

NOTE

Mains Farm v. Worthington: Fair Housing Laws and Fear of Adult Family Homes

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At first glance, the Washington State Supreme Court's decision in *Mains Farm Homeowners Ass'n v. Worthington*¹ might appear to be merely an extension of a long line of Washington cases in which courts have exercised their inherent equitable powers and properly enjoined the breach of a private, legally enforceable restrictive covenant.² However, as one looks more closely at the implications of *Mains Farm* in the context of the societal trend towards full integration of individuals with disabilities into the American mainstream,³ the supreme court's decision in *Mains Farm* becomes somewhat more problematic.

As a result of *Mains Farm*, judicial precedent in Washington State is firmly set: For-profit owner operated group homes for the disabled⁴

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1. 121 Wash. 2d 810, 854 P.2d 1072 (1993).

2. See, e.g., *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash 458, 466, 194 P. 536, 539 (1920); *Krein v. Smith*, 60 Wash. App. 809, 812-13, 807 P.2d 906, 907-8, review denied, 117 Wash. 2d 1002 (1991).

3. See, e.g., H.R. REP. NO. 171, 100th Cong., 2nd Sess. 18 (1988) ("The federal Fair Housing Act is a clear pronouncement of a national commitment to end the exclusion of persons with handicaps from the American mainstream . . ."); H.R. REP. NO. 485 (III), 101st Cong., 2nd Sess. 23 (1990) ("The purpose of the ADA is to provide a clear and comprehensive national mandate to . . . bring [individuals with disabilities] into the economic and social mainstream of American life.").

4. The term "group home for the disabled" is a broad generic term potentially applicable in many contexts. In this Note it will be used synonymously with the narrower, specifically defined statutory term "adult family home." Although there is no universally accepted definition of a group home, an "adult family home" is described by the Washington State Legislature as "a regular family abode of a person or persons who are providing personal care, room, and board to more than one but not more than four adults . . . not related . . . to the person . . . providing the services . . ." WASH. REV. CODE § 70.128.010(1) (1994).

have been designated by the Washington State Supreme Court as "commercial" and "institutional" however hard they may try to emulate family life, and however minimally they may impact the surrounding community.⁵ In the aftermath of the *Mains Farm* decision, group homes are vulnerable to judicial attack if they are situated or proposed in subdivisions and other residential communities in this state which are subject to "single-family dwelling/residential use" restrictive covenants. *Mains Farm* thus empowers group home neighbors who may harbor "Not-In-My-Back-Yard" ("NIMBY")⁶ sentiments with the legal means to attack and expel group homes for the disabled from their communities. In response to this threat, group home defenders and advocates for the disabled in Washington State must closely analyze the majority *Mains Farm* opinion and develop an effective strategy by which to defeat future similar law suits.

Although the *Mains Farm* majority's conclusion that a group home for the disabled is neither a single-family dwelling nor a residential use is certainly questionable,⁷ this Note is neither intended as an addition to the "what is a family?" definitional debate, nor as a proposal that the issues decided in *Mains Farm* be re-litigated. Instead, this Note will: (1) analyze the *Mains Farm* controversy from the often ignored perspective of disabled individuals who benefit from community based group homes, and (2) present applicable state and

The legislature further defines adult family homes as providing a "humane, safe, and homelike environment for persons with functional limitations who need personal and special care . . ." WASH. REV. CODE § 70.128.007(1) (1994). Anyone in Washington State eighteen years of age or older who, has a "developmental disability or physical or mental disability, [that] requires supervision and assistance in personal care services" is eligible for placement in an adult family home. SEE WASH. ADMIN. CODE § 388-76-030(5) (1992).

Please note that the term "disabled" used throughout this Note may refer to individuals who are either developmentally disabled, physically disabled, and/or mentally ill.

5. See *Mains Farm*, 121 Wash. 2d at 818-19, 854 P.2d at 1076.

6. The term "NIMBY" used throughout this Note generally refers to the protectionist attitude of individuals and neighborhood groups intent on preserving the current character of their residential communities by actively resisting what they perceive as unwanted local developments. In a publication proposing "low key" siting strategies for group homes and other community based social service providers, Michael Dear argues that the NIMBY syndrome "represents the pre-eminent threat to community-based human services." MICHAEL DEAR, GAINING COMMUNITY ACCEPTANCE 6 (1991). Dear also quotes from a speech given by Edward I. Koch, the former mayor of New York, in which Koch criticizes the fear and suspicion inherent in the NIMBY syndrome and warns of regression into a "new feudalism" in which neighborhoods and communities "march backwards towards the imaginary safety of feudal fiefdoms defended by NIMBY walls." *Id.* at 2.

7. In a strong dissent in *Mains Farm*, Justice Durham, joined by Justice Johnson, criticized the majority's conclusion that a small group home is neither a residential use nor a family. Justice Durham ultimately concluded that the majority's reasoning in *Mains Farm* lacked "any principled boundaries." *Mains Farm*, 121 Wash. 2d at 829, 854 P.2d at 1081.

federal law by which group homes threatened with judicial attack in the wake of the *Mains Farm* ruling can defend themselves.

Specifically, Section I of this Note will present an overview of both the benefits of group homes for the disabled and the various ways in which resistant NIMBY neighbors and municipalities have attempted to banish them. Section II will analyze the *Mains Farm* decision. Section III will explore evidence of an overriding public policy favoring the establishment of group homes for the disabled in Washington State. Section IV will analyze the neighbors' conduct in *Mains Farm* under both the federal Fair Housing Act and Washington's Law Against Discrimination.

Ultimately, this Note will conclude that future group home defenders should not concentrate on re-litigating the issues decided in *Mains Farm*. Instead, their focus should be on seeking an authoritative judicial determination that neighbors who attempt to use a "single-family dwelling/residential use" restrictive covenant to banish group homes for the disabled from their communities are violating both state and federal fair housing laws.

I. AN OVERVIEW OF THE PROBLEM

The last thirty years have seen the advent of small-scale, community-based group homes in the United States as the preferred model for residential treatment of individuals who are either mentally ill or physically and/or developmentally disabled.⁸ The growth in the number of group homes for the disabled in Washington State, and the corresponding decrease in hospitalized and otherwise institutionally-confined individuals,⁹ has been attributed both to a growing concern

8. A huge body of research literature was produced in the 1970s and 80s in support of theories that deinstitutionalization, community integration, and "normalization" in the least restrictive environment possible positively affect the quality of life of individuals who are disabled. See, e.g., R.L. Schlock & R.S. Harper, *Independent Living and the Disabled: A Systematic Approach to Independent Living Training*, in 1 FRONTIERS OF KNOWLEDGE IN MENTAL RETARDATION 23 (Peter Mittler ed., 1981); ELINOR GOLLAY, COMING BACK: THE COMMUNITY EXPERIENCES OF DEINSTITUTIONALIZED MENTALLY ILL PEOPLE (1978); Richard Eymann, *Relationship Between Community Environments and Resident Changes In Adaptive Behavior: A Path Model*, 4 AM. J. OF MENTAL DEFICIENCY 83 (1979).

9. Both the devastating effects of institutional life and the shift away from institutionalization to community-based placement in Washington State is documented in BARBARA BREECHEN, FROM SEGREGATION TO COMMUNITY INTEGRATION, WASHINGTON STATE DEVELOPMENTAL DISABILITIES SERVICES, 1861-1990 (1988).

for and appreciation of the civil rights of the disabled¹⁰ and to bottom-line budgetary considerations.¹¹

Unfortunately, the national trend towards deinstitutionalization and community-based living for individuals with disabilities has, at times, met resistance at the local level. In numerous instances, the NIMBY syndrome has manifested itself in the form of opposition to the establishment of group homes for the disabled in particular neighborhoods and municipalities.¹² A legacy of centuries of bias against and fear of the disabled,¹³ combined with a related and more readily articulated fear that group homes negatively affect both property values and the "character of the community,"¹⁴ have led to legal challenges,¹⁵ public protests,¹⁶ and even arson¹⁷ as a means of keeping group homes out of particularly resistant neighborhoods.

Although there are few reported instances of violent resistance to the establishment of group homes, case law expansively documents

10. See, e.g., Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disabled*, 70 CAL. L. REV. 54 (1982); Symposium, *The Administration of Psychiatric Justice: Theory and Practice In Arizona*, 13 ARIZ. L. REV. 1 (1971).

11. The savings per client per day as a result of group home placement as opposed to placement in an institutional setting are set out in WASHINGTON STATE LEGISLATIVE BUDGET COMMITTEE, PHASE I REPORT #91-2, RESIDENTIAL SERVICES FOR CLIENTS WITH DEVELOPMENTAL DISABILITIES, A REPORT TO THE 1991 WASHINGTON STATE LEGISLATURE (1991).

12. See, e.g., Rhonda Hillbery, *Group Home's Point of Peril: Is the Danger Inside or Outside?*, L.A. TIMES, Dec. 22, 1992, at A5.

13. For an overview of the historical roots of societal fear of and discrimination against individuals with disabilities see, Laura A. Lorenzo, *Societal Prejudice Reflected In Our Courts: The Unfavorable Treatment of the Mentally Retarded*, 2 SETON HALL CONST. L.J. 771 (1989).

14. In DEAR, *supra* note 6, at 14, the author discusses and refutes these commonly voiced NIMBY concerns regarding proposed human service facilities in residential neighborhoods. Dear cites empirical studies refuting the claim that small to medium sized group homes have any negative affect on property values. Ultimately, Dear concludes that the property value argument "has been reduced to the status of myth." *Id.* See, e.g., MENTAL HEALTH LAW PROJECT [since renamed Judge Bazebon Center for Mental Health and the Law], THE EFFECT OF GROUP HOMES ON NEIGHBORING PROPERTY (1988) (summarizing various studies conducted between 1973 and 1989 on group homes and their effect on surrounding property values). None of the studies indicated a decline in property values as a result of group homes. *Id.*

For an argument refuting the claim that group homes negatively impact the character of the neighborhood in which they are sited and a discussion of the positive affects a group home can have in communities, see ROBERT PERSKE, NEW LIFE IN THE NEIGHBORHOOD: HOW PERSONS WITH RETARDATION AND OTHER DISABILITIES CAN HELP MAKE A GOOD COMMUNITY BETTER (1980).

15. See Nora A. Uehlein, Annotation, *Community Residence for Mentally Disabled Persons As Violation of Restrictive Covenant*, 41 A.L.R.4th 1216 (1985) (listing various state cases in which neighbors have sought injunctions against group homes).

16. See, e.g., Hillbery, *supra* note 12, at A5.

17. Michael Winerip, *Police Suspect Arson In Blaze At Site of a Proposed Group Home*, N.Y. TIMES, Feb. 22, 1989, at B2.

both legislative and judicial methods in which neighbors and/or local governments have resisted group homes for the disabled.¹⁸ A quick survey exposes three methods typically used.

First, certain municipalities have, in response to public pressure, taken a "pro-active" approach by passing zoning ordinances specifically aimed at limiting the number and location of group homes for the disabled in their community. For example, Miami Beach banned group homes for the disabled on certain commercial streets in response to concerns that the presence of disabled residents in these areas would "deter shopping and tourism."¹⁹ In *Burstyn v. City of Miami Beach*,²⁰ a federal district court struck down the ordinance on equal protection grounds.²¹

Second, some cities have utilized pre-existing zoning ordinances in attempts to exclude group homes.²² Although there are some variations,²³ these cities typically justify excluding group homes by claiming that group home residents are in fact boarders or tenants, and as a result, the home violates "single-family use" zoning ordinances.²⁴

Finally, in the absence of either willing local officials or applicable zoning ordinances, group home neighbors have petitioned the courts to enforce private covenants restricting property to single-family dwellings/residential use.²⁵ For example, in *Crane Neck Ass'n*, homeowners in an affluent subdivision contended that a group home housing eight developmentally disabled adults violated a restrictive covenant.²⁶ The covenant stipulated that "there shall not be constructed nor maintained on said premises other than single family dwellings."²⁷ In an influential opinion, the *Crane Neck* court agreed with the homeowner's association that the group home violated both

18. See, e.g., Uehlein, *supra* note 15; James L. Rigelhaupt, Jr., Annotation, *What Constitutes a "Family" Within Meaning of Zoning Regulation or Restrictive Covenant*, 71 A.L.R.3d 693 (1976).

19. See *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 534 (S.D. Fla. 1987).

20. 663 F. Supp. 528 (S.D. Fla. 1987).

21. *Id.* at 536.

22. E.g., *City of Kenner v. Normal Life of Louisiana, Inc.*, 483 So. 2d 903, 906 (La. 1986) (holding that a zoning ordinance that restricted property use to "single family dwellings" prohibited a group home housing five unrelated disabled residents).

23. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435-37 (1985) (discussing an antiquated city ordinance that required a special use permit for "hospitals for the feeble minded," applied in an effort to exclude a group home for the disabled). The special use permit requirement was struck down on equal protection grounds by the U.S. Supreme Court. *Id.* at 439-42, 454.

24. E.g., *Garcia v. Siffrin Residential Ass'n*, 407 N.E.2d 1369 (Ohio 1980).

25. See, e.g., *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 460 N.E.2d 1336 (N.Y. 1984).

26. *Id.* at 1338.

27. *Id.*

the letter and spirit of the restrictive covenant.²⁸ It then held, however, that the overriding public policy of the state of New York prevented the court from enforcing the covenant against the group home.²⁹

Other state and federal courts have not followed *Crane Neck* and have adopted wildly diverse opinions as to whether group homes violate "single-family dwelling/residential use" restrictive covenants.³⁰ Factors that have contributed in varying degrees to the seemingly ad hoc nature of judicial determinations that a group home is or is not a "single-family dwelling" or a "residential use" within the meaning of a restrictive covenant include: the wording of the covenant involved,³¹ the size and activities of the group home,³² legislative pronouncements,³³ as well as traditional notions of what constitutes a family.³⁴ In Washington, in the aftermath of *Mains Farm*, judicial precedent now seems firmly set: A small for-profit group home for the disabled is not a "single-family dwelling/residential use" within the meaning of a private restrictive covenant.³⁵

A. Particularly Problematic Suits

Given (1) the empirically demonstrated benefits of community based living for individuals with disabilities,³⁶ and (2) the lack of any evidence supporting claims that group homes for the disabled

28. *Id.* at 1339.

29. *Id.* at 1343.

30. See, e.g., *Adult Group Properties Ltd. v. Imler*, 505 N.E.2d 459, 467 (Ind. App. 1987) (finding that "family" in subdivision covenant means only those related by blood or marriage). But see *Collins v. City of El Campo*, 684 S.W.2d 756, 761 (Tex. Ct. App. 1984) (finding that "single family dwelling" restrictive covenant was merely an architectural designation).

31. In *Jackson v. Williams*, 714 P.2d 1017, 1023 (Okla. 1985), the court determined that a group home did not violate a "single family" covenant because there was no explicit additional requirement in the covenant that the family in question must consist of individuals related to one another.

32. In *Omega Corp. of Chesterfield v. Malloy*, 319 S.E.2d 728, 732 (Va. 1984), the court held that the presence of a rotating staff of counselors supervising the client's daily activities converted what might otherwise have been a single family use into a "facility" in violation of the covenant.

33. In *Crane Neck*, the legislature's general statement of policy favoring the establishment of community based group homes for the disabled was ultimately determinative in the court's decision to refuse to enjoin the group home's operation. 460 N.E.2d at 1343.

34. E.g., *Adult Group Properties*, 505 N.E.2d at 467 (holding "family" in restrictive covenant to mean only immediate blood relatives).

35. See *Mains Farm*, 121 Wash. 2d at 821, 854 P.2d at 1077 (concluding that an owner-operated group home housing four disabled individuals was a "commercial facility" and not a "single family dwelling/residential use.").

36. See, e.g., GOLLAY, *supra* note 8.

negatively impact the neighborhoods in which they are situated,³⁷ NIMBY lawsuits to exclude group homes from particular communities are extremely problematic. Suits like *Crane Neck* and *Mains Farm*, in which neighbors attempt to enforce facially neutral restrictive covenants against group homes, are particularly troubling for two reasons: (1) The exclusion of group homes for the disabled from residential subdivisions is potentially disruptive of the benefits of group home living,³⁸ and (2) suits to enforce restrictive covenants represent a relatively easy method of banishing group homes from residential neighborhoods.³⁹

Single-family dwelling/residential use restrictive covenants are commonly created and imposed by developers of residential subdivisions in an effort to create stable, predictable residential communities.⁴⁰ Stable residential communities facilitate the opportunity for both the "normalization" and community integration that is essential to a therapeutic group home environment.⁴¹ The most obvious long term danger posed by further *Mains Farm*-type law suits in Washington is that group homes could be effectively excluded from planned residential subdivisions, arguably the most appropriate sites for group homes, and relegated to less suitable and potentially more dangerous surroundings.⁴²

The second reason restrictive-covenant-based suits against group homes are particularly problematic lies in the distinction between zoning regulations and restrictive covenants. In contrast to zoning decisions, restrictive covenants can be privately created and relatively easily enforced.

37. DEAR, *supra* note 6, at 16.

38. In MARTIN JAFFEE & THOMAS P. SMITH, *SITING GROUP HOMES FOR DEVELOPMENTALLY DISABLED PERSONS* 8 (1986), the authors raise the concern that concentration of group homes in poorer, less stable, and less residential neighborhoods "has the potential for undercutting normalization." The authors warn that two particular types of areas are especially inappropriate for group homes because they present particular impediments to therapeutic residential living: (1) quasi-commercial and/or semi-industrial areas, and (2) high crime areas. *Id.*

39. ROGER A. CUNNINGHAM et al., *THE LAW OF PROPERTY* 471-75, 484 (2d ed. 1993).

40. Gerald Korngold, *Single Family Use Covenants: For Achieving a Balance Between Traditional Family Life and Individual Autonomy*, 22 U.C. DAVIS L. REV. 951 (1989).

41. In a nationwide survey conducted by the U.S. General Accounting Office, operators of group homes for the disabled were asked to rate the various factors that contributed to their siting decisions. The survey found that neighborhood safety, site privacy, well-maintained homes and properties, adequate lot size, and access to public transportation and community resources were considered "very important or essential" by most group home sponsors. UNITED STATES GENERAL ACCOUNTING OFFICE, *AN ANALYSIS OF ZONING AND OTHER PROBLEMS AFFECTING THE ESTABLISHMENT OF GROUP HOMES FOR THE MENTALLY DISABLED* 9 (1983).

42. See *supra* note 38.

Zoning regulations are controlled by legislative processes. Thus, NIMBY sentiment needs to be both particularly strong and particularly wide spread to create a pro-active zoning ordinance that excludes group homes. In addition, in all cases involving zoning legislation there is state action. As a result, there is an added constitutional requirement of judicial scrutiny into whether a rational relationship exists between the zoning choice involved and a legitimate state objective.⁴³

In contrast, an individual subdivision resident could bring suit to enjoin the operation of a neighboring group home on the grounds that it violates a single-family dwelling restrictive covenant. Neither principles of constitutional law, nor the common law of covenants obliges a court to require rationality or to initiate any inquiry into the potentially discriminatory reasons behind the plaintiff's choice to bring suit to enforce the covenant.⁴⁴ If a court finds, as happened in *Mains Farm*, that an enforceable "single-family dwelling/residential use" restrictive covenant has been violated, the judicial inquiry will often go no further.⁴⁵ Absent an explicit overriding public policy,⁴⁶ the operation of the group home typically will be enjoined. The *Mains Farm* case both exemplifies this problem and begins to hint at a solution.

II. AN ANALYSIS OF THE MAINS FARM DECISION

In December 1987, Selma Worthington purchased a home in the Mains Farm subdivision near Sequim, Washington.⁴⁷ Ms. Worthington was licensed by the Washington State Department of Social and Health Services as an operator of an "adult family home."⁴⁸ Raymond Miller and three other disabled individuals, ranging in age from 75 to 98, lived in the home at Mains Farm with Ms. Worthington and

43. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974) (applying 14th amendment equal protection analysis to a local zoning ordinance.)

44. See, e.g., *Casa Marie, Inc. v. Superior Court of P.R.*, 988 F.2d 252, 258-60 (1st Cir. 1993) (finding no state action when a court enforces a private, facially-neutral, restrictive covenant, and determining that no constitutional or 42 U.S.C. § 1983 inquiry is possible); CUNNINGHAM, *supra* note 39, at 471-75, 484 (discussing that as long as a real covenant is: (1) found to "touch and concern" the land, and (2) there is intent to bind successors, an injunction to enforce the covenant will be "routinely granted.").

45. See, e.g., Uehlein *supra* note 15.

46. See, e.g., *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 460 N.E.2d 1336, 1343 (N.Y. 1984).

47. *Mains Farm Homeowners Ass'n v. Worthington*, 64 Wash. App. 171, 173, 824 P.2d 495, 496 (1992), *aff'd*, 121 Wash. 2d 810, 854 P.2d 1072 (1993).

48. *Id.*

her two children.⁴⁹ Ms. Worthington purchased the property subject to a restrictive covenant stipulating that “all lots or tracts permitted in Mains Farm shall be designated as ‘residence lots’ and shall be used for single family residential purposes only.”⁵⁰ Ms. Worthington did not believe that her household violated the covenant.⁵¹

In January 1988, the Mains Farm Homeowners Association filed suit against Ms. Worthington alleging that her “adult foster care commercial enterprise” violated the covenant.⁵² The Homeowner’s association sought only an injunction, alleged no damages, and offered no evidence that Ms. Worthington’s group home adversely affected their community.⁵³

On cross motions for summary judgment, the Clallum County Superior Court determined that, although the group home created “no extraordinary impact on the neighborhood,”⁵⁴ the “overriding commercial elements” inherent in the group home’s operation violated the covenant.⁵⁵ In both the Court of Appeals and the Washington State Supreme Court, Worthington consistently argued (1) that her group home was a single-family residence within the meaning of the covenant, and (2) that the covenant, as enforced against her group home, was contrary to public policy and thus void.⁵⁶ She lost both appeals.⁵⁷

The Washington State Supreme court rejected Ms. Worthington’s arguments in a seven to two decision.⁵⁸ Justice Brachtenbach’s majority opinion begins with a discussion of various often quoted, and often contradictory, judicial axioms applied in construing restrictive

49. Brief for Appellants at 2, *Mains Farm Homeowners Ass’n v. Worthington*, 64 Wash. App. 171, 824 P.2d 495 (1992) (No. 13085-8-II), *aff’d*, 121 Wash. 2d 810, 854 P.2d 1072 (1993).

50. *Mains Farm*, 64 Wash. App. at 173, 824 P.2d at 496.

51. Deposition on Oral Pre-Trial Examination of Selma Worthington at 4-5, *Mains Farm* (Clallam County Super. Ct. No. 88-2-00339-7) (1989).

52. *Mains Farm*, 64 Wash. App. at 174, 824 P.2d at 497.

53. On the contrary, the only evidence on record indicated that the four elderly residents of Worthington’s household were quiet, generally stayed indoors, and received visitors only once or twice per month. Brief of Amicus Curiae at 2, *Mains Farm*, 121 Wash. 2d 810, 854 P.2d 1072 (No. 59058-3) (1993). On the whole, there was no greater coming and going at Worthington’s Adult Family Home than at other homes in the neighborhood. *Id.*

54. Memorandum Opinion at 2, *Mains Farm* (Clallam County Super. Ct. No. 88-2-00339-7) (1989).

55. *Id.* at 5.

56. See *Mains Farm*, 121 Wash. 2d at 810, 854 P.2d at 1072; *Mains Farm*, 64 Wash. App. at 179, 824 P.2d at 499.

57. *Id.*

58. *Mains Farm*, 121 Wash 2d. at 827, 833, 854 P2d at 1080, 1083.

covenants.⁵⁹ The court then turned to the initial question of whether Ms. Worthington's group home violated the "single-family" aspect of the Mains Farm covenant.

The court first observed that, although there is an extensive array of cases in which various courts have struggled with the concept of what constitutes a family, "[n]o purpose would be served by examining or comparing them."⁶⁰ The court then concluded that the various dictionary definitions of the word "family" were similarly unhelpful, in part because "the fact that a group home is set up to emulate family behavior should not be regarded as a sufficient condition for family status."⁶¹

Ultimately, in an apparent attempt to set out a coherent test for future cases in this state in which the meaning and extent of a "single-family use" restrictive covenant will surely be tested, the court set out four characteristics which it attributes to "the concept of family":

- (1) a sharing of responsibilities among members, a mutual caring whether physical or emotional,
- (2) some commonality whether it be friendship, shared employment, mutual social or political interest,
- (3) some degree of existing or contemplated permanency to the relationship, and
- (4) a recognition of some common purpose, persons brought together by reasons other than referral by a state agency.⁶²

The court did not explicitly apply its four-part test to the Worthington household, but instead concluded that, in the case of a state licensed for-profit group home for the dependent elderly, "a well socialized speaker of English almost certainly would deny the application of 'family' in favor of 'nursing home'."⁶³

The majority opinion next addressed a second, related restriction in the covenant: that the property be used for "residential purposes only." The court took pains to distinguish *Hunter's Tract Improvement*

59. The majority in *Mains Farm* had difficulty reconciling the axiom that restrictive covenants are to be strictly construed, e.g., *Hunters Tract Improvement Co. v. Corporation of Catholic Bishops*, 95 Wash. 112, 114, 167 P.100, 101 (1917), with (1) the axiom that the court's primary objective in construing restrictive covenants is to determine the intent of the parties, e.g., *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wash. App. 177, 179, 810 P.2d 27, 28-29 (1991), and (2) the rule that language in a restrictive covenant is to be given its ordinary and common meaning. E.g., *Krein v. Smith*, 60 Wash. App. 809, 811, 807 P.2d 906, 907 (1991). See *Mains Farm*, 121 Wash. 2d at 815-16, 845 P.2d at 1074.

60. *Id.* at 817, 854 P.2d at 1074.

61. *Id.*

62. *Id.* at 817-18, 854 P.2d at 1075.

63. *Id.* at 818, 854 P.2d at 1075.

Co. v. Corporation of Catholic Bishops,⁶⁴ a 1917 Washington case that the defenders of the group home had argued was controlling.⁶⁵ *Hunter's Tract* involved a similar "residential purposes only" restriction that neighbors attempted to apply against a nunnery that was both a residence for approximately fifteen Catholic nuns and a site for occasional religious ceremonies.⁶⁶ In *Hunter's Tract*, the court held that, because the "main use and purpose" of the nunnery was as a residence, occasional and incidental non-residential use did not violate a "residential use only" restrictive covenant.⁶⁷

Although the *Mains Farm* majority distinguished the *Hunter's Tract* case as "markedly different,"⁶⁸ it applied *Hunter's Tract's* terminology against Ms. Worthington's operation of a group home in her residence: "In this case, the 'main use and purpose' is not to provide a single-family residence, but to provide 24-hour protective care in exchange for money."⁶⁹

The court determined that a more recent Washington Court of Appeals decision, *Hagemann v. Worth*,⁷⁰ was more on point.⁷¹ *Hagemann* also involved a group home for elderly, disabled individuals that had been licensed by the state as an adult family home.⁷² Although the court's decision in *Hagemann* to enjoin the operation of the group home was based primarily on a covenant explicitly prohibiting "business, industry, or commercial industry of any kind or nature,"⁷³ the state supreme court found that *Hagemann* was "remarkably similar" to *Mains Farm*.⁷⁴ In a decision that does not bode well for group home operators, home sharing programs, or anyone who operates any type of small business out of his or her home, the Washington State Supreme Court in *Mains Farm* adopted the reasoning of the *Hagemann* Court: A group home for the disabled violates a residential use only restrictive covenant because "business is an antonym of residential. . . . [T]o provide a residence to paying customers is not synonymous with a residential purpose."⁷⁵

64. 98 Wash. 112, 167 P. 100 (1917).

65. *Mains Farm*, 121 Wash. 2d at 819, 854 P.2d at 1076.

66. *Hunter's Tract*, 98 Wash. at 113, 167 P. at 101.

67. *Id.* at 115, 167 P. at 101.

68. *Mains Farm*, 121 Wash. 2d at 819, 854 P.2d at 1075.

69. *Id.* at 820, 854 P.2d at 1076.

70. 56 Wash. App. 85, 782 P.2d 1072 (1989).

71. *Mains Farm*, 121 Wash. 2d at 820, 854 P.2d at 1076.

72. *Hagemann*, 56 Wash. App. at 87, 782 P.2d at 1073.

73. *Id.*

74. *Mains Farm*, 121 Wash. 2d. at 820, 854 P.2d at 1077.

75. *Id.* at 820, 854 P.2d at 1077.

The *Mains Farm* majority determined that *Hagemann's* "analysis is sound and its reasoning persuasive."⁷⁶ It ultimately went on to conclude that, because Ms. Worthington was paid for the twenty-four-hour-a-day care she provided to Raymond Miller and the three other disabled residents of Worthington's group home, (1) "her house is more institutional in nature than familial,"⁷⁷ and (2) "the residential nature of defendant's use of her home is destroyed by the elements of commercialism."⁷⁸

After deciding against the defendant on the initial issue of whether the covenant had been violated, the majority opinion in *Mains Farm* addressed the defendant's second argument: Even if her group home is found to violate the "single-family dwelling/residential use" restrictive covenant, public policy dictates that the covenant is void as enforced against an adult family home.⁷⁹ The *Mains Farm* court found that "[t]he record is not adequate to identify the facts and policies upon which such a significant public policy should be considered."⁸⁰ Thus, the court "expressed no opinion" on the public policy question in this case.⁸¹

In rejecting the defendants' public policy arguments, the court seemed to lament that Worthington did not produce a more comprehensive study of governmental goals, efforts, needs, and successes in establishing adult family homes to serve the residential needs of the disabled in Washington State.⁸² The court accepted as relevant the Washington State Legislature finding "that adult family homes are an important part of the state's long-term care system."⁸³ However, the court also seemed swayed by the lack of any explicit legislative declaration in Washington State that group homes shall be considered single-family residences for the purposes of private restrictive covenants.⁸⁴ As a substitute for an explicit legislative pronouncement, the court provided a laundry list of evidentiary factors future litigants must establish as a prerequisite to any judicial pronouncement that

76. *Id.* at 820, 854 P.2d at 1076.

77. *Id.* at 821, 854 P.2d at 1077.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* The court distinguished and rejected various cases presented by the defense, including *Crane Neck*, in which courts in other states have found an overriding public policy favoring the establishment of group homes for the disabled, and thus refused to enforce a private restrictive covenant against similarly situated group homes. *Id.* at 824-25, 854 P.2d at 1079-80.

82. *Id.* at 822, 854 P.2d at 1077-78.

83. *Id.* at 821-22, 854 P.2d at 1077 (quoting WASH. REV. CODE § 70.128.005 (1992)).

84. *See id.* at 822, 854 P.2d at 1077.

there is an overriding public policy in Washington State favoring the establishment of group homes for the disabled.⁸⁵

In essence, the court concluded that future defenders of group homes will need to present it with considerably more facts about (1) the Washington State Legislature's policy regarding adult family homes, and (2) impediments to efforts to establish an adequate number of adult family homes. Specifically, the court dictated that, in future cases involving the same public policy argument, it would consider all evidence tending to show:

- (1) that such a statewide policy exists;
- (2) that there is a need which is not being met;
- (3) that other efforts are or are not being taken to meet the need . . . ;
- (4) [that] there is a public policy intended to override existing protective covenants;
- (5) [that] the restriction of RCW 70.128.175 to zoning was a deliberate legislative effort to avoid conflict with existing protective covenants, and
- (6) . . . [that] the effect of such asserted policy on existing contractual rights and the concomitant question of governmental taking.⁸⁶

Part III of this Note will address the significant burden of showing this overriding public policy under the six factor test set out in *Mains Farm*.

At the end of its opinion, the *Mains Farm* majority declined, on procedural grounds,⁸⁷ to consider two issues: (1) whether the actions of the Mains Farm Homeowner's Association in this case violated the federal Fair Housing Act,⁸⁸ and (2) whether the homeowner's attempt to enforce the covenant against the Worthington group home violated Washington's Law Against Discrimination.⁸⁹ An analysis of these statutes, and their applicability in future cases will be discussed in Part IV of this Note.

85. *Id.* at 822, 854 P.2d at 1078.

86. *Id.*

87. The court declined to consider the claim under the federal Fair Housing Act on the grounds that the issue was "raised first and only by amicus." *Id.* at 826, 854 P.2d at 1080. Similarly, the court refused to address the argument that the Mains Farm neighbors' conduct violated Washington's Law Against Discrimination on the grounds that it "need not consider arguments raised in a supplemental brief." *Id.* at 826-27, 854 P.2d at 1080.

88. 42 U.S.C. §§ 3601-3631 (1988).

89. WASH. REV. CODE § 49.60 (1994).

III. SEARCHING FOR AN OVERRIDING PUBLIC POLICY

The most immediate and ominous repercussion of the *Mains Farm* decision is that group homes for the disabled in Washington State that are proposed or currently situated on property subject to single-family dwelling/residential use restrictive covenants are vulnerable to judicial attack as covenants violating commercial enterprises. In responding to this threat, advocates for the disabled must begin to compile the factual material delineated by the court as a necessary prerequisite to any future attempt to re-litigate the first issue left undecided in *Mains Farm*: Whether the public policy in Washington State to facilitate the establishment of adult family homes is sufficient to override a private restrictive covenant.

Initially, it is clear from both the tone and complexity of the public policy test set out in *Mains Farm* that the court would have preferred an explicit declaration by the Washington State Legislature that "single-family dwelling/residential use" restrictive covenants are void if used against a group home.⁹⁰ Although there is no such explicit pronouncement in Washington State law,⁹¹ various other state legislatures have, to a varying degree, limited the applicability of private restrictive covenants to group homes for the disabled.⁹²

90. The *Mains Farm* majority's six factor public policy test creates an alternative method of finding an overriding public policy in which future group home defenders must initially show (1) explicit evidence of a public policy favoring the establishment of community based group homes, and (2) evidence that the need for group homes is not being met despite government efforts to encourage their establishment. The court strongly hints that it would balance evidence of legislative intent and demonstrated need against arguments that the legislature implicitly approves of the use of restrictive covenants against group homes by not explicitly disallowing it, and neighbor's claims that refusals to enforce covenants against group homes constitutes a governmental taking. See *Mains Farm*, 121 Wash. 2d at 822, 854 P.2d at 1078.

The need for this relatively convoluted analysis would be extinguished by a simple legislative pronouncement that group homes are single family residences for purposes of private restrictive covenants.

91. The Washington State Legislature has, in contrast, explicitly dictated that "[a]dult family home[s] shall be considered a residential use of property for zoning purposes. Adult family homes shall be a permitted use in all areas zoned for residential or commercial purposes, including areas zoned for single family dwellings." WASH. REV. CODE § 70.128.175(2) (1994).

It should be noted that at least two courts in other states have cited to similar statutory language, classifying group homes as "single family dwellings" for zoning purposes, and have found a more general public policy overriding a private covenant as applied against a group home for the disabled. See *Westood Homeowners Ass'n v. Tenhoff*, 745 P. 2d 976, 982-84 (Ariz. Ct. App. 1987); *McMillan v. Iserman*, 327 N.W.2d 559, 563 (Mich. Ct. App. 1983).

92. See JAFFEE & SMITH, *supra* note 38, at 8. This report lists Indiana, Iowa, North Carolina, Rhode Island, and Wisconsin as states that, as of 1985, had enacted statutory pronouncements voiding all private restrictive covenants expressly or implicitly prohibiting group homes for the disabled. In addition, the Arizona, California, and Missouri legislatures had

Washington's state legislature has not yet made a similar explicit public policy pronouncement. However, it has stated that "adult family homes are an important part of the state's long-term care system. Adult family homes provide an alternative to institutional care and promote a high degree of independent living for residents."⁹³ Given this existing evidence that the legislature favors the establishment of adult family homes, and the road map set out by the majority in *Mains Farm*, it is possible that a court would rule favorably on the public policy issue. Group home defenders would need to present evidence sufficient to show the court (1) that there is an ongoing unmet need for more adult family homes in Washington state, and (2) that the use and abuse of private restrictive "single family dwelling/residential purpose only" covenants significantly impedes state efforts to site group homes for the disabled in appropriate residential communities.

A. *Unmet Need and the Impact of Restrictive Covenants*

A 1990 study estimated that there are approximately 70,000 severely disabled individuals and 73,500 frail elderly persons with unmet housing needs in Washington State.⁹⁴ The study specifically addressed the continuing need to complete the transfer of developmentally disabled individuals out of inappropriate nursing home environments and into less restrictive, community-based group homes.⁹⁵ In addition, the study indicated that roughly 15,800 low income elderly individuals currently living either independently or in retirement communities would benefit from community based small scale residential care.⁹⁶

A report compiled by the Washington State Department of Social and Health Services in January of 1992 initially identifies 46 cities and 19 counties in Washington State in need of adult family homes.⁹⁷ In

enacted similar statutes but excluded existing covenants from their reach. *Id.* at 16-20.

93. WASH. REV. CODE § 70.128.005 (1994).

94. JAMES L. MCINTRIE & STANISLAV FRITZ, INSTITUTE FOR PUBLIC POLICY AND MANAGEMENT, UNIVERSITY OF WASHINGTON, CLOSING THE GAP: HOUSING NEEDS IN WASHINGTON STATE 17-18 (1990).

95. *Id.*

96. *Id.* at 18-19.

97. WASHINGTON STATE AGING AND ADULT SERVICES ADMINISTRATION, WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, AREAS WITH UNMET ADULT FAMILY HOME NEEDS 1-2 (1992). The cities designated as in need of adult family homes include: Anacortes, Arlington, Buckley, Burlington, Carnation, Centralia/Chehalis, Chelan, Cle Elum, Colville, Connell, Dayton, Edwall, Ellensburg, (East and North) Everett, Forks, Granite Falls, Kelso, La Cross, Little Rock, Longview, Monroe, Mt. Vernon, Naches, North Bend, Oak

addition, the report specifically states that “[a]ll regions need homes that will accept publicly paid residents.”⁹⁸ Other reports prepared by the Aging and Adult Services Administration, the licensing agency for group homes for the disabled elderly in this state, similarly document both state efforts to facilitate the establishment of licensed adult family homes and the continuing unmet need for group homes in Washington State.⁹⁹

Ultimately, both state efforts to encourage the establishment of group homes for the disabled and the continuing unmet need for this type of residence can be convincingly established. However, the exact impact that “single family dwelling/residential use” restrictive covenants will have on the number and locations of group homes in this state in the post *Mains Farm* era is less demonstrable.

A number of studies in other states have addressed the problems associated with clustering of group homes in urban areas and poorer neighborhoods.¹⁰⁰ What is needed, however, is an empirical study demonstrating a nexus in Washington State between single-family residential-use restrictive covenants prevalent in more affluent neighborhoods and residential subdivisions, and the unmet need for appropriate community-based housing for the disabled in Washington State. In the absence of such a study, it will be difficult for group home defenders to quantify the extent to which the threat of *Mains Farm* type law suits impedes the establishment of group homes for the disabled in this state.

Ultimately, given (1) the relatively complicated public policy road map in *Mains Farm*, (2) the lack of an explicit overriding legislative pronouncement, and (3) the lack of a comprehensive empirical study linking the phenomenon of private restrictive covenants to the demonstrated unmet need for group homes in Washington State, disabled individuals and group home operators should not rely exclusively on public policy arguments to defend themselves against the charge that, under the *Mains Farm* analysis, their living arrange-

Harbor, Oakesdale, Orting, Pomeroy, Port Angeles, Port Townsend, Prosser, Quilcene, Rainier, Raymond, Rochester, Roslyn, Roy, Sedro Wooley, Stanwood, Sultan, Tenino, Tumwater, Waitsburg, Waterville, West Olympia, and Yelm. The counties include: Columbia, Cowlitz, Ferry, Garfield, Island, Kittitas, Klickitat, Lewis, Lincoln, Mason, Pacific, Pend Oreille, (East) Pierce, San Juan, Skagit, Skamania, (Northern) Stevens, Wahkiakum, and Whitman.

98. *Id.* at 2 (emphasis added). The report additionally states that “[h]omes are also needed for persons with special care needs, i.e., advanced dementias; traumatic brain injury; multiple sclerosis; mental illness, etc.” *Id.*

99. See, e.g., AGING AND ADULT SERVICES ADMINISTRATION, ADULT FAMILY HOME CARE MULTIPLE FACILITY OWNERSHIP: A REPORT TO THE 1992 LEGISLATURE (1991).

100. See SMITH & JAFFE, *supra* note 38, at 9.

ments violate "single family dwelling/residential use" restrictive covenants. Instead, defenders of group homes should emphasize that suits like *Mains Farm* violate existing federal and state fair housing laws.

IV. FEDERAL AND STATE FAIR HOUSING LAWS

The *Mains Farm* majority swiftly disposed of a claim raised in amicus briefs that the neighbors' conduct in *Mains Farm* violated the federal Fair Housing Act.¹⁰¹ The court simply pronounced, "[w]e do not consider issues raised first and only by amicus."¹⁰² Regardless of either the jurisprudential inaccuracy of this unequivocal pronouncement,¹⁰³ or its unfortunate result of allowing the *Mains Farm* homeowners to violate state and federal law with impunity, the Washington State Supreme Court has sent a clear message to litigators and advocates for the disabled in Washington State: Be cognizant of both federal and state statutes protecting the disabled from discrimination in housing, and use these anti-discrimination statutes at the trial court level.

A. *The Federal Fair Housing Act*

The 1988 amendments to the federal Fair Housing Act extended the original 1968 Fair Housing Act's prohibitions against discrimination in housing based on race, religion, or national origin, to (1) discrimination against families, and (2) discrimination against the disabled.¹⁰⁴

101. See *Mains Farm*, 121 Wash. 2d at 827, 854 P.2d at 1080.

102. *Id.*

103. Justice Brachtenbach is correct in asserting that the Washington State Supreme Court need not necessarily address an issue raised only in an amicus brief. See, e.g., *Coburn v. Seda*, 101 Wash. 2d 270, 279, 677 P.2d 173, 178 (1984). However, this is not a hard and fast prohibition. "An appellate court has the inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision." *Falk v. Keene Corp.*, 113 Wash. 2d 645, 659, 782 P.2d 974, 982 (1989). Whether there is a broad public interest in the issue is a factor the court should consider in determining whether or not to consider an issue not raised by the parties. See *Port of Edmonds v. Northwest Fur Breeders Coop., Inc.*, 63 Wash. App. 159, 164, 816 P.2d 1268, 1271 (1991).

104. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(b), 102 Stat. 1619, 1622 (1988) (codified as amended at 42 U.S.C. § 3604 (1988)). The 1988 amendments also significantly increased the government's authority to enforce the federal Fair Housing Act by (1) creating a federal administrative structure to process housing discrimination claims, see *id.* § 8, 102 Stat. 1619, 1625-33 (1988) (codified as amended at 42 U.S.C. §§ 3610, 3612 (1988)), and (2) allowing the U.S. Justice Department to seek monetary damages on behalf of victims of discrimination proscribed by the act. See *id.*, 102 Stat. 1619, 1634-35 (1988) (codified as amended at 42 U.S.C. § 3614(d) (1988)). It is worth noting that despite numerous U.S. Supreme Court decisions recognizing extremely broad congressional power to regulate private behavior under the

Under the 1988 Amendments, it is unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of handicap."¹⁰⁵ It is also unlawful to "discriminate against any person in the terms, conditions, or privileges of the sale or rental of a dwelling . . . because of a handicap."¹⁰⁶ Additionally, the Act provides that it is unlawful discrimination to refuse "to make reasonable accommodations in the rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling."¹⁰⁷

In clarifying the intent behind the plain language of the statute, the drafters of the 1988 amendments specified that one of their purposes was "to end the unnecessary exclusion of persons with handicaps from the American mainstream."¹⁰⁸ The House Report that accompanied the 1988 amendments explicitly dictates that "[t]he Act is intended to prohibit the application of . . . *restrictive covenants* . . . that have the effect of limiting the ability of [handicapped] individuals to live in the residence of their choice."¹⁰⁹

In ruling on suits alleging discriminatory application of facially-neutral restrictive covenants, courts have heeded this explicit expression of congressional intent and found that the use of private restrictive covenants to exclude group homes for the disabled from particular residential communities violates the federal Fair Housing Act.¹¹⁰ In

Commerce Clause, *e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942), one federal district court judge has analyzed the federal Fair Housing Act Amendments of 1988 and concluded that Congress has exceeded its constitutional powers in proscribing private acts of discrimination against disabled individuals. *Michigan Protection and Advocacy Service, Inc. v. Babin*, 799 F. Supp. 695, 727-34 (1992), *aff'd on other grounds*, 18 F.3d 337, 347 (6th Cir. 1994).

105. 42 U.S.C. § 3604(f)(1) (1988). "Handicap" with respect to a person under the federal Fair Housing Act is defined very broadly as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such impairment, or (3) being regarded as having such an impairment." 42 U.S.C. § 3602(h) (1988).

106. 42 U.S.C. § 3604(f)(2) (1988).

107. 42 U.S.C. § 3604(f)(3)(B) (1988).

108. H.R. REP. NO. 711, 100th Cong., 2d Sess. 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179.

109. *Id.* at 24, 1988 U.S.C.C.A.N. at 2185 (emphasis added). The House Report explicitly dictates that subsection 3604(f)(2), which bars discrimination against disabled individuals in the terms and conditions of the sale or rental of a dwelling, "is intended to prohibit special *restrictive covenants* . . . which have the effect of excluding, for example, congregate living arrangements for persons with handicaps." *Id.* at 23, 1988 U.S.C.C.A.N. at 2184 (emphasis added).

110. *United States v. Scott*, 788 F. Supp. 1555, 1561-62 (D. Kan. 1992) (finding a neighbor's threat to bring suit to enforce a "single family dwelling" restrictive covenant against a group home violated 42 U.S.C. § 3604(f)(1)(B) because the threat to sue made the dwelling "unavailable . . . because of handicap."); *Casa Marie, Inc. v. Superior Court of P.R.*, 752 F. Supp. 1152 (D.P.R.

various other instances, courts have found that the Act reaches not only practices that are discriminatory on their face, but also facially neutral terms or conditions of sale or rental of property that have the effect of discriminating against individuals with disabilities, or members of other classes protected under the act.¹¹¹

If no intent to discriminate is evident, courts have developed a disparate impact analysis for discrimination claims brought under the Fair Housing Act.¹¹² Under this four-pronged test, a court will examine whether the effect of defendant's facially neutral action is impermissibly discriminatory. The relevant factors are:

- (1) the strength of the showing of discriminatory effect;
- (2) whether there is some evidence of discriminatory intent;
- (3) the alleged discriminator's professed interest in taking the action complained of, and
- (4) whether the complaining party seeks to affirmatively compel others to provide housing for members of a protected class, or merely seeks to restrain others from interfering with individual property owners wishing to provide such housing.¹¹³

This four-part disparate impact test has been applied, and unlawful discrimination prohibited under the Fair Housing Act has been found under conditions remarkably similar to *Mains Farm*.¹¹⁴ In *Casa Marie v. Superior Court*, neighbors in a residential neighborhood in San Juan, Puerto Rico successfully petitioned the local court to enjoin the operation of a medium size "elder-care facility" that allegedly violated a "single family residential use" restrictive covenant.¹¹⁵ Eventually, nine disabled elderly residents of the home filed

1990), *vacated on other grounds*, 988 F.2d 252 (1st Cir. 1993) (finding neighbors' suit to enforce a restrictive covenant and enjoin the operation of an "elder care facility" violated the federal Fair Housing Act). *See also* Cypress Bend Homeowners Ass'n of Countryside, Inc., H.U.D.A.L.J. No. 04-92-0883-1, 1993 WL 668031 (May 5, 1993) (HUD Determination of Reasonable Cause and Charge of Discrimination against Homeowners Association that had threatened suit to enforce a restrictive covenant to stop the establishment of a group home for disabled adults in their neighborhood).

111. *See, e.g.*, *Lindmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977); *Carson v. Rochester Housing Auth.*, 748 F. Supp. 1002 (W.D.N.Y. 1990) (holding that housing authority's regulation requiring proof of ability to "live independently" discriminated against disabled applicants).

112. *See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

113. *Association of Relatives and Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 95, 106 (D.P.R. 1990).

114. *See Casa Marie, Inc. v. Superior Court of P.R.*, 752 F. Supp. 1152 (D.P.R. 1990), *vacated on other grounds* 988 F.2d 252 (1st Cir. 1993).

115. *Id.* at 1154-55.

a claim in federal district court alleging that the local court's action discriminated against them in violation of both the federal Fair Housing Act and the Equal Protection Clause.¹¹⁶

The Federal District Court applied the four-part disparate impact analysis to the claim brought under the Fair Housing Act.¹¹⁷ Initially, the court found that since the result of the neighbors' action to enforce the covenant "would be a broad scale exclusion of the elderly handicapped as opposed to any other group of potential residents," "discriminatory effect was clearly present."¹¹⁸ Next, the court found that the testimony and various other statements of the complaining neighbors demonstrated the minimal level of discriminatory intent to pass the second prong of the test.¹¹⁹ Third, the court found that the neighbor's professed reasons for excluding the group home and its residents were pretextual.¹²⁰ Finally, the court noted that the relief requested by the disabled elderly residents of Casa Marie was merely "to be free of neighborhood interference."¹²¹ They did not seek to affirmatively burden the complaining neighbors.¹²²

Both *Mains Farm* and *Casa Marie* involved neighbors' suits to enforce a facially neutral "single family residential use" restrictive covenant and enjoin a home for the disabled elderly from existing in their neighborhood. Under a *Casa Marie* type four-part disparate impact analysis, the conduct of the *Mains Farm* neighbors could similarly have been found to violate the federal Fair Housing Act. First, although the restrictive covenant in question was facially neutral, its use to enjoin the operation of the group home effectively excluded the disabled residents of the Worthington household from the Mains Farm subdivision.

Additionally, the *Mains Farm* homeowners were unable to demonstrate any adverse impact or undue burden on the neighborhood due to the group home's operation.¹²³ As a result, it is extremely unlikely that the neighbors could have presented a legitimate, non-discriminatory explanation for their suit to enjoin the operation of

116. *Id.* at 1152.

117. *Id.* at 1168-69.

118. *Id.* at 1169.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Brief of Amicus Curiae at 2, *Mains Farm*, 121 Wash. 2d 810, 854 P.2d 1072 (No. 59058-3) (1993).

Worthington's group home. Thus, the minimal requisite level of discriminatory intent could have been inferred.

Finally, the homeowners in *Mains Farm* actively sought to interfere with another property owner's attempt to provide needed housing to a protected class of individuals. In contrast, the Worthington residents did not seek to affirmatively burden their neighbors. Like the group home in *Casa Marie*, the Worthington household merely sought to be free from the neighbors' interference.

The federal Fair Housing Act, as intended by Congress and as enforced by the courts, protects disabled individuals' right to "live in the residence of their choice," free from the discriminatory application of facially neutral restrictive covenants. This federal statute is clearly the most direct and potentially effective means of defending group homes for the disabled against conduct like that in *Mains Farm*, conduct that is discriminatory to the extent that it makes any residence in a particular neighborhood unavailable to any individual simply because of his or her disability.

B. Washington State's Law Against Discrimination

In addition to refusing on procedural grounds to apply the federal Fair Housing Act to the neighbors' conduct in *Mains Farm*,¹²⁴ the Washington State Supreme Court similarly determined that it "need not consider" whether the neighbors' conduct violated Washington State's Law Against Discrimination because the defense did not raise the issue at the trial court level.¹²⁵

The court's choice not to consider this claim is unfortunate. Like the federal Fair Housing Act, Washington State's Law Against Discrimination could have and should have protected the group home residents' right to be free from the discriminatory application of a facially neutral restrictive covenant.

RCW 49.60.224 provides that, "[e]very provision in a written instrument relating to real property . . . which directly or indirectly limits the use or occupancy of real property on the basis of . . . the presence of any sensory, mental, or physical disability . . . is void."¹²⁶ In clarifying its reach, RCW 49.60 states that Washington's Law Against

124. 121 Wash. 2d at 827, 854 P.2d at 1080.

125. *Id.* at 826, 854 P.2d at 1080.

126. WASH. REV. CODE § 49.60.224(1)(1994) (emphasis added). This statute also prohibits similar discrimination based on race, creed, color, sex, national origin, or against families with children. *Id.*

Discrimination "shall be construed liberally for the accomplishment of the purposes" of the act.¹²⁷

The only published Washington appellate court decision involving RCW 49.60.224 is *Riste v. Eastern Washington Bible Camp, Inc.*¹²⁸ *Riste* involved a deed provision that purported to require all occupants of a certain premises to "conduct themselves" in a manner compatible with the "Assembly of God Church."¹²⁹ The Court of Appeals found that RCW 49.60.224 clearly applied to the deed provision. The court then held that, because the provision directly limited the use of the property based on creed, the restriction was void under RCW 49.60.224.¹³⁰

Various state court cases have liberally construed and applied other sections of Washington's Law Against Discrimination.¹³¹ Washington courts have held that, because RCW 49.60 substantially parallels various federal civil rights statutes, including the federal Fair Housing Act, courts may look to judicial interpretation of federal anti-discrimination laws for guidance in interpreting Washington's Law Against Discrimination.¹³² In addition, in 1993, the Washington State Legislature expanded and strengthened RCW 49.60's provisions prohibiting discrimination in housing and created a state fair housing act substantially replicating federal law.¹³³

Thus, despite the lack of specific judicial precedent with respect to the application of RCW 49.60.224, it is extremely likely that a Washington court applying this statute in a *Mains Farm* type situation would follow existing federal precedent and utilize a disparate impact/discriminatory impact test. Under the four-part federal analysis discussed above, the disabled residents in the *Mains Farm* group home could have shown that the neighbors' use of the otherwise neutral restrictive covenant against the Worthington household directly limited their ability to live in the *Mains Farm* subdivision based on their disability and their concurrent need for twenty-four hour care. Thus, the neighbors' suit to enjoin the operation of the group home unlawfully discriminated against them in violation of RCW 49.60.224.

127. WASH. REV. CODE § 49.60.020 (1994).

128. 25 Wash. App. 299, 605 P.2d 1294 (1980).

129. *Id.* at 300, 605 P.2d at 1295.

130. *Id.* at 302, 605 P.2d at 1295.

131. *See, e.g., Fahn v. Cowlitz County*, 93 Wash. 2d 368, 610 P.2d 857 (1980).

132. *E.g., Holingsworth v. Washington Mut. Sav. Bank*, 37 Wash. App. 386, 390, 681 P.2d 845, 848 (1984), *abrogated on other grounds, Allison v. Housing Auth. of Seattle*, 59 Wash. App. 624, 799 P.2d 1195 (1990).

133. *See H.R. 1476*, 53d Leg., Reg. Sess., ch. 69, §§ 1-14, 1993 Wash. Laws 190-202.

V. CONCLUSION

The Washington State Supreme Court's *Mains Farm* decision is unfortunate and unsound for several reasons. First, it is unfortunate that many of the actors involved in the *Mains Farm* case neglected to address the needs and wants of the individuals whom the decision affected most directly and destructively: the four elderly, disabled residents of Worthington's household. Had the supreme court considered the issues raised in the case from the perspective of those individuals, it might possibly have understood and accepted that, for at least six of the seven members of Worthington household, the "main use and purpose" of the house was clearly as a residence, as their home. Instead, the court seemed entirely fixated on the "commercial elements" of Selma Worthington's role in the household, and ruled accordingly.

Second, the supreme court majority opinion in *Mains Farm* is unfortunate in that it opens up an especially slippery slope by which all group homes for the disabled, as well as various other "non-traditional households" in this state, could easily be found to violate typical "single family dwelling/residential use" restrictive covenants.

Third, despite available evidence of both governmental efforts to establish an adequate number of adult family homes, and the continuing pressing need for group homes for the disabled in Washington State, the *Mains Farm* court's reluctance to declare the covenant void on public policy grounds creates a huge evidentiary hurdle for the next group home defender who raises the public policy argument.

Ultimately, the decision is, at the very least, useful because it further delineates the lines upon which future group home battles will be fought. Future defenders of group homes for the disabled must learn the lessons of *Mains Farm*. If these defenders are to adequately serve their clients, and the more general class of disabled individuals potentially denied housing under *Mains Farm*, the case must focus on the plight of the disabled residents of the threatened group home.

Future group home defenders must: (1) initially and continuously frame the issues in the case in terms of disabled group home residents' state and federal statutory right to live in the home of their choice, and (2) initially and continuously stress the aggregate insidious discriminatory effect of law suits like *Mains Farm*—the exclusion of small scale group homes for the disabled from appropriate residential communities throughout the state.

By framing future similar cases in terms of the statutory rights of disabled group home residents, group home defenders will expose

plaintiffs' underlying unfounded NIMBY sentiment, and successfully defend against the discriminatory application of facially neutral restrictive covenants.