Housing Quotas for People with Disabilities: Legislating Exclusion

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THE TRANSFER OF PEOPLE WITH DISABLITIES from state institutions to residential housing is one of the great migrations in recent history, but finding adequate housing is difficult. Laws that enact housing quotas make this task even harder. Quotas can require a minimum distance between group homes, limit the number of group homes that can be allowed in a community, or limit the number of apartments in multifamily projects. This article considers the legality of these quotas under the federal Fair Housing Act, and their constitutionality as an equal protection violation.

The use of quotas in land use regulation to achieve social objectives has long troubled the legal system,[1] and they are inherently objectionable.[2] Supporters claim housing quotas are necessary to keep housing for persons with disabilities from clustering together because this prevents their integration into the community. There is no evidentiary support for this claim.[3] Housing quotas for persons with disabilities are a rigid, unacceptable, and illegal means for allocating housing opportunities. They

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1. Local governments may adopt development quotas in growth management programs that limit the number of developments that can be built. Courts may reject such quotas. *See* Zuckerman v. Town of Hadley, 813 N.E.2d 843 (Mass. 2004). Zoning ordinances may impose quotas on certain types of businesses in order to control competition, by limiting certain types of businesses to downtown areas, for example. Courts accept these limitations if control of competition is not the primary purpose. *See* Hernandez v. City of Hanford, 159 P.3d 33 (Cal. 2007). Zoning ordinances may also contain distance requirements for adult uses, or prohibit their location near sensitive uses, such as schools. These requirements do not violate free speech if they regulate the secondary effects of these uses. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

2. *See* United States v. Starrett City Assocs., 840 F.2d 1096, 1102 (2d Cir. 1988) (noting that "ceiling quotas . . . are of doubtful validity. . . .").

3. U.S. DEP'T OF HOUS. & URB. DEV., SECTION 8 TENANT-BASED ASSISTANCE: A LOOK BACK AFTER 30 YEARS (2000), *available at* http://www.huduser.org/Publications/pdf/look.pdf [hereinafter SECTION 8 TENANT-BASED ASSISTANCE].

clearly violate constitutional and statutory rights to free choice in the distribution of housing opportunity.

Part I describes the universe of housing models available for people with disabilities. Part II examines the problem of clustering that occurs when this housing locates in groups. Part III describes state statutes that require a minimum distance between group homes for people with disabilities, and federal housing subsidy legislation that contains quotas and preferences. It criticizes the dispersion strategy for housing that quotas implicitly require. Part IV considers the constitutionality of housing quotas under the equal protection clause of the federal constitution.

Part V considers the legality of quotas under the federal Fair Housing Act, which makes it a violation to "otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap."[4] Though this language applies only to individuals, the courts have followed legislative history by applying it to statutes and zoning ordinances that contain quota requirements.[5] The Fair Housing Act covers a wide range of individuals with disabilities.[6] This article considers housing for persons with disabilities, and persons recovering from alcoholism and drug addiction. Part VI discusses more acceptable models for distributing housing opportunities.

I. Housing Models for Persons with Disabilities

The problem of institutional care for persons with disabilities, dramatized so well in the movie "One Flew Over the Cuckoo's Nest," prompted a nationwide deinstitutionalization movement beginning in the 1960s.[7]

4. 42 U.S.C. § 3604(f) (2006). The Act preempts conflicting laws. *Id.*, § 3615 (any state or local law "that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid"). Amendments in 1988 prohibit discrimination against the handicapped.

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

6. *See* 42 U.S.C. § 3602(h) (2006); *see, e.g.*, Ass'n for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth, 876 F. Supp. 614 (D.N.J. 1994) (holding that a city ordinance automatically denying conditional use permits to community residents for developmentally disabled persons violated the Fair Housing Act); Support Ministries for Persons with AIDS, Inc. v. Vill. of Waterford, 808 F. Supp. 120 (N.D.N.Y. 1992) (finding that homeless persons with AIDS are "handicapped" within the meaning of the Fair Housing Act); Oxford House, Inc. v. Twp. of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992) (granting an injunction against a town ordinance that would interfere with a group home for recovering alcoholics and substance abusers because it was in violation of the Fair Housing Act). *But see* Budnick v. Town of Carefree, 518 F.3d 1109 (9th Cir. 2008) (finding that aged individuals are not covered under the Fair Housing Act).

7. *See* Laura C. Bornstein, *Conceptualizing Cleburne,* 41 GOLDEN GATE U.L. REV. 91, 99-105 (2010) (discussing deinstitutionalization and opposition to housing for disabled); *see generally* Daniel Lauber, *A Real LULU: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments Act of 1988*, 29 J. MARSHALL L. REV.

Deinstitutionalization worked better for some disability groups than for others, such as persons with mental illness.[8] It dramatically reduced the number of patients in state custodial facilities and sent them to the private housing market, where housing was often inadequate. Residential housing is the accepted model, but there is more than one alternative.

A. *Group Homes*

Congregate housing for persons with disabilities is commonly called a group home, though this term covers different housing models with different characteristics. The term "group home" is used in this article to describe a congregate residential structure occupied, but not rented, by persons with disabilities.[9] It may be owned and managed by a nonprofit or for-profit entity and is usually licensed by the state. Residence may be comparatively permanent or transitional, with transitional residence typical of group homes for alcoholics and substance abusers, known as recovery communities.[10] The level of treatment varies, with treatment and rehabilitation more common in group homes for persons with mental illness and recovery communities. Number

369, 370-374(1996) (offering a comprehensive overview of the development of community residences under the Fair Housing Amendments Act); Nancy K. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory,* 31 EMORY L.J. 375 (1982).

8. Bornstein, *supra* note 7, at 375 (discussing why deinstitutionalization failed for persons with mental illness); *see also* Mary L. Durham, *The Impact of Deinstitutionalization on the Current Treatment of the Mentally Ill,* 12 INT'L J.L. & PSYCHIATRY 117 (1989).

9. 42 U.S.C. § 8013(k) (2006) (noticing the definition in the statute authorizing subsidies for housing for persons with disabilities). This definition includes residences offering a relatively permanent living arrangement and those offering a comparatively temporary living arrangement. *See* Planning/Communications & Law Office Daniel Lauber, Principles to Guide Zoning for Community Residences: Boulder City, Nevada 4-6 (Sept. 2010) (on file with author), *available at* http://www.bcnv.org/AgendaPackets/PlanningCommission/2010-09-15%20CC%20&%20PC%20packet.pdf [hereinafter *Principles to Guide Zoning*] (explaining this distinction).

10. The Oxford House organization is a major supporter of recovery communities, which are self-run and self-supported and do not require a state license. *See* Oxford House, Inc., *Oxford House and Zoning—A Legal Memorandum* (Oct. 10, 2007), *available at* http://oxfordhouse.org/userfiles/file/doc/zonememo.pdf; *see also* Oxford House, http://oxfordhouse.org (last visited May 25, 2011); Douglas L. Polcin et al., *Sober Living Houses for Alcohol and Drug Dependence: 18-Month Outcomes,* 38 J. SUBSTANCE ABUSE TREATMENT 356 (2010). *See generally* Gorman et al., *Fair Housing for Sober Living: How the Fair Housing Act Addresses Recovery Homes for Drug and Alcohol Addiction,* 42 URB. LAW. 607 (2010) (summarizing the legal characteristics of sober living homes and their relation with the Fair Housing Act). Persons with developmental disabilities may need relatively permanent residence, while residence by persons with mental illness may be episodic depending on changes in their condition, and how they progress. Telephone Interview with Charlie Lakin, Minnesota Institute on Community Integration (Jan. 10, 2011) [hereinafter Lakin Interview].

counts are available for group homes for persons with developmental disabilities. One estimate counted 59,937 residential care settings serving 276,460 people.[11]

Size varies. Recovery communities have an average of 8.2 residents.[12] An estimated 90 percent of the residential settings for persons with developmental disabilities served six or fewer people in 2009. The average number was 2.5 persons.[13] This is a dramatic decrease in occupancy rates, as in 1977 the average number of residents was 22.5.[14] Size matters. The effect of quotas on the number of people who can be served by group homes varies with size. A requirement that group homes be a certain distance apart more greatly restricts the number of persons with disabilities who can live in a community if group homes average three rather than 22 occupants.[15] It is also questionable whether a group home with two or three residents is so fundamentally different from a home with a related family that has the same number of persons that it requires a different zoning treatment.

B. *Board and Care Homes*

Board and care homes are an important and fast-growing housing resource. Though they are not limited to persons with disabilities, as many as 330,000 persons with psychiatric disabilities live in these homes.[16] They provide a less supportive residential setting than group homes, and offer only board, bed, and meals and some modicum of supervi-

11. K. Charlie Lakin, et al., *Residential Services for Persons with Developmental Disabilities: Status and Trends Through 2009,* at 41 (2010), *available at* http://rtc.umn.edu/docs/risp2009.pdf. Statistics are not available for mentally ill persons because accommodation is too diverse. Telephone Interview with Ann O'Hara, Technical Assistance Collaborative (April 4, 2011) [hereinafter O'Hara Interview].

12. Telephone Interview with Paul Molloy, Director, Oxford House, Inc. (Jan. 29, 2011) [hereinafter Molloy Interview]. Twenty-four thousand individuals went through the Oxford House system in 2010. Half of these have co-occurring mental illness. *Id.*

13. Lakin, *supra* note 11, at 41-42*; see also* K. Charlie Lakin & Roger J. Stancliffe, *Residential Support for Persons with Intellectual and Developmental Disabilities,* 13 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES RES. REVIEWS 151 (2007).

14. Lakin, *supra* note 11, at 38.

15. Some cities and counties base their spacing requirement on the density of a zoning district, but this is not typical. *Principles to Guide Zoning, supra* note 9, at 10.

16. *See* U.S. CENTER FOR MENTAL HEALTH SERVICES, HHS PUB. NO. 4173, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, TRANSFORMING HOUSING FOR PEOPLE WITH PSYCHIATRIC DISABILITIES REPORT 2 (2006), *available at* http://store.samhsa.gov/product/SMA06-4173 [hereinafter *Transforming Housing*]; *see also* LESLIE A. MORGAN ET AL., SMALL BOARD-AND-CARE HOMES: RESIDENTIAL CARE IN TRANSITION (1995); Nicholas G. Castle, *Facility Charter and Quality of Care for Board and Care Residents,* 20 J. HEALTH & SOCIAL POL'Y 23 (2004) (noting nonprofit homes provide better care).

sion.[17] Nor are they staffed to provide rehabilitation services by a state agency. Licensing is only for egress and compliance with fire codes. Because they are not licensed by the state, protective state legislation that affects zoning usually does not apply to them.

Board and care homes vary considerably. Many have only a few residents, provide an acceptable environment and are well run. Most residents live in homes with more than 51 occupants,[18] while larger homes, known as adult homes, can have 200 persons with mental illness. Critics claim the larger board and care homes do not provide a better environment than the state custodial institutions they replaced.[19] Common problems are ineffective statutory oversight, poor environmental and physical conditions, and inadequate medical and mental health care.[20]

C. *Supportive Housing*

Supportive housing is a housing alternative for persons with disabilities that is gaining attention because critics believe group and board and care homes do not provide an acceptable environment, especially for persons with mental illness.[21] They claim these homes limit housing choice because they link services to a particular type of housing, prevent social integration by grouping people by disability, allow staff to control activity and lifestyle, destroy privacy, and prevent the customizing of service to individual needs by imposing a controlled supervisory structure.[22] Abuse can be a serious problem.[23]

17. O'Hara Interview, *supra* note 11.

18. *Transforming Housing, supra* note 16, at 2.

19. *Id.*

20. *Id.* at 12-13; *see also* U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-89-50, BOARD AND CARE: INSUFFICIENT ASSURANCES THAT RESIDENTS' NEEDS ARE IDENTIFIED AND MET (1989), *available at* http://archive.gao.gov/d15t6/138117.pdf.

21. One observer states that group homes are declining in number, and that fewer group homes are being built. O'Hara Interview, *supra* note 11.

22. Priscilla Ridgeway & Anthony M. Zipple, *The Paradigm Shift in Residential Services: From the Linear Continuum to Supported Housing Approaches,* 13 PYSCHOSOCIAL REHAB. J. 11 (1990) [hereinafter *The Paradigm Shift*]. In the linear continuum, persons with mental illness are moved along increasingly less restrictive residential settings as they improve. *See also* Michael Allen, *Just Where You and I Live: Integrated Housing Options for People with Mental Illness* 2 (2004) *available at* http://www.bazelon.org/LinkClick.aspx?fileticket=4sZjOa313oI%3D&tabid=245 (stating that group homes are a "dinosaur"); Lakin & Stancliffe, *supra* note 13, at 154-55.

23. *See* Danny Hakim, *A Disabled Boy's Death, and a System in Disarray,* N.Y. TIMES, June 5, 2011, at A1 (describing abuse of developmentally disabled); *see also* Danny Hakim, *At State-Run Homes, Abuse and Impunity,* N.Y. TIMES, March 12, 2011, at A1 (reporting 13,000 allegations of abuse in 2009 in New York state); Clare Ansberry, *Disabled People Find Group Homes Can Be Broken, Too,* WALL ST. J., Sept. 13, 2005, at A1 (observing problems in homes for developmentally disabled in South Carolina); Russ Buettner, *Reaping Millions in Nonprofit Care for the Disabled*, N.Y. TIMES,

Supportive housing,[24] where persons with disabilities live in individual apartments or homes, is preferred, especially for persons with mental illness.[25] This housing model is based on the premise that persons with disabilities have a right to choose an independent living environment, and that "a stable home is a prerequisite for effective treatment and psychosocial rehabilitation."[26] Supportive housing is preferred because it allows freedom of housing choice, individualized flexible service, integration in the community, and a shift in control from staff to client. Services are delivered to the individual's home.[27]

This is how supportive housing should work, but studies of its effectiveness do not show a clear advantage over congregate housing.[28] Isolation can impede treatment,[29] monitoring is a daunting issue,[30] and cost is a serious problem.[31] Studies of supportive housing for persons

Aug. 2, 2011, at A1 (reporting inflated costs); Clifford J. Levy, *For Mentally Ill, Death and Misery*, N.Y. TIMES, April 28, 2002, at A1; Clifford J. Levy, *Here, Life is Squalor and Chaos,* N.Y. TIMES, April 29, 2002, at A1; Clifford J. Levy, *Voiceless, Defenseless and a Source of Cash*, N.Y. TIMES, April 30, 2002, at A1.

24. *See* 42 U.S.C. § 8013(k)(3) (2006) (defining "supportive housing" in legislation providing housing subsidies). This type of housing is also called supported housing.

25. *See* O'Hara Interview, *supra* note 11.

26. *The Paradigm Shift, supra* note 22, at 16.

27. *Id.* at 17-26.

28. *See* Lakin & Stancliffe, *supra* note 13, at 155-56 (maintaining the existence of better outcomes generally for persons with lower support needs); H. Stephen Leff et al., *Does One Size Fit All? What We Can and Can't Learn From a Meta-analysis of Housing Models for Persons With Mental Illness,* 60 PSYCHIATRIC SERVS. 473 (2009) *available at* http://psychservices.psychiatryonline.org/cgi/reprint/60/4/473.pdf (finding in a study of housing for persons with severe mental illness that cost-effectiveness of supportive housing not shown and differences among housing models not statistically significant); Geoffrey Nelson et al., *A Comparative Evaluation of Supportive Apartments, Group Homes, and Board-and-Care Homes for Psychiatric Consumer/Survivors,* 25 J. CMTY. PSYCHOL. 167 (1997) (finding no clear advantage for supportive housing); Rita J. Ogilvie, *The State of Supported Housing for Mental Health Consumers: A Literature Review,* 21 PSYCHIATRIC REHAB. J. 122 (1997) (observing no clear advantage for supportive housing). *But see* Dennis P. Culhane et al., *Public Service Reductions Associated with Placement of Homeless Persons with Severe Mental Illness in Supportive Housing,* 13 HOUS. POL'Y DEBATE 107 (2002) *available at* http://repository.upenn.edu/cgi/viewcontent.cgi?article=1067&context=spp_papers (showing marked reductions in shelter use, hospitalization, and length of stay).

29. Molloy Interview, *supra* note 12; *see* Tony Leys, *Acceptance Finding Group Homes Small Part of Overwhelmed System,* DES MOINES REGISTER, Jan. 16, 2011, at A1 (reporting individuals who preferred group home environment). Isolation may also make it more difficult to provide supportive services. *See* Jennifer R. Wolch, *Residential Location of the Service-Dependent Poor,* 70 ANN. ASS'N AM. GEOGRAPHERS 330, 340 (1980) (study of Philadelphia showed "existence and strength of locational interdependency between service-dependent households and human service facilities;" disabled included in service-dependent group).

30. Lakin Interview, *supra* note 10.

31. Lakin & Stancliffe, *supra* note 13, at 156; *see* Joint Center for Housing Studies of Harvard University, *America's Rental Housing: Meeting Challenges, Building*

with mental illness, for example, find they are priced out of the rental housing market.[32] Social Security disability income, which may be the only source of support, does not cover housing cost, and subsidies are needed. Cost is an important factor because it determines the mix of housing that is available. Cost problems may require more reliance on group homes as a source of housing supply.

A number of subsidy alternatives are available to manage cost, and some states creatively use subsidy programs to build supportive housing whose cost can be covered by Social Security income.[33] Important subsidies are provided through the Housing Choice Voucher program authorized by Section 8 the Federal Housing Act[34] and a linked housing subsidy program for persons with disabilities.[35] The Housing Choice Voucher program has long had problems, however. Quality can be a problem,[36] while waiting lists are long and the application process can be challenging for persons with developmental disability.[37] Refusals to

on Opportunities (2011), *available at* http://www.jchs.harvard.edu/publications/rental/rh11_americas_rental_housing/AmericasRentalHousing-2011.pdf (stating that rental markets are tightening, vacancy rates are falling, rents are rising; one in four renters spends more than half their income on rent; affordability of rental housing is expected to worsen).

32. Emily Cooper et al., *Priced Out in 2008: The Housing Crisis for People With Disabilities* (2009), *available at* http://www.tacinc.org/downloads/Priced%20Out%202008.pdf (showing that on average people with disabilities pay 112.1 percent of monthly income to rent a modest one-bedroom unit).

33. Tennessee's Creating Homes Initiative has built 7,700 units. Federal subsidies cover most of the cost. Interview with Bob Currie, Tennessee Department of Mental Health Disabilities, April 15, 2011 [hereinafter Currie Interview]; *see generally* Tennessee Department of Mental Health and Developmental Disabilities, *Creating Homes Initiative*, *available at* http://state.tn.us/mental/recovery/CHI_PACKET_MARCH_2009.pdf (providing a general overview of the Creating Homes Initiative).

34. 42 U.S.C. § 1437f, 124 Stat. 4084 (2006). *See* SECTION 8 TENANT-BASED ASSISTANCE, *supra* note 3 (giving a review of the program and the issues it has raised). Funding is also available from the Section 202 program for housing for the elderly. *See* 42 U.S.C. § 1701q (2006); HOME Investment Partnership Act of 1990, 42 U.S.C. § 12741 (2006); U.S. Dep't of Hous. & Urb. Dev., *Evaluation of Supportive Housing Programs for Persons With Disabilities* Vol. 1 (1995), *available at* http://www.huduser.org/portal/publications/pdf/suphous1.pdf (providing an evaluative review of the § 202 program by the federal agency). A critical investigation of the HOME program found project delays and abandonments and breakdowns in program management at the federal level. *See Million-Dollar Wasteland,* THE WASHINGTON POST, May 14, 2011, *available at* http://www.washingtonpost.com/2010/07/08/AFxelh3G_page.html.

35. 42 U.S.C. § 8013 (2006).

36. *See generally* Sandra J. Newman & Ann B. Schnare, '. . . *And a Suitable Living Environment': The Failure of Housing Programs to Deliver on Neighborhood Quality,* 8 HOUS. POL'Y DEBATE 703 (1997), *available at* http://www.knowledgeplex.org/kp/text_document_summary/scholarly_article/relfiles/hpd_0804_newman.pdf.

37. Lakin & Stancliffe, *supra* note 13, at 156; s*ee* Valerie Baurlein, *Crowds Chase Scarce Housing Vouchers*, WALL ST. J., Aug. 14, 2010, at A3.

rent to voucher holders occur all too often. They may be difficult to attack under the federal Fair Housing Act, because the refusal is based putatively on income rather than racial discrimination. There may not be a demonstrable violation of the Act unless the rejected applicant belongs to a protected class covered by the statute, such as a racial minority.[38]

D. *Conclusion*

Residential housing for persons with disabilities is a troubled market that has produced several housing models. Providing a balance that includes a variety of housing alternatives is the most acceptable social strategy.[39] Laws that govern the availability of housing for persons with disabilities must consider the variety that exists in their housing market. Differences in the size and function of this housing cast doubt on rigid quotas that do not consider this variability.

II. The Clustering Problem

Housing for persons with disabilities has clustered in housing markets. Group homes[40] cluster in certain neighborhoods and certain areas of cities.[41] Often these are areas of older housing. Clustering occurred when group homes, such as those for persons with disabilities, had a greater number of occupants than they do now. A home had to be large enough to house a substantial number of persons, and homes of this size could be found only in older and less expensive areas of cities.[42] Clustering may be less of a problem today. Group homes with fewer occupants are

38. *See* Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148 (S.D.N.Y. 1989) (finding a violation of the Fair Housing Act when rejected applicants were members of racial minority); *see also* Jenna Bernstein, Note, *Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight,* 32 CARDOZO L. REV. 1407 (2010); Manny Fernandez, *Bias Is Seen as Landlords Bar Vouchers,* N.Y. TIMES, Oct. 30, 2007, at A1; Jennifer Medina, *Subsidies & Suspicion: Seeking a Better Life, California Renters Encounter Resistance,* N.Y. TIMES, Aug. 11, 2011, at A12.

39. Lakin Interview, *supra* note 10; Telephone Interview with Andrew Sperling, Nat'l Alliance on Mental Illness (May 27, 2011) [hereinafter Sperling Interview].

40. This discussion also applies to board and care homes. Martin Jaffe & Thomas P. Smith, *Siting Group Homes for Developmentally Disabled Persons,* AM. PLANNING ASS'N, PLANNING ADVISORY SERV. REP. NO. 397 (1986).

41. *Id.* at 13 (noting planners in big cities reported clustering in older areas); U.S. GEN. ACCOUNTING OFFICE GAO/HRD-83-14, AN ANALYSIS OF ZONING AND OTHER PROBLEMS AFFECTING THE ESTABLISHMENT OF GROUP HOMES FOR THE MENTALLY DISABLED, at 19 (1985) [hereinafter *An Analysis of Zoning*] (finding that about one-third of group homes were located near another special population facility, while group homes for mentally ill were less clustered); Currie Interview, *supra* note 33.

42. Jaffe & Smith, *supra* note 40, at 13; Lakin Interview, *supra* note 10; *see also* George Galster et al., *Supportive Housing and Neighborhood Property Value Externalities,* 80 LAND ECON. 33, 36-37 (2004).

smaller and less likely to cluster because they are not limited to these areas.

Supportive housing can also cluster. Clustering can occur in individual buildings, and buildings with supportive housing can cluster in neighborhoods. Supportive housing can be subsidized by the Housing Choice Voucher program, and housing in this program has clustered.[43]

Opponents of clustering argue that it prevents normalization, an important housing goal for persons with disabilities. This goal requires placing them "in an environment that as closely as possible resembles life in normal society in order to provide opportunities for interaction with, and integration into, society."[44] As one presidential commission stated, ghettos of persons with mental illness "destroy the residential character of the affected neighborhoods and subvert the right of handicapped persons to live in normal residential surroundings."[45] Clustering opponents argue that clustering prevents normalization because it creates an institutional environment that does not allow integration into the community.[46]

These claims lack evidentiary support in empirical studies.[47] Identifying outcomes that can determine whether clustering has negative effects is difficult and complicates empirical research.[48] The lack of evidentiary

43. SECTION 8 TENANT-BASED ASSISTANCE, *supra* note 3, at 21 (clustering within relatively few neighborhoods in the 50 largest Metropolitan Statistical Areas).

44. Lauber, *supra* note 7, at 382; *see also* Christina Kubiak, *Everyone Deserves a Decent Place to Live: Why the Disabled are Systematically Denied Fair Housing Despite Federal Legislation,* 5 RUTGERS J.L. & PUB. POL'Y 561, 565 (2008).

45. 4 PRESIDENT'S COMM'N ON MENTAL HEALTH, REPORT TO THE PRESIDENT FROM THE PRESIDENT'S COMMISSION ON MENTAL HEALTH 1390 (1978).

46. Lauber, *supra* note 7, at 385-386; American Plan. Ass'n, *Policy Guide on Community Residences* (1997), http://www.planning.org/policy/guides/adopted/commres.htm (last visited May 29, 2011) (adopting normalization principle); *Principles to Guide Zoning, supra* note 9, at 7-8 (recommending conditional use process to determine exceptions from distance requirement). Also consider the Attorney General's regulations implementing Title II of the Americans with Disabilities Act in 28 C.F.R. § 35.130(d) (1998) (public entity to administer services, programs, and activities in most integrated setting appropriate to needs of qualified individuals with disabilities), defined to require interaction with non-disabled persons to fullest extent possible. 28 C.F.R. pt. 35, app. A, p. 450*; see* Olmstead v. L.C., 527 U.S. 581, 596-602 (1999) (indicating Title II requires states to provide community-based treatment rather than placement in mental institutions when treatment is professionally recommended by the state, is not opposed by the affected person, and can be reasonably accommodated taking into account the resources of the state and the needs of others with mental disabilities); United States v. Georgia (N.D. Ga., Case 1:10-cv-00249-CAP) Settlement Agreement Oct. 19, 2010 (on file with author) [hereinafter *Settlement Agreement*] (providing for community-based housing and treatment for persons in state institutions).

47. *Compare* Jim Mansell & Julie Beadle-Brown, *Dispersed or Clustered Housing for Adults With Intellectual Disability: A Systemic Review,* 34 J. INTELLECTUAL & DEVELOPMENTAL DISABILITY 313 (2009) (showing dispersed housing provided better outcomes than clustered housing on a campus or other site).

48. Lakin Interview, *supra* note 10.

support is troublesome in cases that have challenged the legality of quotas, even though legislative statements of purpose recite the normalization goal and the objections to clustering on which quotas rely.[49]

III. Distance and Other Housing Quotas for Persons with Disabilities

Housing quotas are a response to clustering. Zoning ordinances usually include them, and state statutes may mandate them as a zoning requirement. They are sometimes included in state licensing statutes. Quotas prevent clustering by requiring a minimum distance between housing for persons with disabilities, by prohibiting the "overconcentration" of such housing, or by other measures such as numerical limits.

A. *The Zoning Problem*

Housing quotas are part of a zoning system that determines whether, and where, housing for persons with disabilities can locate in a community. Zoning can be troublesome, and finding a sufficient number of sites for such housing can be problematic. Problems especially arise with group homes, often a Locally Unwanted Land Use (LULU) in some communities that attracts opposition under the Not in My Back Yard (NIMBY) syndrome.[50] Restrictive zoning can result. Zoning ordinances may also create obstacles by requiring the approval of group homes for persons with disabilities as a special exception[51] or variance in residential areas. Local governments can use this authority to deny approval. Some protection is available under the Fair Housing Act, as courts can strike down special exception or variance denials when they violate the Act.[52] The cases are divided on whether a special exception or variance

49. *E.g.,* Oconomowoc Residential Programs v. City of Greenfield, 23 F. Supp. 2d 941, 953 (E.D. Wis. 1998) (quoting legislative purpose; distance requirement held invalid).

50. Allen, *supra* note 22, at 6-7 (noting the difficulty in finding housing for the mentally ill). *Compare An Analysis of Zoning, supra* note 41, at 2 (observing group homes established in residential areas without great difficulty).

51. *See* DANIEL R. MANDELKER, LAND USE LAW §§ 6.53-6.56 (2003) [hereinafter LAND USE LAW] (showing this type of zoning approval to also be known as conditional use or special use).

52. *E.g.*, Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 47-48 (2d Cir. 2002) (holding a special use permit for halfway houses was protected by the Fair Housing Act); Baxter v. City of Belleville, 720 F. Supp. 720, 734 (S.D. Ill. 1989) (noting denial of special use permit for housing aimed at persons with AIDS was discrimination under the Fair Housing Act); *see also* Hovson's, Inc. v. Township of Brick, 89 F.3d 1096, 1105 (3d Cir. 1996) (holding a variance for a nursing home was reasonable accommodation protected by the Fair Housing Act); *see* Bryant Woods Inn, Inc. v. Howard Cnty., Md., 911 F. Supp. 918, 946 (D. Md. 1996) ("[T]he Act prohibits

requirement is a violation of the Act because it puts too much of a burden on housing for persons with disabilities.[53]

Problems are also created in single family zoning districts because only housing occupied by a "family" is allowed in these districts. Group homes can locate in these districts only if the occupants of the home qualify as a family, but the cases are divided on this issue.[54] Zoning that limits the number of unrelated persons who can live together as a "family" in a single family zoning district is another exclusionary strategy. An occupancy limit that is too low eliminates many group homes, because their occupants are unrelated.[55] A Supreme Court case, *Village of Belle Terre v. Boraas,*[56] held constitutional a zoning ordinance that only allowed three unrelated persons to live together in a single family residential district.[57] Occupancy limits have been litigated under the Fair Housing Act, and courts disagree on whether they are valid. Some courts hold occupancy limits of even six or eight residents in group homes invalid.[58]

local governments from applying land use regulations in a manner that will exclude people with disabilities entirely from zoning neighborhoods, particularly residential neighborhoods, or that will give disabled people less opportunity to live in certain neighborhoods than people without disabilities." (citations omitted)). *But see* Gamble v. City of Escondido, 104 F.3d 300, 303, 307 (9th Cir. 1997) (noting a "proposed building was too large for the lot and did not conform in size and bulk with neighborhood structures," and holding that accommodation for "an adult day health care facility [is] not required under the statute.").

53. *Compare* Oxford House-C v. City of St. Louis, 77 F.3d 249, 253 (8th Cir. 1996) (variance requirement is not a failure to make a reasonable accomodation), *and* United States v. Village of Palatine, 37 F.3d 1230, 1233, 1234 (7th Cir. 1994) (same; special use requirement), *with* ARC of New Jersey v. New Jersey, 950 F. Supp. 637, 646 (D.N.J. 1996) (conditional use requirement facially discriminatory), Horizon House Developmental Servs., Inc. v. Upper Southampton, 804 F. Supp. 683, 700 (E.D. Pa. 1992) (need not seek variance as reasonable accommodation), *and* Validity Under the Fair Housing Amendments Act of 1988, Op. Att'y Gen. Kan. No. 89-99 (1989).

54. LAND USE LAW, *supra* note 51, at § 5.08; 32 A.L.R.4th 1018 (1984).

55. Zoning restrictions usually do not prohibit occupancy in group homes by two or three persons, which is now more common for housing for persons with developmental disabilities. Zoning restrictions limiting occupancy in group homes to two or three residents may violate the Fair Housing Act. *See* sources cited *infra* note 58.

56. 416 U.S. 1 (1974).

57. *Id.* at 9.

58. *Compare* Oxford House-C v. City of St. Louis, 77 F.3d 249, 252 (8th Cir. 1996) (upholding ordinance allowing no more than eight unrelated persons in a group home and three in a single family dwelling), *with* Human Res. Research & Mgmt. Grp. v. Cnty. of Suffolk, 687 F. Supp. 2d 237, 265-66 (E.D.N.Y. 2010) (holding a limitation to six occupants in a substance abuse recovery house is invalid), *and* Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1499 (W.D. Wash. 1997) (holding that a city ordinance limiting homes to six residents, two caretakers and minor children is invalid). *See* City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995) (noting occupancy limits in zoning ordinance not authorized by statutory exemption; other codes may include generally applicable occupancy limits); *see also* Oxford House, Inc. v. Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993) (invalidating a city zoning ordinance requirement that

State licensing of group homes may provide relief from zoning restrictions. A state license authorizes the location of a group home at a particular site, but there usually is no explicit preemption of zoning ordinances. Even so, most courts exempt group homes with state licenses from zoning restrictions.[59] They hold that zoning ordinances may not frustrate the treatment policy of the state licensing law by restricting the location of group homes licensed under the law.[60]

The status of group homes under zoning ordinances is also handled by statute in almost all states.[61] They usually apply only to state-licensed homes. This limitation excludes board and care homes and recovery communities that do not have state licenses.[62] More than half of the statutes remove zoning barriers by making group homes a permitted use in single family districts.[63] This protection often is limited to small group homes with fewer than six or eight residents.[64] Some statutes make

residents be a factual and functional equivalent of family); *Twp. of Cherry Hill,* 799 F. Supp. 450 (invalidating an interpretation of a city ordinance requiring unrelated persons to have "permanency and stability" to qualify as family unit).

59. LAND USE LAW, *supra* note 51 at § 5.10, n.1 (2003) (cases did not deal with quota restrictions). *But see* Op. Att'y Gen. Wash. No. 25 (1992) (licensing law with no express preemption provision does not preempt distance requirement for group homes in zoning ordinance). *See* 51 A.L.R.4th 1096 (1987) (discussing validity of statutes requiring local participation or approval of siting decision).

60. Op. Att'y Gen. Wash. No. 25 (1992).

61. *See* Lester D. Steinman, *The Effect of Land-Use Restrictions on the Establishment of Community Residences for persons with disabilities: A National Study,* 19 URB. LAW. 1 (1987) (providing an earlier catalog of these statutes; some of the more extreme statutes in this list have been repealed).

62. The statute may also require covered homes to offer supervision and rehabilitation. *E.g.*, N.C. Gen. Stat. § 168-21(1) (2009).

63. *See* Mental Health Assoc. of Union Cnty. v. City of Elizabeth, 434 A.2d 688 (N.J. Super. Ct. Law Div. 1981) (finding statute preempts contrary local zoning); 32 A.L.R.4th 1018 (1984). The type of group home covered under these statutes varies, but homes for persons with mental and developmental disabilities are usually covered.

64. ARIZ. REV. STAT. ANN. §§ 36-581, 36-582(A) (2009) (limiting the number of occupants to six or fewer persons); ARK. CODE ANN. §§ 20-48-603(4)(A), 20-48-604(a) (2001) (allowing no more than eight developmentally disabled individuals); CAL. WELF. & INST. CODE § 5116 (West Supp. 2010) (allowing six or fewer residents); COLO. REV. STAT. §§ 30-28-115(2)(a), (b.5) (Supp. 2010) (discussing county planning and allowing eight or fewer residents); COLO. REV STAT. §§ 31-23-303(2)(a), (b.5) (Supp. 2010) (discussing, for cities and towns, the same limit of eight and fewer residents); CONN. GEN. STAT. § 8-3e(a) (2010) (allowing six or fewer residents); DEL. CODE ANN. tit. 9, § 4923(a) (Supp. 2010) (allowing ten or fewer persons with disabilities); FLA. STAT. § 419.001(2) (Supp. 2011) (allowing six or fewer residents); HAW. REV. STAT. § 46-4(d) (Supp. 2010) (allowing eight or fewer residents); IDAHO CODE ANN. § 67-6531(1) (Supp. 2010) (allowing eight of fewer residents; IND. CODE § 12-28-4-8 (2007) (permitting "residential facilities with no more than eight developmentally disabled persons"); IOWA CODE § 335.25(2)(c), (3) (2001) (allowing eight or fewer persons); KAN. STAT. ANN. § 12-736 (2001) (defining a "group home" as a dwelling occupied by no more than ten individuals, including eight or fewer individuals with disabilities); KY. REV. STAT. ANN. § 100.984 (West 2004) (establishing parameters for permitting

larger group homes a permitted use in multifamily zones.[65] Statutes may also protect group homes from adverse zoning decisions by prohibiting local governments from requiring a conditional use or variance.[66]

Several statutes go further and prohibit discriminatory zoning for group homes. They invalidate any zoning for group homes that does not

operation of residential care facilities by sponsoring agencies); ME. REV. STAT. ANN. tit. 30A, § 4357-A (2011) (allowing eight of fewer persons with disabilities); MD. CODE ANN. HEALTH-GEN. § 10-518(b)(1) (West 2009) (explaining "a small private group home[] [i]s deemed conclusively a single-family dwelling."); MINN. STAT. ANN. §§ 245A.02(14), 245A.11(2) (West 2011) (defining "residential programs" and allowing six or fewer occupants); MO. ANN. STAT. § 89.020(2) (West Supp. 2011) (allowing eight or fewer unrelated handicapped persons); MONT. CODE ANN. §§ 76-2-411, 76-2-412 (2009) (allowing eight or fewer persons); NEV. REV. STAT. ANN. § 278.02386(1) (West 2011) (defining a "single family residence" to include residential facilities with ten or fewer unrelated persons, homes for residential care, and halfway houses for recovering alcoholics and drug abusers); N.J. REV. STAT. §§ 40:55D-66.1, 40:55D-66.2(a) (2008) (allowing fewer than fifteen persons); N.M. STAT. ANN. § 3-21-1(C) (2010) (allowing fewer than ten persons); N.C. GEN. STAT. §§ 168-21, 168-22(a) (2009) (allowing fewer than six persons); N.D. CENT. CODE § 25-16-14(2) (2002) (allowing six or fewer developmentally disabled individuals in least-density residential zone and eight or fewer such individuals if zoned at greater density than single family use); OHIO REV. CODE ANN. § 5123.19(O) (West 2010) (allowing at least six, but no more than eight, persons); OKLA. STAT., tit. 60, § 863(A) (2010) (determining a political subdivision may also require normal rezoning, special exception or variance procedures); R.I. GEN. LAWS §§ 45-24-31(15)(i), 45-24-37(b)(2) (2009) (waiving all zoning requirements for community residences with six or fewer persons with retardation, and reiterating the allowance of community residences); S.C. CODE ANN. § 6-29-770(E) (2004) (allowing nine or fewer persons, but the local government may request selection of panel to make site decision); TENN. CODE ANN. §§ 13-24-101 to -104 (2011), 13-24-102 to 13-24-104 (2008) (allowing eight or fewer persons); TEX. HUM. RES. CODE ANN. § 123.003 (West 2001); VA. CODE ANN. § 15.2-2291 (Supp. 2009) (allowing fewer than eight individuals); WASH. REV. CODE ANN. § 70.128.175 (2011) (repealed 2011) (determining board and care home with fewer than six unrelated adults is considered a residential use of property); W. VA. CODE §§ 27-17-1, 27-17-2 (allowing fewer than eight or fewer than twelve residents, depending on disability); WIS. STAT. § 59.69(15)(c) (2011) (allowing fewer than eight occupants without needing special zoning permits); *see* UTAH CODE ANN. § 10-9a-520 (West 2007) (determining each municipality will adopt an ordinance to allow residential facilities for persons with disabilities "in any zone where similar residential dwellings that are not residential facilities for persons with a disability are allowed," and the ordinance may limit the number of occupants, but municipality may require dispersion and exclusion of such residential facilities if fundamental change in residential neighborhood character is likely to occur)*; see also* Op. Att'y Gen. Wash. No. 25, (1992) (discussing how statute permitting adult family homes in areas zoned for residential and commercial purposes preempts distance requirement in zoning ordinance).

65. *See, e.g.*, ALA. CODE § 11-52-75.1(a) (Supp. 2010); ARK. CODE ANN. §§ 20-48-603(4)(B), 20-48-604(b) (2001) (allowing between eight to sixteen persons); MD. CODE ANN. HEALTH-GEN. § 10-518(b)(2) (West 2009) (discussing large private group homes); MINN. STAT. ANN. § 245A.11(3) (West Supp. 2011) (allowing seven to sixteen persons); OHIO REV. CODE ANN. § 5123.19(P) (West 2010) (allowing nine to sixteen persons, but may be excluded from planned unit development districts and regulated as conditional use); WIS. STAT. § 59.69(15)(d)-(e) (Supp. 2010) (stating homes with nine to fifteen persons, and homes with sixteen or more persons may require zoning approval).

66. Arkansas, Iowa, North Carolina, West Virginia. *See supra* note 64*; see also* IDAHO CODE ANN. § 67-6532(2) (Supp. 2010) (stating no conditional use permit is required of a group residence).

apply to other single family homes in the same district.[67] This prohibition makes any zoning that applies only to group homes invalid, such as a special exception requirement or a requirement that group homes must be a certain distance apart.[68]

B. *Distance and Other Quotas*

Zoning ordinances often contain distance requirements,[69] and many state statutes include them, sometimes when the statute makes group homes a permitted use in residential zones.[70] Distance requirements restrict the number of sites available for group homes in a municipality, or exclude them if no sites are available that can satisfy the distance limitation.[71] Statutory distance requirements are usually absolute without exceptions, though some allow a waiver by local governments. Distances range from 750 feet to 3000 feet, or more than half a mile.[72] Most statutes provide incomplete coverage, because they apply only to state-licensed or state-supervised group homes.[73] A few statutes authorize other types

67. CONN. GEN. STAT. § 8-3e(a) (2010); IDAHO CODE ANN. § 67-6532(2)-(3) (Supp. 2010); KAN. STAT. ANN. § 12-736(e) (2001); KY. REV. STAT. ANN. § 100.984 (West 2004); Mass. Gen. Laws ch. 40A, § 3 (2011); N.J. REV. STAT. § 40:55D-66.1 (2008); VA. CODE ANN. § 15.2-2291(A) (Supp. 2009).

68. They also invalidate special use, variance and similar provisions that apply only to group homes, or that contain requirements that apply only to group homes. *See supra* note 67.

69. A survey of 110 Illinois municipalities in 1991 found that most of them had distance requirements in single family districts, and that distance requirements of 1000 feet were common. DANIEL LAUBER, ILLINOIS PLANNING COUNCIL ON DEVELOPMENTAL DISABILITIES, RECOMMENDATIONS TO THE ILLINOIS GENERAL ASSEMBLY ON ZONING FOR COMMUNITY RESIDENCES App. A-1 (1991) (on file with author).

70. ALA. CODE § 11-52-75.1(a) (Supp. 2010) (group home; 1000 feet); ARIZ. REV. STAT. ANN. §§ 36-581, 36-582(H) (2009) (residential facility licensed, operated, supported or supervised by state; 1200 feet); COLO. REV. STAT. §§ 30-28-115(2)(b.5), 31-23-303(2)(b.5) (Supp. 2010) (state-licensed group home; 750 feet unless waived by local government); CONN. GEN. STAT. § 8-3f (2010) (state-licensed community residence; 1000 feet unless waived by local government); FLA. STAT. § 419.001(2) (Supp. 2011) (state-licensed home; 1000 feet); IND. CODE § 12-28-4-7(b) (2007) (residential facility for persons with mental illness; 3000 feet); LA. REV. STAT. ANN. §§ 28:477(1), 28:478(B) (2001) (community home licensed, certified or monitored by state; 1000 feet); MINN. STAT. § 245A.11(4) (Supp. 2011) (state licensing act; 1320 feet subject to exceptions); N.C. GEN. STAT. § 168-22(a) (2009) (family care home; optional, one-half mile); OKLA. STAT. tit. 60, § 863(B)(2)(a) (2010) (community based residences; state agency to adopt 1200-foot rule); TEX. HUM. RES. CODE ANN. §§ 123.004, 123.008 (2001) (community home; one-half mile); WIS. STAT. § 59.69(15) (Supp. 2010) (community living arrangements, foster homes, or adult family homes; 2500 feet subject to municipal exception), *invalidated in* Oconomowoc Residential Programs v. City of Greenfield, 23 F. Supp. 2d 941, 954 (E.D. Wis. 1998)*; see also* IOWA CODE § 335.25(3) (2001) (stating that family homes "shall be dispersed through the residential zones and districts and shall not be located within contiguous areas equivalent in size to city block areas.").

71. *See supra* note 70.

72. *See supra* note 70.

73. *See supra note* 70.

of quotas, including density and numerical limitations, and restrictions on the concentration of housing for persons with disabilities.[74]

Federal housing subsidy legislation is another source of quotas. It authorizes preferences in subsidized multifamily projects that exclude persons with disabilities.[75] The federal housing subsidy program for persons with disabilities has limitations on the number of dwelling units available for persons with disabilities in multifamily projects.[76]

C. *A Dispersion Approach for Housing for Persons with Disabilities is Not an Acceptable Housing Strategy*

Critics have opposed housing quotas for persons with disabilities.[77] They are unacceptable because they contain an implicit dispersion man-

74. Missouri authorizes reasonable density standards for residential homes "in any specific single family dwelling neighborhood." MO. REV. STAT. § 89.020(2) (Supp. 2011). Oregon requires the calculation of a capacity allocation for domiciliary care facilities "based on the relationship of the population of the county in which the additional capacity is proposed to be located to the number of persons originating from the county who are determined to be in need of domiciliary care." OR. REV. STAT. §§ 443.205, 443.225 (2011). *But see* Op. Att'y Gen. Or. OP-6403 (1991) (opining that if law violates Fair Housing Act, the availability of waiver does not save law). *See also* OHIO REV. CODE ANN. § 5123.19(P) (2010) (allowing regulation of homes with nine to sixteen persons as conditional use under standards that "limit excessive concentration"); WIS. STAT. § 59.69(15)(b)(1) (Supp. 2010) (stating that facilities may not exceed twenty-five persons or one percent of population of municipality or ward), *invalidated, Oconomowoc Residential Programs,* 23 F. Supp. 2d at 954; N.Y. MENTAL HYG. LAW § 41.34 (McKinney Supp. 2011) (requiring a hearing by state agency if municipality objects to site selected for a facility because there would be a concentration of facilities that would substantially alter the nature and character of an area in the municipality)*; see* Jennings v. New York State Office of Mental Health, 682 N.E.2d 953, 960 (N.Y. 1997) (affirming site selection on appeal, holding that overconcentration is secondary factor in an appeal, and considering but not deciding constitutionality of law); Town of Mt. Pleasant v. Toulon, 739 N.Y.S.2d 445, 446 (N.Y. App. Div. 2002) (rejecting appeal); 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, 215-18 (1999) (explaining three ways in which local governments often regulate the placing of group homes).

75. 42 U.S.C. § 1437e(a)(1) (2006) (allowing a designation of public housing for only elderly families); 42 U.S.C. § 13611 (2006) (allowing owners of elderly family Section 8 housing to give elderly preference); 42 U.S.C. § 13618 (2006) (permitting some kinds of federally assisted property owners to rent housing designed for elderly to them)*; see also* 24 C.F.R. § 941.202(d) (Supp. 2010) (requiring sites to "avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons"); *Settlement Agreement, supra* note 46, at 19 (allowing no more than 20 percent or two units of supported housing, whichever is greater, to be allowed in one building).

76. 42 U.S.C. § 8013(b)(3)(B)(ii) (2006) (requiring that in any multifamily housing project that receives rental assistance, the "aggregate number" of units provided with rental assistance, "used for supportive housing for persons with disabilities," or that have an occupancy preference for such persons, may not exceed 25 percent of the total). A similar requirement applies to multifamily housing projects that receive capital grants. § 8013(e)(4)(A).

77. JAFFE & SMITH, *supra* note 40, at 12-13; JOINT STATEMENT OF THE [U.S.] DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT: GROUP HOMES, LOCAL LAND USE, AND THE FAIR HOUSING ACT (1999),

date. Housing must be dispersed to avoid the clustering that distance and other quotas are adopted to prevent. Dispersion is a statutory objective in a few of the statutes that include quotas.[78]

Professor Vicki Been faults the dispersion approach. Her criticism is directed against a different assumption, that dispersion is required to distribute the unwanted burdens of group homes on a proportionally fair basis.[79] For Professor Been, a dispersion approach does not distribute that burden fairly because it shows a "simplistic insensitivity to many factors affecting the fairness of a siting pattern."[80] Her criticisms apply equally to the dispersion of housing for persons with disabilities. The following criticism draws on her analysis.

Distance requirements illustrate the dispersion approach. They necessarily include a priority in time rule for accepting and dispersing housing opportunities.[81] Group homes are accepted in the order they apply until quota exhaustion prevents additional approvals. Time determines whether a site is available, an allocation rule that does not consider the appropriate distribution of sites among different types of group homes and the needs they serve. A quota can be exhausted by group homes for persons with developmental disabilities, so that a recovery community is dispersed from a community in which there is a need for one.

Another problem is that distance requirements are often adopted to protect the neighborhoods in which group homes locate,[82] but do not distinguish among different types of group homes and their neighborhood impact. This failure makes distance requirements a blunt instru-

available at http://www.justice.gov/crt/about/hce/final8_1.php (arguing that violation of Fair Housing Act are prohibited even if done by local government, but suggesting regulation by state licensing agency); Tennessee Fair Housing Council, *Navigating NIMBY: A Public Official's Guide to Neighborhood Living for People with Disabilities* 9-10 (2003), *available at* http://www.tennfairhousing.org/media/navigatingnimby.pdf; Sperling Interview, *supra* note 39.

78. *E.g.,* IOWA CODE § 335.25(3) (2001)*; see also* MINN. STAT. ANN. § 245A.11(5) (Supp. 2011) (requiring counties to submit dispersal plan to avoid overconcentration of group residential programs).

79. Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses,* 78 CORNELL L. REV. 1001, 1068 (1993).

80. *Id.* at 1070.

81. For discussion of constitutional issues presented by similar problems in a proposed emissions quota for air quality control, see Daniel R. Mandelker & Felice Taub, *Constitutional Limitations on Emissions Quotas As an Air Pollution Control Strategy,* 8 ECOLOGY L.Q. 269 (1979).

82. *See, e.g.*, Human Res. Research & Mgmt. Grp. v. Cnty. of Suffolk, 687 F. Supp. 2d 237, 243 (E.D.N.Y. 2010) (quoting the stated purpose of local law as "protect[ing] the interests of the ill while still ensuring acceptance by local communities."); Oconomowoc Residential Programs v. City of Greenfield, 23 F. Supp. 2d 941, 953 (E.D. Wis. 1998) (noting that statutory statement of purpose provided in part that distance requirement could preserve "the established character of a neighborhood and community.").

ment for controlling neighborhood character. Group homes for persons with developmental disabilities, for example, may have only two or three occupants, and may not have a negative neighborhood impact even if some cluster together.

Distance requirements also adopt a simplified neighborhood model. They apply whether a neighborhood is high density or low density, and usually do not vary depending on the neighborhood in which they apply.[83] Exhaustion of the quota is the only factor considered in deciding whether a site is available. Distance requirements can also define a neighborhood arbitrarily, because they can cross diverse housing areas and physical barriers, such as streets, which are then ignored when the requirement is applied.[84]

Nor do quotas usually consider the availability of alternate sites. None may be available if existing group homes have exhausted the quota. They may be dispersed to other communities where sites may not be suitable and which may also have restrictive distance requirements. An alternate and more acceptable method for distributing housing for persons with disabilities is needed.

IV. The Constitutionality of Housing Quotas for Persons with Disabilities

Housing quotas for persons with disabilities may violate the Equal Protection Clause of the Federal Constitution. The Supreme Court found an equal protection violation in the discriminatory zoning treatment of a group home for persons with disabilities in *City of Cleburne v. Cleburne Living Center.*[85] The group home planned to locate in an apartment district, but the zoning ordinance required a special permit in this district for hospitals for the insane and feeble-minded, for alcoholics and drug addicts, and for penal and correctional institutions.[86] It did not

83. There are a few exceptions. *See* Lakin, *supra* note 11.

84. United States v. City of Chicago Heights, 161 F. Supp. 2d 819, 829 (N.D. Ill. 2001) (involving two group homes blocked by distance requirements that were on different streets and functionally separate); United States v. Marshall, 787 F. Supp. 872, 873 (W.D. Wis. 1991) (involving two properties that were on opposite sides of wide unbridged portion of river; shortest distance between them was approximately one-half mile).

85. 473 U.S. 432 (1985); *see* Daniel R. Mandelker, *Group Homes: The Supreme Court Revives the Equal Protection Clause in Land Use Cases,* 1986 PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN Ch. 3 (1986); Bornstein, *supra* note 7; *The Supreme Court, 1984 Term: I. Constitutional Law,* 99 HARV. L. REV. 120, 161 (1985).

86. *Cleburne Living Ctr.*, 473 U.S. at 436-37.

require a special permit for other similar uses, such as hospitals, homes for convalescents, sanitariums, nursing homes or homes for the aged, though these homes presented similar zoning problems.[87] Cleburne Living Center applied for but was denied a special permit.[88]

The Court first considered the standard of judicial review it should apply. It did not apply a heightened middle tier standard, because it held that persons with developmental disabilities were not a quasi-suspect class entitled to this standard.[89] Instead, the Court applied the standard of judicial review that only requires a rational relationship to a legitimate governmental purpose.[90]

The Court did not decide whether the special permit requirement for group homes for the "feeble-minded" was facially invalid, but applied the rational relationship test to reverse the permit denial.[91] Differences in persons with developmental disabilities as a group were "largely irrelevant"[92] to the legitimate interests of the city and could not support the denial. Moreover, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from" similar uses such as apartment houses.[93] The Court rejected other reasons advanced for the permit denial, such as the location of the group home in a floodplain, its size, and the number of occupants.[94] Similar uses with similar problems, such as nursing homes, were permitted in the zoning district as of right and did not require a special permit. In a holding that can apply to distance requirements, the Court rejected a defense that the ordinance was constitutional because it

87. *Id.*

88. *Id.* at 435.

89. This standard provides that restrictions survive judicial review only if "they are substantially related to a legitimate state interest." *Id.* at 441 (quoting Mills v. Habluetzel, 456 U.S. 91, 99 (1982)). Gender and illegitimacy are quasi-suspect classes. *Id.* The Court in *Cleburne* refused to apply the heightened standard, in part, because it held that the treatment of a large and diverse group such as the "mentally retarded" was a task for legislators, not courts. *Cleburne Living Ctr*. 473 U.S. at 442-443.

90. *Id.* at 441-42.

91. The Court thus held the special permit ordinance was unconstitutional as applied. *See* Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name,* 62 IND. L.J. 779, 793-96 (1987) (describing, but not agreeing with, the heightened scrutiny provided by *Cleburne*).

92. *Cleburne,* 473 U.S. at 448.

93. *Id.* The Court also held that requiring the permit appeared "to rest on an irrational prejudice against the mentally retarded." *Id.* at 450.

94. *Id.* at 449.

was aimed at preventing a "concentration of population."[95] This concern did not explain why similar uses were allowed in the district without a special permit.

How *Cleburne* applies to quotas for housing for persons with disabilities is unclear, because the Court adopted the rational relationship standard of review, the denial of the special permit was difficult to defend, and the Court did not consider the constitutionality of the permit ordinance. A later Supreme Court case weakened the *Cleburne* holding in a dictum, explaining that *Cleburne* merely stated the "unremarkable and widely acknowledged tenet" in its equal protection jurisprudence, that state action does not violate equal protection when it passes the rational relationship test.[96] Later cases divide on how *Cleburne* should apply to permit denials of group homes under zoning ordinances,[97] and on whether a special permit requirement for group homes violates equal protection.[98] Two trial court cases divided on whether a distance requirement violates equal protection.[99]

95. *Id.* at 450. This holding seems to question the validity of the special permit requirement in the ordinance, even though the Court did not reach this question.

96. Garrett v. Bd. of Trustees, 531 U.S. 356, 367 (2001) (holding, per then Chief Justice Rehnquist, that employees' suits for money damages against state for alleged failure to comply with Americans with Disabilities Act is barred by the Eleventh Amendment).

97. *Compare* Avalon Residential Care Homes, Inc. v. City of Dallas, 130 F. Supp. 2d 833, 843 (N.D. Tex. 2000) (upholding denial of permit for a handicapped group home), *with* Open Homes Fellowship, Inc. v. Orange Cnty., 325 F. Supp. 2d 1349, 1361-62 (M.D. Fla. 2004) (holding that county violated the institution's equal protection rights in denial of special exception for the institution's substance abuse recovery center).

98. *Compare* Bannum, Inc. v. City of Fort Lauderdale, 157 F.3d 819, 824 (11th Cir. 1998) (holding that zoning ordinance requiring special use permit for operation of "custodial facility" did not violate equal protection), *with* Bannum, Inc. v. City of Louisville, 958 F.2d 1354 (6th Cir. 1992) (holding that city zoning ordinance requiring special permit for community treatment centers violated equal protection).

99. *Compare Avalon Residential Care Homes,* 130 F. Supp. 2d 833 (no violation), *with* City of Coatesville v. Zoning Hearing Bd., 48 Pa. D. & C. 4th (C.P. of Chester County 2000) (affirming the board's decision that the zoning ordinance violated the equal protection clause of the Fourteenth Amendment). *See* New Directions Treatment Servs. v. City of Reading, 490 F.3d 293 (3d Cir. 2007) (reversing grant of summary judgment on claim that statute prohibiting location of methadone treatment center within 500 feet of a number of specified uses, including schools, churches and child-care facilities, unless governing body gave its approval, violated equal protection); *Jennings,* 682 N.E.2d 953 (considering but not deciding equal protection claim against New York law authorizing rejection of housing proposed for persons with disabilities because facilities would be concentrated and substantially alter nature and character of area)*; see also* Verland C.L.A., Inc. v. Zoning Hearing Bd., 556 A.2d 4 (Pa. Commw. Ct. 1989) (holding that a one-mile spacing requirement served legitimate public purpose of opening up zoning districts to group homes while preventing their unduly high concentration in any one area).

V. The Legality of Housing Quotas for Persons with Disabilities Under the Fair Housing Act

The validity of quotas for group homes has seldom been litigated as a violation of equal protection, probably because the Fair Housing Act provides a better opportunity to challenge these restrictions.[100] The Fair Housing Act has become the battleground where the legality of quotas is tested.[101]

A. *Proving a Statutory Violation*

Quota cases present a different compliance problem than the typical Fair Housing Act case. In the typical case there is some discretionary action, such as a special permit denial, which a group home challenges.[102] Courts reverse the denial if they decide there was discriminatory intent, if the denial had a discriminatory impact,[103] or if the denial was a failure to grant a reasonable accommodation.[104]

When a local government rejects a group home because a quota is violated, the case is a facial, rather than an as-applied, attack. A facial

100. See *New Directions Treatment Servs.,* 490 F.3d 293, 301 (3d Cir. 2007) (permit denial for methadone clinic), for an explanation and description of how an equal protection challenge is more difficult than a challenge under the Americans with Disabilities and Rehabilitation Acts. This same comment can be made about the Fair Housing Act.

101. Simultaneous successful claims may also be made under the Americans with Disabilities Act. *E.g.,* Developmental Servs. v. City of Lincoln, 504 F. Supp. 2d 714 (D. Neb. 2007) (failure to make reasonable accommodation violated the Fair Housing Amendments Act, the Rehabilitation Act, and the Americans with Disabilities Act); Oconomowoc Residential Programs v. City of Greenfield, 23 F. Supp. 2d 941, 954 (E.D. Wis. 1998) (holding spacing requirement invalid because it limited meaningful access to housing for the disabled, and was preempted by the Americans with Disabilities Act and the Fair Housing Amendment Act).

102. *See* Kubiak, *supra* note 44; Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities* 43 AM. U.L. REV. 925 (1994); Cindy Lee Soper, Note, *The Fair Housing Amendments Act of 1988: New Zoning Rules For Group Homes For The Handicapped,* 37 ST. LOUIS U.L.J. 1033 (1993).

103. Examples of the court rejecting the permit denial: Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35 (2d Cir. 2002) (special use); Hovson's, Inc. v. Township of Brick, 89 F.3d 1096 (3d Cir. 1996) (variance); Baxter v. City of Belleville, 720 F. Supp. 720 (S.D. Ill. 1989) (special use). Examples of the court upholding the permit denial: Lapid-Laurel v. Zoning Bd. of Adjustment, 284 F.3d 442 (3d Cir. 2002) (variance and site plan); Forest City Daly Hous., Inc. v. Town of N. Hempstead, 175 F.3d 144 (2d Cir. 1999) (upholding rejection of special exception for group home in business zone when special exception would also be denied for traditional homes); Gamble v. City of Escondido, 104 F.3d 300 (9th Cir. 1997) (affirming the denial of a conditional use permit because the building was too large for lot and did not conform in size and bulk with neighborhood structures).

104. *See* 42 U.S.C. § 3604(f)(3)(B) (2006) (reasonable accommodation required). This requirement appears only in that part of the Fair Housing Act that applies to the handicapped.

violation claim argues a law is invalid as written and cannot be applied to make it valid. Whether a court will find a housing quota facially invalid requires a choice among conflicting rules for deciding cases under the Fair Housing Act. Choices must be made about how a prima facie case must be proved, the standard of judicial review to apply, and the defenses the courts will allow.

A plaintiff can move a case forward and shift the burden of proof to the government by proving a prima facie violation of the Act. Plaintiffs make a prima facie case by showing a law is facially an explicit differential treatment of housing for persons with disabilities, and that it applies only to such housing.[105] The burden of proof then shifts to the government. A court must next select the standard of judicial review it will apply to decide whether the government has met that burden. One court of appeals that upheld a distance requirement adopted the rational relationship standard from the *Cleburne* case.[106] Most courts reject this standard. They adopt a heightened standard of judicial review they consider necessary to protect individuals covered by the Fair Housing Act.[107]

There is considerable variation in the justifications courts accept that will satisfy a heightened judicial review standard. A frequently quoted justification requires "'(1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes.'"[108] This

105. *E.g.,* Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1050 (9th Cir. 2007) (arguing that exclusion from community house based on gender and familial status is facially discriminatory); Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995) (involving a discriminatory treatment case for conditions on zoning approval for group homes); Human Res. Research & Mgmt. Grp. v. Cnty. of Suffolk, 687 F. Supp. 2d 237, 254 (E.D.N.Y. 2010) (involving a discriminatory treatment case for quotas). Malice or discriminatory animus need not be proved in a discriminatory treatment case. *See* Kaitlin B. Bridges, Note, *Justifying Facial Discrimination by Government Defendants Under the Fair Housing Act: Which Standard to Apply?,* 73 MO. L. REV. 177 (2008); *see also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks,* 93 MICH. L. REV. 2229, 2236 (1995) (criticizing prima facie case rule in Title VII cases).

106. Familystyle of St. Paul, Inc. v. St. Paul, 923 F.2d 91, 95 (8th Cir. 1991).

107. *E.g.*, *Human Res. Research & Mgmt. Grp.,* 687 F. Supp. 2d at 254-257 (discussing cases adopting higher standard, and invalidating quota); Sierra v. City of New York, 552 F. Supp. 2d 428, 430-431 (S.D.N.Y. 2008) (same, and invalidating maintenance code that discriminated against children); *accord,* Larkin v. Mich. Dep't of Soc. Servs., 89 F.3d 285 (6th Cir. 1996) (invalidating distance requirement).

108. *Human Res. Research & Mgmt. Grp.,* 687 F. Supp. 2d at 257 (quoting Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1050 (9th Cir. 2007)) (discriminatory policy in homeless shelter). For cases in which this standard was not met see, e.g., *Human Res. Research & Mgmt. Grp.,* 687 F. Supp. 2d at 237; Nev. Fair Hous. Ctr., Inc. v. Clark Cnty., 565 F. Supp. 2d 1178 (D. Nev. 2008); Children's Alliance v. City of Bellevue, 950 F. Supp. 1491 (W.D. Wash. 1997).

justification comes from cases that considered physical and other conditions for housing for persons with disabilities,[109] and does not seem appropriate for quota cases. An alternate justification more appropriately emphasizes the legitimacy of a quota restriction, and holds "the defendant must prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect."[110] This justification requires governments to consider a less discriminatory alternative, a requirement typically applied when judicial review is heightened.[111] Either standard makes a quota requirement suspect and a justification harder to prove.[112] The following sections consider the justifications the courts will accept.

B. *The Legality of Distance Requirements*

1. DISTANCE AND SIMILAR REQUIREMENTS HELD INVALID

Distance and other quota requirements are frequently litigated. Most cases hold they violate the Fair Housing Act. *Larkin v. Michigan Department of Social Services*[113] is a leading Sixth Circuit decision. An adult foster care facility for persons with disabilities was denied a state license because it violated a statute that prohibited such facilities within 1500 feet of another unless permitted by local zoning.[114] A license could

109. *E.g., Bangerter,* 46 F.3d 1491*; see also Larkin,* 89 F.3d at 290 (requirements of 24-hour supervision and supervision by a community advisory committee, must be "warranted by the unique and specific needs and abilities of those handicapped persons.") (quoting Marbrunak, Inc. v. Stow, 974 F.2d 43 (6th Cir. 1992)).

110. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988); *accord,* ARC of New Jersey v. New Jersey, 950 F. Supp. 637, 643 (D.N.J. 1996) (citing Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978)); *see Human Res. Research. & Mgmt. Grp.*, 687 F. Supp. 2d at 256-257 (discussing the different standards).

111. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 21, 30 (1993) (noting heightened scrutiny requires close connection between asserted justification and means legislature has chosen, and a search for a less restrictive alternative); *see, e.g.,* State v. Baker, 405 A.2d 368 (N.J. 1979) (invalidating ordinance prohibiting occupancy by more than four persons not related by blood or marriage). For a classic analysis, see Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process,* 80 HARV. L. REV. 1463 (1967).

112. Some courts do not adopt a standard of judicial review to decide the validity of quotas, but nevertheless carefully examine the merits of a quota requirement.

113. 89 F.3d 285 (6th Cir. 1996) (applying the justification that requires benefits to the class or a response to legitimate safety concerns). The court also held invalid a requirement that the municipality and neighbors of the proposed facility had to be notified. *Id.* at 292; *accord Human Res. Research & Mgmt. Grp.,* 687 F. Supp. 2d 237; *see* Allison L. Zippay, *Psychiatric Residences: Notification, NIMBY, and Neighborhood Relations,* 58 PSYCHIATRIC SERVS. 109 (2007) (notification requirement increases neighborhood opposition).

114. *Larkin,* 89 F.3d at 288.

also be denied if its issuance would "substantially contribute to an excessive concentration" of state-licensed residential facilities within a city or village.[115]

The court adopted the heightened judicial review standard, and held the prevention of reinstitutionalization, ghettoization, and clustering did not justify the statutory restrictions.[116] "[I]ntegration is not a sufficient justification for maintaining permanent quotas,"[117] especially when their burdens fall on a disadvantaged minority. The state produced no evidence that group homes would cluster in the absence of the statutory restrictions, simply assumed that persons with disabilities must be integrated, and did not recognize that persons with disabilities might like to live near one another.[118] Though deinstitutionalization was a legitimate goal, the state did not show how the statutory restrictions advanced that goal. They might inhibit it by limiting the number of group homes that could locate in a community. The justification advanced for the restrictions conflicted with the right of persons with disabilities to live in a community of their choice. A benign desire to help them was not enough.[119]

A number of district court cases, some decided before and some after *Larkin,* held distance and similar requirements invalid under the Fair Housing Act. One court held invalid, as applied to a home for substance abusers, a local law that adopted a dispersal rule.[120] It allowed the county to object to a group home because there was no need for it, or because it would result in a concentration of group homes that substantially altered the nature and character of an area.[121] There was no

115. *Larkin,* 89 F.3d at 287 (quoting MICH. COMP. LAWS SERV. § 400.716 (2011)).

116. *Larkin,* 89 F.3d at 290-91.

117. *Larkin,* 89 F.3d at 291. The courts have had to contend with an unresolved conflict between the Act's integration and nondiscrimination objectives. South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991), *cert. denied,* 502 U.S. 1074 (1992) (noting benign steering does not violate Act); United States v. Starrett City Assocs., 840 F.2d 1096, 1101 (2d Cir. 1988)*; see also* 24 C.F.R. § 100.70(a) (Supp. 2011) (stating it is unlawful to restrict housing choices "so as to perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a community, neighborhood or development.").

118. *See also* Horizon House Developmental Servs., Inc. v. Upper Southampton, 804 F. Supp. 683 (E.D. Pa. 1992) (stating that distance requirement degrades right to choose where to live).

119. *See also* Oconomowoc Residential Programs v. City of Greenfield, 23 F. Supp. 2d 941, 954 (E.D. Wis. 1998) (noting that "benign intentions on the part of lawmakers cannot justify laws which discriminate against protected groups.").

120. Human Res. Research & Mgmt. Grp. v. Cnty. of Suffolk, 687 F. Supp. 2d 237 (E.D.N.Y. 2010).

121. *Id.* (applying the test that requires benefits to the class or a response to legitimate safety concerns).

support for the law, the court held, apart from scattered anecdotes and unsupported generalizations, and it was a response to public pressure.[122] Its restrictions were so broad that a rational trier of fact could not find them narrowly tailored under the heightened scrutiny standard.[123]

Other district court cases held distance requirements invalid because the court did not accept avoidance of clustering or the need for integration as justifications,[124] because the requirement discriminated facially against persons with disabilities by enacting a rule that applied only to them,[125] or because the local government failed to introduce any supporting evidence for the requirement.[126] Courts also rejected other justi-

122. *Id.; see also Nev. Fair Hous. Ctr., Inc.,* 565 F. Supp. 2d 1178 (invalidating ordinance where court found it was based on fear); *Horizon House Developmental Sers., Inc.*, 804 F. Supp. 683 (same).

123. Cases also arise in which a waiver from a distance or similar requirement is requested but denied by a local government. A waiver may be required by the Act as a reasonable accommodation. 42 U.S.C. § 3604(f)(3)(B) (2006) (requiring reasonable accommodation if necessary to afford a handicapped person the equal opportunity to use and enjoy a dwelling); Advocacy Ctr. for Pers. with Disabilities Inc. v. Woodlands Estates Ass'n, 192 F. Supp. 2d 1344, 1348 (M.D. Fla. 2002) (accommodation is reasonable if does not impose undue financial or administrative burdens or substantial changes, adjustments or modifications in existing programs, or constitute fundamental alterations in nature of program). For cases requiring waivers from distance requirements as a reasonable accommodation, see Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002); *Developmental Servs. of Neb.,* 504 F. Supp. 2d 714; *Oconomowoc Residential Programs,* 23 F. Supp. 2d at 955; Citizens for a Balanced City v. Plymouth Congregational Church, 672 N.W.2d 13 (Minn. Ct. App. 2003). *Contra* New Hope Fellowship, Inc. v. City of Omaha, 2005 U.S. Dist. LEXIS 39174 (D. Neb. Dec. 22, 2005). *See* Robert L. Schonfeld, *"Reasonable Accommodation" Under the Federal Fair Housing Amendments Act,* 25 FORDHAM URB. L.J. 413 (1998)*; see also* Children's Alliance v. City of Bellevue, 950 F. Supp. 1491 (W.D. Wash. 1997) (indicating availability of reasonable accommodation does not make distance requirement valid).

124. *Nev. Fair Hous. Ctr., Inc.*, 2007 U.S. Dist. LEXIS 12800 (D. Nev. 2007) (rejecting anti-clustering argument); *Children's Alliance,* 950 F. Supp. 1491 (rejecting anti-clustering argument); ARC of New Jersey v. New Jersey, 950 F. Supp. 637 (D.N.J. 1996) (rejecting anti-clustering argument); *Horizon House Developmental Sers., Inc.*, 804 F. Supp. 683 (rejecting anti-clustering argument). Some of these cases cite Larkin v. Mich. Dep't of Soc. Servs., 89 F.3d 285 (6th Cir. 1996). *See also City of Chicago Heights,* 161 F. Supp. 2d 819 (noting that courts have repeatedly rejected anti-clustering justifications).

125. *Nev. Fair Hous. Ctr., Inc.,* 565 F. Supp. 2d 1178; *Nev. Fair Hous. Ctr., Inc,* 2007 U.S. Dist. LEXIS 12800; *Oconomowoc Residential Programs,* 23 F. Supp. 2d 941; *Children's Alliance,* 950 F. Supp. 1491; *Ass'n for Advancement of the Mentally Handicapped,* 876 F. Supp. 614; *Horizon House Developmental Sers., Inc.*, 804 F. Supp. 683; *see also* Op. Att'y Gen. Del. 90 I-1001 (1990) (stating a 5000-foot distance requirement is invalid); Op. Att'y Gen. Md. 89-026 (1989) (indicating distance and density requirements are invalid).

126. *Nev. Fair Hous. Ctr., Inc.,* 2007 U.S. Dist. LEXIS 12800; *Children's Alliance,* 950 F. Supp. 1491; *ARC of New Jersey,* 950 F. Supp. 637; *Ass'n for Advancement of the Mentally Handicapped,* 876 F. Supp. 614; *Horizon House Developmental Servs., Inc.,* 804 F. Supp. 683.

fications, including arguments that residents of group homes presented a danger to the community,[127] that distance requirements protected the safety of group home occupants,[128] and that they were necessary to protect the residential character of an area.[129] In all of these district court cases the distance requirement was 1000 feet or more.

The failure of governments in so many cases over so many years to introduce evidence to justify distance and other quotas suggests, as noted earlier, that such evidence cannot be found. The testimony of a witness in one of these cases is instructive. She stated that " 'meaningful integration' is a deep and complex notion; it involves a variety of circumstances, not the least of which is the relationship between the individuals and their community. The first step, however, is to be 'physically included' and to have choices about where to live."[130] Distance requirements prevent that choice.

2. DISTANCE REQUIREMENTS HELD VALID

A few cases held housing distance requirements valid under the Fair Housing Act. The most important is an Eighth Circuit case in which state and local laws required a quarter-mile distance between group homes.[131] The court treated the case as a possible facial violation that raised a disparate impact claim, and adopted the rational relationship standard from *Cleburne* to reject it. Factually, the case involved a request to add three group homes for persons with mental illness to eighteen such homes owned by the same owner in a one and half-block area.[132] The court relied on this factual situation in reaching its decision, even though the statutory violation claim was facial.

This court held the distance requirement did not conflict with the language and purpose of the Fair Housing Act by limiting the housing choice of persons with mental illness.[133] Congress did not intend to limit state licensing powers for such persons. Distance requirements legitimately achieved the state's deinstitutionalization goals, which were

127. *Ass'n for Advancement of the Mentally Handicapped,* 876 F. Supp. 614.

128. *ARC of New Jersey,* 950 F. Supp. 637; *Ass'n for Advancement of the Mentally Handicapped,* 876 F. Supp. 614.

129. *Ass'n for Advancement of the Mentally Handicapped,* 876 F. Supp. 614; *see also City of Chicago Heights,* 161 F. Supp. 2d 819 (indicating reasonable accommodation required and would not change character of residential area).

130. *Horizon House Developmental Servs., Inc.,* 804 F. Supp. at 698.

131. Familystyle of St. Paul, Inc. v. St. Paul, 923 F.2d 91 (8th Cir. 1991); *see also* Op. Att'y Gen. N.C., 1993 N.C. AG LEXIS 11 (1993) (relying on *Familystyle,* but requirement may be invalid if discriminatory, though not preempted).

132. *Familystyle of St. Paul, Inc.,* 923 F.2d at 92.

133. *Id.* at 93.

consistent with the Act's nondiscrimination objective. They "address the need of providing residential services in mainstream community settings."[134] They also guarantee "that residential treatment facilities will, in fact, be 'in the community,' rather than in neighborhoods completely made up of group homes that re-creates an institutional environment."[135] The court did not discuss studies or any other evidence to support its conclusions.

Two district court decisions held distance requirements valid under the Fair Housing Act.[136] In one case the court held a 500-foot requirement was presumptively valid because it had been approved in a settlement agreement.[137] The court also held the Fair Housing Act did not prohibit regulations that prevented the concentration of housing for persons with disabilities.[138] In two contrary cases it cited, the spacing distance was significantly greater, and the spacing requirement in this case applied to all group homes, not just homes for persons with disabilities.[139] Another case upheld a 1000-foot distance requirement that could be waived through a special use permit, which was denied.[140] Noting that the distance requirement allowed a higher occupancy rate for homes for persons with disabilities than for other, similar uses, the court held it "prevents the problems associated with a high concentration of unrelated people—handicapped or not—in close proximity."[141]

3. WHAT THE CASES MEAN

Significant differences divide these cases. Decisions holding that distance requirements violate the Fair Housing Act found a right of free

134. *Id.* at 94. The court also critically noted, as a factor influencing its decision, that the Familystyle treatment facility housed more than 100 mentally ill patients. *Id.* It is not clear whether this comment was a reference to all of its group homes or only the one under review.

135. *Id.* The court also held that a distance requirement is "designed to ensure that mentally handicapped persons needing residential treatment will not be forced into enclaves of treatment facilities that would replicate and thus perpetuate the isolation resulting from institutionalization." *Id.* at 95. Neither did the court find an intent to discriminate against persons with disabilities. *Id.*

136. *See* Harding v. City of Toledo, 433 F. Supp. 2d 867 (N.D. Ohio 2006); Avalon Residential Care Homes, Inc. v. City of Dallas, 130 F. Supp. 2d 833 (N.D. Tex. 2000).

137. *Harding,* 433 F. Supp. 2d 867.

138. *Id.* at 869.

139. *Id.*; *see also* Larkin v. Mich. Dep't of Soc. Servs., 89 F.3d 285 (6th Cir. 1996); Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002).

140. *Avalon Residential Care Homes, Inc.,* 130 F. Supp. 2d at 840. The court also relied on the availability of a waiver opportunity, but held a reasonable accommodation was not necessary. *But see* Children's Alliance v. City of Bellevue, 950 F. Supp. 1491 (W.D. Wash. 1997) (discussing that availability of reasonable accommodation does not make distance requirement valid).

141. *Avalon Residential Care,* 130 F. Supp. 2d at 840. The court did not cite any studies in support of this conclusion.

choice in housing was denied and refused to find a justification for this denial. Contrary cases accepted the dispersal justification for distance requirements. None of the cases discussed the validity of the dispersal approach that quotas necessarily imply.

These cases were not decided on an open slate. The Fair Housing Act prohibits the denial of housing to handicapped persons. Rules that shift the burden of justification to government once a prima facie case is made, and the burden placed on government to find a justification for a denial, make distance requirements difficult to defend. Often adopted as an exclusionary strategy, they are an unacceptable measure for keeping group homes for persons with disabilities out of a community.

C. *Ceiling Quotas*

Distance requirements enact an implicit quota that limits the number of group homes in a community. Statutes and ordinances can also contain explicit ceiling quotas. They vary. A law may allow a municipality to prohibit additional group homes once the occupants of existing group homes exceed a specified number or a certain percentage of the population,[142] or when there is an "excessive concentration" of group homes.[143] Federal housing subsidy legislation contains preferences and quotas that can limit the number of dwelling units in multifamily housing that are available to persons with disabilities.[144]

These quotas may be adopted to achieve integration maintenance in housing for persons with disabilities, either in a municipality or a housing project. Similar proposals for racial integration maintenance in housing were made in the 1960s. They were intended to avoid the racial "tipping" of neighborhoods, caused by white flight, if a minority presence became too dominant. In one form, the quota limited the number of minorities who could live in a residential neighborhood. Additional minority purchasers were not allowed once the quota was exhausted. Commentary considered the constitutional problems raised by this type of quota, and its validity under the Fair Housing Act. Much of this commentary was critical.[145]

142. ARC of New Jersey v. New Jersey, 950 F. Supp. 637 (D.N.J. 1996) (holding invalid).

143. Human Res. Research & Mgmt. Grp. v. Cnty. of Suffolk, 687 F. Supp. 2d 237 (E.D.N.Y. 2010) (holding invalid).

144. *See supra* text accompanying notes 73-74.

145. A classic article in the form of hypothetical majority and dissenting decisions examined the constitutional problems of racial housing maintenance quotas under the law at that time. Borris I. Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations,* 71 YALE L.J. 1387 (1962)*; see also* William E. Parker, *The Integration Ordinance; Honi Soit Qui Mal Y Pense,* 17 STAN. L. REV. 289 (1965)

Racial integration maintenance also attracted attention as a strategy to maintain racial balance in housing projects.[146] Starrett City, located in Brooklyn and then the largest private housing project in the nation, adopted a racial ceiling quota as an integration maintenance strategy. It received federal and state subsidies, and a real estate tax abatement from the city based on assurances it would be racially integrated. To meet this obligation, Starrett attempted to maintain a racial distribution of 64 percent white, 22 percent black and 8 percent Hispanic. The United States brought an action claiming, in part, that the quota violated the Fair Housing Act by making apartments "unavailable" to blacks because of race,[147] and the Second Circuit found a violation in *United States v. Starrett City.*[148]

Starrett City claimed an avoidance of "white flight" justified the quota, but the court held this was not an acceptable justification like those accepted in affirmative action plans upheld in previous cases.[149] As the court explained, white flight "cannot serve to justify attempts to maintain integration . . . through inflexible racial quotas that are neither temporary in nature nor used to remedy past racial discrimination or imbalance within the complex."[150] Ceiling quotas were of doubtful

(presenting majority and dissenting opinions). Later articles argued that integration maintenance was unconstitutional and violated the Fair Housing Act. Rodney A. Smolla, *In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980's,* 58 S. CAL. L. REV. 947 (1985); Rodney A. Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight,* 1981 DUKE L.J. 891; William C. Myers, Comment, *Constitutionality of the "Benign" Quota,* 40 TENN. L. REV. 55 (1972).

146. For cases involving quotas in publicly-owned housing, see Burney v. Housing Authority of Beaver, 551 F. Supp. 746 (W.D. Pa. 1982) (holding unconstitutional, and Fair Housing Act violation); Schmidt v. Boston Housing Authority, 505 F. Supp. 988 (D. Mass. 1981) (rejecting Fair Housing Act claim; discriminatory effect not shown); Williamsburg Fair Hous. Comm. v. New York City Hous. Auth., 493 F. Supp. 1225 (S.D.N.Y. 1980) (finding a Fair Housing Act violation), *aff'd and remanded without opinion,* 647 F.2d 163 (2d Cir. 1981).

147. 42 U.S.C. § 3604(c) (2006). No minority applicant had been denied an apartment under the quota, but minority applicants waited on waiting lists longer than white applicants.

148. 840 F.2d 1096 (2d Cir. 1988), *cert. denied,* 488 U.S. 946 (1988), discussed in Lisa J. Laplace, Note, *The Legality of Integration Maintenance Quotas: Fair Housing or Forced Housing?,* 55 BROOKLYN L. REV. 197 (1989). *See* Howard Husock, *Subsidizing Discrimination at Starrett City,* CITY J., Winter 1992, at 48 (discussing history of Starrett City and arguing racial quota was used to screen out problem tenants because income screening could not be used in subsidized project, and to make project acceptable to adjacent single family areas); *see also* Charles E. Daye, *Whither "Fair" Housing: Meditations on Wrong Paradigms, Ambivalent Answers, and a Legislative Proposal,* 3 WASH. U. J.L. & POL'Y 241 (2000).

149. *Starrett City,* 840 F.2d at 1102.

150. *Id.*

validity, and the quota was invalid because it did "not provide minorities with access to Starrett City, but rather act[ed] as a ceiling to their access."[151] An allocation of apartments through a quota had a clear discriminatory effect in violation of the statute.[152] A dissenting opinion would have held that applying the statute to bar integration maintenance was contrary to statutory policy.[153] There was no indication that this perverse end was within the legislative intent.[154]

Because of its racial purpose, the application of Starrett City to housing quotas for persons with disabilities is unclear. The dynamics of racial integration are different, and race-based quotas require a higher standard of judicial review. Still, the decision helps to support a claim that ceiling quotas for housing for persons with disabilities are invalid under the Fair Housing Act. An attorney general's opinion concluded a state law violated the Act by including a ceiling quota that limited the number of residences for persons with disabilities in a multifamily building to 10 percent of the total or two units.[155] The opinion was handed down only one year after the Act was extended to persons with disabilities, but its conclusion is consistent with later judicial decisions invalidating distance and other quotas.

VI. Housing for Persons with Disabilities: How Should it be Provided?

An alternate method must be found for distributing housing opportunities for persons with disabilities. A fair share approach is one alternative. New York City has a fair share program for the distribution of facilities that are publicly-owned or receive substantial public funding,

151. *Id.* The *Starrett* court distinguished Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973), which upheld a plan under which the Authority rented a substantial majority of new apartments in a former urban renewal area to whites. The court held the Authority had a constitutional and statutory obligation to fulfill the goal of integrated housing patterns, even though some members of a racial minority who had previously lived in the renewal area were denied new apartments. The *Starrett* court also distinguished *Otero* as a "one-time measure," and because 40 percent of the former residents of the renewal area were white. 846 A.2d at 1103. *Otero* may have been effectively overruled by subsequent Supreme Court cases. *See* Luiz Antonio Salazar Arroyo, *Tailoring the Narrow Tailoring Requirement in the Supreme Court's Affirmative Action Cases,* 58 CLEV. ST. L. REV. 649 (2010).

152. *Starrett City,* 840 F.2d at 1100.

153. *Id.* at 1103 (Newman, J., dissenting).

154. *Id.*

155. Housing—Handicapped—State Requirements Regarding Siting of Community Residences for Special Populations May Not Be Enforced as to Persons with Disabilities, Op. Att'y Gen. Md. 89-026 (1989).

and it includes residential facilities.[156] Its purpose is to balance the need for these facilities against their impact on the community, and to fairly distribute their burden throughout the city.[157] Its principal elements are an annual Statement of Needs, and a set of fair share criteria to be used in siting decisions. A provision that applies to residential facilities requires the avoidance of "[u]ndue concentration or clustering,"[158] and the avoidance of "a significant cumulative negative impact on neighborhood character" where there is a high ratio of residential facility beds to the population.[159]

The problem with the New York City program is its assumption that these facilities create burdens on the community because they create problems for the areas where they locate. The fair share program was adopted to distribute these objectionable burdens.[160] This problem is not necessarily created by housing for persons with disabilities. Studies show this housing does not have negative property value and crime impacts if it is done at a reasonable scale, and does not have too large a concentration of assisted residents.[161] An approach is needed for siting

156. The program is based on an administrative regulation. New York City Planning Comm'n, *Criteria for the Location of City Facilities* (1990), *available at* http://home2.nyc.gov/html/dcp/pdf/pub/criteria_lcf.pdf [hereinafter *Criteria for the Location of City Facilities*]. The American Planning Association's model land use legislation includes a proposal based on the New York model. GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND MANAGEMENT OF CHANGE 5-10 to 5-23 (Stuart Meck ed. 2002), *available at* http://www.planning.org/growingsmart/guidebook/print/index.htm [hereinafter LEGISLATIVE GUIDEBOOK]. The Guidebook discusses and has excerpts from the New York regulation. *Id.* at 5-68 to 5-74.

157. Richard J. Rogers, Note, *New York City's Fair Share Criteria and the Courts: An Attempt to Equitably Redistribute the Benefits and Burdens Associated with Municipal Facilities,* 12 N.Y.L. SCH. J. HUM. RTS. 193, 207 (1994); *see generally* William Valetta, *Siting Public Facilities on a Fair Share Basis in New York City,* 25 URB. LAW. 1 (1993).

158. *Criteria for the Location of City Facilities, supra* note 156, art. 6.51.

159. *Id.* at art. 6.53. The need for the facility, the distribution of similar facilities throughout the city, the size of the facility, and the adequacy of streets and transit to handle the facility's traffic, must also be considered. *Id.* at art. 6.1. A provision that applies to all facilities requires consideration of the adverse impact on neighborhood character that would be caused by a concentration of facilities. *Id.* at art. Article 4.1(b). Additional criteria are included in the regulation.

160. *See also* MINN. STAT. ANN. § 245A.11(5) (West Supp. 2011) (requiring counties to adopt dispersal plans to avoid the overconcentration of "group residential programs.").

161. Letter from George C. Galster, Distinguished Professor & Clarence B. Hillberry Professor of Urban Affairs, Wayne State Univ., to Mayor & Council, City of Vancouver [Canada] (Sept. 17, 2008) (on file with author) [hereinafter Letter from Galster] (noting that virtually all studies were done for developments with 12 units or less); *see* George Galster et al., *Supportive Housing and Neighborhood Property Value Externalities,* 80 LAND ECON. 33 (2004) (reviewing and finding shortcomings in earlier studies, adopting revised method of analysis, and finding positive impacts)*; see also* Lauber, *supra* note 7, at 384-85 (reviewing studies).

housing for persons with disabilities that considers the need for such housing, and determines the areas and sites where it can appropriately be located.[162]

An alternative that achieves this objective ties the siting of housing for persons with disabilities to the local comprehensive plan.[163] The housing element required for comprehensive plans by California planning legislation is an example. It requires regional planning agencies, assisted by the state Department of Housing and Community Development, to make quantified regional allocations of housing need.[164] Regional planning agencies then determine each city and county's share of the calculated need.[165] Actions must be taken at the local level to make sites available during the planning period of the plan, with appropriate zoning and development standards, services and facilities to accommodate the local fair share.[166] Unfortunately, compliance with the statute has not been as effective as it might be because it is enforced through private litigation.[167]

A similar comprehensive plan element can be required for housing for persons with disabilities. Regional planning agencies, or the state licensing agency,[168] would make quantified local allocations of residential units by considering factors such as need, housing type and size, and the availability of services. Local plans would include these allocations. Local governments would make siting decisions under their zoning ordinances, but would have to provide enough sites to meet their housing allocation. These decisions would take housing type, size, and

162. *See* Letter from Galster, *supra* note 161 (stating negative impacts occur because of opportunistic acquisition without considering scale and concentration effects).

163. Most states authorize, and a number of states including California require, the adoption of a comprehensive plan and the consistency of zoning with the adopted plan. LAND USE LAW, *supra* note 51, at ch. 3.

164. CAL. GOV'T CODE §§ 65580-65589.8 (West 2010 & Supp. 2011).

165. *Id.*

166. § 65583(c)(1) (Supp. 2011).

167. STUART MECK ET AL., REGIONAL APPROACHES TO AFFORDABLE HOUSING: 42-67 (2003), *available at* http://www.huduser.org/Publications/pdf/reg_aff_hsg_intro.pdf (providing data for and critique of the California legislation). For a similar model law requiring a housing element in local plans that requires state review and approval, see LEGISLATIVE GUIDEBOOK, *supra* note 156, 4-73 to 4-107.

168. Illinois state licensing legislation provides that "community integrated living arrangements" shall be integrated "into their community or neighborhood." The state agency "shall adopt a plan ('State plan') for the distribution of community living arrangements throughout the State," taking need into account. The effect of the plan on local zoning is not stated. 210 ILL. COMP. STAT. ANN. 135/10(a) (2008); *see also* IND. CODE § 12-28-4-12 (2007) (allowing state agency to give priority to new residential facilities in areas whose ratio of beds to county population is in lowest 25 percent as compared to all other counties).

neighborhood character into account.[169] An enforcement mechanism would be necessary, such as a housing appeals board.[170] It should have the authority to override local denials if the local government cannot justify the denial, such as a showing of clear incompatibility with the area adjacent to the site.

This program establishes minimum rather than maximum limits on housing availability, and is an access rather than a ceiling quota. It should not create problems under the Fair Housing Act because it provides a basis for approving, not denying, housing for persons with disabilities. Problems should arise only if a local government rejects housing that satisfies its allocated housing need, and that denial is sustained on appeal.[171] The question is whether a justified denial is a sufficient defense to a suit brought under the Fair Housing Act. It is if the allocation of housing need and the right to appeal denials provide enough freedom of choice to avoid a statutory violation, even when a housing project is rejected.[172]

VII. Conclusion

Housing for persons with disabilities, such as group homes, receives statutory protection in many states, but communities can use zoning restrictions and requirements for zoning approvals as barriers to entry. Quotas reinforce these barriers by limiting the sites where group homes

169. Some modification will be necessary in laws authorizing group homes as a permitted use in residential areas. *See supra* text accompanying notes 62-64.

170. Four states have adopted appeals laws for affordable housing. *See* Spencer M. Cowan, *Anti-Snob Land Use Laws, Suburban Exclusion, and Housing Opportunity,* 28 J. URB. AFF. 295 (2006); Symposium, *Increasing Affordable Housing and Regional Housing Opportunities in Three New England States and New Jersey: Comparative Perspectives on the Occasion of the Thirtieth Anniversary of the Massachusetts Comprehensive Permit Law,* 22 W. NEW ENG. L. REV. 321 (2001). For a model law based on these statutes, see LEGISLATIVE GUIDEBOOK, *supra* note 156, at 4-107.

171. Local governments would not have to provide sites to meet their allocations immediately, but would have to show reasonable progress based on need.

172. The answer to this question depends on how the program is structured. A showing that alternate sites are available when a site is rejected should be required by statute. For example, a housing project may be rejected because the need for housing for persons with disabilities in the jurisdiction has been met, but unsatisfied need exists elsewhere. The question is whether the availability of alternate sites in another jurisdiction is enough to make housing "available" under the Fair Housing Act so that a violation is avoided. If a site is rejected because it is unsuitable, but unmet need exists in the rejecting jurisdiction, the question is whether suitable alternate sites in that jurisdiction satisfy the statutory availability requirement. *See* Kevin J. Zanner, *Dispersion Requirements for the Siting of Group Homes: Reconciling New York's Padavan Law with the Fair Housing Amendments Act of 1988,* 44 BUFF. L. REV. 249, 278-281 (1996) (suggesting that New York's flexible siting law does not violate the Fair Housing Act).

can locate, especially if a distance requirement is substantial. Numerical limitations have the same effect.

Though litigation against quotas under the Equal Protection Clause is not well advanced, the decisions have made a convincing case that distance and other quotas are invalid under the Fair Housing Act.[173] The courts respect the freedom to choose without discrimination that the Act protects. They do not accept justifications for quotas based on the need to prevent clustering. Quotas on housing for persons with disabilities are unacceptable. States and local governments should consider an alternate method for distributing housing opportunities.

173. Congress should adopt an amendment to the Fair Housing Act that considers the zoning problem for housing for persons with disabilities. One alternative is a requirement for state statutory programs like the program outlined in the text, with federal review and approval of state statutes that meet the Act's requirements. The author recommended a similar requirement when Congress was considering an extension of the Act to the handicapped, but it was rejected. These recommendations were made by the author during telephone conversations with a Senate committee staff member.