

Pace Law Review

Volume 21
Issue 2 *Spring 2001*

Article 6

April 2001

Senior Citizen Overlay Districts and Assisted Living Facilities: Different but the Same

Cori Menkin

Follow this and additional works at: <http://digitalcommons.pace.edu/plr>

Recommended Citation

Cori Menkin, *Senior Citizen Overlay Districts and Assisted Living Facilities: Different but the Same*, 21 Pace L. Rev. 481 (2001)

Available at: <http://digitalcommons.pace.edu/plr/vol21/iss2/6>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

Comment

Senior Citizen Overlay Districts and Assisted Living Facilities: Different but the Same

Cori Menkin*

Table of Contents

PART I. INTRODUCTION	482
PART II. BACKGROUND	483
A. Assisted Living Facilities	483
B. Senior Citizen Overlay Districts	485
C. Relevant Case Law and Statutory Law	489
1) Exclusionary Zoning - <i>Maldini v. Ambro</i> ...	489
2) Spot Zoning - <i>Beyer v. Burns</i>	490
3) Equal Protection - <i>Campbell v. Barraud</i> ...	491
4) <i>Are Towns Required to Allow Assisted Living Facilities?</i> <i>Forest City Daly Housing, Inc. v. Town of North Hempstead</i>	492
5) <i>The Fair Housing Act and the Fair Housing Amendments Act of 1988</i>	493
6) <i>United States v. City of Taylor</i>	495
7) <i>“K” Care, Inc. v. Town of Lac Du Flambeau</i>	497
8) <i>Potomac Group Home Corporation v. Montgomery County, Maryland</i>	498

* The author would like to thank John Nolon for his help and guidance on this Article. She would also like to thank Sheryl Straney, Lou DelJuicide, and Jill Grinham for their time and efforts in editing this Article. Thanks to Allison Arcuri and Gerald Coviello for their input. Special thanks to her friends and family for all of their support during her time in law school.

i) <i>Group Homes for the Elderly</i>	499
ii) <i>Defining "Elderly"</i>	499
PART III. ANALYSIS	500
PART IV. CONCLUSION	507

PART I. INTRODUCTION

In recent years, the need for affordable housing for the nation's elderly population has become increasingly apparent. "A tight housing market and a shortage of appropriate housing is a serious problem for older Americans."¹ As the need becomes a reality, efforts are being made to accommodate the housing needs of this rapidly growing group, as well as to allow the elderly to age in place. Two efforts gaining popularity are assisted living facilities and senior citizen overlay districts. Although these two solutions meet similar needs and have similar characteristics, they are not given the same deference by the law or by local zoning boards. However, this article explains why assisted living facilities and senior citizen overlay districts should be afforded the same treatment by local zoning boards.

Part II discusses the nature of both assisted living facilities and senior citizen overlay districts. This section also explores relevant case law and statutory law. The relevant law illustrates that assisted living facilities must be allowed by local zoning boards where other residential uses are permissible.² Moreover, assisted living facilities are predominantly inhabited by the elderly.³ While they do accommodate younger people with disabilities, the majority of their population is senior citizens.⁴ Some even require that their residents be over a certain

1. Patricia Baron Pollack & Alice Nudelman Gorman, *Community-Based Housing for the Elderly*, 420 AM. PLANNING ASS'N, PLANNING ADVISORY SERV., at 1 (1989).

2. See *United States v. Taylor*, 798 F. Supp. 442, 447 (E.D. Mich. 1992). "The [Fair Housing Act], applicable to state and local land use laws and ordinances, demands that municipalities . . . change their rules to afford elderly handicapped the same opportunity to housing as those who are not handicapped." *Id.*

3. See, e.g., *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 147 (2d Cir. 1999). The typical resident of an assisted living facility is over eighty years of age. See *id.*

4. See, e.g., *Assisted Living Assocs. of Moorestown v. Moorestown Township*, 996 F. Supp. 409, 416 (D.N.J. 1998) (defining the typical resident of an assisted living facility as one who "needs assistance with two or more basic daily activities,

age.⁵ In contrast, while the creation of senior citizen overlay districts is within the town's power, the town is not required to allow such districts. Based on the similarities between the two housing options, local zoning boards should be required to allow senior citizen overlay districts as well as assisted living facilities in their towns.

Part III focuses on the meaning given to the terms "elderly" and "handicapped" by the Fair Housing Act (FHA). The interpretation of these terms is used to apply the FHA to assisted living facilities and senior citizen overlay districts, comparatively. In this section, the premise that local zoning boards should treat senior citizen overlay districts the same as assisted living facilities is supported. Part III also sets forth the legislative history, judicial interpretation, and congressional intent behind the FHA as applied to the elderly. This section ultimately concludes how the terms "elderly" and "handicapped" should be interpreted in relation to assisted living facilities and senior citizen overlay districts. Part IV briefly reviews relevant case and statutory law, and reiterates the treatment that senior citizen overlay districts should be given by local zoning boards.

PART II. BACKGROUND

In order to critically analyze and fully understand the purposes and characteristics of assisted living facilities and senior citizen overlay districts, it is necessary to describe each housing option in detail. It is also necessary to examine the case law and statutory history before the topic can be analyzed. Therefore, this part will be divided into three sections: A) Assisted Living Facilities, B) Senior Citizen Overlay Districts, and C) Relevant Case Law and Statutory Law.

A. *Assisted Living Facilities*

Many different definitions for assisted living facilities have been propounded. There is no specific definition that is officially correct. One definition is that an assisted living facility is "a model of senior housing that incorporates residential

such as toileting, bathing, or dressing, and is, on average, approximately 85 years old.").

5. See *infra* Part II.C.

quarters with personal services. These facilities provide basic services, such as laundry, light housekeeping, communal meals, dressing, bathing and medication . . . [and] provide[] a maximum level of independence with 24-hour security.”⁶ In comparison, it has also been defined as “a facility designed to provide care, in a residential environment, for individuals with certain disabilities.”⁷ Assisted living facilities have also been defined as:

residential setting[s] that provides or coordinates flexible personal care services, 24-hour supervision and assistance (scheduled or unscheduled), activities, and health-related services; has a service program and physical environment designed to minimize the need for tenants to move within or from the setting to accommodate changing needs and preferences; has an organizational mission, service programs, and a physical environment designed to maximize residents’ dignity, autonomy, privacy, and independence; and encourages family and community involvement.⁸

These living facilities are “a model of housing for the elderly that blends residential and personal services.”⁹ In addition, assisted living facilities:

usually provide basic residential services, such as laundry, light housekeeping, and one meal a day. Additionally, maintenance of a resident’s living quarters is provided. Residents choose and pay for additional services they need, ranging from help with dressing, bathing, medication, and errands to transportation services, private companions, guest meals, physical therapy, and medical services.¹⁰

Furthermore, “[a] typical resident of an assisted living facility needs assistance with two or more basic daily activities, such as toileting, bathing, or dressing, and is, on average, approximately 85 years old.”¹¹

6. Christopher Seeger, *Developing Assisted Living Facilities*, 12 No. 10 N.Y. REAL EST. L. REP. 10, 10 (1998).

7. *Forest City*, 175 F.3d at 146.

8. Stephanie Edelstein, *Assisted Living: Recent Developments and Issues for Older Consumers*, 9 STAN. L. & POL’Y REV. 373, 374 (1998) (citing KEREN BROWN WILSON, ASSISTED LIVING: RECONCEPTUALIZING REGULATIONS TO MEET CONSUMERS’ NEEDS AND PREFERENCES 11 (1996)).

9. David Abromowitz & Rebecca Plaut, *Assisted Living for Low-income Seniors*, 5-Fall J. AFFORDABLE HOUS. & CMTY. DEV. L. 63, 63 (1995).

10. *Id.*

11. *Assisted Living Assocs. of Moorestown*, 996 F. Supp. at 416.

As the “baby boomers” reach the age of retirement, the nation’s need for senior housing is increasing rapidly. The percentage of the population aged sixty-five or older is expected to increase from thirteen percent to twenty percent over the next thirty years.¹² Assisted living facilities are one option to help the country meet this need.¹³ They are targeted at accommodating the older population and providing services commonly required by such residents, while at the same time, allowing for as much independence and personal autonomy as possible. The amount of help available at assisted living facilities ranges from “minimal personal assistance and/or light housekeeping” to skilled medical care equal to that given in nursing homes.¹⁴ While some facilities provide for a large number of services, both medical and otherwise, others simply coordinate the facility and make the services available to the residents, to be used at their option.¹⁵ Assisted living facilities may range in size from fewer than five residents to several hundred residents.¹⁶ The characteristics of assisted living facilities vary from one facility to the next. Therefore, it is difficult to precisely define assisted living.

B. *Senior Citizen Overlay Districts*

Another approach to meeting the demand for housing for the elderly is the overlay district,¹⁷ or floating zone.¹⁸ Recently, municipalities have begun to amend their local zoning ordinances to create zoning districts specifically designed for senior

12. See Edelstein, *supra* note 8, at 374.

13. Generally, other options include nursing homes, senior citizen overlay districts, and home care.

14. See Edelstein, *supra* note 8, at 374.

15. See *id.*

16. See *id.*

17. See JOHN R. NOLON, *WELL GROUNDED: SHAPING THE DESTINY OF THE EMPIRE STATE* 442 (1998). [hereinafter NOLON, *WELL GROUNDED*]. An overlay district is defined as “a zone or district created by the local legislature for the purpose of conserving natural resources or promoting certain types of development. Overlay zones are imposed over existing zoning districts and contain provisions that are applicable in addition to those contained in the zoning law.” *Id.*

18. See *id.* at 435. A floating zone is defined as “a zoning district that is added to the zoning law but that ‘floats’ until an application is made to apply the new district to a certain parcel. Upon the approval of the application, the zoning map is amended to apply the floating district to that parcel of land.” *Id.*

citizens.¹⁹ They are essentially districts within districts. For example, a municipality may locate a senior citizen overlay district within a residential district already established in the town. The new district is "overlaid" on top of the district already in place. The purpose of this type of district is "to address the specialized housing needs of the elderly by incorporating design features that recognize the physical infirmities accompanying aging[,]"²⁰ such as concentrated services and public transportation facilities, ramps, health care facilities, and recreation planning.²¹

One ordinance amendment, the New Rochelle Zoning Ordinance, states that the purpose of the overlay district is to encourage the development of homes specifically designed to meet the needs of senior citizens who prefer to live in a single-family home and have a single-family form of ownership.²² The ordinance sets forth specific requirements, facilities, and amenities that are intended to meet the changing physical and social needs of the elderly.²³ It allows flexibility in design and promotes preservation of open space as well.²⁴

Overlay districts, or floating zones, operate in a unique manner. First, the municipality is required to pass an amendment to its zoning ordinance to allow for such districts.²⁵ At this time, the ordinance does not apply to any specific area.²⁶ Once that has occurred, the town may, upon the developer's request, allow the developer to take advantage of the floating zone

19. See, e.g., NEW ROCHELLE, N.Y., ZONING ORDINANCE, art. VI, § 331-10 (1999) [hereinafter NEW ROCHELLE ORDINANCE]; see also VILLAGE OF BRIARCLIFF MANOR, N.Y., ZONING ORDINANCE, Local L. No. 1 (amended 1994) (establishing an Eldercare Community EC District); see also VILLAGE OF BRONXVILLE, N.Y. CODE ch. 310, art III, Local L. No. 1 (1996) (permitting the construction of age restricted multiple residence facilities).

20. J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 804 (1982).

21. See *id.*

22. See NEW ROCHELLE ORDINANCE, *supra* note 19, § 331- 19.1(A).

23. See *id.* § 331-10.

24. See *id.* § 331-19.1(A).

25. See NOLON, WELL GROUNDED, *supra* note 17, at 192. "Floating zones are adopted by the local legislature, after public hearing, notice, and environmental review, just as other zoning provisions or amendments." *Id.*

26. See John Nolon, *Shattering the Myth of Municipal Impotence: The Authority of Local Government to Create Affordable Housing*, 17 FORDHAM URB. L. J. 383, 394 (1989) [hereinafter Nolon, *Shattering the Myth*].

amendment.²⁷ A developer buys a parcel of land and then applies for a permit to create a floating zone.²⁸ Such a permit will allow the developer significant leeway in bulk requirements such as density.²⁹ The application will be granted in return for the developer's commitment to create a certain type of living arrangement such as affordable housing for senior citizens. With respect to senior citizen overlay districts, the developer may be required to meet certain needs of the elderly population in each residence unit such as primarily first floor living and handicap accessible doorways.³⁰ This arrangement is evidence of the municipality's recognition of the need for senior housing. Although it seems as if most municipalities have not yet implemented a plan for senior citizen overlay districts, the notion may gain popularity as an alternative to other forms of accommodating the senior population.

Senior citizen overlay districts, sometimes referred to as retirement communities or golden age districts, "usually feature low-density developments, are designed on a relatively large scale, and may consist of a variety of building types They frequently incorporate such features as recreational and medical facilities, central dining areas, security systems, low-gradient walks, hand rails, and ramps."³¹

An example of an ordinance amendment allowing for a senior citizen overlay district was quoted in *Bell v. Planning & Zoning Commission of the Town of Westport*.³² "Zoning Amendment #80," adopted by the Westport Planning and Zoning Commission in Connecticut on March 20, 1975, reads as follows:

The purpose of this Section of the regulations is to promote the public health, safety and general welfare of the community by providing decent, safe, and sanitary housing units for elderly persons at reasonable rents, to assure housing facilities specially adapted for elderly persons as a public use in the public interest, and to allow multiple-family housing for elderly persons within the Town of Westport subject to securing a Special Permit . . . and

27. See *id.*

28. See *id.* at 395.

29. See *id.* at 389-90.

30. See, e.g., NEW ROCHELLE ORDINANCE, *supra* note 19, § 331-19.1(D).

31. Richards, *supra* note 20, at 800-01.

32. 377 A.2d 299.

in accordance with the appropriate standards, conditions and safeguards as hereinafter specified.³³

The Westport amendment requires that any site developed pursuant to the amendment be located so as to ensure the easy accessibility of medical facilities, shopping areas, and public transit.³⁴ The bulk requirements for any development are also set forth in detail in the amendment.³⁵

Senior citizen overlay districts differ from assisted living facilities in that the residential units in an overlay district are usually single-family dwelling units, often owned by the resident, as opposed to the apartment-style or single-room living that is common in assisted living facilities.³⁶ In addition, the developer of an overlay district usually does not provide the services for its residents that are customarily available in assisted living facilities.³⁷ The residents of an overlay district provide privately for their own care, instead of living in a facility where those services are available to them upon request.³⁸

Another advantage to senior citizen overlay districts is that assisted living facilities do not offer senior citizens the opportunity to live in an all-elderly community. By allowing younger handicapped persons and the elderly to reside together, conflicts often arise in assisted living facilities that would not surface in senior citizen overlay districts.³⁹ The mixing of the elderly and non-elderly handicapped populations has led to a number of problems for both the senior citizens and the younger disabled persons.⁴⁰ Many of the older "residents who anticipated a quiet, all-elderly environment are frightened and disturbed by the younger residents [and] experience clashes in lifestyles."⁴¹ This tends to lead to an increase in complaints di-

33. *Id.* at 299-300 n.1.

34. *See id.*

35. *See id.*

36. *See supra* Part II.A for a description of assisted living facilities. *See also* NEW ROCHELLE ORDINANCE, *supra* note 19, for a description of the requirements of a senior citizen overlay district

37. *See supra* Part II.A for a description of assisted living facilities. *See also* NEW ROCHELLE ORDINANCE, *supra* note 19, for a description of the requirements of a senior citizen overlay district.

38. *See infra* note 158 and accompanying text.

39. *See* H.R. REP. No. 104-281, at 7-8 (1995).

40. *See id.*

41. *Id.*

rectly “proportionate to the increase in the building’s young and disabled population.”⁴² “Moreover, younger disabled people in these [predominantly] elderly developments are [also] unsatisfied. [This portion of the assisted living population often] complains that their elderly neighbors treat them with suspicion and resentment.”⁴³ Senior citizen overlay districts offer a viable alternative to these problems. By eliminating the mixing of the two populations, the aforementioned conflicts will not arise.

C. *Relevant Case Law and Statutory Law History*

1) *Exclusionary Zoning - Maldini v. Ambro*

Along with the advent of overlay districts came challenges to the authorities that attempted to establish them. It was charged that overlay districts were exclusionary zoning and not within the authority of local zoning boards.⁴⁴ In the landmark case of *Maldini v. Ambro*,⁴⁵ individual homeowners of Huntington, N.Y., living in the area of a proposed retirement community, asked the court for a declaratory judgment that the Town Board of Huntington had exceeded its power by amending its zoning ordinance to create a “Retirement Community District.”⁴⁶ In that case, an application to rezone a twenty acre parcel from a “Residence B district” to a “Retirement Community District” by a non-profit New York Corporation was granted by the Town Board.⁴⁷ Local residents claimed that the zoning board exceeded the power given to it by the legislature and that the granting of the application constituted an age-based classification.⁴⁸ The Court of Appeals of New York held that the town acted within the scope of its power when granting the organization’s application to rezone its parcel as a “Retirement Community District.”⁴⁹ The court stated, “ [a]ge’ considerations are appropriately made if rationally related to the achievement of a proper governmental objective. Here, as already indicated,

42. *Id.*

43. H.R. REP. NO. 104-281, at 7 (1995).

44. *See Maldini v. Ambro*, 330 N.E.2d 403, 404 (N.Y. 1975).

45. 330 N.E.2d 403 (N.Y. 1975).

46. *See id.* at 405.

47. *See id.* at 404.

48. *See id.* at 405.

49. *See id.* at 406.

meeting the community shortage of suitable housing accommodations for its population, including an important segment of that population with special needs, is such an objective.”⁵⁰ The court categorized the town’s ordinance amendment as inclusionary, rather than exclusionary.⁵¹ It reasoned that the ordinance addressed the need for housing for older people and “imposed no particular hardship on other groups of persons who suffer from [a] significant lack of housing.”⁵² According to the court, the town was “acting well within its delegated ‘general welfare’ power.”⁵³

2) *Spot Zoning - Beyer v. Burns*

In addition to being challenged as exclusionary, overlay districts have also been challenged on the grounds that they constitute illegal spot zoning. Spot zoning designates one “small parcel of land for a use classification totally different from that of the surrounding area. . . for the benefit the owner of the property and to the detriment of [his neighbors].”⁵⁴ If the town engages in spot zoning that is inconsistent with its comprehensive plan, the zoning ordinance/amendment is ultra vires⁵⁵ or unauthorized.⁵⁶

In *Beyer v. Burns*,⁵⁷ residents of the town of Bethlehem, New York petitioned the Supreme Court of Albany County for an annulment of a zoning ordinance that established an overlay district for a senior citizen housing development.⁵⁸ The court held that in order for an overlay district to be considered illegal

50. *Maldini*, 330 N.E.2d at 407.

51. *See id.* at 406.

52. *Id.*

53. *Id.*

54. *Beyer v. Burns*, 567 N.Y.S.2d 599, 601 (N.Y. Sup. Ct. 1991) (internal citations omitted).

55. For a definition of ultra vires, see BLACK’S LAW DICTIONARY at 1057 (6th ed. 1993). In respect to actions of municipalities, ultra vires refers to an act that is beyond the powers conferred upon it by law. *See id.*

56. *See Nolon, Shattering the Myth, supra* note 26, at 390 n.25 (citing R. Anderson, NEW YORK ZONING LAW AND PRACTICE § 9.15, at 415 (3d ed. 1984) (“The term ‘spot zoning’ is used by the courts to describe a zoning amendment which is invalid because it is not in accordance with a comprehensive or well-considered plan.”) (quoting R. Anderson, NEW YORK ZONING LAW AND PRACTICE § 5.04, at 164.).

57. 567 N.Y.S.2d 599 (N.Y. Sup. Ct. 1991).

58. *See id.* at 600.

spot zoning, the petitioner must have demonstrated that the purpose behind the district is to benefit the owners of the proposed location,⁵⁹ “rather than to benefit the community by providing low cost senior citizen housing pursuant to a comprehensive plan.”⁶⁰

The petitioners failed to meet the burden of proving that the town’s purpose was to benefit the owners of the proposed development.⁶¹ Therefore, the ordinance was upheld because it did not constitute illegal spot zoning.⁶² By creating an amendment to the zoning ordinance and awaiting a developer to take advantage of that ordinance, a municipality is not spot zoning.⁶³ Perhaps if the town had created the ordinance simply to accommodate and benefit a particular developer, the ordinance would be considered illegal spot zoning.

3) *Equal Protection - Campbell v. Barraud*

The establishment of senior citizen overlay districts has also been challenged on equal protection grounds.⁶⁴ In *Campbell v. Barraud*,⁶⁵ town residents sought declaratory and injunctive relief from the Appellate Division of the Supreme Court of the Second Department.⁶⁶ The Town Board of Brookhaven had amended its zoning ordinance to rezone a particular parcel of land as a “Planned Retirement Community” (“PRC”).⁶⁷ As in *Beyer v. Burns*, the residents of the town argued that the town’s action constituted illegal spot zoning.⁶⁸ In addition, the plaintiffs contended that the rezoning was unconstitutional on equal protection grounds because it was discriminatory on the basis of age.⁶⁹ The court held that the rezoning did not constitute illegal spot zoning because it was made as an effort to meet the public

59. *See id.* at 601.

60. *Id.*

61. *See id.*

62. *See Beyer*, 567 N.Y.2d at 601.

63. *See Nolon, Shattering the Myth, supra* note 26, at 394-95.

64. *See, e.g., Campbell v. Barraud*, 58 A.D.2d 570 (N.Y. App. Div. 1977) (challenging the establishment of senior citizen overlay districts on equal protection grounds).

65. 58 A.D.2d 570 (N.Y. App. Div. 1977).

66. *See id.* at 570.

67. *See id.*

68. *See id.*

69. *See id.*

need for senior citizen housing, a need which was expressed in the town's comprehensive plan.⁷⁰ Furthermore, the court held that the rezoning did not violate the Equal Protection Clause of the Constitution.⁷¹ The court stated that it would be illogical to hold that it was within the town's power to accommodate the housing needs of the elderly by encouraging the construction of senior citizen overlay districts, while at the same time prohibiting the town from excluding other segments of the population from residing in such districts.⁷² In essence, the effort would be self-defeating.⁷³ The court stated, "[i]n short, we believe it is essential to the achievement of the purpose of the planned retirement community ordinance, and its rational application, that the population group intended to be served be specifically defined and granted exclusive user status."⁷⁴

4) *Are Towns Required to Allow Assisted Living Facilities?*
Forest City Daly Housing, Inc. v. Town of North Hempstead.

It is apparent from the case law above that creating senior citizen overlay districts is within the power of the municipality. However, it has never been determined that local planning boards are *not* required to allow senior citizen overlay districts within a given municipality. Assisted Living Facilities are apparently afforded different treatment than senior citizen overlay districts by zoning boards and courts. In *Forest City Daly Housing, Inc. v. Town of North Hempstead*,⁷⁵ the United States Court of Appeals for the Second Circuit addressed the question of whether "federal anti discrimination statutes [i.e., the FHA] require a . . . [town] to make accommodations in order to permit construction of an assisted living facility, . . . on land zoned for commercial uses."⁷⁶ The court concluded that if comparable traditional residences would be permitted, a municipality is re-

70. See *Campbell*, 58 A.D.2d at 571.

71. See *id.*

72. See *id.* at 572.

73. See *id.*

74. *Id.*

75. 175 F.3d 144 (2d Cir. 1999).

76. *Forest City*, 175 F.3d at 146.

quired to make accommodations that would facilitate a building permit for an assisted living facility.⁷⁷

In *Forest City*, a prospective developer and prospective residents of a proposed assisted living facility alleged that the town's denial of a special use permit for an assisted living facility violated the Americans with Disabilities Act, the Rehabilitation Act, and the FHA as amended by the Fair Housing Amendments Act of 1988.⁷⁸ Although the court held that the town was not required to allow the facility in a commercially zoned district, it held, by implication, that if the permit had been requested for a residential district, the town board would have been required to grant the application.⁷⁹

5) *The Fair Housing Act and the Fair Housing Amendments Act of 1988.*

At this juncture, it is necessary to examine the regulations promulgated by the Department of Housing and Urban Development, under the FHA,⁸⁰ in detail. These regulations read, in pertinent part, as follows:

Scope: (a) It is the policy of the United States to provide, within Constitutional limitations, for fair housing throughout the United States. No person shall be subject to discrimination because of race, color, religion, sex, handicap, familial status, or national origin in the sale, rental, or advertising of dwellings, in the provision of brokerage services or in the availability of residential real estate-related transactions.⁸¹

This passage implies that if elderly persons are "handicapped" pursuant to the FHA, then housing facilities having the

77. *See id.* at 152.

78. *See id.* at 149; *see also* 42 U.S.C. § 12101 et. seq. (1999) (Americans with Disabilities Act); 29 U.S.C. § 794 (1999) (Rehabilitation Act); 42 U.S.C. § 3601-3631 (1999) (FHAA).

79. *See Forest City*, 175 F.3d at 152.

80. *See* 24 C.F.R. § 100 (2000). The original FHA is commonly known as Title VIII of the Civil Rights Act. *See* Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3631 (1988)). The original legislation only prohibited against discrimination on the basis of color, race, national origin, and gender. *See id.* Pursuant to the FHA, as amended by the FHAA, the Department of Housing and Urban Development promulgated its own regulations on fair housing. *See* 24 C.F.R. § 100.1 (2000).

81. 24 C.F.R. § 100.5 (2000).

sole purpose to accommodate them must be allowed by local zoning boards. These regulations define “[h]andicap” as follows:

“Handicap” means, with respect to a person, a physical or mental impairment which substantially limits one or more major life activities; having a record of such an impairment; or being regarded as having such an impairment.⁸²

The Fair Housing Amendments Act of 1988 (FHAA)⁸³ extended the initial protection of the FHA to include discrimination based on handicap and familial status.⁸⁴ The FHAA makes it unlawful to:

82. As used in this definition:

“Physical or mental impairment” includes:

- (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
- (2) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term “physical or mental impairment” includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.
 - (a) “Major life activities” means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
 - (b) “Has a record of such an impairment” means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
 - (c) “Is regarded as having an impairment” means:
 - (1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;
 - (2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or
 - (3) Has none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment.

24 C.F.R. § 100.201 (2000).

83. 42 U.S.C. § 3604 (1995).

84. *See id.* For a discussion on the purposes and parameters of the FHAA, see Laurie C. Malkin, *Troubles at the Doorstep: The Fair Housing Amendments Act of 1988 and Group Homes for Recovering Substance Abusers*, 144 U. PA. L. REV. 757, 777-781 (1995). (“With broad strokes, the 101st Congress enacted a law to protect

discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of -

- (A) that buyer or renter, [sic]
- (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
- (C) any person associated with that buyer or renter.⁸⁵

In addition, the FHAA requires that "reasonable accommodations" be made if it would enable a disabled person "to use and enjoy a dwelling."⁸⁶ This notion has been interpreted broadly by courts so as to better effectuate the intent of Congress.⁸⁷ The handicap provisions of the FHAA also apply to state and local land use and health and safety laws, regulations, practices, and decisions which discriminate against individuals with handicaps.⁸⁸ Therefore, the law applies to a municipality's decisions regarding zoning for the elderly, if they are deemed handicapped pursuant to the FHAA.

Neither the Department of Housing and Urban Development regulations nor the FHAA specifically address whether the elderly are included within the definition of handicapped. Moreover, neither explicitly excludes the elderly from its definition of handicapped.⁸⁹ There are a few cases, discussed in the following section, which help to interpret the purpose of the FHA and the FHAA as applied to the aged.

6) *United States v. City of Taylor*

In the 1992 case, *United States v. City of Taylor*,⁹⁰ an adult foster care home operator, Smith and Lee, brought an action against the City of Taylor for an alleged violation of the FHA.⁹¹

those who suffer from housing discrimination because of their mental, physical, or emotional disabilities.".)

85. 42 U.S.C. § 3604(f)(1) (1995).

86. 42 U.S.C. § 3604(f)(3)(B) (1995).

87. See *Potomac Group Home Corp. v. Montgomery County, Md.*, 823 F. Supp. 1285, 1294 (D. Md. 1993).

88. See *id.* (citing H.R. REP. NO. 100-711, 100th Cong., 2d Sess. 24, reprinted in 1988 U.S.C.C.A.N. 2173, 2185).

89. Compare 24 C.F.R. § 100 (2000) with 42 U.S.C. § 3604 (1995).

90. 798 F. Supp. 442 (E.D. Mich. 1992), *rev'd*, 13 F.3d 920 (6th Cir. 1993), *denied en banc*, 1994 U.S. App. Lexis 4423 (6th Cir., March 11, 1994), *rev'd on other grounds*, 102 F.3d 781 (6th Cir. 1996).

91. See *Taylor*, 798 F. Supp. at 443.

Smith and Lee owned a group home which housed six elderly disabled persons, and they sought permission from the city zoning board to expand their adult foster care (AFC) unit to accommodate twelve persons.⁹² The city refused to grant permission.⁹³ Michigan state law required that the city permit AFC homes for six or fewer residents in single-family residential neighborhoods.⁹⁴ In order to operate an AFC home for twelve residents, Michigan law required that the plaintiffs obtain local zoning approval to qualify for a state license.⁹⁵

Plaintiffs claimed that the city violated the reasonable accommodations provision of the FHAA⁹⁶ and § 3604(f)(1) of the FHA⁹⁷ by making housing unavailable on the basis of the handicap status of the potential residents.⁹⁸ The court concluded that the residents of the adult foster care unit, both present and proposed, were handicapped under the FHA.⁹⁹ The court recognized that the residents suffered from ailments associated with the elderly, such as Alzheimer's syndrome, senile dementia, organic brain syndrome, hypertension, and hip replacement.¹⁰⁰ The court stated that these impairments limited the major life activities of the residents and they were, therefore, handicapped under the FHA.¹⁰¹ Although the holding was ultimately reversed by the Court of Appeals on separate grounds,¹⁰² the reversal never overturned the portion of the decision that classified the residents of the adult foster care unit as handicapped under the FHA.¹⁰³

92. *See id.*

93. *See id.* at 444.

94. *See* MICH. COMP. LAWS § 125.583b(2) (1997).

95. *See* MICH. COMP. LAWS § 400.716(2) (1997).

96. *See Taylor*, 798 F. Supp. at 443; *see also* 42 U.S.C. § 3604(f)(3)(B) (1999) for the provisions of the FHAA in which plaintiffs claimed the city violated.

97. *See Taylor*, 798 F. Supp. at 443; *see also* 42 U.S.C. § 3604(f)(1) (1999) for the provisions of the FHA in which plaintiff claimed the city violated.

98. *See Taylor*, 798 F. Supp. at 443.

99. *See id.* at 446.

100. *See id.*

101. *See id.*

102. *See Smith & Lee Assocs. v. City of Taylor, Mich.*, 13 F.3d 920 (6th Cir. 1993), *denied en banc*, 1994 U.S. App. Lexis 4423 (6th Cir., March 11, 1994), *rev'd on other grounds*, 102 F.3d 781 (6th Cir. 1996).

103. *See Smith & Lee Assocs.*, 13 F.3d at 933.

7) "K" Care, Inc. v. Town of Lac Du Flambeau

In the 1993 case, *"K" Care, Inc. v. Town of Lac Du Flambeau*,¹⁰⁴ the Court of Appeals of Wisconsin held that elderly group home residents were handicapped under the FHA.¹⁰⁵ In *"K" Care*, the town of Lac du Flambeau, Wisconsin refused to grant permission to "K" Care, Inc. ("K" Care) to build a community-based residence for the elderly.¹⁰⁶ "K" Care had already established and run a similar operation before applying to the zoning board for permission to build another facility on the same site.¹⁰⁷ The parcel of land was forty acres, and the building of a second residence would have violated a town ordinance, which prohibited the establishment of two facilities of this type within 2500 feet of each other without the consent of the town board.¹⁰⁸ After conducting a hearing, the town board refused to grant an exception for "K" Care.¹⁰⁹

After the denial by the town board, "K" Care filed a complaint with the circuit court claiming that the board had violated the FHA by refusing to make a reasonable accommodation and by discriminating against the handicapped.¹¹⁰ After considering the definitions of "handicap" included in the FHA, the court held that the elderly group home residents who intended to occupy the "K" Care facility were handicapped for purposes of the FHA.¹¹¹ The court considered the types of ailments that often afflict the elderly, such as strokes, hip replacements, heart problems, high blood pressure, and diabetes.¹¹² These types of ailments clearly caused the proposed residents of "K" Care's facility to fall within the meaning of handicap as set forth by the FHA.¹¹³

104. 510 N.W.2d 697 (Wis. Ct. App. 1993).

105. *See id.* at 700.

106. *See id.* at 698.

107. *See id.* at 698-99.

108. *See id.* at 698.

109. *See "K" Care*, 510 N.W.2d at 698-99.

110. *See id.* at 699.

111. *See id.* at 700.

112. *See id.*

113. *See id.*

8) *Potomac Group Home Corporation v. Montgomery County, Maryland*

In the 1993 case, *Potomac Group Home Corp. v. Montgomery County, Maryland*,¹¹⁴ elderly residents of a group home filed suit against Montgomery County, Maryland for alleged violations of the FHAA and the Americans with Disabilities Act.¹¹⁵ Potomac is a Maryland corporation that provides community-based housing and support services to elderly persons who need some assistance with daily living activities in Montgomery County.¹¹⁶ These group homes generally house eight people with at least two employees of Potomac on staff at each home during the day and one during the night.¹¹⁷ The staff members help the residents with activities such as bathing, grooming, and eating.¹¹⁸ The defendants conceded that Potomac's group homes provide elderly persons in Montgomery County with the opportunity to avoid premature institutionalization and to live in 'home-like' settings.¹¹⁹

In this case, the court specifically held that the elderly group home residents were clearly "handicapped" within the meaning of the FHAA.¹²⁰ If it can be demonstrated that the practices and regulations implemented by a county/town have a discriminatory effect against handicapped persons, then it is possible to show a violation of the FHAA.¹²¹ It is not necessary to show that the town had a discriminatory intent in order to prove a violation of the FHAA.¹²² Discriminatory effect provides a sufficient constitutional basis.¹²³

114. 823 F. Supp. 1285.

115. *See Potomac*, 823 F. Supp. at 1287-88.

116. *See id.* at 1287.

117. *See id.* at 1289.

118. *See id.*

119. *See id.*

120. *See Potomac*, 823 F. Supp. at 1295 (citing *United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220 (D.P.R. 1991); *Casa Marie, Inc. v. Super. Ct. of P.R.*, 752 F. Supp. 1152, 1168 (D.P.R. 1990)).

121. *See Potomac*, 823 F. Supp. at 1295.

122. *See id.*

123. *See id.*

i) *Group Homes for the Elderly*

Before moving forward, the nature of group homes must be examined in order to fully understand the impact of the *Taylor*, “*K*” *Care*, and *Potomac* cases. Much like assisted living facilities and senior citizen overlay districts, the purpose of group homes for the elderly is “to alleviate financial problems, poor housing conditions, declining health, unavailability of services, family conflicts, loneliness, bereavement, and the desire for companionship” among the elderly population.¹²⁴ Typically, group homes may accommodate from three to twenty-five residents, and they usually employ a staff to assist with meal preparation, housekeeping, and other services.¹²⁵ Group homes are usually composed of unrelated individuals who share a single home with a common kitchen and bathrooms and other common living areas.¹²⁶ While some group home residents choose to live there for health reasons, others may choose to live in a group home for financial or social reasons.¹²⁷ While not all residents of a group home are necessarily “handicapped,” if the home serves to assist some residents who are handicapped, then it would appear to be protected under the FHA and the FHAA.¹²⁸

ii) *Defining “Elderly”*

In order to determine whether or not the elderly are, or should be, included as “handicapped” pursuant to the FHA and the FHAA, it is necessary to consider the term apart from these Acts. Elderly can be construed to mean simply “a person sixty years of age or older.”¹²⁹ Alternatively,

[a]n elderly person is a person who: (1) [h]as attained the age of 62; or (2) [i]s unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental im-

124. Michael J. Davis & Karen L. Gaus, *Protecting Group Homes for the Non-Handicapped: Zoning in the Post-Edmonds Era*, 46 U. KAN. L. REV. 777, 803 (1998).

125. See *id.* at 804.

126. See Anna L. Georgiou, *NIMBY's Legacy-A Challenge to Local Autonomy: Regulating the Siting of Group Homes in New York*, 26 FORDHAM URB. L.J. 209, 210 (1999).

127. See Davis & Gaus, *supra* note 124, at 808.

128. See *supra* notes 83-89 and accompanying text.

129. N.Y. EXEC. LAW § 543-a (McKinney 1996).

pairment which can be expected to result in death or to be of long, continued, and indefinite duration; or (3) [h]as a physical impairment expected to be of long, continued and indefinite duration which substantially impedes the person's ability to live independently and which could be improved by more suitable housing and conditions.¹³⁰

Irrespective of any formal definition, elderly persons, such as those in "K" Care, often suffer from a broad array of ailments common among such persons. For instance, many have suffered strokes and early dementia and undergone hip replacements.¹³¹ Common among the elderly are high blood pressure, diabetes, and hypertension.¹³² In addition, some elderly persons require assistance with activities such as eating, bathing, and toileting.¹³³ They often suffer from physical and mental impairments that substantially limit one or more activities of daily living.¹³⁴

PART III. ANALYSIS

The only way to determine if senior citizen overlay districts should be afforded the same treatment as assisted living facilities by local zoning boards is to determine if the residents of such a district are "handicapped" within the meaning of the FHA. In order to ascertain the meaning of the word "handicapped" as applied to the elderly, the legislative history, judicial interpretation, and congressional intent behind the FHA must be considered.

The term "handicapped," as used by the FHA and the FHAA, has been interpreted by courts to include a broad array of persons.¹³⁵ The courts have included groups such as persons with AIDS, schizophrenics, and recovering substance abusers within the definition of handicapped.¹³⁶ While the *Taylor*, "K" Care, and *Potomac* cases discussed above are helpful, none of

130. Davis & Gaus, *supra* note 124, at 792 (citing HAW. REV. STAT. § 321-15.6 (1985 & Supp. 1992)).

131. *See* "K" Care, 510 N.W.2d at 700.

132. *See id.*

133. *See id.*

134. *See id.*

135. *See* William Graham, *There Goes the Neighborhood: The Evolution of "Family" in Local Zoning Ordinances*, 9 TOURO L. REV. 699, 724 (1993).

136. *See id.* at 724-32.

these cases specifically deem elderly persons to be handicapped under the FHA or the FHAA. The courts' holdings in each of the cases were very fact-specific, and only classified the residents (or proposed residents) of each particular housing unit as handicapped.¹³⁷

Unfortunately, the legislative history of the FHA is of little help. After thoroughly searching the congressional record, it is apparent that Congress avoided the issue of whether or not to classify the elderly as handicapped for purposes of the Act. The record reflects that Congress believed the elderly to be handicapped in an economic sense, but shows no reference to that group of the population being physically or mentally handicapped pursuant to the Act.¹³⁸

The main reference made to the elderly in the FHAA is the exemption of housing for such persons from the "familial status" provision of the amended FHA.¹³⁹ Clearly, the FHAA extended the FHA by making it unlawful to discriminate in the sale or rental of housing to persons or families based on familial status.¹⁴⁰ The intent of this provision was to protect families with children and pregnant women from housing discrimination.¹⁴¹ However, the Department of Housing and Urban Development granted an exception, under this Act, for housing (1) provided under any State or Federal program "specifically designed and operated to assist elderly persons[;]"¹⁴² (2) "intended for, and solely occupied by persons 62 years of age or older[;]"¹⁴³ or (3) "intended and operated for persons 55 years of age or older."¹⁴⁴ This exemption demonstrates that older persons should be given special treatment with respect to housing in some circum-

137. See discussion *supra* Part II.C.6-8.

138. See S. REP. NO. 105-36(I), at 67 (1997), stating that "[t]he heavy concentration of small incomes among [the elderly] reflects the fact that, as a group, they are handicapped at least in an economic sense. They have suffered unusually as a result of the rise in cost-of-living and the changes in the tax system which occurred since the beginning of the war. Unlike younger persons, they have been unable to compensate for these changes by accepting full-time jobs at prevailing high wages." *Id.*

139. See S. REP. NO. 105-36(I), at 225 (1997).

140. See 24 C.F.R. § 100.5 (2000).

141. See S. REP. NO. 105-36(I), at 225 (1997).

142. 24 C.F.R. § 100.302 (2000).

143. See 24 C.F.R. § 100.303(a) (2000).

144. 24 C.F.R. § 100.304 (2000).

stances. Creating an exemption for housing for older persons from the familial status provision establishes that this group often requires a different type of living environment than other segments of the population.

Other than the familial status exemption, very few references are made to the elderly under the FHA or the FHAA. Common throughout the congressional record are references to the "elderly and disabled."¹⁴⁵ A distinction is drawn between the elderly disabled and the non-elderly disabled, but no such distinction is drawn between the elderly disabled and the elderly non-disabled. Nowhere in the congressional record does it state specifically that the elderly should be deemed handicapped for purposes of the Act.¹⁴⁶ Nor does it state that the elderly should not be deemed handicapped for its purposes. It appears that the legislators assumed that the elderly and the handicapped/disabled were one and the same group when they wrote the Act. Upon examination of the congressional record, it is rare to find an instance where Congress refers to one group by itself, without reference to the other.¹⁴⁷ This fact supports the premise that Congress intended the elderly to be treated the same as the handicapped under the FHA. Furthermore, upon examination of the specific rules promulgated by the Department of Housing and Urban Development under the FHA, it appears that the Department of Housing and Urban Development also concluded that Congress intended for the elderly to be included within the definition of the term "handicap." As stated above, the agency's definition of "handicap" includes anyone who (1) has a "physical or mental impairment which substantially limits one or more major life activities[,]" (2) has a "record of such an impairment[,]" or (3) is "regarded as having an impairment."¹⁴⁸ A person is regarded as having such an impairment if he/she:

- (1) [h]as a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by

145. See, e.g., 145 CONG. REC. H9983-03, H9987, H9998, H9999 (Wednesday, October 13, 1999).

146. See, e.g., 145 CONG. REC. H9983-03, H10006 (Wednesday, October 13, 1999).

147. See, e.g., 145 CONG. REC. H9983-03 (Wednesday, October 13, 1999).

148. 24 C.F.R. § 100.201 (2000).

another person as constituting such a limitation; (2) [h]as a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or (3) [h]as none of the impairments defined in [this section] but is treated by another person as having such an impairment.¹⁴⁹

The treatment of the nation's elderly undoubtedly qualifies them for protection under the FHA. The elderly are regarded by many people as having substantially limiting impairments. In this country, it is apparent that people, each and every day, regard the elderly as disabled. Even the elderly who do not suffer from any specific physical or mental impairment are often treated as though they do. People tend to assume that the aged cannot care for themselves, and that they require assistance in some form or another. The typical 'little old lady who needs help crossing the street' is a prime example of society's attitudes toward the elderly. Society's attitude toward the elderly clearly places them within the protection of the FHA.

Manual tasks, walking, seeing, hearing, and speaking are specifically noted as major life activities.¹⁵⁰ As old age sets in, many people will have difficulty with these tasks. The elderly population of this country will continually be treated as if they have substantially limiting impairments, regardless of any given person's actual health. This is not to suggest that every senior citizen is regarded, by everyone, as having some sort of impairment. However, the stereotypical elderly person suffers from at least one substantially limiting impairment. As a result, the majority of the population will assume that any given elderly person does suffer from such an ailment. The treatment of the aged in this country makes it crucial that the FHA ensures their protection.

The Department of Housing and Urban Development obviously took into consideration that certain people might be unintentionally excluded from the FHA's protection due to their inability to document any actual impairment. By including the language that extends the Act's protection to those "regarded as having an impairment,"¹⁵¹ the Department of Housing and Ur-

149. *Id.*

150. *See id.*

151. *Id.*

ban Development, acting under the inherent authority of the FHA, attempted to insure that people who were treated by others as being impaired would fall within the protection of the FHA. This language clearly extends the Act to protect the elderly population.

Senior citizen overlay districts should be afforded the same treatment as assisted living facilities by local zoning boards. The common ailments that plague the elderly population place them within the meaning of the word "handicapped" for purposes of the FHA. Seniors, as a group, suffer from numerous infirmities. By requiring a municipality to allow assisted living facilities, but not senior citizen overlay districts, the law is essentially penalizing those seniors who choose to provide for their care privately or who have family members or friends to assist them. Those senior citizens who are financially able to own their own homes, but need special accommodations within those homes, are not being protected by the law. Many amendments to local zoning ordinances that allow for senior citizen overlay districts require that special housing needs be met.¹⁵² For example, homes in the district must usually be primarily first floor living and handicap accessible.¹⁵³ Thus, it follows that all rooms as well as appliances, i.e., sinks, dishwashers, etc., must also be handicap accessible, and there must be guard rails in all bathrooms.¹⁵⁴ In an amendment to its zoning ordinance, the City of New Rochelle, N.Y. set forth the requisite design features for its "Single Family Senior Citizen (SFSC) Overlay Zoning District."¹⁵⁵ The amendment reads as follows:

D. Design Features

The housing in an SFSC District shall be specifically designed to meet the needs of senior citizens who can generally live independently without medical care typically provided in a nursing home or assisted living facility. The following types of facilities and amenities shall be provided in a single family senior citizen development:

- (1) The main exterior access to each home shall be provided without steps.

152. See, e.g., NEW ROCHELLE ORDINANCE, *supra* note 19, § 331-19.1(D).

153. See *id.*

154. See generally NEW ROCHELLE ORDINANCE, *supra* note 19, § 331-19.1(D).

155. *Id.* §331-10.

- (2) Each home shall be built primarily for first floor living, with a master bedroom and wheelchair accessible bathroom provided on that floor. If a proposed home has a two-story design, the second story and basement shall be adaptable for construction of an elevator, by providing for the elevator shaft. The space may be used for a closet until the elevator is installed. If a proposed home has a one-story design, it shall be adaptable for future installation of an elevator or lift to the basement.
- (3) Homes shall be further built to meet seniors' daily accessibility requirements with doorways sufficiently wide to accommodate a wheelchair. At least one bathroom and the kitchen shall be appropriately designed to enable wheelchair turning in a single turn. The bathroom and kitchen shall be made adaptable in accordance with CABO/ANSI standards.
- (4) Emergency communication services, including heat and smoke detectors, shall be provided linking homes with: a) one or more among the following which are staffed 24 hours a day: the clubhouse, community room, and gatehouse, or b) a 24 hour off-premise monitoring service. . . .
- (5) Due consideration shall be given in planning walks, ramps and driveways to prevent slipping or stumbling, and hand-rails and ample places for rest shall be strategically provided . . .¹⁵⁶

Although the ordinance specifically states that it will meet the needs of elderly persons who desire to live independently and without the medical care typically provided in an assisted living facility, the design features set forth in the amendment seem to recognize that the typical resident of the overlay district will be almost identical to a resident of an assisted living facility. The requirements of wheelchair accessibility and elevator adaptability demonstrate that the proponents of the amendment predict that the residents will require such accommodations. The district is essentially being built to accommodate those elderly persons who cannot live independently in an ordinary home. The design features are essentially a substitute for the care often provided in assisted living facilities. Instead of having a person on staff to assist the person in activities of daily living, the home is set up so as to eliminate the need for assistance. This in no way changes the common characteristics among the residents of the two types of housing.

156. *Id.*

These requirements imply that the homes are being built for people who would clearly fall within the meaning of "handicapped." The homes are being created to accommodate these people, and if it can be shown that even one single handicapped elderly person will potentially live in that district, then the municipality should not be allowed to exclude the district from the town through zoning.

Senior citizens often suffer from common ailments such as stroke, heart problems, high blood pressure, early dementia, hypertension, and hip replacements.¹⁵⁷ Therefore, it is more than likely that a large portion of residents in a senior citizen overlay district will suffer from one or more of these ailments. In fact, many of the overlay districts are designed to accommodate and "address specialized housing needs of the elderly by incorporating design features that recognize the physical infirmities accompanying aging."¹⁵⁸ In addition, the overlay districts may "incorporate recreational and medical facilities, central dining areas, security systems, low-gradient walks, hand rails, and ramps."¹⁵⁹ Assisted living facilities and group homes offer many of the same accommodations to the elderly as senior citizen overlay districts. It is discriminatory for a town to be able to deny a permit for a senior citizen overlay district but not for an assisted living facility or group home.

Moreover, if a given assisted living facility happened, by chance, to consist of only elderly persons and no younger disabled persons, it would still be protected from discriminatory denial under the FHA because typically, at least some of those persons would be protected.¹⁶⁰ However, little, if any, distinction can be drawn between an assisted living facility comprised only of elderly persons and a senior citizen overlay district. Simply because a resident of an overlay district chooses to privately provide for his own care and assistance does not mean

157. See, e.g., "*K*" Care, 510 N.W.2d at 700. In "*K*" Care, the court considered the types of ailments that often affect the elderly—strokes, hip replacements, heart problems, high blood pressure, and diabetes. See *id.*

158. J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L. J. 761, 804 (1982).

159. *Id.*

160. See *Forest City*, 175 F.3d 147 (defining the typical resident an assisted living facility as "over 80 years old and requires assistance in one or more [daily life] activities.").

that he is any more able, or unable, to perform activities of daily living than someone who chooses to live in an assisted living facility where those services are provided for him. Towns should not be allowed to classify one of these people as protected by the FHA, while denying the other person the same protections, simply due to the person's residential preference.

PART IV. CONCLUSION

The purpose of the FHA is to "provide, within constitutional limitations, for fair housing throughout the United States."¹⁶¹ The FHA originally prohibited discrimination in the sale, rental, or advertising of dwellings, in the provision of brokerage services or in the availability of residential real estate-related transactions on the basis of race, color, religion, sex, or national origin.¹⁶² The FHAA of 1988 extended that protection to discrimination based on handicap or familial status.¹⁶³ This extension of the FHA made it obligatory for municipalities to allow assisted living facilities to be built within the town where other traditional residential uses are allowed.¹⁶⁴ This right has not yet been extended to senior citizen overlay districts, despite the fact that they are fundamentally similar to assisted living facilities. Both housing options aim to provide affordable housing that will allow the elderly to age in place and maintain as much independence as possible. The two options differ in the methods used to accommodate the elderly, but both essentially attain the same goal.

The creation of senior citizen overlay districts is within the power of the municipality,¹⁶⁵ but towns are not obligated to allow such overlay districts within a residential district. *Beyer v.*

161. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3631 (1988)); see also 24 C.F.R. § 100.5 (2000) (recognizing that it is the policy of the United States to provide fair housing).

162. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3631 (1988)).

163. See 42 U.S.C. § 3604 (1995). For a discussion on the purposes and parameters of the FHAA, see Laurie C. Malkin, *Troubles at the Doorstep: The Fair Housing Amendments Act of 1988 and Group Homes for Recovering Substance Abusers*, 144 U. PA. L. REV. 757, 777-781 ("With broad strokes, the 101st Congress enacted a law to protect those who suffer from housing discrimination because of their mental, physical, or emotional disabilities.").

164. See *Forest City*, 175 F.3d at 152.

165. See *Maldini*, 330 N.E.2d at 405.

*Burns*¹⁶⁶ established that the districts do not constitute illegal spot zoning,¹⁶⁷ and *Campbell v. Barraud*¹⁶⁸ struck down a challenge to the districts on equal protection grounds.¹⁶⁹ Although senior citizen overlay districts have survived numerous challenges, the courts have never been asked to decide if a town can deny a permit to create a senior citizen overlay district without violating the FHA.

In order for senior citizen overlay districts to qualify for protection under the FHA, the elderly must be included within the meaning of the term "handicapped." No court has ever explicitly stated that all elderly are handicapped for purposes of the FHA. The courts have, however, included elderly group home residents as handicapped,¹⁷⁰ and have also included residents of an adult foster care unit within the definition of handicapped.¹⁷¹ Moreover, the very agency authorized to act under the FHA granted an exemption for elderly persons.¹⁷² In addition, the legislative history seems to imply that Congress intended that the elderly be protected by the FHA. However, the congressional record does not explicitly state this intent.¹⁷³

Irrespective of the lack of explicit inclusion of the elderly within the FHA, this segment of the population should be protected by the Act. Elderly residents of senior citizen overlay districts are not given the same protection as elderly residents of assisted living facilities when, often, the only difference between the two is their choice of residence. The ailments and impairments that are common among the elderly should place them within the meaning of the term "handicapped." It seems inevitable that a large portion of the people who choose to live in senior citizen overlay districts will suffer from some type of malady that will label them as "handicapped." The regulations surrounding the development of senior citizen overlay districts

166. 567 N.Y.S.2d 599 (N.Y. Sup. Ct. 1991).

167. *See id.* at 601.

168. 394 N.Y.S.2d 909 (N.Y. App. Div. 1977).

169. *See id.* at 912.

170. *See "K" Care*, 510 N.W.2d at 700; *see also Potomac Group Home Corp.*, 823 F. Supp. at 1295 (holding "[e]lderly group home residents are clearly 'handicapped' within the meaning of the FHAA.") (citations omitted).

171. *See Taylor*, 798 F. Supp. at 446.

172. *See supra* notes 142-44.

173. *See supra* notes 138 to 147 and accompanying text.

seems to suggest this as well. By requiring these districts to be handicap accessible, the creators of the ordinances obviously assumed that the residents would most likely be handicapped. The fact that these districts are aimed at accommodating the disabled elderly should give them the same protection as is afforded to assisted living facilities. Even if the elderly, as a whole, are not deemed "handicapped" within the meaning of the FHA, it is clear that most senior citizen overlay districts aim to accommodate those elderly persons who would be included within the definition of "handicapped." Therefore, senior citizen overlay districts should be afforded the same treatment by local zoning boards as assisted living facilities.