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City of Edmonds v. Oxford House, Inc.: A Comment on the Continuing Vitality of Single-Family Zoning Restrictions

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CASE COMMENT

City of Edmonds v. Oxford House, Inc.: A Comment on the Continuing Vitality of Single-Family Zoning Restrictions

I. INTRODUCTION

In *City of Edmonds v. Oxford House, Inc.*,[1] the Supreme Court decided the scope of an important exemption under the Fair Housing Amendments Act (FHAA).[2] At issue was a zoning ordinance that banned more than five unrelated people from living together in a single-family dwelling. The ordinance was challenged by a group home for recovering alcoholics and drug addicts; the group argued that by enforcing the regulation the city had violated the FHAA. The group home contended that the city was required to make an exception for it because the FHAA requires cities to make a "reasonable accommodation" in policies and rules for persons with handicaps. The city's position was that reasonable governmental restrictions on the maximum number of occupants of a dwelling are exempted from the Act's coverage. Thus, the issue for the Court was whether such a restriction was exempt from the FHAA.

Many believed that a ruling by the Court in *City of Edmonds* that the regulation did not fall within the exemption would herald the end of single-family zoning.[3] In a six to three decision, the Court did indeed rule that the exemption was not applicable. A careful reading, however, shows that the decision does not sound the death-knell of single-family zoning. In fact, the Court's pronouncement is only a limited victory for advocates of group homes because it only decides a threshold issue. Moreover, the Court's opinion gives tacit approval of reasonable restrictions on single-family dwellings.

The Court's ruling does not settle the matter of whether such ordinances actually discriminate against people with handicaps under the FHAA. That issue was remanded by the Supreme Court to the lower courts. A recent case from the Eighth Circuit, discussed below, indicates that ordinances similar to the one at issue in *City of Edmonds* may be "reasonable" within the meaning of the FHAA.

Part II of this Comment examines the state of the law prior to the Court's decision. Part III addresses the procedural and background facts and the majority and dissenting opinions in *City of Edmonds*. Part IV analyzes Congress's intent in enacting § 3607(b)(1), the protected status of the family, and the difference between an equal right and a preferred right to housing. Part V considers the state of the law post-*City of Edmonds*, includ-

1 115 S. Ct. 1776 (1995).

2 42 U.S.C. §§ 3601-3631 (1994).

3 *See, e.g.*, Petitioner's Brief at 11, 25, *City of Edmonds* (No. 94-23) (contending that subjecting single-family zoning to FHA scrutiny would "overturn Euclidian zoning" and "destroy the effectiveness and purpose of single-family zoning").

ing the public reaction to the case and the application of the holding in subsequent lower court cases. Part VI concludes that while the Court ruled that zoning restrictions such as those at issue in *City of Edmonds* are not exempt from the FHAA, single-family zoning restrictions remain viable.

II. STATE OF THE LAW PRIOR TO *CITY OF EDMONDS V. OXFORD HOUSE, INC.*

A. *The Fair Housing Amendments Act of 1988*

The FHAA was enacted to "extend[ ] the principle of equal housing opportunity to handicapped persons."[4] The Act amended Title VII of the Civil Rights Act of 1968, also known as the Fair Housing Act, which prohibits housing discrimination based on race, color, religion, national origin, and sex.[5] The FHAA was specifically aimed at the "unnecessary exclusion of [handicapped] persons" as well as "misperceptions, ignorance, and outright prejudice."[6] The definitions and concepts of the Rehabilitation Act of 1973, which had been the first legislation to protect the handicapped from discrimination, were incorporated into the FHAA.[7] The FHAA defined handicap,[8] with respect to a person 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 an impairment, or
> (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance as defined in § 802 of Title 21.[9]

Recovering drug addicts and alcoholics are considered handicapped within the meaning of the FHAA.[10]

The FHAA makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with such dwelling, because of a handicap."[11] Discrimination is defined as including "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal oppor-

4 H.R. REP. No. 711, 100th Cong., 2nd Sess. 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2174.

5 42 U.S.C. § 3601-3631 (1994).

6 H.R. REP. No. 711, *reprinted in* 1988 U.S.C.C.A.N. at 2179.

7 *Id.* at 2178.

8 The FHAA's definition of handicap was adopted from section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701-794 (1976), which was amended by the Rehabilitation, Comprehensive Services, and Developmental Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (codified at titles 29, 32, and 42 U.S.C.). The definition of handicap adopted by the FHAA became effective after 1978.

9 42 U.S.C. § 3602(h) (1994).

10 See United States v. Southern Management Corp., 955 F.2d 914, 919 (4th Cir. 1992) (holding that recovering drug addicts are "handicapped" under 42 U.S.C. § 3602(h); 24 C.F.R. § 100.201(a)(2)(1994) (interpreting "[p]hysical or mental impairment" in § 3602(h)(1)-(3) of the FHAA to include "drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism").

11 42 U.S.C. §3604(f)(2) (1994).

tunity to use and enjoy a dwelling."[12] A failure to do so constitutes discrimination. Although the FHAA does not mention the Act's applicability to zoning, the legislative history of the FHAA specifically mentions zoning.[13]

B. Section 3607(b)(1)

Despite its broad scope, the FHAA exempts certain housing restrictions.[14] Section 3607(b)(1) provides: "Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[15] This seemingly straightforward language gave rise to two competing interpretations, discussed more completely below.

The legislative history of § 3607(b)(1) is somewhat ambiguous in that it fails to specify whether the exemption applies only to maximum occupancy restrictions that are based on numerical formulas such as square footage or number of bedrooms or whether it extends to any reasonable limitation on the number of occupants. As a result, both interpretations have found support from it. According to the House Judiciary Committee Report,

> [t]hese provisions are not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.[16]

C. Judicial Interpretation of the Maximum Occupancy Exemption: The Restrictive View

Prior to the Court's decision in *City of Edmonds*, the majority of courts held that the exemption applies only to building and occupancy codes designed to prevent overcrowding.[17] According to these decisions, a zon-

12 *Id.*

13 "The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." H.R. REP. No. 711, 100th Cong., 2nd Sess. 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185. Of course, given the Court's holding in *City of Edmonds*, the FHAA now unquestionably applies to zoning.

14 Besides the exemption for maximum occupancy restrictions, the FHAA exempts regulations pertaining to religious organizations and private clubs, housing for older persons, and regulations aimed at persons convicted of the manufacture or distribution of controlled substances. 42 U.S.C. § 3607 (1994).

15 *Id.* at §3607(b)(1).

16 H.R. REP. No. 711, at 31, *reprinted in* 1988 U.S.C.C.A.N. at 2192.

17 *See* City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994); Oxford House v. City of St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994); Oxford House v. City of Virginia Beach, 825 F. Supp. 1251 (E.D. Va. 1993).

ing ordinance that only applies to unrelated persons is not exempted. This position relies upon the inclusion in the House Judiciary Committee's Report of the finding that a number of jurisdictions limit the number of occupants by mathematical formula, without regard to status of occupants.[18] These courts interpreted the report to indicate that Congress intended this to be the only permissible restriction.[19] Accordingly, because the five-person limitation in *City of Edmonds* only applied to unrelated occupants, the ordinance would not be exempted under the restrictive view.

D. Judicial Interpretation of the Maximum Occupancy Exemption: The Nonrestrictive View

The nonrestrictive view, followed in the Eleventh Circuit,[20] concludes that any reasonable limitation on the number of people that can occupy a dwelling is exempt. This analysis assumes that Congress was aware of judicial precedent concerning restrictions on maximum occupancy and enacted § 3607(b)(1) and that the House Judiciary Committee Report was written with that precedent in mind.[21] Since the Supreme Court had upheld a maximum occupancy restriction that only applied to unrelated persons in *Village of Belle Terre v. Boraas*,[22] Congress knew that the Supreme Court approved of zoning restrictions that apply only to unrelated persons. Additionally, in *Moore v. City of East Cleveland*,[23] the Court had declared unconstitutional an ordinance that made it illegal for a woman to live with her grandson under a narrow construction of the definition of "family." A synthesis of the two cases produces a rule that permits restrictions on maximum occupancy that apply only to unrelated persons, but forbids restrictions on maximum occupancy that apply to families.[24] In this context, § 3607(b)(1) is interpreted as exempting ordinances that limit maximum occupancy, ordinances which are in themselves limited to regulating unrelated persons.[25] With respect to the House Judiciary Committee Report, the Eleventh Circuit believed that the discussion of the square-footage method of regulating occupancy was merely illustrative of one reasonable means of regulation and not meant to exclude other potentially reasonable regulations.[26] Additionally, the word "reasonable" in the Act is emphasized.[27] The Act prohibits unreasonable restrictions having a disparate impact upon people with handicaps; it does not prohibit maximum occupancy restrictions that apply only to unrelated persons.[28]

18 H.R. REP. No. 711, at 31, *reprinted in* 1988 U.S.C.C.A.N. at 2192.
19 *Edmonds*, 18 F.3d at 805.
20 Elliott v. City of Athens, 960 F.2d 975 (11th Cir. 1992), *cert. denied*, 506 U.S. 940 (1992).
21 *Id.* at 980.
22 416 U.S. 1 (1974).
23 431 U.S. 494 (1977).
24 *Elliott*, 960 F.2d at 980.
25 *Id.*
26 *Id.*
27 *Id.* at 981.
28 *Id.* at 981-84.

III. *CITY OF EDMONDS v. OXFORD HOUSE, INC.*

A. Background and Procedural History

In 1990, Oxford House, Inc.[29] leased a residence in Edmonds, Washington in order to establish a group home for ten to twelve recovering alcoholics and drug addicts in a single-family residential zone.[30] Because of the large number of occupants, the group home was in violation of the city's zoning ordinance.[31] Although the city's zoning ordinance permitted group homes within single-family residential zones, it limited the number of unrelated occupants who could occupy a single-family dwelling to five.[32] Once the city became aware of the presence of the group home, it issued criminal citations for violation of the zoning code.[33]

Oxford House responded by asking Edmonds to make an exception, allowing it to continue to operate the home.[34] The city refused the request, but it did pass an ordinance listing group homes as permitted uses in multi-family and general commercial zones.[35] Edmonds brought a declaratory judgment action in a federal district court seeking a ruling that its zoning ordinance was consistent with the FHAA.[36] Oxford House brought a counterclaim maintaining that the city had violated the FHAA by not making a "reasonable accommodation."[37] The United States filed a similar action and the two cases were consolidated.[38]

The district court granted summary judgment in favor of Edmonds. The court held that the zoning ordinance was exempted from the FHAA because it was a "reasonable restriction[ ] regarding the maximum number of occupants permitted to occupy a dwelling"[39] and therefore did not violate the FHAA.

On appeal, the Ninth Circuit reversed.[40] The court concluded that Edmonds' zoning ordinance was not exempted by § 3607(b)(1) because it

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29 Oxford House, Inc. is a non-profit corporation that has chartered over 375 individual group homes for recovering drug addicts and alcoholics. Joint Appendix at 116-19, *City of Edmonds* (No. 94-23).

30 *City of Edmonds*, 115 S. Ct. at 1779.

31 *Id.*

> [T]he Oxford House has adopted a rather high-handed policy: "As a matter of practice, Oxford House, Inc. does not seek prior approval of zoning regulations before moving into a residential neighborhood." Apparently, the Oxford House believes that if members of the group move in quietly without notice it will be harder to evict them. This strategy is evident throughout this appeal. United States of America v. Palatine, 37 F.3d 1230, 1234-35 (1994) (Manion, J., concurring).

32 Edmonds Community Development Code § 21.30.010 (1990) (limiting occupancy in single-family dwelling units to "families," which are defined under the city's code as "an individual or two or more person related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage").

33 *City of Edmonds*, 115 S. Ct. at 1779. The city, however, agreed to suspend enforcement of the zoning ordinance pending outcome of the litigation. City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 803 (1994).

34 *City of Edmonds*, 115 S. Ct. at 1779.

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 42 U.S.C. §3607(b)(1) (1994).

40 City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994).

only applied to unrelated people.[41] The court construed the legislative history as limiting the § 3607(b)(1) exemption to maximum occupancy restrictions that apply to both related and unrelated occupants.[42] Edmonds appealed to the Supreme Court, which granted certiorari to resolve the split between the circuits.

B. The Majority

Justice Ginsburg wrote for the Court. She was joined by Chief Justice Rehnquist and Justices Stevens, Souter, O'Connor, and Breyer. As a preliminary matter, the Court declined an opportunity to dismiss the case as moot because of a recent Washington law.[43]

The Court emphasized that the only issue before it was whether Edmonds' ordinance qualified for the § 3607(b)(1) exemption.[44] Significantly, the Court did not decide whether the ordinance in question constituted discrimination under the FHAA.[45]

The focus of the Court's analysis was whether a restriction on the number of unrelated individuals that could occupy a dwelling constituted a "reasonable . . . restriction[ ] regarding the maximum number of occupants permitted to occupy a dwelling."[46] There are, concluded the Court, two kinds of restrictions that place limits on the number of people that may occupy a dwelling: municipal land use restrictions and maximum occupancy restrictions. The Court explained the difference:

> Land use restrictions aim to prevent problems caused by the "pig in the parlor instead of the barnyard." In particular, reserving land for single-family residences preserves the character of neighborhoods securing "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." To limit land use to single-family residences, a municipality must define the term "family"; thus family composition rules are an essential component of single-family residential use restrictions. Maximum occupancy restrictions, in contradistinction, cap the number of occupants per dwelling, typically in relation to available floor space or the number and type of rooms. These restrictions ordinarily apply uniformly to all residents of all dwelling units. Their purpose is to protect health and safety by preventing dwelling overcrowding.[47]

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41 *Id.* at 807.

42 *Id.* at 805.

43 *City of Edmonds*, 115 S. Ct. at 1780 n.3. Washington's law provided:

> [n]o city may enact or maintain an ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure differently than a similar residential structure occupied by a family or other unrelated individuals. As used in this section, 'handicaps' are as defined in the federal fair housing amendments act of 1988 (42 U.S.C. § 3602). WASH. REV. CODE § 35.63.220 (1994).

44 *City of Edmonds*, 115 S. Ct. at 1780.

45 *Id.* at n.4.

46 42 U.S.C. § 3607(b)(1) (1994).

47 *City of Edmonds*, 115 S.Ct. at 1781 (citations omitted).

The Court found support for its distinction in an earlier case, *Moore v. City of East Cleveland*,[48] and in the legislative history of the FHAA.[49] Having made the distinction between land use restrictions and maximum occupancy restrictions, the Court concluded that only the latter are within the exemption.[50]

Under the Court's analysis, Edmonds' ordinance easily fell into the nonexempt category. Edmonds argued that the ordinance was a maximum occupancy restriction because it capped at five the number of unrelated people that could occupy a single-family dwelling. The majority rejected the argument that the ordinance was not a maximum occupancy statute because it did not answer the question "What is the maximum number of [related and unrelated] occupants permitted to occupy a house?"[51]

According to the Court, Edmonds' contention that "subjecting single-family zoning to FHA scrutiny will 'overturn Euclidian zoning' and 'destroy the effectiveness and purpose of single-family zoning'" was misplaced because it "both ignores the limited scope of the issue before us and exaggerates the force of the FHA's antidiscrimination provisions."[52] Here, the Court underscores that its holding is limited to whether Edmonds' ordinance is exempt under § 3607(b)(1) and that the FHA's antidiscrimination provisions are limited to unreasonable restrictions. Thus, the Court deliberately leaves the door open for reasonable single-family zoning restrictions. By limiting the scope of its decision and emphasizing the reasonableness standard, the Court denied group home advocates a decisive victory.

C. The Dissent

Justice Thomas wrote the dissent and was joined by Justices Scalia and Kennedy. Justice Thomas's basic argument was that the majority's opinion failed to "give effect to the plain language of the statute."[53] According to the dissent, Edmonds' ordinance was a "reasonable . . . restriction[ ] regarding the maximum number of occupants permitted to occupy a dwelling" because it set a limit on the number of unrelated persons that could occupy a dwelling in a single-family neighborhood. In the dissent's view, the ordinance did not have to set an equivalent limit on the number of related occupants because the statute did not specify that only restrictions applying to both related and unrelated people qualified for the exemption.[54] "[Section] 3607(b)(1) does not set forth a narrow exemption only for 'absolute' or 'unqualified' restrictions regarding the maximum number of occupants. Instead it sweeps broadly to exempt *any* restrictions regarding such maximum number."[55]

48 431 U.S. 494 (1977).
49 *See supra* note 16 and accompanying text.
50 *City of Edmonds*, 115 S.Ct. at 1782.
51 *Id.*
52 *Id.* at 1783.
53 *Id.* at 1783 (Thomas, J., dissenting).
54 *Id.* at 1784 (Thomas, J., dissenting).
55 *Id.* (emphasis added).

The dissent disagreed with the majority's conclusion that the ordinance failed because it did not specify the absolute number of persons permitted to occupy a house.[56] On the contrary, the ordinance "establish[ed] a specific number—five—as the maximum number of unrelated persons permitted to occupy a dwelling in the single-family neighborhoods of Edmonds, Washington."[57] "In other words, petitioner's zoning code establishes for certain dwellings 'a five-occupant limit, [with] an exception for [traditional] families.'"[58]

Again, referring to the language of the statute, the dissent pointed out that § 3607(b)(1) exempts "*any* reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[59] The ordinance falls within the exemption because it is a restriction on maximum occupancy, albeit limited to unrelated people. The exemption does not require that both unrelated and related occupants be affected. "It is difficult to imagine what broader terms Congress could have used to signify the categories or kinds of relevant governmental restrictions that are exempt from the FHA."[60]

Justice Thomas gave two examples to illustrate that the Edmonds ordinance is a maximum occupancy restriction: First, if a real estate agent who had just been assigned to the city of Edmonds were to ask whether the city had *any* restrictions on the maximum number of occupants permitted to occupy a building, the answer would have to be yes; "the maximum number of unrelated persons permitted to occupy a dwelling in a single-family neighborhood is five."[61] The second example involves the Autobahn in the Federal Republic of Germany. Assume that the German government imposed no restrictions on the speed of 'cars' driving on the Autobahn, but limited the speed at which 'trucks' could travel. If someone were to ask whether there were any restrictions on the maximum speed of motor vehicles on the Autobahn, the answer would be yes, that there is a maximum restriction on the speed at which trucks can drive on the Autobahn.[62]

The majority, according to Justice Thomas, misinterpreted the exemption: The majority's mistake is that it asks "What is the maximum number of occupants permitted to occupy a house?"[63] The majority believes that for an ordinance to satisfy the exemption it must impose a limit on the absolute maximum number of occupants. When the majority submits the Edmonds ordinance to this higher standard, it fails. In contrast, the dissenters state that the statute only requires the ordinance to impose a restriction "regarding" the maximum number of occupants. "Surely, a restriction can 'regar[d]'—or 'concern,' 'relate to,' or 'bear on'—the max-

56 *Id.* at 1782.
57 *Id.*
58 *Id.* at 1784 (quoting from the Tr. of Oral Arg. 46) (Thomas, J., dissenting).
59 42 U.S.C. § 3607(b)(1) (1994) (emphasis added).
60 *City of Edmonds*, 115 S. Ct. at 1784 (Thomas, J., dissenting).
61 *Id.*
62 *Id.*
63 *Id.* (quoting from *Id.* at 1782).

imum number of occupants without establishing an absolute maximum number in all cases."[64]

The dissent also criticizes the majority's example of a "prototypical maximum occupancy restriction."[65] The housing ordinance that would satisfy the requirements of § 3607(b)(1), according to the majority's point of view, "caps the number of occupants a dwelling may house, based on floor area."[66] This ordinance, explains Justice Thomas, does not satisfy the majority's test of "What is the absolute maximum number of occupants that are permitted to occupy a house?"[67] The ordinance cannot answer the majority's question because the answer depends upon the floor area of a house. A large house could accommodate more people than a smaller one. Thus, "the answer to the majority's question is the same with respect to both § 503 (b) and ECDC § 21.30.010: 'it depends.' With respect to the former, it depends on the size of the house's bedrooms; with respect to the latter, it depends on whether the house's occupants are related."[68]

Furthermore, the dissent objects to the majority's "interpretive premise," which "regard[s] this case as an instance in which an exception to 'a general statement of policy' is sensibly read 'narrowly in order to preserve the primary operation of the [policy].'"[69] The disagreement is on two grounds: First, the "policy" of the FHA does not justify an atypical interpretive premise because all statutes have a "policy."[70] Second, the majority's interpretive premise encroaches on Congressional power.

> Nor could the reason be that a narrow reading of s[ection] 3607(b)(1) is necessary to preserve the primary operation of the FHA's stated policy "to provide . . . for fair housing throughout the United States." 42 U.S.C. s[ection] 3601. Congress, the body responsible for deciding how specifically to achieve the objective of fair housing, obviously believed that section 3607 (b)(1)'s exemption for "any . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling" is consistent with the FHA's general statement of policy. We do Congress no service—indeed, we negate the "primary operation" of s[ection] 3607(b)(1)—by giving that congressional enactment an artificially narrow reading.[71]

Additionally, Supreme Court precedent requires that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States."[72] Accordingly, since zoning is an area of regulation that has traditionally been left to state and local governments,

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64 *Id.*

65 *Id.* at n.2 (quoting from *Id.* at 1782).

66 *Id.* at 1782.

67 *Id.* at 1784 n.2. (Thomas, J., dissenting).

68 *Id.* (citations omitted).

69 *Id.* at 1780 (quoting Commissioner v. Clark, 489 U.S. 726 (1989)).

70 *Id.* at 1785 (Thomas, J., dissenting).

71 *Id.*

72 *Id.* at 1786 (Thomas, J., dissenting) (quoting Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) (citations omitted)).

the dissent states "even if it might be sensible in other contexts to construe exemptions narrowly, that principle has no application in this case."[73]

The dissent also criticizes the majority's conclusion that "maximum occupancy restrictions" was a phrase in use prior to the enactment of the FHAA. It rejects the majority's distinction between maximum occupancy restrictions and municipal land use restrictions or "family composition" rules.[74] Claiming that the majority's categorization of "maximum occupancy restrictions" was "simply invented," the dissent argues that the statute does not make the same distinction that the majority does.[75] Moreover, since no state or judicial opinion used the term prior to 1992, it is unlikely that Congress "enacted section 3607 (b)(1) against the backdrop of an evident distinction between municipal land use restrictions and maximum occupancy restrictions."[76]

IV. ANALYSIS

A. *Congress Never Contemplated This Issue*

Prior to passage of the FHAA, the legality of restrictions on the maximum number of unrelated persons who could occupy a house within a single-family residential zone had been upheld by the Supreme Court in *Village of Belle Terre v. Boraas*.[77] That such restrictions were permitted prior to passage of the FHAA does not itself provide much of an argument for their continuing legality. But given the prevalence of such restrictions, and the impact that outlawing them would have upon ordinances in thousands of cities, it seems likely that if Congress had truly intended to forbid restrictions such as those upheld in *Belle Terre*, the language of the Act and the House Judiciary Committee Report would have been less equivocal. In other words, because there is no discussion of the effect of the FHAA upon a very common type of zoning restriction, it stands to reason that no effect was intended.

The type of discrimination sought to be prevented by the FHAA was discrimination against persons based solely upon the existence of a handicap. Congress was concerned about the type of discrimination that arose in *City of Cleburne v. Cleburne Living Center*.[78] In *City of Cleburne*, the Court ruled that a zoning ordinance requiring special use permits for group homes for the mentally retarded but not for other group homes violated the Equal Protection Clause. The Court concluded that the reason permits were required for the group home was because of the "irrational fears of the property owners."[79]

It was noted in the House Judiciary Committee Report that,

73 *Id.* at 1786.
74 *Id.* at 1786-87 (Thomas, J., dissenting).
75 *Id.* at 1787 (Thomas, J., dissenting).
76 *Id.* at 1787 (quoting from 1780) (Thomas, J., dissenting).
77 416 U.S. 1 (1974).
78 473 U.S. 432 (1985).
79 *Id.* at 432.

> [w]hile state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment . . . of . . . land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.[80]

This passage of the Report included a footnote to the *Cleburne* case indicating that legislative intent was focused on eradicating the kind of discrimination forbidden in that case three years earlier. That Congress intended to codify the *Cleburne* decision is also shown by the concern, in the text above, that requirements were imposed upon persons with handicaps and not on similarly situated individuals. Furthermore, the only kind of discrimination mentioned in the House Judiciary Committee Report was the type of discrimination addressed in the *Cleburne* case.

Congress intended to prevent disparate treatment of persons with handicaps; e.g., situations where families or groups of unrelated persons could live in a certain zone, but individuals with handicaps could not because of restrictions based on stereotypes and ignorance.

The foregoing scenario is different from the one presented in *City of Edmonds*. The Edmonds ordinance did not discriminate between persons with or without handicaps, but between related and unrelated persons. As long as group homes complied with the occupancy limitations applied to all other unrelated individuals living in shared housing, they were allowed to operate within the single-family residential. Maximum occupancy restrictions, such as Edmonds', do not single out the handicapped for discriminatory treatment. They apply to all unrelated individuals, without regard to handicap, race, sex, or religion.

B. Protected Status of the Family

Despite the Court's disparagement of the Edmonds ordinance as a "family values preserver,"[81] the Court has previously recognized the role of zoning to protect family values.

Beginning with the seminal case of *Village of Euclid v. Amber Realty Co.*,[82] the Supreme Court has upheld the exclusion of uses inappropriate to residential districts by way of zoning. The Supreme Court established the protected status of the family in *Village of Belle Terre v. Boraas*.[83] In *Belle Terre*, the Court upheld the constitutionality of a zoning ordinance that limited the occupancy of single-family dwellings to traditional families or to groups

80 H.R. REP. No. 711, 100th Cong., 2nd Sess. 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185.

81 *City of Edmonds*, 115 S. Ct. at 1783.

82 272 U.S. 265 (1926).

83 416 U.S. 1 (1974).

of two or less unrelated individuals.[84] According to the Court, the police power extended beyond the mere prevention of nuisances.

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[85]

The family's status was reaffirmed two years later in *Moore v. City of East Cleveland.*[86] In *Moore,* an East Cleveland housing ordinance restricted occupancy of single-family dwellings to certain categories of related individuals such that a grandmother who lived with her son and two grandsons was found to be in violation of the ordinance. *Belle Terre's* expansion of the police power did not control here, explained the Court, because of the "overriding factor" that the ordinance in *Belle Terre* only affected unrelated individuals.[87] "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[88] Thus, in *Moore,* the Court concluded that the extended, as well as nuclear, family was entitled to constitutional protection.[89] These decisions establish ample precedent for the protection of families through zoning.

C. *Equal Access to Housing Does Not Mean a Preferred Right to Housing*

The FHAA guarantees the handicapped the right to equal housing opportunity, not a right to preferred housing opportunities.[90] At the same time, however, the rights of the handicapped must be balanced with those of the rest of the community. Group homes have the same effect on neighborhoods that any house with a large number of unrelated adults would: more cars, more noise, and more people.[91] The Supreme Court has held

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84 *Id.* at 7.
85 *Id.* at 9.
86 431 U.S. 494 (1976).
87 *Id.* at 498.
88 *Id.* at 503-04.
89 "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id.* at 504-05.
90 The FHAA guarantees the handicapped an "equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B) (1994). Courts disagree whether the FHAA guarantees the right to live in a specific dwelling. Bryant Woods Inn, Inc. v. Howard County, 911 F. Supp. 918, 945 (D.Md.1996) ("The Act does not require that people with disabilities be given preferential access to housing, unless that access is necessary to accommodate their special needs."). *Contra* Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1185 n.10 (E.D.N.Y. 1993) ("s[ection] 3604 (f)(3)(B) dictates that a handicapped individual must be allowed to enjoy a particular dwelling, not just some dwelling somewhere in the town.").
91 "These institutional uses are not only inconsistent with the single-housekeeping-unit concept but include many more people than would normally inhabit a single-family dwelling." *Moore,* 431 U.S. at 517 (Stevens, J., concurring).

that zoning restrictions which further family values by restricting cars, housing density, and population density are "legitimate guidelines."[92]

Reasonable restrictions, such as those at issue in *City of Edmonds*, do not prohibit persons with handicaps from living in single-family residential zones. Persons with handicaps may live as of right in group homes which adhere to zoning regulations or with relatives or by themselves. Rather, persons with handicaps are only restricted if they choose to live in a group home with more than the permissible number of occupants. This restriction, however, does not single out people with handicaps; it applies to all unrelated persons. The restriction, then, is not discriminatory and does not come within the scope of the FHAA. Treating individuals with handicaps in a non-paternalistic manner also helps to dispel the myth that they are inferior.[93]

V. POST-*CITY OF EDMONDS*

A. *Public Reaction to* City of Edmonds

The media reaction to the *City of Edmonds* decision was interesting because the perception of the scope of the decision was far from uniform. A common misconception was that the *City of Edmonds* court had invalidated the city's ordinance. According to the *Los Angeles Times*, the Court "gave the law a liberal interpretation so as to invalidate local ordinances that bar five or more unrelated persons from living together in a neighborhood of single-family homes."[94] The editorial from another newspaper criticized the Court's ruling that "local governments may not use zoning restrictions to bar group homes for alcoholics and drug addicts from neighborhoods of single-family homes."[95] The *San Francisco Chronicle* reported that cities were now forbidden from setting occupancy limits unless the limits applied to both unrelated and related people.[96] Similarly, one editorial proclaimed that the *City of Edmonds* decision said that "the Fair Housing Act exempts group homes for the disabled from local zoning codes that limit the number of occupants in single-family homes."[97] It is remarkable that the *City of Edmonds* decision would be so consistently misinterpreted, especially in light of the Court's explicit statement of the limited nature of its holding.

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92 Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

93 "[A] genuinely evenhanded, non-paternalistic policy towards people with disabilities recognizes that 'individuals with disabilities are entitled to the cultural opportunities, surroundings, experiences, risks, and associations enjoyed by people without disabilities.'" Bryant Woods Inn, Inc. v. Howard County, 911 F. Supp. 918, 945 (D. Md. 1996) (citations omitted).

94 David G. Savage, *Court Says Cities Can't Bar Homes for Ex-Addicts*, LOS ANGELES TIMES, May 16, 1995, at A1.

95 *Court Rejects Notion of Family*, HARRISBURG PATRIOT, May 19, 1995, at A14.

96 Linda Greenhouse, *Group Homes For Disabled Win Protection/Supreme Court limits the use of zoning laws*, SAN FRANCISCO CHRON., May 16, 1995, at A1.

97 *Group Homes Win Big in Court*, SEATTLE POST-INTELLIGENCER, May 21, 1995, at E2.

B. The Application of City of Edmonds *in Subsequent Cases*

The sweep of *City of Edmonds* has proved to be much narrower than group home advocates had predicted. Instead of wiping out single-family zoning, *City of Edmonds* has merely added a judicial gloss to the meaning of "reasonable accommodation."

The most recent case to apply the holding of *City of Edmonds* to similar facts is *Oxford House-C v. City of St. Louis*.[98] This case is significant, if for no other reason, because it dispels the apparent belief of group home advocates that any restriction on group homes was per se unreasonable under the FHAA. In *City of St. Louis*, the city's zoning code included group homes of eight or fewer unrelated handicapped individuals within the definition of single-family dwelling.[99] Oxford House established a group home in a single-family residential area with more than eight occupants. Once the city realized the violation, it cited the group home. Oxford House refused to apply for a variance from the eight-person limitation and sued the city alleging that the city had violated the Fair Housing Act.[100] The district court ruled that the city had violated the Fair Housing Act by enforcing its zoning code against Oxford House.[101] The court also enjoined the city from enforcing its zoning code against the group homes.[102]

The Eight Circuit, however, reversed the district court, finding that the city had not "unlawfully discriminated against, failed to accommodate, [or] interfered with the housing rights of the handicapped men."[103] Even though the court acknowledged *City of Edmonds*, it held that the ordinance did not violate the FHAA. The court noted that the ordinance actually favored handicapped people because it allowed group homes to have up to eight residents, while otherwise permitting only three unrelated people to live together in a single-family zone.[104]

The financial viability argument, which Oxford House and other group home advocates have consistently relied upon as a basis for the alleged unreasonableness of restrictions on group homes,[105] did not persuade the court. Accordingly, the court rejected the district court's finding that the city's zoning ordinances discriminated against the group home because an eight-person limit would destroy the financial viability of many Oxford Houses.[106] "Even if the eight-person rule causes some financial hardship for Oxford House, however, the rule does not violate the Fair

98 Nos. 94-1600, 94-3073, 1996 WL 75685 (8th Cir. Feb. 23, 1996).

99 ST. LOUIS, MO., REV. CODE tit. 26, § 26.20.020(a)(1) (1994).

100 Oxford House-C v. City of St. Louis, 843 F. Supp. 1556 (E.D. Mo. 1994).

101 *Id.* at 1584.

102 *Id.*

103 City of St. Louis, 1996 WL 75685, at *2.

104 City of St. Louis, 1996 WL 775685, at *2 (citing ST. LOUIS, MO., REV. CODE tit. 26, § 26.20.020(a)(1) (1994)).

105 City of Edmonds v. Oxford House, Inc., 115 S. Ct. 1776, 1779 (U.S. 1995) ("Group home users, Oxford urged, need 8 to 12 residents to be financially . . . viable."); Elliott v. City of Athens, 960 F.2d 975 (11th Cir. 1992) ("The only evidence of disparate impact was . . . the testimony that a group home for recovering alcoholics . . . could not be economically feasible with fewer than 12 residents.").

106 *Id.*

Housing Act if the City had a rational basis for enacting the rule."[107] Thus, the court concludes that the negative financial impact of an ordinance on a group home does not necessarily make that ordinance unreasonable. This reaffirms that the Fair Housing Act only requires a city to make reasonable accommodations in its zoning code when necessary to give handicapped people an "equal opportunity to use and enjoy a dwelling."[108]

The city was justified in its zoning restriction, opined the court, because "[c]ities have a legitimate interest in decreasing congestion, traffic, and noise in residential areas, and ordinances restricting the number of unrelated people who may occupy a single-family residence are reasonably related to these legitimate goals."[109] Furthermore, explained the court, "[t]he city does not need to assert a specific reason for choosing eight as the cut-off point, rather than ten or twelve."[110]

The court also expressed its disapproval with Oxford House's tactic of using the federal courts as a first step instead of trying to work with the local zoning board by applying for a variance. "Congress did not intend the federal courts to act as zoning boards by deciding fact-intensive accommodation issues in the first instance."[111] The court insisted that Oxford House could not claim that St. Louis had failed to make a reasonable accommodation when the group home had failed to apply for a variance. "Their refusal is fatal to their reasonable accommodation claim."[112]

The Eighth Circuit's decision in *City of St. Louis* indicates that single-family zoning is far from dead. Cities can make reasonable regulations that preserve the character of single-family residential areas, while still accommodating group homes.

Although cities still risk litigation if they try to enforce restrictions such as those in *City of Edmonds*, the holding in *City of St. Louis* gives group homes and cities some post-*City of Edmonds* guidance. First, unless a group home applies for a variance, a city will not likely be deemed to have failed to make a "reasonable accommodation." Group homes should not use the courts as first-resort zoning boards. Second, group homes cannot rely on a financial viability argument. The mere fact that a larger number of occupants in a group home would increase revenue will not suffice for a showing of unreasonableness.[113] Finally, cities can argue the Eighth Circuit's holding in *City of St. Louis*, along with similar holdings,[114] to justify reason-

107 *Id.* (citing Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 94 (8th Cir. 1991)).

108 42 U.S.C.A. § 3604(f)(3)(B) (1994).

109 *City of St. Louis*, 1996 WL 75685, at *2 (citing Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)). Oxford House states that the average length of stay for a resident is about thirteen months. Brief for Respondents Oxford House, Inc. at 6, *City of Edmonds* (No. 94-23).

110 *City of St. Louis*, 1996 WL 75685, at *2.

111 *Id.* at *3 (citing Oxford House v. City of Virginia Beach, 825 F. Supp. 1251, 1261 (E.D. Va. 1993)).

112 *Id.*

113 On the other hand, if the permitted number of occupants was so low as to be unable to sustain any group home, even one operated by a non-profit organization, that would seem to indicate that the ordinance was unreasonable.

114 *See* Bryant Woods Inn, Inc. v. Howard County, 911 F. Supp. 918 (D. Md. 1996) (holding that a refusal to permit a group home to increase its number of residents from eight to fifteen is not a failure to make a reasonable accommodation).

able restrictions designed to maintain the integrity and character of single-family neighborhoods.

VI. CONCLUSION

City of Edmonds, despite its potential for becoming an important decision, ultimately decided a narrow legal issue. The ordinance at issue in the case was not invalidated, the Court held only that it was not exempt from the Act's coverage. The Court remanded the issue of whether the ordinance discriminated against the handicapped to the lower court. After *City of Edmonds*, cities are still free to establish and regulate single-family neighborhoods; the only difference is that now cities with restrictions like those at issue in Edmonds may not claim the protection of § 3607(b)(1).

Perhaps the most significant dimension of the *City of Edmonds* Court's decision is its weak support for the FHAA. From the majority's narrow textual reading of the statute, it appears that in order to garner a majority Justice Ginsburg had to chart a narrow course between the Scylla of civil rights, on one hand, and the Charybdis of family values, on the other. By failing to champion either civil rights, as the Court did in *City of Cleburne v. Cleburne Living Center, Inc.*,[115] or family values, as it did in *Village of Belle Terre v. Boraas*[116] and *East Cleveland v. Moore*,[117] the Court ultimately disappointed both sides.

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115 473 U.S. 432 (1985) (holding that requiring a special use permit for a group home for the retarded, while not requiring a similar permit for similar uses, violated the Equal Protection Clause).

116 416 U.S. 1 (1974) (upholding a maximum occupancy restriction in a single family zone that only applied to unrelated people).

117 431 U.S. 494 (1977) (holding that a narrow definition of "family" that did not permit a grandmother to live with her grandson violated Due Process).