by the belief that they were possessed by demons.[14] The movement to institutionalize them, that is, to pack the mentally ill into locked hospital wards, was itself believed to be a humane gesture. There, at least, they could be protected from abuse and neglect from the outside world.[15] Over time, however, it became apparent that such warehousing of persons was not a humane approach, and a new movement—deinstitutionalization—arose in its stead.

The goal of the deinstitutionalization movement was, and continues to be, to bring the mentally ill out of the oppressive hospital setting and place them in a more mainstream community environment.[16] From 1955 to 1965, the population of mental patients in hospitals

12. 42 U.S.C. § 3601 (1968).

13. 42 U.S.C. § 3601 (1988).

14. RAYMOND L. SPRING ET AL., PATIENTS, PSYCHIATRISTS AND LAWYERS: LAW AND THE MENTAL HEALTH SYSTEM 1, 3 (2d ed. 1997).

15. Rhoden, *supra* note 3, at 401.

16. Peter W. Salsich, Jr., *Group Homes, Shelter, and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP. PROB. & TR. J. 413, 416 (1986).

decreased from 559,000 to 475,200.[17] By 1976, that number fell to 171,000.[18] While a number of factors may have contributed to the movement, the three most significant are: (1) the exposure of the deplorable conditions within the institutions;[19] (2) the economic incentive to send patients away;[20] and (3) the judicial movement, begun by Judge David L. Bazelon in *Lake v. Cameron*,[21] to place individuals with mental illnesses in the "least restrictive setting."[22]

In 1958, the President of the American Psychiatric Association, Harry Soloman, declared that conditions in psychiatric hospitals were "bankrupt beyond remedy."[23] The horrifying conditions witnessed by mid-century reformers "revealed the extent to which the very structure of the asylum helped to create and perpetuate the pathology it was designed to cure."[24] In short, the institutions built to improve the lives of the mentally ill were themselves considered decidedly un-therapeutic.[25] This exposure of these deplorable conditions was a major driving force in the deinstitutionalization movement.

The deinstitutionalization movement was also spurred by an unusual alliance between libertarian crusaders and fiscally conservative politicians.[26] On the one hand, new policies that liberated captive people and made the process of involuntary commitment to asylums more difficult were hailed as great advancements in social justice. On the other hand, state officials focused on cost-cutting found satisfaction in canceling plans to build new hospitals, reductions in expenditures to support patients, and the use of land from closed hospitals for other revenue-generating purposes.[27] While some commentators have tried

17. Rhoden, *supra* note 3, at 402.

18. *Id.*

19. *Id.* at 380.

20. *Id.* at 381-382.

21. Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966).

22. Rhoden, *supra* note 3, at 420.

23. *Id.* at 380 (quoting Statement of Harry Solomon, as quoted in Robitscher, *Implementing the Rights of the Mentally Disabled: Judicial, Legislative and Psychiatric Action*, *in* MEDICAL, MORAL AND LEGAL ISSUES IN MENTAL HEALTH CARE 145, 146 (F. Ayd ed. 1975)).

24. Rhoden, *supra* note 3, at 380.

25. *Id.*

26. *Id.* at 382.

27. *Id.*

to downplay the importance of the economic rationale as a driving force in the movement,[28] it clearly played a major role.[29]

As civil libertarians, legislatures, and budget analysts worked to reduce psychiatric inpatient numbers, the judiciary followed suit. In general, the judiciary has supported the socioeconomic forces that propelled the deinstitutionalization movement during the latter half of the twentieth century, largely through use of the "least restrictive environment" doctrine. In 1966, Judge Bazelon articulated this doctrine in *Lake v. Cameron*,[30] which pronounced that hospital administrators and state officials must carefully assess less restrictive placement options before resorting to commitment.[31] The doctrine was utilized again in *Dixon v. Weinberger*,[32] which ordered Washington, D.C. officials to implement community care structures so that the rights promoted by the least restrictive environment requirement would be meaningful.[33]

Along the same lines, some courts analogized involuntary hospital commitment to criminal incarceration.[34] These cases held that such commitment was unconstitutional unless infused with procedural due process safeguards including notice of reasons for confinement, right to counsel, right to trial by jury, and the consideration of less restrictive alternatives.[35] In *Jackson v. Indiana*,[36] the Supreme Court held that a mentally ill man, found incompetent to stand trial for a criminal offense, could not be indefinitely committed because of his incompetency.[37] The Court decreed that in such a situation, a state must either release the individual or initiate civil proceedings for involuntary commitment.[38]

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28. Leonard V. Kaplan, *State Control of Deviant Behavior: A Critical Essay on Skull's Critique of Community Treatment and Deinstitutionalization*, 20 ARIZ. L. REV. 189, 203-206 (1978).

29. Rhoden, *supra* note 3, at 382.

30. 364 F.2d 657 (D.C. Cir. 1967).

31. *Id.*

32. 405 F. Supp. 974 (D.D.C. 1975).

33. *Id.* at 977-980.

34. *See, e.g.*, Lessard v. Smith, 349 F. Supp. 1078 (E.D. Wis. 1972).

35. Rhoden, *supra* note 3, at 386.

36. 406 U.S. 715 (1972).

37. *Id.* at 738.

38. *Id.*

II. IMPEDIMENTS TO THE SUCCESS OF THE DEINSTITUTIONALIZATION MOVEMENT: POOR PLANNING, NIMBY-ISM, AND RESTRICTIVE ZONING

As the deinstitutionalization movement was never a clearly articulated policy from any level of government, the massive emigration from hospitals was not adequately supported by community-based housing programs.[39] In other words, when the roughly 338,000 individuals were released from the hospital environment between 1955 and 1976, issues of where they would go and who would take care of them arose. The following excerpt from that period articulates one commentator's hope:

> The institution as a means of coping with the problems of specific sectors of our population seems at this point to have run its course. Whether one is aged, below par intellectually or emotionally, delinquent, alcoholic or drug addicted, the source—and the remedy—of the problem lie in the communities where such people come from. By bringing them back to the community, by enlisting the good will and the desire to serve, the ability to understand which is found in every neighborhood, we shall meet the challenge with such groups of persons present, and at the same time ease the financial burden of their confinement in fixed institutions.[40]

Unfortunately, the benevolence and understanding supposedly found "in every neighborhood" has yet to fully materialize. By the 1980s, some thirty years after the origins of the deinstitutionalization movement, adequate community facilities had not yet been created.[41] It is thus not difficult to understand the origin of the modern mental health crisis of inadequate housing. Massive quantities of heavily institutionalized individuals were released from locked wards, and many of them had nowhere to go and no one to support them. This poor planning is reflected in the idea that while the federal government assumed that state and municipal bodies would pick up the burden, these entities assumed the federal government would come to their aid.[42] One result of these presumptuous assumptions was

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39. Rhoden, *supra* note 3, at 392.

40. *Id.* (quoting BENEDICT ALPER, CLOSING CORRECTIONAL INSTITUTIONS, vii-viii (Y. Bakal ed. 1973).

41. Rhoden, *supra* note 3, at 376.

42. *Id.* at 392-93.

a sharp rise in homelessness among the mentally ill,[43] a trend that continues today.[44]

Despite a general lack of coordination between government entities, many community organizations have established housing for mentally ill and other service-dependant individuals over the past few decades. One of the most common examples is the "group home." A group home is simply a term to describe any small, decentralized, programmatic dwelling used to support a variety of individuals, from recovering alcoholics to juvenile offenders.[45]

Frequently, development of such programs instigates fierce local clashes between service organizations and neighborhood residents.[46] This has been identified as the "Not In My Back Yard" or "NIMBY" phenomenon, which refers to local residents who, in theory, support the building of jails, mental hospitals, waste facilities, etc.—so long as it does not occur where they live.[47] A closer look at the NIMBY syndrome, as it relates to group housing for the mentally ill, illustrates the breadth of reaction from residents when questioned as to why they do not want a group home in their neighborhood. One study revealed that some people find just about any reason why a group home is inappropriate for their area. The responses ranged from "we don't have sidewalks" to "the retarded stay up and scream all night" to "dust in our neighborhood would be a health hazard to the residents of the home."[48] A mailing sent out by group in Michigan even went as far as depicting the following reasons given by some residents:

> Our road is too wide / Our road is too narrow
>
> It's too dangerous in the country / It's too dangerous in the city
>
> The residents might hurt my kids / My kids might hurt the residents
>
> Our street ends in a cul-de-sac / Our street is a thru street.[49]

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43. *Id.* at 376.

44. NAT'L RES. AND TRAINING CTR. ON HOMELESSNESS AND MENTAL ILLNESS, *supra* note 4.

45. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1063 (Aspen Law & Business 2002).

46. Salsich, Jr., *supra* note 16, at 417.

47. DUKEMINIER & KRIER, *supra* note 45, at 1063 (citing Salsich, Jr., *supra* note 16).

48. *Id.* at 1064.

49. *Id.*

It is, on one hand, possible to sympathize with those who do not want group homes and the like near them and their families. People are generally frightened of what they do not understand, and people do not generally understand mental illness, retardation, drug and alcohol addiction, and other such service-dependant illnesses. Further, homeowners are generally concerned with the value of their homes and are wary of welcoming anything into the neighborhood that might decrease property values. Many homeowners have children and experience an almost animal instinct to protect them from any perceived threat.[50]

On the other hand, however, one must face the painful but necessary conclusion that if our communities are to provide quality housing options for large segments of the mentally ill population, NIMBY-ism can obliterate any hope for the success of the deinstitutionalization movement. Complicating matters is that the problem is not merely one of hostility by residents to programs and services for the mentally ill; it is also the ability to enforce exclusionary zoning policies. Zoning ordinances, characterized by the segregation of land uses within the community, have always had an exclusionary bias and have been used effectively to sustain NIMBY-ism.[51] Indeed, the very language of *Village of Euclid v. Ambler Realty Co.*,[52] the Supreme Court decision sanctioning modern zoning laws, is tainted with such bias. While the Court's referral to apartment buildings as "parasites" in the community[53] cannot be blamed for the future use of zoning regulations to exclude certain groups of people,[54] it nonetheless created an atmosphere that enabled this effect.[55]

As the deinstitutionalization movement gained momentum in the latter half of the twentieth century, it had to contend with these pervasive local zoning laws. Within this context, zoning issues did not center around *how* land would be used, but *who* used the land.[56]

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50. A few community members protested the formal opening of Zeke's House, a group home for mentally ill residents located in Washington, D.C., by standing on the sidewalk in front of the house, carrying signs, and handing out information about the dangers of pedophilia. None of the residents of Zeke's House had any history of pedophilia. As witnessed by author in September, 2001. *See also infra* Part III.B.

51. Salsich, Jr., *supra* note 16, at 413-14.

52. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

53. *Id.*

54. Salsich, Jr., *supra* note 16, at 415.

55. *Id.*

56. Kanter, *supra* note 1, at 960.

Specifically, seminal issues centered around special-use permits, "facially neutral" zoning classifications that have a discriminatory impact on handicapped persons, and ordinances that single out individuals with handicaps for special treatment.[57] Predictably, "efforts to establish group homes in residential areas often were thwarted by zoning laws,"[58] leading to a concern by the American Planning Association that "overly restrictive zoning regulations have been a major stumbling block to the deinstitutionalization movement."[59] To put the matter simply, communities were able to creatively adapt entrenched zoning laws to make it difficult for certain people to move into their neighborhoods.

By requiring special-use permits and compliance with other zoning measures, certain communities could frustrate a person's transition from the hospital to a decent home, "thereby contributing to the concentration of mental patients in deteriorating neighborhoods."[60] In the values clash between providing quality housing for mentally ill individuals and respecting concerns of certain segments of the community, zoning laws tipped the balance in favor of the latter group. As a result, "despite the recognized public policies of deinstitutionalization and normalization, the development of community housing opportunities was and continues to be slow and has not kept pace with the demand for such housing."[61]

The preceding paragraphs provide the context for the following analysis of the Fair Housing Amendments Act of 1988 and the *Community Housing Trust* decision. A central theme of the FHAA is to help ensure handicapped individuals equal access to housing of their choice.[62] As part of this goal, Congress intended "to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special-use permits that have the effect of limiting the ability of such individuals to live in the

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57. Robert L. Schonfeld & 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, 300 (1994) (describing how these issues have arisen largely as a result of the Fair Housing Amendments Act).

58. Rhoden, *supra* note 3, at 393.

59. Salsich, Jr., *supra* note 16, at 419. The APA is an association of professional land use planners that host conferences, publish papers, post jobs, conduct planning research, etc.

60. Rhoden, *supra* note 3, at 393.

61. Kanter, *supra* note 1, at 962.

62. Schonfeld & Stein, *supra* note 57, at 302.

residence of their choice in the community."[63] The central issue of *Community Housing Trust* revolves around a zoning ordinance of the District of Columbia that served to limit housing options for mentally ill individuals.[64] The clash between this zoning law and the assertion of rights under the FHAA raises the narrow question of the appropriate standard to be used in deciding FHAA cases.

III. *COMMUNITY HOUSING TRUST V. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS*

A. The Fair Housing Act and the Fair Housing Amendments Act

In response to the urban unrest of the 1960s, Congress enacted the Fair Housing Act, codified in Title VIII of the Civil Rights Act of 1968.[65] The purpose of the FHA was to prohibit housing discrimination based upon race, color, religion, or national origin.[66] While this legislation represented a significant advance in civil rights for many, a number of individuals who had been victims of housing discrimination were left out.[67] Recognizing that people with mental and physical disabilities had been generally excluded from housing options due to inaccurate stereotypes, Congress enacted the Fair Housing Amendments Act in 1988.[68] Pursuant to the FHA's broad policy goal of providing fair housing throughout the United States,[69] the FHAA incorporated the words "handicapped" and "family status" into the above-mentioned protected classes.[70] It is important to note that the FHAA specifically defines "handicapped" persons to include individuals with both physical and mental impairments.[71] The FHAA also provides for greater judicial and administrative remedies for aggrieved persons who sue for violations of the Act.[72]

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63. H.R. REP. NO. 100-711, at 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185.

64. *Cmty. Hous. Trust*, 257 F. Supp. 2d at 213.

65. Schonfeld & Stein, *supra* note 57, at 299.

66. *Id.*

67. *Id.*

68. Fair Housing Amendments Act, 42 U.S.C. § 3601 (1988).

69. *Id.* § 3601.

70. *Id.* § 3604(c)-(e).

71. *Id.* § 3602(h)(1).

72. Schonfeld & Stein, *supra* note 57, at 302.

Although this Act was not designed to be a panacea for the nation's mentally ill, it was a step in the right direction to correct the shortcomings of the deinstitutionalization movement by facilitating access to decent community-based housing. Indeed, soon after its passage, some commentators recognized the great potential of the FHAA. "The FHA changes . . . will allow community activists, who have long felt themselves relatively powerless under prior law, to conduct a far more expansive and aggressive campaign in the fair housing area."[73] The following section will illustrate this point, and show how the FHAA can be used to combat discriminatory housing policies.

B. Factual Background of Community Housing Trust

The Community Council for the Homeless at Friendship Place (CCHFP), the parent group of the Community Housing Trust,[74] is a non-profit organization that works with the homeless population of Washington, D.C. The mission of CCHFP, located in Ward 3 of Washington, D.C., is to provide quality case management services to their homeless clients, providing them with the shelter, transitional housing, benefits, medical care, and general support they need to rebuild their lives.[75] In addition to these basic services, CCHFP is also committed to purchasing and developing houses to serve as permanent homes for their clients.[76]

On March 8, 2001, CCHFP purchased a home in a residential district of northwest Washington, D.C.[77] Christened "Zeke's House," the new home was to provide housing for five male clients, each living with a major mental illness. A resident manager would supervise the community. The potential residents would be subject to a vigorous screening process. They would live as a community, sharing a common kitchen, living room, basement, dining room, and garden.[78]

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73. Craig Ulrich, *The Fair Housing Amendments Act of 1988: New Litigation Tools for Housing Advocates*, 46 BUS. LAW 345 (1990).

74. The Community Housing Trust, established and operated by CCHFP, is responsible for procuring, developing, and funding housing units for CCHFP clients.

75. CMTY. COUNCIL FOR THE HOMELESS AT FRIENDSHIP PLACE, PROFILES, 2002: ANNUAL REPORT (2002).

76. *Id.*

77. *Cmty. Hous. Trust*, 257 F. Supp. 2d at 212.

78. *Id.*

Negative reaction among the Ward 3 community in the wake of the purchase was swift. Within two weeks, concerned residents had collected fifty-two signatures opposing the proposed use of the house.[79] Zeke's House became the first item on the agenda at the next ANC-3G meeting.[80] During this tempestuous gathering, a divided roomful of neighbors eventually agreed to send a letter to the Zoning Administrator for the District of Columbia to see if anything could be done to prevent or inhibit CCHFP's plans.[81] Specifically, the letter asked whether the five men who would move into Zeke's House would legally constitute a "family" or members of a "community-based residential facility" (CBRF) under applicable D.C. zoning regulations. This determination would be of great significance, as it would determine whether or not CCHFP, under the current zoning laws, would be required to obtain a "certificate of occupancy."[82]

In response to the letter, CCHFP and the community opposition submitted their respective views to city officials. CCHFP urged that, under relevant D.C. Municipal Regulations, the residents of Zeke's House would indeed constitute a family. A "family" is defined as "one (1) or more persons related by blood, marriage, or adoption, or not more than six (6) persons who are not so related, including foster children, living together as a single housekeeping unit, using certain rooms and housekeeping facilities in common."[83] The opposition disagreed, claiming that Zeke's House should be classified as a CBRF, defined as "a residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living."[84] On September 6, 2001, the Zoning Administrator determined that under the zoning laws Zeke's House would be a CBRF, and would thus require a certificate of occupancy if it were to operate on its proposed site.[85] Three weeks later, CCHFP, believing

79. *Id.*

80. An ANC, or Advisory Neighborhood Commission, is a local community council whose purpose is to meet periodically and discuss important issues in the neighborhood. ANC-3G is in Ward 3.

81. *Cmty. Hous. Trust*, 257 F. Supp. 2d at 213.

82. *Id.* Under D.C. zoning laws, any group home falling under the definition of a "community-based residential facility" is required to obtain a certificate of occupancy. D.C. MUN. REGS. tit 11, § 199.1 (2004). *See also infra* note 84 and accompanying text.

83. D.C. MUN. REGS. tit. 11, § 199.1 (2004).

84. *Id.*

85. *Cmty. Hous. Housing Trust*, 257 F. Supp. 2d at 214.

the zoning laws to be in violation of the FHAA, assisted five of their clients into Zeke's House without a certificate of occupancy.[86]

Three days after the residents moved in, the Zoning Administrator personally delivered to Zeke's House a notice of infraction carrying a five hundred-dollar fine.[87] On October 10, however, the D.C. Department of Consumer and Regulatory Affairs (DCRA) suspended the notice for two reasons. First, the DCRA stated that the owners, CCHFP, had "met the substance of the requirements for health and safety . . . as contemplated in the certificate of occupancy guidelines."[88] Second, the mayor of Washington, D.C. was at that time in the process of organizing a task force to review all regulations applicable to group homes in the city. The next day CCHFP filed suit against the various parties, claiming violations of the FHAA.[89]

IV. ANALYSIS OF *COMMUNITY HOUSING TRUST*

Community Housing Trust v. Department of Consumer & Regulatory Affairs can be broken down into four salient issues. The first is whether the case was rendered moot by the subsequent actions of the DCRA. The second is whether the residents of Zeke's House, and/or CCHFP generally, suffered any actual harm as a result of the zoning ordinance. The third is whether the zoning laws of the District of Columbia are facially discriminatory with respect to persons with disabilities—that is, do they violate the FHAA. The final issue, and the one of central import for this Note, is the nature of the standard that should be employed in granting a municipality an exception to the FHAA's prohibition of discrimination against mentally ill people.

A. Was the Case Rendered Moot by the Subsequent Actions of the DCRA?

On December 6, 2001, the DCRA informed CCHFP that Zeke's House would no longer need to obtain a certificate of occupancy.[90] Pursuant to this action, DCRA argued at a status conference hearing that the case was now moot.[91] This argument was rejected, however,

86. *Id.* at 215.
87. *Id.*
88. *Id.* at 216.
89. *Id.*
90. *Cmty. Hous. Trust*, 257 F. Supp. 2d at 216.
91. *Id.*

prompting DCRA to file a motion for summary judgment. In analyzing this motion, the D.C. District Court followed the principle laid down by the Supreme Court in *County of Los Angeles v. Davis*.[92] The Court held that where a defendant voluntarily ceases his (potentially) illegal conduct, the action is not rendered moot unless (1) there is no reasonable expectation that the conduct will occur again and (2) the interceding actions by the defendant have completely and irrevocably eliminated any ill effects of the alleged violation.[93] In *Community Housing Trust*, the district court concluded that neither prong of the above standard was met. In particular, the court stressed that "defendants have not shown that the zoning problems that plagued Zeke's House will not plague future establishments."[94]

This conclusion is instructive and has consequences that reach far beyond Zeke's House. As noted previously, certain zoning laws have played a major role in limiting housing options for the disabled, particularly the mentally ill. They can stand as silent and furtive barriers, frustrating the development of decent housing for the disabled. If a municipality is permitted to "threaten" various individuals and organizations with zoning laws that violate the FHAA, only to retract its position if and when the individual or organization exerts a sustained effort to confront it, genuine progress toward fair housing is frustrated. By holding that DCRA's reversal did not render the case moot, the court compelled the city to confront its own discriminatory policies.

B. Did the Residents of Zeke's House, or CCHFP Generally, Suffer Any Actual Harm?

Whether CCHFP or the residents of Zeke's House actually suffered harm is an issue of standing. Under the D.C. zoning laws, if a home is classified as a CBRF, it must then be further classified into one of seven categories.[95] Zeke's House does not fit neatly into any of these categories, but most closely approximates a "community residence facility."[96] A community residence facility must be licensed by the city

92. County of Los Angeles v. Davis, 440 U.S. 625 (1979).

93. *Id.* at 631.

94. *Cmty. Hous. Trust*, 257 F. Supp. 2d at 219-20.

95. D.C. MUN. REGS. tit. 11, § 199.1 (1995). The seven categories are: (1) adult rehabilitation home; (2) community residence facility; (3) emergency shelter; (4) health care facility; (5) substance abusers home; (6) youth rehabilitation home; and (7) youth residential care home. *Id.*

96. *Cmty. Hous. Trust*, 257 F. Supp. 2d at 214.

to operate; this requirement in turn triggers a host of additional regulations that must then be met. If at any time any of these requirements are not met, the license can be revoked. If the license is revoked, the certificate of occupancy can also be taken away, causing the residents to lose their home.[97]

One such requirement of the license is that the facility be staffed with twenty-four-hour supervision. Zeke's House, like other housing programs run by CCHFP, is designed to efficiently promote the independence and welfare of high-functioning individuals who also happen to live with a mental illness. While a resident manager would be present in the evening and throughout the night, he would not be there during the day, nor would he need to be.[98] The case management requirements of CCHFP generally require residents to be active during the day, involved in structured programs run by other organizations similar to CCHFP.[99] Some residents have the opportunity to attend job readiness programs enabling them to secure future employment. If there are any problems, CCHFP staff can be reached instantly, by the residents or the community, at CCHFP's nearby office from eight a.m. to roughly six p.m.[100]

The requirement of such round-the-clock supervision, therefore, is not well suited for a housing program like Zeke's House.[101] Indeed, in a letter to the executive director of CCHFP, the Director of the D.C. Mental Health Commission stated that Zeke's House does not need a license.[102] By forcing Zeke's House into a CBRF classification, the city had attempted to impose additional burdens that could not have been met absent "a fundamental alteration of their supportive housing model."[103] In sum, this classification was another way for the zoning laws to silently and insidiously frustrate bona fide efforts to establish quality housing options for mentally ill individuals. The court combined the above reasoning with the fees and extensive inspections involved to reject DCRA's contention that the discriminatory laws were not burdensome enough to trigger a violation of the FHAA. In other words, the court found that Community Housing Trust had standing to pursue the suit.

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97. *Id.* at 214-15.

98. *Id.* at 215.

99. Interview with Wendy Guyton, MSW, Community Council for the Homeless at Friendship Place, Washington, D.C. (Nov. 22, 2003).

100. *Id.*

101. *Id.*

102. *Cmty. Hous. Trust*, 257 F. Supp. 2d at 215.

103. *Id.* at 215.

C. Are the Zoning Laws of the District Facially Discriminatory Within the Meaning of the FHAA?

CCHFP argued that Title 11 of the D.C. Municipal Regulations facially discriminates on the basis of an FHAA-protected characteristic. The court first articulated that, based on the definition of "handicapped" as stipulated in § 3602(h)(1) of the FHAA, the residents of Zeke's House are indeed members of a protected class.[104] The court noted the differential treatment by pointing out that the zoning laws require a CBRF to obtain a certificate of occupancy, while a "family" does not need a certificate.[105]

CCHFP illustrated the issue with the following analogy. Imagine two houses on a block. One is populated by six nineteen-year-old college students. The other is populated by six handicapped persons. Title 11 says that the first group does not need a certificate, but the latter group, because of a "common need for treatment, rehabilitation, assistance, or supervision in their daily living" does.[106] The court concluded that, indeed, the zoning laws in question do apply different standards to different groups on the basis of their disability.[107] The court further noted that this is so even though the zoning laws in question make no specific reference to "disability."[108] The court found that because a protected group had been subjected to expressly differential treatment, a prima facie case for an FHAA violation was satisfied.[109]

D. What Standard Should Be Used in Making a Final Determination of an FHAA Violation?

The mere fact that a zoning law may be discriminatory on its face or as applied to a certain group or individual does not necessarily mean that the law actually violates the FHAA. Indeed, exceptions to the FHAA allow extra restrictions and burdens to be placed on group homes and other housing arrangements in certain situations, prompting an FHAA claim to go through further analysis.[110] These exceptions are derived from the FHAA provision stating "[n]othing in

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104. *Id.* at 221.

105. D.C. MUN. REGS. tit. 11, § 3202.1 (2004).

106. 257 F. Supp. 2d at 222 (quoting D.C. MUN. REGS. tit. 11, § 199.1 (2004)).

107. *Id.*

108. *Id.*

109. Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995).

110. *Cmty. Hous. Trust*, 257 F. Supp. 2d at 228.

this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health and safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."[111] The following legislative history on this section gives the rationale for this nebulous permutation in the law:

> While the Committee does not foresee that the tenancy of any individual with handicaps would impose any risk, much less a significant risk, to the health or safety of others by the status of being handicapped, the Committee added this provision to allay the fears of those who believe that the non-discrimination provisions of this Act could force landlords and owners to rent or sell to individuals whose tenancies pose such a risk.[112]

In other words, Congress provided that discriminatory zoning laws and other regulations against handicapped individuals would not violate the FHAA, so long as these individuals constituted a "direct threat." The unresolved question, then, is posed: *With respect to this exception, what standard should be used to determine if the imposition of a special restriction or other discriminatory law violates the FHAA?* The answer to this question reaches the heart of *Community Housing Trust.* As the court stated, "The D.C. Circuit has not adopted a standard of review for determining when special restrictions are warranted under the FHAA, and the circuits are split."[113] For example, the Eighth Circuit follows the notion that discrimination against handicapped individuals is permissible so long as the governmental body promulgating the rule has a rational reason for doing so.[114] The Sixth and Tenth Circuits, however, require a higher standard.[115]

1. Eighth Circuit Standard

The method of analysis used by the Eighth Circuit employs an inappropriately low standard of review. A brief evaluation of a recent

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111. Fair Housing Amendments Act, 42 U.S.C. § 3604(f)(9) (2001).

112. H.R. REP. NO. 100-711, at 28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2189.

113. *Cmty. Hous. Trust*, 257 F. Supp. 2d at 228.

114. *See generally* Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996); Familystyle of St. Paul v. City of St. Paul, 923 F.2d 91, 94 (8th Cir. 1991).

115. *See generally* Bangerter v. Orem City Corp. 46 F.3d 1491 (10th Cir. 1995); Marbrunak, Inc. v. City of Stow, 974 F.2d 43 (6th Cir. 1992).

decision illustrates this point. In *Oxford House-C v. City of St. Louis*,[116] the issue surrounded the number of men who could live in a supportive group home for recovering alcoholics. The men who reside in Oxford Houses, which have numerous successful programs nationwide, are required to live in a community, attend meetings, work if possible, and remain sober.[117] Residents who relapse are immediately removed from the community and placed in inpatient rehabilitation programs.[118] In order to remain economically viable, Oxford Houses typically house six to fifteen members.[119] The Oxford House at issue in this case, however, was in a neighborhood where zoning laws required group homes to have eight or fewer residents.[120] In a terse opinion, the court stated that "[e]ven if the eight-person rule causes some financial hardship for Oxford Houses, however, the rule does not violate the Fair Housing Act if the City had a rational basis for enacting the rule."[121]

The court's language suggests that the Eighth Circuit would treat an FHAA claim as they would an equal protection claim under the Constitution. In *City of Cleburne v. Cleburne Living Center*,[122] for example, the Supreme Court concluded that handicapped individuals do not merit heightened scrutiny review in challenging discriminatory laws on equal protection grounds.[123] They instead applied a minimal scrutiny standard, requiring only that the laws have a rational relation to a legitimate governmental purpose to pass constitutional muster.[124] By similarly demanding that the regulating body simply have a rational basis for promulgating the rule, the Eighth Circuit also employs this minimal standard of review. The concern with this approach, of course, is that "if a court uses a minimal scrutiny standard of review, it will look very deferentially at the government action at issue, would require less justification for it, and would be relatively unwilling and unlikely to strike down the action."[125]

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116. *See Oxford House-C*, 77 F.3d at 251.

117. Oxford House, Questions and Answers, *at* http://www.oxfordhouse.org (last visited May 12, 2005).

118. *Id.*

119. *Id.*

120. *See Oxford House-C*, 77 F.3d at 251.

121. *Id.* at 252.

122. 473 U.S. 432 (1985).

123. *Id.* at 446.

124. *Id.*

125. WILLIAM KAPLIN, CONCEPTS AND METHODS OF CONSTITUTIONAL LAW 56 (1992).

It is elementary, of course, that the Eighth Circuit's analysis of the case would be exactly correct *if the matter at hand was subject only to equal protection analysis.* But this is not the case. The existence of the FHAA indicates a greater need to specifically protect, by statute, housing rights for handicapped individuals. Because "[t]he Fair Housing Amendments Act . . . is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream,"[126] the law clearly implies that handicapped individuals should receive more protection from the statute then they would under an equal protection analysis. Indeed, the mere use of the equal protection rational basis standard runs contrary to the FHAA's central purpose, and is therefore an inadequately low standard to use when determining whether or not a discriminatory housing law may stand.

In addition, in justifying their holding in *Oxford House-C*, the Eighth Circuit focused solely on the concerns of the community and not the needs of the handicapped residents.[127] Specifically, the court found that decreasing congestion, traffic, and noise in residential areas all serve the city's legitimate interest.[128] Also, the court did not take seriously the charge that the city's actions were motivated by bias against and stereotypes of recovering alcoholics.[129] Brushing off this insinuation, the court stated, "We believe the City's enforcement actions were lawful regardless of whether some City officials harbor prejudice or unfounded fears about recovering addicts."[130] This language indicates that the Eighth Circuit is far too dismissive of a large motivating factor behind the FHAA.

The legislative history reveals that Congress was concerned about the role of stereotypes in preventing handicapped individuals from obtaining decent housing. The House Report of June 17, 1988 is replete with this concern. Early in the report, the drafters state "[p]rohibiting discrimination against individuals with handicaps is a major step in changing the stereotypes that have served to exclude them from American life. These persons have been denied housing because of misperceptions, ignorance, and outright prejudice."[131]

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126. H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179.

127. *See Oxford House-C*, 77 F.3d at 252.

128. *Id.*

129. *Id.*

130. *Id.*

131. H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 2179.

Shortly after, the report proclaims that the FHAA "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."[132]

Moreover, the House makes a point to emphasize that their intention to eradicate unfounded bias extends to mentally ill individuals as well. With specific regard to the provision that FHAA protection does not extend to individuals whose tenancy would pose a substantial risk to others,[133] the House pronounces that

> [g]eneralized assumption, subjective fears, and speculation are insufficient to prove the requisite direct threat to others. In the case of a person with mental illness, for example, there must be objective evidence from the person's prior behavior that the person has committed overt acts which caused harm or which directly threatened harm.[134]

Finally, the report also addresses the concern of restrictive zoning laws. It implies that these laws sometimes prevent handicapped persons from obtaining quality housing while purporting to exist for "their own good." In a clear attack on such zoning regulations, the report states,

> Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety, and land-use in a manner which discriminates against people with disabilities. Such discrimination often results from false or over-protective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited.[135]

This legislative history of the FHAA indicates that Congress was indeed concerned about prejudice and unfounded fears against handicapped individuals, and that this concern was a major driving force in its promulgation. For the Eighth Circuit to be so dismissive of this issue indicates a fundamental misunderstanding of the law. In short, *Oxford House-C* illustrates why *Community Housing Trust* is good law. The mere existence of the FHAA indicates that something

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132. *Id.*

133. 42 U.S.C. § 3604(f)(9).

134. H.R. REP. NO. 100-711, at 29 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 2190.

135. *Id.* at 24, *reprinted in* 1988 U.S.C.C.A.N. at 2185.

more than minimal rational basis review must be required in evaluating discriminatory zoning laws.

2. The Sixth and Tenth Circuits

In *Marbrunak, Inc. v. City of Stow, Ohio,*[136] the Sixth Circuit faced a situation factually similar to *Community Housing Trust.* With the assistance of a state grant, several families who had adult children with mental disabilities joined together to create a housing program for their children.[137] This house would not need to be licensed by the state in order to function.[138] They then purchased a home situated in a neighborhood zoned for single-family use only.[139] At this point the city intervened. Conceding that the use of the house would indeed constitute "family use," the city nonetheless informed the families that they would need to comply with other zoning regulations because the house would be occupied by persons with developmental disabilities.[140] These extra requirements, not imposed on other family dwellings, were both a substantial inconvenience and an added expense. For example, the regulations required all doors to have push bars and lighted exit signs, a whole-house sprinkler system, fire extinguishers every thirty feet, and special fire retardant wall and floor coverings, to name a few.[141] While at first glance these regulations may strike the reader as sensible safety precautions, they have the additional effect of increasing the cost of the house and the time it would take to prepare it for the waiting residents. Moreover, and of central relevance here, while the imposition of these restrictions may have been appropriate for certain groups of disabled persons, they were unnecessary for *these* individuals. One of the families brought suit, claiming that the zoning ordinances in question violated the FHAA.

In deciding the case, the Sixth Circuit referred to the legislative history of the FHAA, articulating how Congress had "an intent that the prohibition against discrimination extend to zoning practices and enforcement of otherwise neutral safety regulations that have the effect of limiting the ability of handicapped individuals to live in the residence of their choice."[142] They then went on to explain how the

136. Marbrunak, Inc., v. City of Stow, 974 F.2d 43 (6th Cir. 1992).
137. *Id.* at 45.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Marbrunak,* 974 F.2d at 45 n.1.
142. *Id.* at 45.

discriminatory zoning regulations in question, although permissible in some circumstances, were simply not allowable in this situation.[143] For example, the city did not make any attempt to show why special fire alarms were necessary for these individuals, none of whom were hearing impaired. Further, the city made no showing of why the doors currently in the home were improper for the prospective residents.[144] Following this logic, the court then pronounced the standard for this particular situation. With respect to discriminatory housing regulations, the city "may impose standards which are different from those to which it subjects the general population, so long as that protection is demonstrated to be warranted by the *unique and specific needs and abilities* of those handicapped persons."[145]

By so holding, the Sixth Circuit articulated a standard that brings the needs of the individual handicapped person to the forefront of the FHAA inquiry. The court recognized that zoning regulations—even benign, paternalistic ones that seemingly benefit handicapped people—will not be tolerated if they blindly serve to make housing options for such people significantly more difficult. This standard clearly evidences the court's opinion that the FHAA dictates a higher level of justification for such regulations than merely a rational basis. To drive home the point that in this case the standard had not been met, the court concluded that "the expense that would result from complying with needless safety requirements amounts to an onerous burden which has the effect of limiting the ability of these handicapped individuals to live in the residence of their choice."[146]

Three years later, in 1995, the Tenth Circuit produced a similar holding in *Bangerter v. Orem City Corp.*,[147] a factually analogous case. The issue in this case centered around the multiple obligations imposed by the requirement of a "conditional use permit" for a group home for mentally handicapped people. The district court held that, while the zoning regulations were facially discriminatory, they nonetheless passed FHAA muster because they were rationally related to the legitimate governmental purpose of integrating handicapped persons into mainstream society.[148] The Tenth Circuit sharply criticized this result: "[T]he use of an Equal Protection analysis is

143. *Id.* at 47.

144. *Id.*

145. *Id.* (emphasis added).

146. *Marbrunak*, 974 F.2d at 48.

147. Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995).

148. *Id.* at 1497.

misplaced here because this case involves a federal statute and not the Fourteenth Amendment . . . the FHAA specifically makes the handicapped a protected class for purposes of a statutory claim . . . even if they are not a protected class for constitutional purposes."[149] In the end, the court concluded that "the district court utilized the wrong legal standard in applying the FHAA."[150]

In discussing what standard to apply in this case, the Tenth Circuit panel stated that the FHAA permits housing discrimination in two general circumstances. First, discrimination is warranted where one's tenancy would pose a direct threat to the health or safety of other neighboring residents.[151] Second, discrimination is permitted where it will in fact serve the actual needs of the handicapped person. As the court logically pointed out, "[T]he FHAA should not be interpreted to preclude special restrictions upon the disabled that are actually beneficial to, rather than discriminatory against, the handicapped."[152] In both situations, however, careful consideration must be given to the needs and abilities of the actual handicapped persons in question; blind allegiance to stereotypes will not suffice. With regard to public safety issues, "[R]estrictions predicated on public safety cannot be based on stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents."[153] As for restrictions purporting to benefit the handicapped person, these must also be individually tailored to produce some discernable benefit *to the particular handicapped people in question.* In addition, these benefits must outweigh any corresponding burdens arising because of the discriminatory regulation. In effect, the *Bangerter* court adopted the *Marbrunak* standard, while specifically rejecting the Eighth Circuit's approach in *Oxford House.*

3. Community Housing Trust *Court Agrees on Higher Standard*

The *Community Housing Trust* court clearly states that it supports the more reasoned and searching analysis employed by the Sixth and Tenth Circuits when faced with an FHAA claim. They preface their decision to follow these circuits by reviewing Supreme Court jurisprudence and announcing, "Traditionally, courts have broadly

149. *Id.* at 1503.

150. *Id.* at 1500.

151. 42 U.S.C. § 3604(f)(9).

152. *Bangerter*, 46 F.3d at 1504.

153. *Id.* at 1503.

interpreted the FHA, so as to fully effectuate Congress' remedial purpose."[154] Bringing this idea to bear on the case before them, the court continued, "The Supreme Court has held that the FHAA should be afforded the same generous construction as the original Act."[155] The court then cited to a Seventh Circuit decision, which stated that the FHAA is "a broad mandate to eliminate discrimination against and equalize housing opportunities for disabled individuals."[156]

With the FHAA thus characterized, the court went on to articulate their standard for determining when facially discriminatory housing laws violate this Act. Recognizing the approach taken by the Sixth and Tenth Circuits as the proper standard when deciding FHAA cases, the court stated that mere rational basis review is not enough.[157] The differential treatment must be either warranted by the "unique and special needs and abilities of those handicapped persons to whom the regulations apply,"[158] or justified by legitimate (*i.e.* real and not just stereotypical) safety concerns posed by their residing in the neighborhood.[159] By so holding, the District of Columbia joined a growing number of jurisdictions in adopting a more scrutinizing level of review regarding violations of the FHAA. This important decision gives housing advocates for all disabled individuals, particularly the mentally ill, a powerful tool in housing discrimination cases.

V. *COMMUNITY HOUSING TRUST* AND SOCIAL POLICY

The FHAA is a broad mandate to remove barriers to housing options for handicapped persons and should be liberally construed in favor of assisting such people to find housing.[160] The Act endeavors to change stereotypes based on misperception, ignorance, and prejudice

154. *Community Housing Trust*, 257 F. Supp. 2d at 220; *see also* Haven's Realty Corp. v. Coleman, 455 U.S. 363, 372-74 (1982); Trafficante v. Metro Life Ins. Co., 409 U.S. 205, 209, 212 (1972).

155. 257 F. Supp. 2d at 220; *see also* City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995).

156. Bronk v. Ineichen, 54 F.3d 425, at 428 (7th Cir. 1995).

157. *Cmty. Hous. Trust*, 257 F. Supp. 2d at 229.

158. *Id.* at 228.

159. *Id.* at 229.

160. Schonfeld & Stein, *supra* note 57, at 304.

about the handicapped, including persons living with mental illness.[161] One such stereotype about mentally ill individuals is that they are prone to violence and thus a danger to any community. While numerous studies historically conclude mentally ill people are more prone to violence than the "general community,"[162] some modern scholarship applies a more searching inquiry and arrives at a different conclusion. The following two studies provide fresh insight into this complex issue.

In 2002, Duke University Medical Center conducted a study to analyze the link between mental illness and violent behavior.[163] This study involved 802 seriously mentally ill individuals[164] living in four different states.[165] Recognizing the need for a more holistic approach to the problem, the study postulates "[m]ore informed and nuanced models are needed to elucidate how and why violent behavior occurs in individuals with mental illness who have certain characteristics and experiences."[166] In analyzing the problem, the study considers three "risk factor subgroups" which often relate to experiencing life with mental illness: a history of violent victimization, substance abuse, and exposure to community violence.[167] The study reveals that individuals with none or only one risk factor had predicated probabilities of violence close to the national average for the general population.[168] However, those with two or three of these risk factors exhibited violent behavior far out of proportion with the general population.[169] The study concludes that "[p]sychopathy per se seldom leads to

161. H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179.

162. *See generally* L. Sosowski, *Explaining the Increased Arrest Rate Among Mental Patients: a Cautionary Note*, 137 AM. J. PSYCH. 1602 (1980); J. Rabkin, *Criminal Behavior of Discharged Mental Patients: A Critical Appraisal of the Research*, 86 PSYCH. BULLETIN 1 (1979).

163. Jeffery W. Swanson et al., *The Social-Environmental Context of Violent Behavior in Persons Treated for Severe Mental Illness*, 92 AM. J. PUBLIC HEALTH 1523 (2002).

164. All participants in the study were currently receiving treatment for their mental illness. *Id.* at 1529.

165. *Id.* at 1523.

166. *Id.* at 1528.

167. *Id.*

168. Swanson et al., *supra* note 163, at 1528.

169. *Id.*

assaultiveness, but it may converge with other risk factors that, together, significantly increase the likelihood of violent behavior."[170]

In an article regarding the study, Dr. Jeffery Swanson discusses how the results relate to the overall treatment of the mentally ill. "While the illness certainly plays a role, the risk factors we examined compound the illness in a way that makes violence more probable. Those risk factors should be a large part of the focus of treatment and services for persons with mental illness and a history of violence."[171] Dr. Swanson also notes that much of the violence caused by people with mental illness can be prevented with the proper resources.[172] "Yet many individuals with serious and disabling psychiatric disorders are not receiving the treatment and support that might enable them to live productive lives in the community."[173] Another author of the study, Dr. Marvin Swartz, discusses the results in light of the need to provide quality housing options for mentally ill people, stating, "If we're worried about violence among people with serious mental illness, we need to pay far more attention to finding safe housing in decent neighborhoods."[174]

The message from the Duke Medical Center study is clear—it is not enough to simply say, with no further analysis, that people with mental illness are more prone to violence than those in the general population. Rather, the inquiry should begin by understanding that people with mental illnesses, properly treated, do not pose an increased danger to the community merely because of their psychopathy. Only when such individuals are exposed to certain risk factors does violent behavior tend to increase. If these risk factors (victimization, substance abuse, and exposure to community violence) are addressed and dealt with by organizations, like CCHFP, that serve the mentally ill, then the result is a safer community for all, nonhandicapped and handicapped alike. Again, as the Duke study indicates, mentally ill persons with none or one risk factor have similar propensities to violence as the general population.[175]

A three-site MacArthur Foundation study reached similar results. This study concluded that discharged psychiatric patients, who were properly medicated and without current substance abuse problems,

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170. *Id.* at 1523.

171. Tracy Koepke, *Three Risk Factors Cited in Violent Behavior Among People with Severe Mental Illness*, DUKE NEWS, Aug. 30, 2002.

172. *Id.*

173. *Id.*

174. *Id.*

175. Swanson et al., *supra* note 163, at 1529.

had about the same incidence of violent behavior as other individuals in the same neighborhoods.[176] The logical conclusion is that this is a strong argument for providing more services targeted specifically to persons who suffer from both mental illness and addiction. This active targeting is important because these individuals are less likely to comply voluntarily with conventional outpatient treatment.[177] Again, this is exactly what organizations like CCHFP attempt to do, and why access to quality housing is so important in the overall treatment of people with mental illness. The deinstitutionalization movement, if it is to survive and flourish, depends on such community organizations. Likewise, if organizations like CCHFP are to be successful with the actual front-line work envisioned by the movement, they will depend on decisions like *Community Housing Trust.*

CONCLUSION

Individuals with mental disabilities have a long history of inadequate housing.[178] Large numbers of mentally ill people live on the streets[179] or in dangerous neighborhoods.[180] This state of affairs led some commentators in the 1980s to conclude that the deinstitutionalization movement had utterly failed.[181] The simple truth was that hospitals were releasing their patients into communities that did not have the housing resources to accommodate them.[182] Overly restrictive zoning regulations further frustrated the deinstitutionalization movement.[183] Recognizing the need to intervene, Congress in 1988 passed the Fair Housing Amendments Act.[184]

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176. H.J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhood*, 55 ARCH. GEN. PSYCH. 393-401 (1998).

177. Jeffrey W. Swanson et al., *Violence and Severe Mental Disorder in Clinical and Community Populations: The Effects of Psychotic Symptoms, Comorbidity, and Lack of Treatment*, 60 PSYCHIATRY 1-22 (1997).

178. Kanter, *supra* note 1, at 929.

179. NAT'L RES. AND TRAINING CTR. ON HOMELESSNESS AND MENTAL ILLNESS, *supra* note 4.

180. Kanter, *supra* note 1, at 929.

181. Rhoden, *supra* note 3, at 392.

182. *Id.*

183. Salsich, Jr., *supra* note 16, at 419.

184. 42 U.S.C. § 3601 (2000).

In this Act, Congress extended its policy to provide "for fair housing throughout the United States"[185] to handicapped persons, including the mentally ill. The Act was immediately recognized as a potentially powerful tool for fair housing advocates.[186] A particular goal of the FHAA was to eliminate certain restrictive zoning regulations that had the effect of denying housing to handicapped people.[187] Built into the Act, however, exists a subtle exception that renders the FHAA inapplicable in situations where the prospective tenant will pose a "direct threat" to the safety of the community.[188] In light of this language, lower courts have applied the FHAA to discriminatory zoning regulations with varying rigor. The Eighth Circuit, in *Oxford House-C v. City of St. Louis*, applied an analysis tantamount to mere rational basis review[189] in concluding that a zoning ordinance, though facially discriminatory to handicapped persons, did not violate the FHAA.[190] Other courts have recognized that in enacting the FHAA, Congress intended to provide special protection to handicapped people, including the mentally ill, in their pursuit of quality housing. With their decisions in *Marbrunak Inc., v. City of Stow,*[191] and *Bangerter v. Orem City Corp.,*[192] the Sixth and Tenth Circuits, respectively, applied a more searching review, declaring that discriminatory zoning regulations may only survive FHAA scrutiny if they are "tailored to particularized concerns about individual residents."[193]

In *Community Housing Trust v. Department of Consumer & Regulatory Affairs,* the District Court for the District of Columbia rejected the Eighth Circuit's approach, choosing to side with the growing majority of courts who demand a higher standard.[194] In so doing, the court continued a trend of decisions that are breathing life into the FHAA. These decisions may also reflect a growing acceptance of the mentally ill within our communities, as misperceptions regarding mental illness and violent behavior are

185. 42 U.S.C. § 3601.
186. Ulrich, *supra* note 73, at 345.
187. Schonfeld & Stein, *supra* note 57, at 323.
188. 42 U.S.C. § 3604(f)(9) (2000).
189. *Oxford House-C,* 77 F.3d at 252.
190. *Id.* at 250.
191. 974 F.2d 43.
192. 46 F.3d 1491.
193. *Id.* at 1503.
194. *Cmty. Hous. Trust,* 257 F. Supp. 2d at 229.

addressed by modern medical research.[195] The higher standard employed by the *Community Housing Trust* court properly reflects the spirit of the FHAA and should be used by other jurisdictions as they address the issue. In the long run, this higher standard will hopefully benefit the deinstitutionalization movement and the mentally ill people it desires to serve.

195. Swanson et al., *supra* note 163, at 1523, 1529.