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## The Coming Wave of Pretextually Profiteering Social Entrepreneurs: A Case Study at the Nexus of Property and Civil Rights

David Groshoff

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# **THE COMING WAVE OF PRETEXTUALLY PROFITEERING SOCIAL ENTREPRENEURS: A CASE STUDY AT THE NEXUS OF PROPERTY AND CIVIL RIGHTS**

DAVID GROSHOFF\*

## ABSTRACT

This Article builds on my prior publications employing case studies that serve as the prisms through which this Article applies a legal analysis to a newly trending problem in social entrepreneurship.

Specifically, this Article reviews the financial and property interests implicated when, in the milieu of an aging baby-boomer demographic likely to display decaying neurocognitive abilities, ostensibly socially beneficent limited liability companies (“LLCs”) pretextually pose as small businesses with a desire to serve people suffering from particular alleged mental disorders. In reality however, these brand-managed social entrepreneurs may represent conveniently detachable arms of integrated corporate enterprises that have hundreds of millions of dollars and hundreds of employees backing them.

Thus, the integrated corporate enterprise uses the LLC and an associated small-business-owner tale to manipulate antidiscrimination law through which the integrated corporate enterprise can (i) exploit (a) small municipalities’ zoning ordinances, and (b) relative funding and legal specialization deficiencies; and (ii) threaten municipalities with costly legal action, should the municipality fail to change its zoning ordinances to permit the integrated corporate enterprise to operate a twenty-four-hour commercial business deep in the heart of real property historically zoned

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\* Despite this Article’s conclusion based on legal analysis, I remain a strong proponent of fair housing and believe that the basis of a municipality’s or a tribunal’s zoning ordinance, variation, or conditional use permit should occur via nondiscriminatory evaluative processes. I thank the many helpful government employees at the numerous state and municipal agencies in Ohio for providing me with quick access to relevant documentation without having to conduct Freedom of Information Act (“FOIA”) requests. I also thank Jani Lane and Kevin DuBrow for demonstrating to me that one’s best writing often goes underappreciated, while one’s worst writing often appeals to the masses. I believe this manuscript will fall in the former category.

for single-family residential use. As a result, the integrated corporate enterprise's actions leave all but itself drowning in the spillover effects of the enterprise's negative externalities, including the risks of material (i) physical harm to existing real property owners and residents—whether young children or the elderly—and (ii) financial losses to (a) existing real property owners and (b) municipalities who must internalize the integrated corporate enterprise's externalities, thereby leading to a forced socialization of what would otherwise be a private cost.

Because this Article concerns an area of the law that lacks uniform or model legal codes from which one could otherwise address this problem and propose a broad-brush and purely theoretical solution, this Article employs a case study method to dissect trending issues too nascent and interdisciplinary to be covered in existing legal literature. As a result, the Article employs a granular, fundamental, bottom-up analysis to serve as a microcosm through which the Article arrives at its broader descriptive understandings and prescriptive solutions and conclusions that should spark further debate on this growing area of concern.

As the nation's age demographic shifts, the Article's analysis should educate and advance dialogue among interdisciplinary scholars, legal tribunals, and municipalities relative to this emergence in social entrepreneurship. The Article also serves to assist legitimate healthcare providers in avoiding the errors made by certain large corporate integrated enterprises so that people suffering from disabilities indeed receive the care and the housing that they may seek. The Article proposes ways in which municipalities can ensure that they do not become the victim of purported social entrepreneurs attempting to extract literal and figurative economic rent-seeking, which then leads the municipality and existing property owners to seek declaratory relief from the courts, thus engaging in their own mental health-based quiet riot.

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## INTRODUCTION

Imagine that for over thirty-five years you have lived in a single-family home located in a suburban municipality twenty minutes from a mid-major city in the Midwest. Further, imagine that the location of your home—which you purchased in reliance on the neighborhood being zoned as single-family residential housing—offers safe yards, streets, and sidewalks, quiet and respectful neighbors represented by diverse individuals and families, service along with neighboring municipalities by outstanding schools, and a location nestled on a small cul-de-sac containing only five homes, with all five driveways situated in the circle of the cul-de-sac.

Now imagine that one LLC purchases twenty percent of the housing on the cul-de-sac, another related LLC submits an application for a conditional use permit (“CUP”) to vary the zoning on that cul-de-sac to allow the second LLC to open a commercial enterprise that would operate twenty-four hours a day, seven days a week, on nearly 100% of the property. Further imagine that representatives of a multimillion-dollar real estate conglomerate, rather than either LLC, begin negotiating and threatening the municipality with federal and state antidiscrimination claims on behalf of the second LLC, should the municipality continue to enforce its pre-existing zoning ordinance.

This Article addresses those issues by building on my existing research program and scholarly publication base that uses current multiple<sup>1</sup> or single<sup>2</sup> case studies as an analytic tool to apply legal theory to fact.

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<sup>1</sup> See, e.g., David Groshoff, *Contrepreneurship? Examining Social Enterprise Legislation’s Feel-Good Governance Giveaways*, 16 U. PA. J. BUS. L. 233 (2013) (employing a multiple case-study analysis with global social enterprises to support the article’s thesis that the post-2007 legislative movement to create new social entrepreneurial business forms—including benefit corporations, public benefit corporations, low-profit limited liability companies (“L3Cs”), and flexible purpose corporations—represent a con to investors).

<sup>2</sup> See, e.g., David Groshoff, *Unchartered Territory: Market Competition’s Constitutional Collision with Entrepreneurial Sex-Segregated Charter Schools*, 2010 BYU EDUC. & L.J. 307, 344–54 (2010) (using the social entrepreneurial endeavor of an upstate New York all-boys charter school as the article’s single case-study subject).

Specific to this context, using a single case-study analysis helps develop my research program's thesis by exposing flaws in purported socially beneficial companies, whether formed under state benefit corporation statutes, designated as socially beneficial by a third-party rating agency, or simply engaged in perceived socially beneficent activities under traditional business law doctrine.

In particular, this Article analyzes the hypothetical of a business organization that claims to engage in a socially beneficial activity—providing housing to people with disabilities—despite the business organization: (i) lacking such a stated purpose in the business's formation documents, i.e., the charter; (ii) being part of a massive corporate integrated enterprise that (a) acts as a sole, socially beneficial, business organization unto itself when advantageous to the integrated enterprise, but (b) attempts to act as a part of a broader legally integrated enterprise when detrimental to the sole socially beneficial business organization's goals of generating revenue for the integrated enterprise; and (iii) attempting to threaten a small municipality with claimed violations of federal and state anti-discrimination law relative to the municipality's enforcement of its pre-existing zoning ordinances.

The Article then applies this hypothetical to an actual case study involving certain understandings of what would occur when the City of Montgomery, Ohio, a relatively small upper-middle-class suburb of Cincinnati that has displayed traditionally well-defined and strongly enforced zoning ordinances, would meet a business organization masking itself as a socially beneficent LLC that practically is an arm of a greater corporate integrated enterprise threatening to sue the small municipality in federal court by claiming housing discrimination by the municipality, should the integrated enterprise fail to achieve a net present value on the Montgomery project.

This Article first describes the background and apparent integrated corporate enterprise surrounding adult care facility operators such as Our Family Home. Next, this Article cites and describes in great detail why the federal Fair Housing Act ("FHA") is inapplicable to a situation akin to the one facing Montgomery. Third, this Article explains why state law does not support the position that a CUP must be granted by a municipality. The Article next addresses how the municipality's zoning ordinance does not align with the desires of the CUP application. Fifth, this Article addresses inconsistencies and concerns advanced by an applicant or its agents. Finally, this Article argues that municipalities in the situation faced by Montgomery appear to be well within their federal, state, and local rights to reject conditional use applications without

fear of a losing—or costly—court battle. This Article suggests—under federal, state, and local laws, rules, regulations, ordinances, case law, and public policy—that existing residents of a municipality live under an expectation and reliance that the municipality will enforce its zoning ordinances on a uniform and consistent basis. As a result, the Article concludes that as the age demographic in the United States shifts due to an aging baby boomer population, both law and policy currently supports municipalities in Montgomery's position to reject any CUP application.

I. CASE STUDY BACKGROUND: THE APPLICATION, INTEGRATED ENTERPRISES, AND INQUIRING WHO ARE THESE LLCs?

Given the conditions precedent to Montgomery sending its notice of hearing to certain residents and homeowners,<sup>3</sup> and based on the documentation that Montgomery has made publicly available for research purposes, this Article presumes that the June 7, 2013 letter to Montgomery on Our Family Home letterhead reflects the CUP application (“the Application”).<sup>4</sup> The Application is “to operate an Adult Family Home<sup>5</sup> for up to five Alzheimer's and/or dementia patients at an existing single family house”<sup>6</sup> located on a five-lot cul-de-sac within a single-family residentially zoned area.

All “Adult Care Facilities” (“ACFs”) must be licensed by the state's department of mental health (“DMHSA”).<sup>7</sup> Several varieties of ACFs exist, with two major types serving as the general varieties of ACFs, (i) Adult Family Homes (“AFHs”), which have five or fewer residents, and (ii) Adult Group Homes (“AGHs”), which have between six and sixteen residents.<sup>8</sup> This Article assumes that the applicant for the ACF-based CUP is “Our Family Home” or “Our Family Home Operating Co., LLC”—neither of which represents the legal entity who purchased the property from the prior owner, which creates numerous other issues addressed in this Article.

Our Family Home attempts to brand itself as an empathetic, socially beneficent entity founded by a sympathetic man who has claimed deep

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<sup>3</sup> See MONTGOMERY, OHIO, CODE OF ORDINANCES, tit. XV, ch. 150.16, § 150.1601 (2005).

<sup>4</sup> Letter from Mark A. Damante, Vice President of Our Family Home, to Tracy Roblero, City Planner of the City of Montgomery (June 7, 2013) (on file with author) [hereinafter *The Application*].

<sup>5</sup> See discussion of Adult Family Homes, *infra* Part II.

<sup>6</sup> Undated Notice of Public Hearing from City Administrator Frank Davis to Residents of Montgomery (on file with author) [hereinafter *Notice of Public Hearing*].

<sup>7</sup> Ohio Adult Care Facilities Organization, <http://www.ohioadultcarefacilitiesassociation.org/>, archived at <http://perma.cc/QV6Q-CYZ5> (last visited Mar. 15, 2015).

<sup>8</sup> OHIO ADMIN. CODE 5122-33-01 (2014).



personal connections with the issues of dementia and Alzheimer's.<sup>9</sup> Our Family Home's website claims that the "founder and CEO of Our Family Home . . . has always had a passion to serve individuals with Alzheimer's and memory loss."<sup>10</sup> The website further describes the CEO as "the National Alzheimer's Ambassador to educate, and discuss issues/concerns with local, state, and federal legislators."<sup>11</sup> According to the website, the CEO "is a trained speaker of the local Alzheimer's Speakers Bureau, which goes out into the community to educate small and large organizations about Alzheimer's disease"<sup>12</sup> and "knows the importance of family."<sup>13</sup>

Not only in the Application but also in discussions with the municipality regarding the subject property,<sup>14</sup> the communications between Our Family Home and Montgomery did not include the CEO. Instead, the communications were between Montgomery and Mark Damante.<sup>15</sup> In addition, the purchaser of the subject property from the prior individual owner<sup>16</sup> was not Continental Real Estate, Our Family Home, or Our Family Home Operating Co., LLC. Rather, the purchaser was OFH Properties, LLC, whose statutory agent is Mark Damante.<sup>17</sup>

A. *Is Our Family Home Co. LLC an Integrated Enterprise with the Continental Real Estate Enterprises?*

According to the global WHOIS domain name registration database, the owner of continental-realestate.com is Continental Real Estate Companies.<sup>18</sup> Over the years, Continental Real Estate Companies, whose original corporate name is "Continental Building Systems, Inc.,"<sup>19</sup> has

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<sup>9</sup> OUR FAMILY HOME, <http://www.ourfamilyhomeinc.com>, archived at <http://perma.cc/F5AV-SQF5> (last visited Mar. 15, 2015).

<sup>10</sup> *Founder*, OUR FAMILY HOME, <http://www.ourfamilyhomeinc.com/founder.html>, archived at <http://perma.cc/5B2B-2WEB> (last visited Mar. 15, 2015).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> E-mail from Mark Damante to Frank Davis (June 17, 2013, 11:29 AM) (on file with author) [hereinafter E-mail].

<sup>15</sup> *Id.*

<sup>16</sup> Parcel Info Summary, DUSTY RHODES, HAMILTON CNTY. AUDITOR, <http://www.hamiltoncountyauditor.org/realestateii/ROVER30.ASP>, archived at <http://perma.cc/G689-VJSW> (accessed by selecting "Parcel ID" and entering 6000080039900) (last visited Mar. 15, 2015).

<sup>17</sup> *Id.*; see also OFH PROPERTIES, LLC, ARTS. OF ORG. (CHARTER) FOR A DOMESTIC FOR-PROFIT LTD. LIAB. CO., No. 210089 (Ohio Sec. of State Doc. No. 20121090343 (Apr. 16, 2012)).

<sup>18</sup> See Query of Continental-RealEstate.com, WHOIS, <http://www.whois.com/whois/continental-realestate.com>, archived at <http://perma.cc/63SF-348N> (last visited Mar. 15, 2015).

<sup>19</sup> See generally Receipt of Filing Articles of Incorporation from State of Ohio to Benjamin



filed the necessary paperwork with the Ohio Secretary of State to use “Continental Realty” as a fictitious name<sup>20</sup> and “Continental Building Services” as a trade name for Continental Realty.<sup>21</sup> Continental Building Systems’s stated corporate purpose in its charter includes provisions to “construct office and commercial buildings.”<sup>22</sup> One of Continental Building Systems’s fictitious business names is a major residential project called Hallmark Communities, Ltd., a meaningful provider of college student housing from Ohio to Tennessee to Louisiana.<sup>23</sup>

Continental Realty is a large-scale real estate player that boasts of its investment services,<sup>24</sup> its property management services,<sup>25</sup> and its property maintenance services.<sup>26</sup> Prominently displayed on Continental Realty’s investment services webpage, for example, is “New Albany Medical Center,” a medical facility in New Albany, Ohio “[c]onnected to New Albany Surgical Hospital.”<sup>27</sup> Continental Realty thus appears to have significant familiarity

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L. Zox, Incorporator (Mar. 19, 1984) (Receipt No. 52654) (referencing corporate charter number 630170), in Certificate of Incorporation, SEC’Y STATE OF OHIO, Roll F413 at Frame 1050 of the Records of Incorporation & Misc. Filings (Mar. 13, 1984).

<sup>20</sup> See, e.g., Certificate of Incorporation, SEC’Y STATE OF OHIO, Roll 4151, Frame 0387 of the Records of Incorporation and Misc. Filings (Feb. 4, 1994).

<sup>21</sup> See Record of Trade Name Certificate, SEC’Y STATE OF OHIO (Doc. No. 200912700150) (May 6, 2009) (referencing corporate charter number 630170); see also Renewal of Fictitious Name Certificate, SEC’Y STATE OF OHIO, Roll 5649 at Frame 1101 of the Records of Incorporation & Misc. Filings (Oct. 3, 1996) (giving the fictitious business name for which Continental Real Estate Companies filed).

<sup>22</sup> See Receipt of Filing, *supra* note 19.

<sup>23</sup> See *Our Projects*, HALLMARK CAMPUS CMTYS., <http://www.hccliving.com/our-projects.aspx>, archived at <http://perma.cc/PG6Z-UUYT> (last visited Mar. 15, 2015) (describing what Hallmark Communities, Ltd. does and its location), and Renewal of Fictitious Name Certificate, SEC’Y STATE OF OHIO, Roll 5649 at Frame 1101 of the Records of Incorporation & Misc. Filings (Oct. 3, 1996) (filing by Continental Real Estate Companies for Hallmark Communities, Ltd.).

<sup>24</sup> *The Mills/Montooth Investment Services Group*, CONT’L REALTY, <http://www.continental-realty.com/investment-services/home.aspx>, archived at <http://perma.cc/Y7TG-RBE2> (last visited Mar. 15, 2015).

<sup>25</sup> *Commercial Real Estate Property Management in Columbus, Ohio*, CONT’L REALTY, <http://www.continental-realty.com/Services/Property-Management.aspx>, archived at <http://perma.cc/K67F-3W3J> (last visited Mar. 15, 2015).

<sup>26</sup> See *Columbus Property Maintenance Service*, CONT’L REALTY, <http://www.continental-realty.com/Services/Property-Maintenance.aspx>, archived at <http://perma.cc/5H93-8PL3> (last visited Mar. 15, 2015).

<sup>27</sup> Listing of Village of New Albany Business Park—Available Office Space, NEW ALBANY, <http://www.newalbanyohio.org/wp-content/uploads/2012/02/Bus-Pk-Avail-Office-Space-102.pdf> (last visited Mar. 15, 2015) (leading a reasonable person to question why the Enterprise simply does not develop its facility in Montgomery in the Bethesda North medical area, zoned for use of this type).

with commercial real estate development, including commercial medical facility development. Continental Building Systems's webpage further boasts of Continental Building Systems being a \$250 million company, using the tagline "Trust begins with people who care."<sup>28</sup> Perhaps this refers to the trust of people who must care primarily about maximizing shareholder value over any other stakeholder (e.g., tenant) value, per longstanding, legally imposed fiduciary duties.<sup>29</sup>

Given the apparently integrated enterprise business lines<sup>30</sup> among Our Family Home Operating Co., LLC, OFH Properties, LLC, Continental Realty, Continental Business Systems, Inc., Continental Real Estate, Hallmark Communities, Ltd., Our Family Home, and others (collectively, the "Integrated Enterprise"), the Integrated Enterprise may employ certain entities as separate legal persons when it suits the needs of the Enterprise while using other areas of the Enterprise when it does not suit the Enterprise's value maximizing needs. As a result, one logically wonders the following: (1) Who but various arms of the Integrated Enterprise would make modifications to the real property and improvements to comply with the Americans With Disabilities Act ("ADA")? Who would manage the property?;<sup>31</sup> (2) Who but various arms of the Integrated Enterprise would represent the employer of twenty-four-hour caretakers at the subject property?;<sup>32</sup> and (3) Who could reasonably argue that this scenario does not represent a commercial enterprise seeking to avail itself of federal antidiscrimination laws as revenue generation protection, rather than a

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<sup>28</sup> *Our Story*, CONT'L BLDG. SYS., <http://www.continental-buildingsystems.com/About-Us.aspx>, archived at <http://perma.cc/3J2R-3A3Z> (last visited Mar. 15, 2015).

<sup>29</sup> See, e.g., *Granada Invs., Inc. v. DWG Corp.*, 823 F. Supp. 448, 459 (N.D. Ohio 1993) (stating that "the sole duty of a corporation's officers is to maximize shareholder wealth"); see also *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919). In its enduring statement, the Supreme Court of Michigan famously asserted the following:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among its stockholders in order to devote them to other purposes . . . [I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholder and for the primary purpose of benefiting others.

*Id.*

<sup>30</sup> See generally PHILLIP I. BLUMBERG ET AL., *BLUMBERG ON CORPORATE GROUPS* 1–3 (2d ed. 2011 & Supp. 2011–2012).

<sup>31</sup> See *E-mail*, *supra* note 14.

<sup>32</sup> *Id.*

residential enterprise helping persons with Application-specific alleged—but nondiagnosable—disabilities?<sup>33</sup> Such a scenario and use of an Integrated Enterprise is inequitable and contrary to public policy.

*B. Assuming an Integrated Enterprise Exists, How Could the Applicant Receive Authorization to Operate?*

The Applicant underscores the unfortunate behavior of certain social entrepreneurs. For example, Ohio's Administrative Code mandates two things. First, regardless of which of the Integrated Enterprise's fictitious names or divisions would constitute the "operator" for purposes of complying with state law, each Adult Housing Facility ("AHF") property requires a separate license from the Ohio Department of Mental Health and Addiction Services.<sup>34</sup> Because of the interchangeable personnel within the Integrated Enterprise, in this case study, the Applicant currently appears ineligible for a license under the Ohio Administrative Code.<sup>35</sup> Ohio requires an application review process in which the director considers the following:

[A]ny information regarding the past record of the owner . . . and any individuals who are principal participants in an entity that is the owner or manager in operating facilities providing care to adults. The director shall consider whether any of the following actions have been taken against any of those individuals: . . . (6) Denial, *suspension*, or revocation of a professional license.<sup>36</sup>

A law license is a professional license. A strong argument exists that Damante constitutes a principal participant in the subject matter, given not only his e-mails on behalf of the Applicant, but also his having executed the Application submitted to the municipality. Yet as of this writing, Damante has been suspended for the past decade by the State Bar of Texas, according to the State Bar of Texas's website and Membership Department.<sup>37</sup> For this reason, material questions exist as to whether the Integrated Enterprise even qualifies to receive AFH licensure.

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<sup>33</sup> See detailed discussion regarding Alzheimer's and Dementia, *infra* Part II.B.2.b.

<sup>34</sup> OHIO ADMIN. CODE 5122-33-02 (Supp. 2012–2013).

<sup>35</sup> *Id.* § 5122-33-04(B)(6).

<sup>36</sup> *Id.* (emphasis added).

<sup>37</sup> *Find a Lawyer, Mr. Mark A. Damante*, STATE BAR OF TEXAS, [http://www.texasbar.com/AM/Template.cfm?Section=Find\\_A\\_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=234266](http://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=234266), archived at <http://perma.cc/3UUE-8JFP> (last visited Mar. 15, 2015).

Second, at the time of the Application, Ohio's statutory regime indicated that failure to maintain such license, certification or other approval requirements would result in revocation of the home's conditional use certificate.<sup>38</sup> As a result, the possibility exists that either the Ohio licensing agency did not investigate the Applicant's background, the Applicant creatively used the Integrated Enterprise to its advantage by hiding Damante on the Integrated Enterprise's prior applications, or the Applicant or the Integrated Enterprise misled the state agency regarding this decade-long suspension of his professional license.

Nonetheless, the primary aim of the enterprise is to maximize economic value for its owners. As the baby-boom generation ages, a substantial likelihood exists that purported socially beneficial companies will engage in tactics necessary to avail themselves of the federal protections which Congress likely intended to protect natural persons, rather than state-chartered corporations and limited liability entities.

## II. FEDERAL LAW

As a result, if an Application to operate an AFH is rejected, the Enterprise may threaten legal action based on federal and state antidiscrimination laws. Regardless of how much saber-rattling in which an applicant or its legal representatives may engage, such threats do not satisfy the myriad of legal mandates imposed on the AFH applicants if it chooses to pursue an antidiscrimination claim under federal, state, and local law.<sup>39</sup> As one legal scholar noted: "[I]n a handicap[-]discrimination case[,] the person alleging discrimination must establish that the person or persons to live in the residence in question is or are 'handicapped' as defined in the FHAA."<sup>40</sup>

### A. *The Federal Preemption Doctrine*

First, as Justice Souter stated: "federal pre-emption of state law is *only* to be found in a clear congressional purpose to supplant exercises

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<sup>38</sup> See OHIO REV. CODE ANN. § 5119.34 (LexisNexis 2015) (today, the code states that the "department may refuse to issue or renew and may revoke a license if it finds the facility is not in compliance with rules . . .").

<sup>39</sup> See *infra* Part IV.

<sup>40</sup> Robert L. Schonfeld & Seth P. Stein, *Fighting Municipal "Tag-Team": The Federal Fair Housing Amendments Act and Its Use in Obtaining Access to Housing for Persons with Disabilities*, 21 FORDHAM URB. L.J. 299, 307 (1994) (citing *Oxford House, Inc. v. Twp. of Cherry Hill*, 799 F. Supp. 450, 458–60 (D.N.J. 1992) (prospective residents of group home for recovering drug addicts) and *Baxter v. City of Belleville*, 720 F. Supp. 720, 728–30 (S.D. Ill. 1989) (residence for AIDS sufferers)).

of the States' traditional police powers."<sup>41</sup> Under the Federal Fair Housing Act, no clear congressional intent existed to preempt state law in many situations facing municipalities,<sup>42</sup> demonstrating that if that were indeed the case, then logically no state law discrimination cases could exist in the provisions of a state statutory scheme to either mirror the Federal Fair Housing Act or be litigated thereunder.<sup>43</sup> As a result, the preemption doctrine would not apply to remove this case study from an analysis under a federal antidiscrimination statute.

*B. Applying the Federal Fair Housing Act to the Case Study*

1. History and Background of Fair Housing Act

To prevent racial discrimination in housing, Congress enacted Title VIII of the Civil Rights Act in 1968, more commonly known as the "Fair Housing Act" ("FHA").<sup>44</sup> Via the Fair Housing Amendments Act of 1988 ("FHAA"), Congress amended the FHA to prevent discrimination in housing, based on certain other characteristics, such as being handicapped.<sup>45</sup> The FHAA defines "handicap" as "(1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment."<sup>46</sup>

The regulations promulgated under the FHAA state that a "[p]hysical or mental impairment includes . . . [a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss," or "[a]ny mental or psychological disorder."<sup>47</sup> These regulations also define "major life activities" to include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."<sup>48</sup> Given that the term "disability" has become accepted and preferred to the more pejorative term

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<sup>41</sup> *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 115 (1992) (Souter, J., dissenting) (emphasis added).

<sup>42</sup> See Brian E. Davis, *The State Giveth and the Court Taketh Away: Preserving the Municipality's Ability to Zone for Group Homes Under the Fair Housing Amendments Act of 1988*, 59 U. PITT. L. REV. 193, 210 (1997).

<sup>43</sup> See, e.g., OHIO REV. CODE ANN. § 4112.01 (LexisNexis 2015).

<sup>44</sup> Fair Housing Act, Pub. L. No. 90-284, §§ 801-819, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (1994)).

<sup>45</sup> H.R. REP. NO. 100-711, at 2 (1988).

<sup>46</sup> 42 U.S.C. § 3602(h)(1)-(3) (2006).

<sup>47</sup> 24 C.F.R. § 100.201(a)(1)-(2) (2012) (emphasis in original).

<sup>48</sup> 24 C.F.R. § 100.201(b) (2012).

“handicap” (part of why the Americans with Disabilities Act employed term disability, rather than handicap),<sup>49</sup> this Article employs the lexical unit *disability* to refer to what the FHAA defines as a handicap.

2. The Integrated Enterprise’s Application to the Municipality Lacks FHAA Coverage
  - a. The Integrated Enterprise Cannot Be Disabled or Possess an Impairment

Under the FHAA, a “person” admittedly includes corporate persons.<sup>50</sup> But logically, a corporation such as the Enterprise cannot be physically or mentally impaired or disabled. Even assuming the applying LLC is the sole party in interest, the FHAA does not list LLCs as persons, and meaningful distinctions exist between corporations and LLCs,<sup>51</sup> including numerous corporate requirements to adhere to formalities that do not apply to LLCs.<sup>52</sup> Regardless, neither an LLC nor a corporate person can possess (i) a physical or mental impairment that substantially limits a major life activity or (ii) a disability. And a corporation or an LLC cannot have a record of or be regarded as having such an impairment. As a result,

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<sup>49</sup> *Id.*

<sup>50</sup> § 3602(d).

<sup>51</sup> See, e.g., Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375, 424 (1992) (noting the IRS “will treat an unincorporated organization, such as an LLC, as a corporation for tax purposes [only] if it has more corporate than noncorporate characteristics,” including, “(1) associates, (2) an objective to carry on business and divide the gains, (3) continuity of life, (4) free transferability of interests, (5) centralization of management, and (6) limited liability”); *Stone v. Jetmar Props., LLC*, 733 N.W.2d 480, 486 (Minn. Ct. App. 2007) (blending partnership law and corporate law to determine whether LLC formation had occurred) (quoting 14 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 81A.04(1)(a)(iii) (Michael Allan Wolf ed., 2006) (“[M]any, but not all, courts have denied validity to deeds conveying property to corporations which are not incorporated at the time of conveyance”)); *Gottsacker v. Monnier*, 697 N.W.2d 436, 440 (Wis. 2005) (synthesizing corporate and partnership law to determine LLC management rights); *NetJets Aviation, Inc. v. LHC Commc’ns, LLC*, 537 F.3d 168, 176 (2d Cir. 2008) (mixing corporate and partnership law to determine LLC rights relative to limited liability protection); *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1213 (Del. 2012) (reviewing both corporate and partnership law to determine LLC fiduciary duties); D. GORDON SMITH & CYNTHIA A. WILLIAMS, *BUSINESS ORGANIZATIONS: CASES, PROBLEMS, AND CASE STUDIES* 97–140 (Aspen 3d ed. 2012) (explaining each of the above cases in greater detail).

<sup>52</sup> SMITH & WILLIAMS, *supra* note 51, at 93.



OFH Properties, LLC, as the new owner of the subject property, cannot constitute a disabled person for purposes of the FHAA. Perhaps to many readers' surprise, neither can the potential people articulated as the alleged revenue drivers of the Applicant referenced by the Integrated Enterprise in its submitted materials to Montgomery on the Applicant's behalf.<sup>53</sup>

b. The Application's Specific Terms Facially Preclude FHAA Coverage

Although the Application must fail in obtaining FHAA protection for multiple statute-specific reasons discussed throughout Part II, this subsection articulates three unrelated reasons why the case study's subject Application must fail and provides guidance for future parties who may consider seeking CUPs or other zoning variances. Before advancing those reasons, however, this Article emphasizes the need for potential applicants seeking a zoning variance based on purported disabilities to ensure that the purported disabilities listed in the zoning variance application actually exist—particularly when professing to be experts in those disabilities.<sup>54</sup>

1) The DSM-5

Specifically, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, ("DSM-5") serves as the authority that health professionals and researchers employ to diagnose mental disorders.<sup>55</sup> Further,

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<sup>53</sup> See *infra* Part V.C.

<sup>54</sup> See *supra* text accompanying notes 9–14 (claiming that the public face of the Integrated Enterprise's Applicant division is an expert in Alzheimer's and dementia).

<sup>55</sup> Rheana Murray, *DSM-5, the New Mental Illness 'Bible,' May List Internet Addiction Among Illnesses*, N.Y. DAILY NEWS (Feb. 11, 2012, 4:06 PM), <http://www.nydailynews.com/life-style/health/dsm-5-new-mental-illness-bible-list-internet-addiction-illnesses-article-1.1020979>, archived at <http://perma.cc/G3Z8-CLK3> (indicating that the DSM is "widely considered the 'bible' of psychiatric symptoms in the mental-health industry"). The American Psychological Association indicates that:

DSM-5 is the handbook *used by health care professionals in the United States and much of the world as the authoritative guide to the diagnosis of mental disorders*. Clinicians use DSM-5 diagnoses to communicate with their patients and with other clinicians, and to request reimbursement from insurance organizations. DSM-5 diagnoses may also be used by public health authorities for compiling and reporting morbidity and mortality statistics. *Another important role of DSM is to establish diagnoses for research on mental disorders*. Only by having consistent and



from a business standpoint, the DSM-5's diagnostic codes serve as the basis from which individual health providers<sup>56</sup> and hospitals<sup>57</sup> receive payment from health insurers, including government insurers such as Massachusetts's "Romneycare,"<sup>58</sup> the United States's "Obamacare,"<sup>59</sup> and

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reliable diagnoses can researchers determine the risk factors and causes for specific disorders, and determine their incidence and prevalence rates.

*Insurance Implications of DSM-5*, AM. PSYCHIATRIC ASS'N (2013), available at <http://www.psychiatry.org/File%20Library/Practice/DSM/DSM-5/Insurance-Implications-of-DSM-5.pdf> (emphasis added).

<sup>56</sup> *Id.* Rhetorically inquiring, "Can clinicians continue to use the DSM-IV-TR diagnostic criteria?", and responding that:

[T]here may be brief delays while insurance companies update their claim forms and reporting procedures to accommodate DSM-5 changes, and clinicians should use DSM-IV-TR diagnoses and codes when required by a specific company. . . . [However], [t]he APA [American Psychiatric Association] is working with these groups with the expectation that a transition to DSM-5 by the insurance industry can be made by December 31, 2013. As part of the transition to DSM-5, there will also need to be updates of questions in board certification examinations and quality assessments for medical record reviews. APA will be providing periodic updates of agreements with federal agencies, private insurance companies, and medical examination boards as they become available.

*Id.*

<sup>57</sup> See Jay Neugeboren, *The Consolation of a Psych Diagnosis*, THE ATLANTIC (May 8, 2013, 12:47 PM), <http://www.theatlantic.com/health/archive/2013/05/the-consolation-of-a-psych-diagnosis/275608/>, archived at <http://perma.cc/NY2S-3DW8> (asserting that the DSM's influence "cannot be overestimated: its diagnostic categories are required for private insurance reimbursement, government payments for mental health treatment, and for public and private research funding. It serves as the basis of psychiatric law for our court systems, regulatory agencies, schools, social services, prisons, juvenile detention facilities, and drug companies"). This article quotes Frank Putnam, a professor of child psychiatry at Children's Hospital Medical Center in Cincinnati, who states:

"You need a diagnosis to bill—that's the way the world works. Most of the interventions we do at my center aren't billable—we lose \$220 for every kid we see. You can't just treat somebody without giving a formal diagnosis," and as a result, "the DSM has become the tail that wags the dog." In addition, without an official diagnosis, there's no money for research, since you can't, for example, go to the National Institute of Mental Health and ask to be funded for a non-existent disease.

*Id.*; see also *Top-Ranked Pediatric Hospitals for Cancer*, U.S. NEWS & WORLD REPORT, <http://health.usnews.com/best-hospitals/pediatric-rankings>, archived at <http://perma.cc/PUE7-W82C> (last visited Mar. 15, 2015) (ranking Cincinnati's Children's Hospital number one among the top-ranked pediatric hospitals for cancer).

<sup>58</sup> See, e.g., AM. PSYCHIATRIC ASS'N, *supra* note 55, at 4.

<sup>59</sup> See, e.g., Michael Dhar, *As DSM-5 Launches, the Drama Ends and the Effects Begin*, THE FIX (May 21, 2013), <http://www.thefix.com/content/dsm-5-diagnosis-mental-health-addiction-controversy8434?page=all>, archived at <http://perma.cc/BZM8-6UT7> ("The DSM-5 revisions

certain international universal healthcare systems.<sup>60</sup> In fairness, however, this Article acknowledges its author's previously published personal disagreements with the DSM's historic maltreatment of individuals possessing certain traits.<sup>61</sup> The discomfort with the DSM has been the DSM's *over*-inclusiveness, not its *under*-inclusiveness. And even authors who have vigorously disagreed with those previously published personal disagreements share this concern.<sup>62</sup> This unease particularly exists in light of the mounting evidence that large pharmaceutical companies engage in medicalization<sup>63</sup> and disease mongering.<sup>64</sup> These tactics involve pharmaceutical

were based on the same healthcare research that shaped Obamacare, and will work in tandem with the legislation to encourage early intervention in substance use disorders," according to Charles O'Brien, M.D., Ph.D., who serves as the leader of "the University of Pennsylvania's Center for Studies in Addiction and chair of the *DSM-5*'s Substance-Related Disorders Work Group").

<sup>60</sup> See, e.g., AM. PSYCHIATRIC ASS'N, *supra* note 55, at 2–3.

<sup>61</sup> See David Groshoff, *The Wrong Track, Baby—How Damage to Gay Youth was Borne This Way: Via Ideologically Bound Law Reviews Publishing "Hopy Changey Stuff,"* 18 CARDOZO J. L. & GENDER 275, 281–86, 314 n.245 (2012) (attacking previous editions of the DSM for their notorious created mental disorders applicable to individuals in the LGBTQIA community).

<sup>62</sup> Compare LEONARD SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES 9 (Doubleday 2005) (advocating strongly for sex-segregated education); LEONARD SAX, BOYS ADRIFT: THE FIVE FACTORS DRIVING THE GROWING EPIDEMIC OF UNMOTIVATED BOYS AND UNDERACHIEVING YOUNG MEN 22 (Basic Books 2007) (same); Leonard Sax, *Reclaiming Kindergarten: Making Kindergarten Less Harmful to Boys*, 2 PSYCH. OF MEN & MASC. 3, 9–11 (2001) (same); with David Groshoff, *Unchartered Territory: Market Competition's Constitutional Collision with Entrepreneurial Sex-Segregated Charter Schools*, 2010 BYU EDUC. & L.J. 307, 356–57 (2010) (indicating strong support for charter schools as a form of social entrepreneurship but vigorously opposing sex-segregated publicly funded charter schools based on analysis of more recently reliable published data, in addition to a detailed analysis of statutory, legislative, and administrative history contextualizing the Court's guidance on the matter). Cf. Leonard Sax, Opinion, *'Unspecified Mental Disorder'? That's Crazy*, WALL ST. J., June 27, 2013, at A21 (stating, that the DSM-5 "loosens the rules [for obtaining a psychiatric diagnosis] in a disturbing way" because, for example, "[t]he DSM-5 offers a completely new diagnostic category 'Unspecified Mental Disorder' . . . . The only requirement is that you 'do not meet the full criteria for any mental disorder'").

<sup>63</sup> See Shankar P. R. & Subish P., *Disease Mongering*, 48 SINGAPORE MED. J. 275, 275–77 (2007). This article provides a global case study, asserting that:

Convincing healthy people that they are sick and in need of medicines creates an enormous market for drugs and medicines. Medicalisation is the process of turning ordinary life events and its customary ups and downs into medical conditions . . . Disease mongering can turn ordinary ailments into medical problems, see mild symptoms as serious, treat personal problems as medical ones, see risks as diseases, and frame prevalence estimates to increase potential markets . . . The industry has

companies' inventing and branding disorders<sup>65</sup> with a goal of marketing<sup>66</sup> their respective patented prescription drugs,<sup>67</sup> which will simultaneously

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learnt to influence the prescribing behaviour of doctors indirectly and to use "opinion leaders" from the medical profession to promote their products. "Illness promotion" involves using public awareness campaigns in the media to encourage people to seek new treatments, and ensuring support to patient-help organisations. "Disease awareness" campaigns are linked to the marketing strategies of drug companies. Companies fund and facilitate disease awareness campaigns and consumer groups using their public relation and marketing departments. The media is targeted with stories and reports which create a fear about a disease or a particular condition and highlight the latest treatment . . . Disease mongering can generate huge profits for the industry.

*Id.*

<sup>64</sup> See, e.g., Ray Moynihan & David Henry, *The Fight Against Disease Mongering: Generating Knowledge for Action*, 3 PLoS MED. 425, 425 (2006). This article argues that:

[D]isease mongering is the selling of sickness that widens the boundaries of illness and grows the markets for those who sell and deliver treatments. It is exemplified most explicitly by many pharmaceutical industry-funded disease-awareness campaigns—more often designed to sell drugs than to illuminate or to inform or educate about the prevention of illness or the maintenance of health.

*Id.*

<sup>65</sup> See Vince Parry, *The Art of Branding a Condition*, MED. MKTING. & MEDIA, May 2003, at 46, 49, available at <https://sdsuwriting.pbworks.com/f/Parry+art+of+branding+a+condition.pdf> (demonstrating how marketing on behalf of pharmaceutical clients fosters the creation of new disorders, including mental disorders, such as "Xanax" and "panic disorders"); cf. *Not 'Crazy Cat Ladies': Hoarding Gets New Diagnosis*, NBC NEWS (Dec. 8, 2012, 12:46 PM), [http://vitals.nbcnews.com/\\_news/2012/12/08/15757938-not-crazy-cat-ladies-hoarding-gets-new-diagnosis](http://vitals.nbcnews.com/_news/2012/12/08/15757938-not-crazy-cat-ladies-hoarding-gets-new-diagnosis), archived at <http://perma.cc/2J42-XAN5> (indicating that on the heels of reality television successes regarding programming observing peoples' hoarding behaviors, the DSM-5 now recognizes a new disorder). Distinct from the prior diagnosis of "obsessive-compulsive disorder," Mapes's article describes the specifically named "hoarding disorder":

The revised diagnosis should "result in more people having access to treatment," says Randy Frost, a professor of psychology at Smith College . . . ["]Once it shows up in DSM, there will be much more pressure on clinicians to train in how to treat this problem" . . . [F]rost stresses there is no "magic pili" [sic] . . . We don't know yet whether there are medications that might be useful for this," he says. "But *that's one of the things that will happen now that it's in the DSM. There will be an interest in researching this.*" Until then, hoarders can get help overcoming their urge to acquire and save through cognitive behavior therapy.

*Id.* (emphasis added). In other words, the national news organization is implicitly acknowledging that a pill will arrive now that the DSM diagnosis has been created.

<sup>66</sup> See Parry, *supra* note 65.

<sup>67</sup> See, e.g., RAY MOYNIHAN & ALAN CASSELS, *SELLING SICKNESS: HOW THE WORLD'S BIGGEST PHARMACEUTICAL COMPANIES ARE TURNING US ALL INTO PATIENTS* ix (Nation Books 2005)

(i) drive material revenue growth; and (ii) mask marketing as pharmaceutical research and development (“R&D”),<sup>68</sup> which will (a) increase the firms’ interest tax shields,<sup>69</sup> (b) lead to greater real cash flows,<sup>70</sup> and (c) exploit “accounting gimmickry”<sup>71</sup> that collectively result in skewed net income derived figures used by investors,<sup>72</sup> leading to an increased likelihood of a strong share price in the market.<sup>73</sup>

Despite its quirks, however, the DSM-5 unquestionably sets the standards for what diagnoses legitimately exist for healthcare providers and researchers to employ. Unfortunately, this schema may cause considerable problems for zoning variance applicants seeking AHFs. First, although

(asserting that “[t]he marketing strategies of the world’s biggest drug companies now aggressively target the healthy and the well. The ups and downs of daily life have become mental disorders, common complaints are transformed into frightening conditions, and more and more ordinary people are turned into patients [by using] promotional campaigns that exploit our deepest fears”).

<sup>68</sup> See MARCIA ANGELL, *THE TRUTH ABOUT THE DRUG COMPANIES: HOW THEY DECEIVE US AND WHAT TO DO ABOUT IT* 156–72 (Random House 2004) (revealing what the author witnessed during her time as the Editor-in-Chief of the *New England Journal of Medicine*).

<sup>69</sup> See generally Pablo Fernández, *Valuing Companies by Cash Flow Discounting: Ten Methods and Nine Theories* (Univ. of Navarra, IESE Bus. Sch., Univ. of Navarra, Working Paper 451, Rev. 2006), available at <http://www.iese.edu/research/pdfs/di-0451-e.pdf> (explaining that all ten discounted cash flow methodologies arrived at the same value, but differences arose when debt and associated interest tax shields occurred); but see generally Pablo Fernández, *The Value of Tax Shields is NOT Equal to the Present Value of Tax Shields*, 73 J. FIN. ECON. 145 (2004) (alerting the reader that tax shields’ value is not necessarily their value discounted to the present).

<sup>70</sup> Many ways exist to measure cash flow, given the readership of legal scholarship in law journals, this author employs the relatively simple “Earnings Before Interest Taxes, Depreciation, and Amortization” (“EBITDA”) as a proxy for cash flow. See, e.g., David Groshoff, *Would “Junkholder Primacy” Reduce Junk Corporate Governance?*, 13 J. BUS. & SEC. L. 59, 90–91 (2012); David Groshoff, *Creatively Financed Legal Education in a Marketized Environment: How Faculty Leveraged Buyouts Can Maximize Law Schools’ Stakeholder Values*, 17 FORDHAM J. CORP. & FIN. L. 387, 439–41 (2012).

<sup>71</sup> See, e.g., Walter P. Schuetze, *What Are Assets and Liabilities? Where Is True North? (Accounting That My Sister Would Understand)*, 37 ABACUS 1, 23 (2001) (“Earnings management is a scourge in the U.S.A. Earnings management is the ultimate in accounting gimmickry”).

<sup>72</sup> For example, the denominator in a Price/Earnings ratio, commonly used by investors including Warren Buffet, is based on accounting rules. While sophisticated financiers such as Buffet may understand how to undo the accounting gimmickry, many individual investors may not. See, e.g., Stephen H. Penman, *The Articulation of Price-Earnings Ratios and Market-to-Book Ratios and the Evaluation of Growth*, 34 J. ACCT. RES. 235, 235–36 (1996).

<sup>73</sup> Cf. *supra* note 29 and accompanying text (discussing the corporate primary objective to maximize shareholder value).

the Application seeks a home for persons with “Alzheimer’s or dementia,”<sup>74</sup> dementia no longer constitutes a recognized disorder under the DSM-5. Second, a diagnosis of Alzheimer’s occurs only post-mortem. Third, the Applicant, Enterprise, or both appear to violate the FHAA by simultaneously seeking to cloak themselves in the FHAA’s protections while truly acting in furtherance of the Integrated Enterprise’s other commercial real estate business activities.<sup>75</sup>

## 2) Dementia Is No Longer a Recognized Mental Disorder Under the DSM

Per the prior Diagnostic Statistical Manual of Mental Disorders, the Fourth Edition, Text Revision (DSM-IV-TR),<sup>76</sup> Alzheimer’s was considered a particular form of dementia that required a diagnosis of dementia as a condition precedent to a diagnosis of possible or probable Alzheimer’s (generally known as possible or probable “Dementia of the Alzheimer’s Type” or “DAT”).<sup>77</sup> However, those diagnoses no longer occur, and were no longer possible at the time that the Applicant submitted its Application to the municipality.

The public knew the removal of dementia from DSM-5’s list of mental disorders was in the works for many years before the American Psychiatric Association published its removal, with advance notice of its contents and release date, on May 18, 2013.<sup>78</sup> Although neurocognitive disorders or other diagnoses may subsume what was once diagnosed as dementia,<sup>79</sup> dementia nonetheless no longer represents a recognized mental

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<sup>74</sup> *The Application*, *supra* note 4.

<sup>75</sup> See discussion *infra* Part V.B.

<sup>76</sup> AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 154 (4th ed. 2000). This manual is commonly referred to as *DSM-IV-TR*.

<sup>77</sup> *Id.*; see also PETER J. WHITEHOUSE & DANIEL GEORGE, THE MYTH OF ALZHEIMER’S: WHAT YOU AREN’T BEING TOLD ABOUT TODAY’S MOST DREADED DIAGNOSIS 103 (2008) (arguing that the Alzheimer’s disease is a social construct that simply represents the “medicalization of brain aging”). The DSM-5 was just published in May 2013, and people and practitioners are still digesting the changes from the DSM-IV-TR.

<sup>78</sup> See, e.g., Marguerite Mantao-Rao, *Will New DSM-5 Diagnosis End ‘Dementia’ Stigma?*, HUFFINGTON POST (Apr. 5, 2012, 5:38 PM), [http://www.huffingtonpost.com/marguerite-manteaurao/dsm-dementia\\_b\\_1404224.html](http://www.huffingtonpost.com/marguerite-manteaurao/dsm-dementia_b_1404224.html), archived at <http://perma.cc/NJU6-GENV>; see also *supra* notes 55–56 (indicating in advance notice to various constituencies of what would appear in the DSM-5, well before its official release); *Highlights of Changes From DSM-IV-TR to DSM-5*, AM. PSYCHIATRIC PUBL’G at 16–17 (2003).

<sup>79</sup> See *supra* note 62 (indicating that nearly anything can now receive a diagnosis as a mental disorder under the DSM-5’s catchall provisions).



disorder. As a result, the public fact of the Integrated Enterprise's—Our Family Home<sup>80</sup>—specifically indicated on its Application a desired purpose “to operate an Adult Family Home for up to five Alzheimer's and/or dementia patients at the existing single family house.”<sup>81</sup> Yet the municipality received the submitted Application subsequent to the DSM-5 having removed dementia as a disorder.<sup>82</sup>

The Application, per its own terms, cannot lead to future potential residents receiving a dementia diagnosis because that diagnosis no longer exists. If approved, a CUP application from a company which, by its own free will, affirmatively and intentionally limited itself to operating an AHF for residents on the basis of two mental conditions, one of which is no longer a recognized mental disorder and the other can only be diagnosed post-mortem, would ultimately lead to an empty residence. In addition, a rejection of such an application could not lead to any legitimate claims of discrimination against persons who have a record of any impairment or are regarded as having such impairment because the municipality's decision to deny such an application would be made with the knowledge that the specifically alleged impairment does not constitute a legitimate diagnosis.

### 3) Alzheimer's Diagnoses Can Occur Only Post-Mortem

Beyond the need of potential AHF applicants to ensure their application lists an existing diagnosable condition when it submits a zoning variance to a municipality, potential applicants must also ensure that they understand the scientific basis of when and how any listed recognized-diagnosable condition can occur. For example, the alleged experts in Alzheimer's who authorized the case study's Application chose to employ the specific term “Alzheimer's,” not “Probable Alzheimer's” or “Possible Alzheimer's.”<sup>83</sup> These distinctions result in consequential differences.

For decades, it has been a scientific fact that verifiable diagnoses of Alzheimer's can occur only after death. This consistent scientific fact has remained unchanged from the initial peer-reviewed scientific publications

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<sup>80</sup> See *supra* notes 10–14 (discussing the CEO of Our Family Home).

<sup>81</sup> *Notice of Public Hearing*, *supra* note 6.

<sup>82</sup> Guy McKhann et al., *Clinical Diagnosis of Alzheimer's Disease: Report of the NINCDS-ADRDA Work Group Under the Auspices of Department of Health and Human Services Task Force on Alzheimer's Disease*, 34 *NEUROLOGY* 939, 940 (1984), available at <http://www.neurology.org/content/34/7/939.full.html>, archived at <http://perma.cc/9AY7-GZGR>.

<sup>83</sup> *Id.*

regarding Alzheimer's in 1984 through the interim, per the National Institute on Aging,<sup>84</sup> to internationally peer-reviewed scientific journals published as recently as Spring 2013.<sup>85</sup> Further, according to PubMed, the resource library for the National Center for Biotechnology Information and a division of the National Library of Medicine at the National Institutes of Health, "[t]he *only* way to formally confirm a diagnosis of Alzheimer's is by the presence of plaques in the brain in a post-mortem after the patient has died."<sup>86</sup>

The inability to ascribe an Alzheimer's diagnosis to individuals during their lifetime is similar to the popular media stories in 2013 regarding the brain trauma potentially impacting former National Football League ("NFL") players. For example, former San Diego Chargers Running Back Ronney Jenkins took many hits to the head during his playing career in the NFL.<sup>87</sup> Based on his symptoms, Jenkins believes that he suffers from chronic traumatic encephalopathy ("CTE")—the same diagnosis applied to Jenkins's fellow-former Chargers teammate, star linebacker Junior Seau, who committed suicide in 2012 by shooting himself.<sup>88</sup> Despite Jenkins's belief that his symptoms reflect CTE, "he will never be sure [because] [t]he only way to diagnose CTE is after death—by analyzing brain tissue and finding microscopic clumps of an abnormal protein called tau."<sup>89</sup> Boston University School of Medicine's Professor and co-founder of the Center for the Study of Traumatic Encephalopathy Robert Stern

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<sup>84</sup> See, e.g., McKhann et al., *supra* note 82, at 940–41 (indicating that diagnosis of Alzheimer's occurs post-mortem); see also *Alzheimer's Disease: Fact Sheet*, ALZHEIMER'S DISEASE EDUC. & REFERRAL CENT. (July 2011), [http://www.nia.nih.gov/sites/default/files/alzheimers\\_disease\\_fact\\_sheet\\_0.pdf](http://www.nia.nih.gov/sites/default/files/alzheimers_disease_fact_sheet_0.pdf) ("Alzheimer's can be definitively diagnosed only after death by linking clinical measures with an examination of brain tissue and pathology in an autopsy.").

<sup>85</sup> See Lydia C. B. Fletcher et al., *Diagnosing Alzheimer's Disease: Are We Any Nearer to Useful Biomarker-based Non-invasive Tests?*, 9 *GMS HEALTH TECH. ASSESS.* 1, 2 (2013), available at <http://www.egms.de/static/pdf/journals/hta/2013-9/hta000107.pdf> ("A definitive diagnosis of Alzheimer's disease can be made only through autopsy after death, by linking clinical measures with an examination of brain tissue.").

<sup>86</sup> See *Details lacking on 'new Alzheimer's test'*, PUBMED HEALTH (Apr. 16, 2012, 3:33 PM), <http://www.ncbi.nlm.nih.gov/pubmedhealth/behindtheheadlines/news/2012-04-16-details-lacking-on-new-alzheimers-test/>, archived at <http://perma.cc/C8WD-DE4G> (emphasis added).

<sup>87</sup> Stephanie Smith, *Study Offers Clues about How Athletes' Brain Disease Begins*, CNN (Aug. 22, 2013, 7:57 AM), <http://www.cnn.com/2013/08/21/health/cte-study-ronney-jenkins/>, archived at <http://perma.cc/SJQ8-QUUD>.

<sup>88</sup> Nadia Kounang & Stephanie Smith, *Seau Had Brain Disease that Comes From Hits to Head, NIH Finds*, CNN (Jan. 11, 2013, 10:18 AM), <http://www.cnn.com/2013/01/10/health/seau-brain-disease/index.html>, archived at <http://perma.cc/UX5P-2JXE>.

<sup>89</sup> Smith, *supra* note 87.



indicated that a problem exists when people clinically diagnose CTE because “[t]here is no framework to make that diagnosis while someone is alive.”<sup>90</sup>

In this case study, based on appearance of the Applicant being a self-professed expert in Alzheimer’s,<sup>91</sup> it is reasonable to believe the Applicant knew that the diagnosis of Alzheimer’s can only occur post-mortem and questioned why such a term would be used in an application submitted to a municipality.<sup>92</sup> Because “CTE can result in Alzheimer’s-like symptoms such as dementia, memory loss, *aggression* and depression,”<sup>93</sup> the distinction between symptoms that can indicate either CTE or Alzheimer’s (and a confirming diagnosis of which disorder manifested the symptoms) represents a meaningful difference for that person, his friends, family, healthcare professionals, researchers, and here, the law.<sup>94</sup> Based on the specific Application language on which the municipality or court must evaluate the Application,<sup>95</sup> no one with an Alzheimer’s diagnosis could live at the subject property in this case study. Additionally, the rejection of such a flawed application could not lead to any legitimate claims of discriminating against persons who have a record of, or are regarded as having, any impairment because only a deceased individual can be diagnosed with Alzheimer’s.

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<sup>90</sup> *Id.*

<sup>91</sup> See *supra* notes 10–14 and accompanying text (discussing the CEO of Our Family Homes).

<sup>92</sup> Underscoring this fact’s particular relevance is the purported founder of Our Family Home’s alleged status as a “National Alzheimer’s Ambassador” and “a trained speaker of the local Alzheimer’s Speakers Bureau, which goes out into the community to educate small and large organizations about Alzheimer’s disease.” *Founder, OUR FAMILY HOME*, <http://www.ourfamilyhomeinc.com/founder.html>, archived at <http://perma.cc/5B2B-2WEB> (last visited Mar. 15, 2015) (excepting that the language is phrased in a way that questions whether the organization or the CEO actually communicates to the public on Alzheimer’s related matters).

<sup>93</sup> Kounang & Smith, *supra* note 88 (emphasis added).

<sup>94</sup> See Robert A. Stern et al., *Clinical Presentation of Chronic Traumatic Encephalopathy*, 81 NEUROLOGY 1122, 1124–27 (2013), available at <http://www.bu.edu/cte/files/2013/09/CTE-Neurology-2013-Stern-1122-9.pdf> (indicating that a genetic link appears to exist with recovery and cognition in CTE, because the study subjects who lacked CTE represented a smaller population than CTE subjects relative to possessing the APOE Gene).

<sup>95</sup> In early August 2013, the municipality that was the subject of this case study became so confused with the situation, that the municipality filed an action seeking a declaratory judgment on the matter from state court. Complaint for Declaratory Relief at 2, *City of Montgomery v. Our Family Home, Inc.*, No. A1305315 (Hamilton Cnty. of Common Pleas Ct. Aug. 30, 2013), ECF No. [hereinafter the Complaint] (“Defendants, through one entity or another which is unclear, have submitted the June 7, 2013 application to Montgomery for the approval of an Adult Family Home to house up to five (5) unrelated resident individuals suffering from Alzheimer’s or dementia.”).

## 4) Synthesis

Therefore, by applying the undisputed published and peer-reviewed scientific reality to the facts of the case study, it is evident that: (1) dementia is not a recognized mental disorder diagnosable under the DSM-5, and dementia represents the diagnosable condition included in the Application which was filed following the adoption of the DSM-5 by supposed experts in treating persons with these alleged conditions; and (2) a confirmed diagnosis of Alzheimer's cannot occur until after an individual diagnosed with probable or possible Alzheimer's has died. As a result, an applicant seeking a zoning variation or a CUP should be wary of submitting such an application on the basis of narrowly tailored and specifically alleged disorders or impairments for which living people cannot receive a diagnosis. Without such a diagnosis, discrimination under the FHAA is moot since facially the application must fail of its own merits.

Conversely, in the face of threats by a large and apparently well-capitalized integrated corporate enterprise, no small municipality should simply believe that the municipality must accept a zoning variance or CUP application or else face an inevitable losing legal battle. Should a future zoning variance or CUP applicant wish to avail itself of the FHAA's protections, then that applicant ought to apply the broad definitions and descriptions of disabilities articulated and available under the FHAA and the rules and regulations promulgated thereunder and supported by the almost limitless possibilities abounding in the DSM-5<sup>96</sup>—excepting, of course, Alzheimer's and dementia. In this Article's case study, had the Applicant chosen that route, the Applicant likely would have avoided not only these legal problems but also additional legal and policy problems.<sup>97</sup>

### III. APPLICANTS SHOULD EMPLOY CAUTION NOT TO VIOLATE THE FHAA'S POLICIES AND COME BEFORE A COURT OR TRIBUNAL WITH UNCLEAR HANDS

By refusing to accept federal funding, an applicant may cleverly attempt to avoid certain requirements of § 504 of the Rehabilitation Act of 1973,<sup>98</sup> which prohibits disability-based discrimination in federally

<sup>96</sup> See *supra* notes 56, 62 (describing the DSM-5's catch-all provision).

<sup>97</sup> See *infra* Part IV.

<sup>98</sup> See 29 U.S.C. §§ 791–96(i) (1988). 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, 940 (1994) (“To bring a successful claim under section

funded programs or activities. However, while the FHAA may not apply to the case study's municipality,<sup>99</sup> the FHAA may apply to applicants such as the Integrated Enterprise<sup>100</sup> whose applications are overly specific. This assertion exists because "it is unlawful to refuse to rent or sell to a person who has a record of being disabled or who is perceived as being disabled."<sup>101</sup>

Regardless of the ADA, however:

[T]he Fair Housing Act's no-inquiry regulation . . . prohibits a housing provider from inquiring into a handicap of an applicant for tenancy. Courts have ruled consistently that the Fair Housing Act (FHA) applies to nursing homes, assisted living facilities, and other long-term care facilities, because each of these facilities is considered a "dwelling" under the FHA.<sup>102</sup>

Thus, as a matter of basic public policy, a zoning variance or CUP applicant should not be permitted to pick and choose which disabled persons the applicant admits to an AHF. The case study's Application, by its very wording, discriminates against all disabled persons, except for living natural persons with the impossible diagnoses of dementia, Alzheimer's, or both. Moreover, courts have held that simply requesting a description of an individual's disability exceeds the scope of permissible inquiry.<sup>103</sup>

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504, a plaintiff must establish that: (1) the challenged program or activity receives federal financial assistance; (2) she or he is an 'individual with handicaps' under the Act; (3) she or he is 'otherwise qualified' for that specific program or activity; and (4) she or he was excluded from the program solely on the ground of her or his handicap."); *see generally* Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002 (3d Cir. 1995) (indicating that a nursing home wanting to serve persons with one group of disabilities or disorders violated antidiscrimination laws by refusing to admit an applicant with a different diagnosed disorder). This Author lacks information as to whether any federal funding has been received by the greater Integrated Enterprise. Compare 42 U.S.C. § 12182(a)-(b) (2006) (requiring federal funding as a condition precedent to an antidiscrimination claim), with the Americans with Disabilities Act (ADA), 29 U.S.C. § 794(a) (2006) (lacking any federal funding condition to bring a disability-based discrimination claim in a place of public accommodation).

<sup>99</sup> See *supra* Part II.B.2.

<sup>100</sup> This Article specifically refers to the LLC entity here, but given the questionable nature and scope of the Integrated Enterprise, a municipality should seek to determine whether the greater enterprise has received federal funding. See the Complaint, *supra* note 95 (describing the complaint for declaratory relief).

<sup>101</sup> Kanter, *supra* note 98, at 947.

<sup>102</sup> Eric M. Carlson, *Disability Discrimination in Long-Term Care: Using the Fair Housing Act to Prevent Illegal Screening in Admissions to Nursing Homes and Assisted Living Facilities*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 363, 364 (2007).

<sup>103</sup> Robards v. Cotton Mill Assocs., 677 A.2d 540, 544 (Me. 1996).

Furthermore, a municipality's approval of such an application may impose unnecessary risk management on the municipality. For example, by agreeing to such a CUP application, a municipality would wrongly place its imprimatur on the very discrimination that the FHAA seeks to avoid.<sup>104</sup> As a result, such a municipality would open itself to facing legitimate FHAA discrimination charges by third parties for approving a zoning variance or CUP application that permits explicit discriminatory and segregation-based admissions policies to AHFs. Considering the studies evidencing that people suffering from a given disability do not fare better when housed with other people suffering from the same disability,<sup>105</sup> coupled with the fact that integration was a major policy rationale underlying the FHAA, regardless of its motives, an AHF-based applicant should not discriminate against certain types of disabilities when making admission decisions. Put simply, no single alleged disability should be entitled to preference or discriminatory admissions treatment over another disability.<sup>106</sup>

Relative to discriminatory admissions procedures, the Court's guidance in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>107</sup> is instructive to municipalities and other tribunals when considering zoning-variance or CUP applications that include a stated purpose of explicit admissions-based discrimination on the specific basis of a potential resident's disability.<sup>108</sup> To paraphrase Chief Justice Roberts, in discriminatory admissions practices perhaps "the way to stop discrimination" in disability-based admissions "is to stop discriminating" on that very basis.<sup>109</sup>

A. *Assuming Application of Law to Scientific Fact Does Not Govern the Case Study*

While Chief Justice Roberts and the Court ultimately interpret the law, the Sixth Circuit Court of Appeals is one step below the Supreme Court

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<sup>104</sup> See 42 U.S.C. § 3601 (2006).

<sup>105</sup> See Stephen J. Taylor et al., *The Nonrestrictive Environment: A Resource Manual on Community Integration for People with the Most Severe Disabilities* 49–50 (Jan. 1986) (Ctr. of Human Pol'y 1986); 2 JULIE ANN RACINO ET AL., *HOUSING, SUPPORT AND COMMUNITY: CHOICES AND STRATEGIES FOR ADULTS WITH DISABILITIES* 357, 361 (1993).

<sup>106</sup> See, e.g., *Implementation of the Fair Housing Amendments Act of 1988*, 54 Fed. Reg. 3232, 3245 (1989) (codified at 24 C.F.R. § 100.201 (1997)).

<sup>107</sup> 551 U.S. 701 (2007).

<sup>108</sup> For a detailed discussion of this admissions-based discrimination as applied to a case study in the educational entrepreneurship setting, see Groshoff, *Unchartered Territory*, *supra* note 2, at 342–44.

<sup>109</sup> *Parents Involved in Cmty. Sch.*, 551 U.S. at 748.

and is the controlling federal appellate court for all of Ohio, Michigan, Kentucky, and Tennessee,<sup>110</sup> the jurisdiction of the case study and locus of very recent declaratory relief action. In agreement, the Seventh Circuit cogently proclaimed: “[N]ot every refusal to grant a conditional use permit, even if the request is reasonable, violates the FHAA.”<sup>111</sup> Keeping this admonition in mind and applying it to the case study, the Integrated Enterprise, as a corporation, may constitute an “aggrieved person” under the FHAA but the Applicant, as a limited liability company, may not.<sup>112</sup>

Nonetheless, the FHAA defines an “aggrieved person” as “any person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.”<sup>113</sup> However, several conditions exist before any potential aggrieved person may assert an alleged discriminatory housing practice under the FHAA. Specifically, the FHAA requires a violation of either: (i) § 3604; (ii) § 3605; (iii) § 3606; or (iv) § 3617.<sup>114</sup> Reviewing each of these provisions in turn demonstrates that in a situation similar to the subject case study, a municipality’s rejection of a zoning-variance or CUP-based AHF application does not give rise to a legitimate FHAA violation.

*B. 42 U.S.C. § 3604—Direct Threat Safe Harbors and Other Foreseeable Threats*

1. Direct Threat Safe Harbor Exemption

Vital to both federal law and public policy is the FHAA’s safe-harbor provision.<sup>115</sup> The safe-harbor provision states in no uncertain terms that the FHAA’s protections do apply to persons “whose tenancy would

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<sup>110</sup> *Additional Information on the Court of Appeals*, U.S. CT. APPEALS FOR THE SIXTH CIRCUIT, [http://www.ca6.uscourts.gov/internet/court\\_of\\_appeals/courtappeals.htm](http://www.ca6.uscourts.gov/internet/court_of_appeals/courtappeals.htm), archived at <http://perma.cc/2MPF-SYDL> (last visited Mar. 15, 2015).

<sup>111</sup> *Erdman v. City of Fort Atkinson*, 84 F.3d 960, 963 (7th Cir. 1996).

<sup>112</sup> The statutory language is unclear, as the FHAA was enacted prior to limited liability companies gaining popularity and the FHAA is silent as to limited liability companies. See *supra* note 51 (detailing judicial analyses of LLCs that employ a mixture of partnership law and corporate law to arrive at LLC law and quoting the IRS that an LLC is not incorporated).

<sup>113</sup> 42 U.S.C. § 3602(i) (2006).

<sup>114</sup> 42 U.S.C. § 3602(f) (2006).

<sup>115</sup> Act of Sept. 13, 1988, Pub. L. No. 100-430, § 804(f)(9), 1988 U.S.C.C.A.N. (102 Stat.) 1622 (current version at 42 U.S.C. § 3604(f)(9) (2006)).

constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.”<sup>116</sup> Buttressing the statutory language, the FHAA’s legislative history compounds problems for potential applicants who submit applications that are too narrowly tailored, presumably such as the case study’s Application. In particular, the FHAA’s legislative history demonstrates that Congress enacted the safe-harbor provision specifically “*to allay the fears of those who believe that the non-discrimination provisions of this Act could force . . . [transactions related] to individuals whose tenancies could pose such a risk*” of a direct threat against them.<sup>117</sup> This evidences a policy rationale not to evict a tenant ex-post, following a direct threat, but instead to assuage concerns ex-ante related to potential direct threats in the future.

A page on the Applicant’s website as of June 20, 2013,<sup>118</sup> applying the FHAA’s safe harbor provision to the case study, stated that its related entities’ residents display “difficult behaviors, like aggression, mood swings, wandering, or sundown[ing].”<sup>119</sup> Another webpage describes a resident

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<sup>116</sup> *Id.*

<sup>117</sup> H.R. REP. NO. 100-711, at 28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2189 (emphasis added) (additional views of various members of the House Judiciary Committee criticizing the breadth of the handicap provisions in the bill that eventually became the 1988 Amendments Act).

<sup>118</sup> See *Frequently Asked Questions*, OUR FAMILY HOME, <http://www.ourfamilyhomeinc.com/faq.html>, archived at <http://perma.cc/4QFE-2ZF6> (last visited Mar. 15, 2015). This Article refers to “Our Family Home” broadly here, as the website suggests a corporation by virtue of the “inc.” at the end of the web address, which would be a different entity under Ohio law in 2006. See Articles of Incorporation for Our Family Home, Inc., STATE OF OHIO CERTIFICATE (Doc. No. 200608202924), available at <http://www2.sos.state.oh.us/reports/rwservlet?imgc&Din=200608202924>, archived at <http://perma.cc/MF53-QN4Q>; see also the Complaint, *supra* note 95 (evidencing confusion by the case study municipality).

<sup>119</sup> *Id.* Compare Oscar L. Lopez et al., *Psychiatric Symptoms Vary with the Severity of Dementia in Probable Alzheimer’s Disease*, 15 J. NEUROPSYCHIATRY & CLINICAL NEUROSCI. 346, 347 (2003), available at <http://neuro.psychiatryonline.org/doi/pdf/10.1176/jnp.15.3.346> (indicating that “sundowning” included delusions as “defined in accordance with the DSM-IV criteria.”), with D.L. Bliwise et al., *Disruptive Nocturnal Behavior in Parkinson’s Disease and Alzheimer’s Disease*, 8 J. GERIATR. PSYCHIATRY & NEUROLOGY 107, 107 (1995) (evidencing that the authors, members of the Department of Neurology at Emory University’s Medical School, state that the more clinical name for “sundowning” is “disruptive nocturnal behavior”), and Nina Khachiyants et al., *Sundown Syndrome in Persons with Dementia: An Update*, 8 PSYCHIATRY INVESTIG. 276, 277 (2011) (“In general, sundown syndrome is characterized by the emergence or increment of neuropsychiatric symptoms such as *agitation, confusion, anxiety, and aggressiveness* in late afternoon, in the evening,



with a propensity for being a flight risk via memorizing door codes.<sup>120</sup> While the webpage indicated that the individual eventually was taken off of his drugs, the webpage never indicated that the individual ever stopped being a flight risk.<sup>121</sup>

And the facts do not stop at the anecdotal evidence proffered by the Our Family Home website. Doctors Dilip V. Jeste and Sanford I. Finkel indicated “a number of groups of researchers have found that delusions and hallucinations are commonly associated with aggression, agitation, and disruptive behavior in patients with [Alzheimer’s Disease]” and “[p]sychotic symptoms are a major cause of caregiver distress.”<sup>122</sup> Yet, despite such caregiver distress, Ohio’s Administrative Code (“OAC”) requires no continuing education and little education for caregivers at ACF-type AHFs.<sup>123</sup> Additionally, under the DSM-IV-TR, which governed at the time of the Article’s publication, the most common dementia was probable or possible

or at night. Sundowning is highly prevalent among individuals with dementia”) (emphasis added). For a detailed discussion of Sundowning, *see also* Ladislav Volicer et al., *Sundowning and Circadian Rhythms in Alzheimer’s Disease*, 158 AM. J. PSYCH. 704 (2001).

Sundowning, or sundown syndrome, is a poorly defined entity. Some investigators even question its existence, pointing out that some patients are more “agitated” in the morning, some more in the afternoon and evening, and some equally agitated throughout the whole day. Sundowning has been also ascribed to environmental influences, such as change of shift, or to attempts of confused individuals to leave their units because they “want to go home from work.”

*Id.* at 704 (internal citations omitted). *But see* Avrid Skjerve & Harald A. Nygaard, Case Report, *Improvement in Sundowning in Dementia with Lewy Bodies after Treatment with Donepezil*, 15 INT’L J. GERIATR. PSYCHIATRY 1147, 1147 (2000) (“Sundowning refers to the recurring onset of confusion or agitation in elderly patients in the evening and can be a significant clinical problem. In community dwelling patients with Alzheimer’s disease (AD), the phenomenon has been reported to be associated with significant caregiver stress”); *see supra* note 65 (describing the pharmaceutical industry’s impact on branding diseases to sell patented medication). *See also* GORDON LIGHTFOOT, SUNDOWN (Warner Bros. Records 1975) (“Sundown you better take care/if I find you been creepin’/round my back stairs . . . Sometimes I think it’s a shame/when I get feelin’ better/when I’m feelin’ no pain”).

<sup>120</sup> *Videos*, OUR FAMILY HOME, <http://www.ourfamilyhomeinc.com/videos.html>, archived at <http://perma.cc/W5S2-JDRW> (last visited Mar. 15, 2015).

<sup>121</sup> *Cf.* Skjerve & Nygaard, *supra* note 119, at 1147 (suggesting that medication may help reduce the negative results of disruptive nocturnal behavior).

<sup>122</sup> Dilip V. Jeste & Sanford I. Finkel *Psychosis of Alzheimer’s Disease and Related Dementias*, 8 AM. J. GERIATR. PSYCH. 29, 29 (2000) (citations omitted), available at <http://webpace.psychiatry.wisc.edu/walaszek/geropsych/docs/jeste-psychosis.pdf>. The AD diagnoses presumably occurred post-mortem, given the scientific nature of the publication.

<sup>123</sup> *See generally* OHIO ADMIN. CODE 5122–33 (West 2007 & Supp. 2012) (discussing Adult Care Facilities).



Alzheimer's disease,<sup>124</sup> and people suffering from dementia diagnoses could exhibit at any time a wide number of symptoms that include "behavioral problems such as wandering . . . emotional outbursts, disruptiveness, and aggression."<sup>125</sup>

Abundant data in scholarly journals details persons suffering from alleged dementias and Alzheimer's constitute direct threats to others. For instance, a 2003 manuscript published in the *Indiana Law Journal* suggested that a person who makes loud noises on a nightly basis,<sup>126</sup> thereby preventing neighbors from sleeping, would pose a health risk to neighbors; such conduct constitutes a direct threat under the FHAA's safe harbor.<sup>127</sup> Perhaps saving the best evidence for last, courts have held that alleged disruptive behaviors that would constitute criminal conduct—even without conviction—are a "direct threat" for FHAA purposes.<sup>128</sup>

Further, a municipality that approves an ACF-based CUP application on the basis of two alleged impairments that specifically have violent behaviors associated with them not only acquiesces to particularized disability-based admission discrimination policies, but also places persons with demonstrated violent propensities—direct threats to the health or safety (or both) of others, subject to a specific safe-harbor carve out in the FHAA and its legislative history—inside a residential neighborhood zoned for single-family use. Applying this general idea to the case study, a bus stop for a K–12 public-school district apparently has existed at the corner of the subject property since at least 1977.<sup>129</sup> The school district

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<sup>124</sup> JOHN PARRY, *MENTAL DISABILITY LAW: A PRIMER* 5–6 (5th ed. 1995); *see also* Lopez et al., *supra* note 119, at 346 (employing in its title "probable Alzheimer's," rather than merely "Alzheimer's").

<sup>125</sup> PARRY, *supra* note 124, at 5.

<sup>126</sup> Jennifer L. Dolak, Note, *The FHAA's Reasonable Accommodation & Direct Threat Provisions as Applied to Disabled Individuals Who Become Disruptive, Abusive, or Destructive in Their Housing Environment*, 36 *IND. L. REV.* 759, 779 (2003).

<sup>127</sup> *Id.* at 779.

<sup>128</sup> *See* Arnold Murray Constr., LLC v. Hicks, 621 N.W.2d 171, 173, 175 (S.D. 2001); *see generally* Groner v. Golden Gate Gardens Apts., 250 F.3d 1039 (6th Cir. 2001); *see also* Lapid-Laurel, LLC v. Zoning Bd. of Adjustment, 284 F.3d 442, 445 (3d Cir. 2002) (stating collectively the same substantial proposition regarding violent threats under the FHAA, albeit in rental and reasonable accommodation contexts). *See* Dolak, *supra* note 126, at 776–77 (stating that "Groner v. Golden Gate Gardens Apartments supports the proposition that the burden is on the resident to propose" a potential solution in such cases).

<sup>129</sup> *See generally* *Policy Manual for Sycamore Community School District*, OHIO SCH. BDS. ASS'N, <http://z2.ctspublish.com/osba/Z2Browser2.html?showset=sycamore-osba>, archived at <http://perma.cc/GU4Q-CU68>, (last visited Mar. 15, 2015).

operates in at least four municipalities.<sup>130</sup> As a result, the school system is governed by its own board of education elected by voters in each of the municipalities, only one of which is the municipality scrutinized in this case study.<sup>131</sup> Consequently, even if it wanted to, the municipality has neither the right nor the ability to tell or request the school district to move the bus stop,<sup>132</sup> and the school district has no obligation to do so.<sup>133</sup>

Thus, material concerns exist in requiring public school children as young as five years old to be in close proximity to direct threats without the benefit of having the physical, mental, or social development to defend themselves. Likewise, the municipality is unable to defend those children from direct threats without incurring significant financial, human, and social burdens, such as having municipal police monitor the stop during busing hours. This situation smacks of failing at least some of government's essential functions: protecting residents from physical harm and using taxpayer money efficiently.

Thus, applied to the case study, even assuming that the Application's two submitted alleged disabilities were to exist as valid diagnoses, the FHAA would remain unavailable to the Applicant or its Integrated Enterprise because of the distinctively ascribed aggressive and violent propensities associated with the two narrowly chosen classes of people and diagnoses. Again, the takeaway for courts, policymakers, and potential AHF applicants is that applicants should submit broad, non-discriminatory

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<sup>130</sup> *About us*, SYCAMORE CMTY. SCH., <http://www.sycamoreschools.org/district/about-us.html> (last visited Mar. 15, 2015).

<sup>131</sup> See Policy Manual, *supra* note 129.

<sup>132</sup> A discussion of potential HIPAA violations is beyond this Article's scope.

<sup>133</sup> A logical question arises when this point is raised to third-party reviewers: what is the nexus between a municipality disclosing this information to a school district and the privacy protections articulated under HIPAA? Although HIPAA may apply to municipalities in other limited contexts, HIPAA is wholly inapplicable to the situation this Article examines. Congress limited the entities subjected to HIPAA's reach. 42 U.S.C. § 1320(d) (2006). As a result, municipalities are not covered entities under HIPAA in the instant context. 45 C.F.R. § 160.103 (2012) (stating that a "covered entity" under HIPAA is "(1) [a] health plan, (2) [a] health care clearinghouse, [or] (3) [a] health care provider who transmits any health information in electronic form in connection with a transaction" under which the U.S. Department of Health and Human Services ("HHS") has promulgated standards); see also Guidance Materials for Consumers, U.S. DEP'T HEALTH & HUMAN SERVS., <http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/>, archived at <http://perma.cc/4H36-D468> (last visited Mar. 15, 2015) ("Examples of organizations that do not have to follow the Privacy and Security Rules include . . . many municipal offices"); see generally ANDREA I. O'BRIEN, WHAT EVERY MUNICIPALITY SHOULD KNOW ABOUT HIPAA'S MEDICAL PRIVACY RULES 25 (2003).

applications that span a wide range of disabilities or disorders which comport with the FHAA's protective language, rather than the FHAA's safe harbor. Doing so would help prevent potential AHF applicants from cabining themselves to alleged impairments that present specific diagnoses of direct threats, particularly as these threats have been broadly interpreted by some courts to receive FHAA safe-harbor exclusions. Failing to submit a broad, nondiscriminatory application appears to remove the ability of a zoning-variance applicant to avail itself of any relevant protections under 42 U.S.C. § 3604.<sup>134</sup>

## 2. Other Threats

Threats arise not only from the potential of physical harm *to* existing residents but also *from* those existing non-ACF residents. Using a reasonably foreseeable example, existing non-ACF residents could become defendant tortfeasors by accidentally driving into a wandering AHF tenant with sundowners syndrome late at night. In the case study, the Application indicates that wandering is a product of the alleged disabilities. Municipalities and tribunals should exercise extreme caution when deliberating the potential approval of AHF-based CUP applications that place unnecessary and potentially significant tort liability on existing non-AHF residents. More importantly, from a policy standpoint municipalities should also be cognizant that the Court's recent decisions in *McDonald v. City of Chicago*<sup>135</sup> and *District of Columbia v. Heller*<sup>136</sup> strongly underscore citizens' Second Amendment rights to use lethal self-help if threatened in their homes or on their property.

In the case study, the municipality's voters have elected congressional delegations for decades and have consistently supported representatives who strongly support the Second Amendment to the United States Constitution.<sup>137</sup> As a result, the foreseeability of additional persons owning

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<sup>134</sup> See generally *Groner v. Golden Gate Gardens Apts.*, 250 F.3d 1039 (6th Cir. 2001), and *Lapid-Laurel, LLC v. Zoning Bd. of Adjustment*, 284 F.3d 442 (3d Cir. 2002) (stating collectively the same substantial proposition regarding violent threats under the FHAA, albeit in rental and reasonable accommodation contexts). See also Dolak, *supra* note 126, at 776–77 (stating that “*Groner v. Golden Gate Gardens Apartments* supports the proposition that the burden is on the resident to propose” a potential solution in such cases).

<sup>135</sup> See generally *McDonald v. City of Chicago*, 561 U.S. 3025 (2010).

<sup>136</sup> See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>137</sup> See generally *Republican Elected Officials*, MONTGOMERY CNTY. REPUBLICAN PARTY, <http://www.mcohiogop.org/elected-officials.html>, archived at <http://perma.cc/3QGGZ-AYVR> (last visited Mar. 15, 2015).

or using guns (or both) to defend themselves from a direct threat by an aggressive, wandering AHF tenant who entered the landowner's property is neither unreasonable, nor even constitutionally questionable. As a matter of public policy however, strong support of the Second Amendment does not equate to a strong policy desire to make its citizenry reasonably fear the need to spend its resources to further arm itself or increase the likelihood of a lethal confrontation by a non-AHF resident fearing the need to resort to self-help against persons so "out of their mind" as to lack the requisite intent to commit aggravated trespass for the event leading to the confrontation. As a result, municipalities and tribunals should be aware of this setting and recognize that such a real scenario may not be one that the decision maker necessarily would want to set in motion by approving an AHF-based zoning variance or CUP application.

*C. 42 U.S.C. § 3605 and the Financial Impact of AHFs on Nearby Properties*

However, the applicable definition of "persons" excludes municipalities or municipal entities.<sup>138</sup> FHAA § 3605(a) states:

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.<sup>139</sup>

The exclusion arises due to § 3602(d)'s reference to trustees in bankruptcy under Title 11 of the United States Code.<sup>140</sup> Title 11 also has a definition of "municipality," and by excluding municipalities from both the general definition in § 3602(d) and the corresponding reference to Title 11 of the United States Code, little doubt can exist that Congress intended to exclude municipalities from this section.<sup>141</sup>

Two relevant factors needed to analyze a municipality's zoning ordinance and the financial valuation of existing residents' nest eggs are

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<sup>138</sup> See 42 U.S.C. § 3602(d) (2006).

<sup>139</sup> *Id.* § 3605(a).

<sup>140</sup> *Id.* § 3602(d).

<sup>141</sup> See 11 U.S.C. § 101(40) (2006) (defining *municipality* as a "political subdivision or public agency or instrumentality of a State").

located in § 3605. First, § 3605(b) states that appraising residential real property is a “[r]esidential real estate-related transaction.”<sup>142</sup> And second, § 3605(c) reads: “Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.”<sup>143</sup>

While corporations may be persons under the law,<sup>144</sup> corporate owners of real property have perpetual lives under default law and thus have no long-term concerns regarding potential resale value at any particular moment in life.<sup>145</sup> And as Professor Braucher recently wrote, “individuals do have to sleep at night, and that may be a much stronger enforcer of their promises than contract law. Corporations do not need sleep or the moral tranquility that makes it possible.”<sup>146</sup>

However, individual home and real property owners save for a lifetime and then often use their home’s value to pay for retirement or post-retirement care. A real estate appraiser may not consider a person’s disability in valuing real property and improvements. However, an appraiser may consider associated public information relative to that LLC in the appraisal, including the extremely odd situation of real estate owned by a non-real estate investment trust (“REIT”), non-benefit corporation, non-501(c)(3) not-for-profit corporation, and non-corporate-relocation entity—i.e., a purely profit-driven LLC. Such an esoteric ownership structure ought to result in various risk-premium enhancements that result in discounts to the otherwise intrinsic value of the neighboring real estate and improvements. Also leading to discounts in property valuation would include any changes to zoning frontage as well as simply the zoning change itself that occurs via the CUP being granted in the heart of a residentially zoned, single family cul-de-sac that lacks adequate space to engage in the business activities contemplated by the Application.

The financial analysis extends to the case study, and to municipalities and tribunals in particular. The Integrated Enterprise and proponents

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<sup>142</sup> *Id.* § 3605(b).

<sup>143</sup> *Id.* § 3605(c).

<sup>144</sup> *See, e.g.*, *Bank of the United States v. Deveaux*, 9 U.S. 61, 88, 91 (1809) (defining a corporation as a “person”), *overruled in part on other grounds by Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497 (1844) (defining a corporation as a “person”).

<sup>145</sup> *See* PATRICIA H. WERHANE, *PERSONS, RIGHTS, AND CORPORATIONS* 33 (Prentice-Hall 1985), *available at* [http://www.wirtschaftsethik.ch/upload/werhane-ch1\\_3.pdf](http://www.wirtschaftsethik.ch/upload/werhane-ch1_3.pdf) (“In the law corporations are by and large treated as fictional persons, but unlike ordinary persons they are granted an unlimited ‘life’ when chartered by state license”).

<sup>146</sup> Jean Braucher, *The Sacred and Profane Contracts Machine: The Complex Morality of Contract Law in Action*, 45 *SUFFOLK U. L. REV.* 667, 677 (2012).

of the Application submitted to the municipality and to nearby residents a memo entitled, "A Representative Sample of the 50+ Studies on the Impacts of Community Residences for People with Disabilities."<sup>147</sup> The memo asserted two materially misleading claims relative to the financial value of nearby human-owned real property, which this Article debunks with peer-reviewed research from prominent authors.

First, the memo claimed "[o]ver [fifty] scientific studies have been conducted to determine if the presence of a [community residence] . . . has any effect on property values,"<sup>148</sup> and then claimed "[n]o matter which methodology has been used, every study has concluded that group homes not clustered on the same block have *no effect* on property values . . . nor on . . . parking, traffic, public utilities, nor municipal services."<sup>149</sup> This Article addresses each of these claims. Second, the memo definitively asserted: "Few studies have been conducted recently simply because this issue is so well settled that funding for further research is rarely available."<sup>150</sup> This Article will address the disingenuousness and ethical concerns of these assertions in detail.

The memo's initial—and modest—citation is Lauber's self-authored and self-published manuscript, a 1986 archeological find, which represents the most recently dated study in the alleged "50+" scientific studies the memo references. Every other referenced manuscript in the memo was authored and published during the Nixon, Ford, Carter, and Reagan Administrations, with no citations to more recent sources.

Second, the assertion that the memo referenced no recent manuscripts on the issue because the "issue is so well settled" and "funding for further research is rarely available"<sup>151</sup> is untrue for two primary reasons: (a) Those outdated studies—including Lauber's—have been discredited by more recent publications and (b) funding for research indeed still exists for studies.<sup>152</sup>

Specifically discrediting Lauber's work, two New York University ("NYU") professors, a NYU doctoral fellow, and an economist for the U.S.

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<sup>147</sup> Memorandum compiled by Daniel Lauber, *A Representative Sample of the 50+ Studies on the Impacts of Community Residences for People With Disabilities*, PLANNING/COMMUNICATIONS 2 [hereinafter Memo], available at [http://www.planningcommunications.com/gh/bibliography\\_group\\_home\\_impact\\_studies.pdf](http://www.planningcommunications.com/gh/bibliography_group_home_impact_studies.pdf).

<sup>148</sup> *Id.* at 1.

<sup>149</sup> *Id.* (emphasis added).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See *infra* note 163 (describing federal research grant funding for the Wharton School's research study).



Department of the Treasury co-authored an article in 2008 indicating that statistically significant negative changes in property value do occur in properties located certain distances from such housing in New York City. In particular, the authors stated: “Results from the majority of these early studies suggested that such housing does not negatively affect the values of surrounding homes . . . . The early work suffers from serious methodological limitations, however.”<sup>153</sup>

There exists no meaningful need to review any other earlier study advanced in the memo because Lauber’s work is debunked by these four authors in 2008. This is true not only because Lauber’s work was the first-cited and the most recently authored manuscript in the memo, but also because the referenced earlier-published and since-discredited work of Lauber served as the basis for the memo.<sup>154</sup>

New York City is nothing like the case study’s municipality, Montgomery, Ohio. Closer to Montgomery than New York City, researchers George Galster and Yolanda Williams authored a study in the mid-1990s that applied data from 741 single-family home sales in Mt. Vernon, Ohio and 1,649 sales in Newark, Ohio to estimate the impact of homes for severely disabled adults on neighboring single-family home sales.<sup>155</sup> The authors found “single-family homes within a two-block radius sold for [forty] percent less than otherwise-comparable homes during the nine months following the complexes’ opening.”<sup>156</sup> In 2000, other researchers found similar results in DuPage County, Illinois.<sup>157</sup> As a result, a number of more recent and relevant studies exist since 1986 demonstrating that the financial impact issue did not become settled at that time.<sup>158</sup>

To further demonstrate that federal funding existed for such studies well past 1986, federal grant funding backed the 1999 research publication of three Ph.D.s, including the Chair of the Wharton School’s Real Estate

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<sup>153</sup> Vicki Been et al., *The Impact of Supportive Housing on Surrounding Neighborhoods* 3 (N.Y.U. Sch. of L., Furman Ctr. for Real Estate & Urban Pol’y, Working Paper No. 06, 2008), available at <http://www.muni.org/Departments/health/Documents/Furman%20Center%20Working%20Paper%20on%20the%20Impacts%20of%20Supportive%20Housing.pdf>.

<sup>154</sup> Compare Memo, *supra* note 147, with sources cited in *infra* note 163 and accompanying text (describing the Wharton study).

<sup>155</sup> George Galster & Yolanda Williams, *Dwellings for the Severely Mentally Disabled and Neighborhood Property Values: The Details Matter*, 70 LAND ECON. 466, 466, 468 (1994).

<sup>156</sup> *Id.* at 475.

<sup>157</sup> See, e.g., Peter F. Colwell et al., *The Effect of Group Homes on Neighborhood Property Values*, 76 LAND ECON. 615 (2000).

<sup>158</sup> See *infra* notes 163–65 and accompanying text.



Department at the University of Pennsylvania.<sup>159</sup> The authors indicated that part of the impetus for their research study was the fact that “the studies are few in number, are limited in geographic scope, and span four decades, which precludes any general conclusions being drawn from them.”<sup>160</sup> In their conclusion, however, the authors stated: “All types of assisted housing programs, except FHA housing, have negative impacts on property values in nearby areas, and their coefficients are statistically significant.”<sup>161</sup> Numerous studies, funded by both private and federal grants, have occurred since 1986 demonstrating that statistically significant negative impacts affect nearby real property values due to the insertion and operation of AHF-type housing facilities in a residential neighborhood.<sup>162</sup> It is inequitable for an integrated corporate enterprise to generate hundreds of thousands of dollars in revenue per year by turning a single-family residence into a 24-hour operating business, when that business’s economic spillover effects represent statistically significant negative externalities. As a result, § 3605 serves no benefit to an applicant that threatens a municipality in an AHF-based zoning modification request or CUP application.

*D. 42 U.S.C. § 3606, the Transferability of Real Property Ownership, and the FHAA’s Constitutional Basis*

42 U.S.C. § 3606 states:

After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers’ organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, handicap, familial status, or national origin.<sup>163</sup>

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<sup>159</sup> Grant from the U.S. Department of Housing and Urban Development, Office of Policy Development and Research; *see also* Chang-Moo Lee et al., *The Differential Impacts of Federally Assisted Housing Programs on Nearby Property Values: A Philadelphia Case Study*, 10 HOUS. POL’Y DEBATE 75, 92 (1999) (detailing the background of each author).

<sup>160</sup> Lee et al., *supra* note 159, at 80.

<sup>161</sup> *Id.* at 86.

<sup>162</sup> *Id.* at 92–93 (referencing multiple studies of this nature).

<sup>163</sup> 42 U.S.C. § 3606 (2006); *see also* Pandozy v. Segan, 518 F. Supp. 2d 550, 557 (S.D.N.Y. 2007) (holding that the plaintiff’s claim failed because he did not allege that the defendants

In the instant case study, this provision appears inapplicable because the real property and improvements already have been sold to an arm of the Integrated Enterprise.

1. 42 U.S.C. § 3617 and Issues of Standing

Relative to another arguably relevant provision, Section 3617 states:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.<sup>164</sup>

Although this provision ostensibly applies to states and political subdivisions such as municipalities based on *United States v. City of Parma*,<sup>165</sup> several material facts and controlling federal cases distinguish *Parma* from the situation that this Article analyzes.

In this situation, under the FHAA, a strong argument exists that an applicant would lack standing.<sup>166</sup> Even if an ACF-based CUP applicant constitutes an “aggrieved person” under the FHAA, such an aggrieved person must satisfy the standing requirements mandated by Article III of the U.S. Constitution, which limits federal court jurisdiction to real cases or controversies.<sup>167</sup> This language means that any plaintiff who “failed to make out a case or controversy between himself and the defendant” must be denied standing.<sup>168</sup> In *Gladstone Realtors v. Bellwood*, the Court articulated three minimum, irreducible requirements that serve as conditions precedent for Article III standing.<sup>169</sup>

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“engaged in ‘residential real estate-related transactions,’ or that they provided a real estate listing or brokerage service, or that he was denied participation in such a service”).

<sup>164</sup> 42 U.S.C. § 3617 (2006).

<sup>165</sup> 661 F.2d 562, 571–72 (6th Cir. 1981).

<sup>166</sup> See *Warth v. Seldin*, 422 U.S. 490, 492 (1975). The United States Supreme Court recently underscored this doctrine was narrowing further during its latest term that ended in late June 2013. See, e.g., *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2662 (2013) (holding that no standing existed by the appellants in part due to claiming a mere generalized grievance by someone lacking a concrete interest in the case or controversy and that “[t]o have standing, a litigant must seek relief for an injury that affects him in a ‘personal and individual way’”) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

<sup>167</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>168</sup> *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979).

<sup>169</sup> *Id.* at 120–21 (Rehnquist, J., dissenting); see also *Lujan*, 504 U.S. at 560 (“Over the

First, the injury-in-fact requirement: The plaintiff must have suffered an injury that is “concrete and particularized” and “actual or imminent,” not “conjectural or hypothetical.”<sup>170</sup> Applied to the facts of the case study, because no concrete injury exists and only a conjectural or hypothetical injury exists (at best), the Enterprise, as a potential plaintiff, does not seem to satisfy the injury-in-fact requirement for standing to bring a lawsuit.

Second, the causation requirement: Even if a potential plaintiff's injury may be “indirect,” the injury must be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.”<sup>171</sup> Applied, as discussed in detail in the denial of Integrated Enterprise's application,<sup>172</sup> Montgomery would not have engaged in any action; simply, Montgomery would be enforcing its existing zoning laws in a consistent manner.

Third, the redressability requirement: The Court stated “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”<sup>173</sup> Given the totality of the law addressed in this Article, applied to the facts of the case study, no reasonable person could claim that it must be likely, rather than speculative, that any injury would be redressed by a favorable decision.

*Hallmark Developers, Inc. v. Fulton County*<sup>174</sup> illustrates this point well. In *Hallmark*, property developers sued under the FHAA, claiming that the municipality's denial of their rezoning application simply implemented the community's discriminatory attitude against a protected class of persons that the developers sought to house.<sup>175</sup> The Eleventh Circuit Court of Appeals indicated that, despite expert testimony to the contrary, the municipality did not discriminate on a prohibited basis because even the expert's testimony regarding disparate impact was “inherently speculative,” particularly given that other housing existed in the municipal area for people in the group protected from discrimination.<sup>176</sup> That same logic holds true in the Montgomery case study and, as a result, threatens

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years, our cases have established that the irreducible constitutional minimum of standing contains three elements.”).

<sup>170</sup> *Lujan*, 504 U.S. at 560 (citations omitted).

<sup>171</sup> *Id.* at 560–61 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)).

<sup>172</sup> See *infra* Part II.B.

<sup>173</sup> *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43).

<sup>174</sup> *Hallmark Devs., Inc.*, 466 F.3d 1276 (11th Cir. 2006).

<sup>175</sup> *Id.* at 1276.

<sup>176</sup> *Id.* at 1286–87.

of the municipality's having violated the FHAA appear to be mere saber-rattling by the Applicant, the Integrated Corporate Enterprise, or both, with little to no basis in law or fact.

In 2010, the Sixth Circuit distinguished *Parma* in *White Oak Property Development, LLC v. Washington Township* when it affirmed the U.S. District Court for the Southern District of Ohio—the relevant federal district court for Montgomery. In *White Oak*, the Sixth Circuit said:

[T]he evidence of record in *City of Parma*—absent in the present case—demonstrated a pervasive pattern and practice of racial discrimination in housing decisions by Parma officials, including: Parma's "small fraction of one per cent" Black population compared to the 16% Black population in the Cleveland metropolitan area, Parma's reputation for hostility toward Blacks, "statements of elected officials of Parma which were either overtly racist or were found to have racist meanings[,] and a history of challenged housing decisions, all of which were "based on a desire to keep minorities out of the community and . . . had an acute and foreseeable segregative effect on this virtually all-white city."<sup>177</sup>

The *White Oak* decision represents controlling federal law in the case study's jurisdiction. In *White Oak*, a company challenged Washington Township's residential-zoning resolutions, a challenge that Washington Township's Trustees ultimately denied based on existing provisions in Washington Township's zoning resolutions.<sup>178</sup> The company sued claiming that the zoning resolution was unconstitutional on its face, that Washington Township violated 42 U.S.C. § 1301, and six additional causes of action.<sup>179</sup> The court rejected all of the claims contained in the company's lawsuit.<sup>180</sup> Applying the *White Oak* test to the facts presented in the case study leads to the conclusion that no legitimate claim or controversy could arise in favor of the Applicant. Specifically, no evidence exists that the municipality has: (i) a disproportionate fraction of disabled persons relative to the general population, (ii) elected officials who have made no

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<sup>177</sup> *White Oak Prop. Dev., LLC*, 606 F.3d 842, 851 (6th Cir. 2010) (quoting *Parma*, 661 F.2d 562, 566–67 (6th Cir. 1981) (citation and internal quotation marks omitted)).

<sup>178</sup> *Id.* at 844–46.

<sup>179</sup> *Id.* at 846–47.

<sup>180</sup> *Id.* at 842.

statements antagonistic toward disabled persons, and (iii) any history of challenged housing decisions based on any desire to keep disabled persons out of the community.<sup>181</sup>

Also favoring the Application's rejection as a protected act is that as recently as 2012 the Sixth Circuit strongly reiterated its narrow grounds relative to companies' attempts to leverage antidiscrimination laws in their favor. In *HDC, LLC v. City of Ann Arbor*,<sup>182</sup> the federal appeals court chided the plaintiff company's weak allegations of municipal discrimination against handicapped persons under the FHAA by reminding the plaintiff company of the strong burden that a plaintiff company must meet in the Sixth Circuit:

In this Circuit, a plaintiff is required to demonstrate “discriminatory animus” to prevail on an interference claim under the Act . . . . The developers' vague and conclusory allegations that Ann Arbor acted with “a discriminatory intent, purpose, and motivation” to prevent handicapped people from living on the property do not transform the developers' otherwise insufficient factual pleadings into allegations that plausibly support an inference of discriminatory animus. *Indeed, such allegations are “[c]onclusory allegations or legal conclusions masquerading as factual allegations* [for purposes of a 42 U.S.C. § 3617 interference claim against the local municipality],” . . . and we conclude that the district court did not err in finding the developers' complaint insufficient.<sup>183</sup>

In the case study, no discriminatory animus exists by a municipality following its own zoning ordinance and denying the Application. Moreover, the *HDC* court dovetailed FHAA §§ 3617, 3604, and 3605 through its analysis by asserting “To show disparate impact [under 42 U.S.C. §§ 3604, 3605], a plaintiff must demonstrate that a facially neutral policy or practice has the effect of discriminating against a protected class of which the

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<sup>181</sup> See *supra* note 177 and accompanying text.

<sup>182</sup> *White Oak Prop. Dev., LLC*, 675 F.3d 608 (6th Cir. 2012).

<sup>183</sup> *Id.* at 613–14 (quoting *Tam Travel, Inc. v. Delta Airlines, Inc.*, 583 F.3d 896, 903 (6th Cir. 2009)) (emphasis added); see also *Michigan Prot. & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 347 (6th Cir. 1994) (finding that § 3617 covers actors “who are in a position directly to disrupt the exercise or enjoyment of a protected right and exercise their powers with a discriminatory animus”).

plaintiff is a member.”<sup>184</sup> In the Montgomery case study, therefore, the municipality’s enforcement of its facially neutral policy and its practices lack an effect of discriminating against a protected class.<sup>185</sup>

Even without any animus analysis, the Applicant still appears to lack an ability to pass the relevant federal appeals court’s test for discriminatory impact without discriminatory intent as articulated in *Arthur v. Toledo*.<sup>186</sup> The *Arthur* court articulated a three-prong inquiry as to whether a discriminatory effect would still exist under the FHAA, even assuming no discriminatory intent, which involves determining: (1) the relative strength of the applicant’s showing of discriminatory effect; (2) the municipality’s interest in taking the action complained of; and (3) if the applicant sought to compel the municipality to affirmatively provide housing for members of minority groups, or merely to restrain the municipality from interfering with individual property owners who wish to provide such housing.<sup>187</sup> Applying that three-prong test to the case study, (1) the Applicant cannot show any discriminatory effect, as none has occurred; (2) a rejection of the Application would maintain the standards in the municipality’s existing zoning ordinance standards and fulfill a core function of government, namely protecting its residents, including schoolchildren, from direct health and safety threats; and (3) the Applicant wants the municipality to affirmatively change its existing zoning and use restrictions, rather than enforce and maintain the status quo.<sup>188</sup>

### *E. Synthesis*

Thus, under federal law, rules, regulations, statutory history, and federal court opinions—supported by scientific fact and empirical financial data—no legitimacy exists for applicants seeking zoning variances or

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<sup>184</sup> *HDC, LLC*, 675 F.3d at 613 (quoting *Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm’n*, 508 F.3d 366, 371 (6th Cir. 2007)). In addition, other federal appellate courts have taken similar positions. In *Artisan/American Corp. v. City of Alvin*, a municipality’s rejection of a developer’s specific project based on the general knowledge of the project was not arbitrary nor unreasonable under the FHAA. 588 F.3d 291, 293 (5th Cir. 2009). In that case, the court held that no evidence existed that the municipality’s resolutions constituted departures from the municipality’s normal policies and procedures. *Id.*

<sup>185</sup> See also *infra* Part V.B (describing material doubts on whether the plaintiff applicant in the case study could be a member of such a class).

<sup>186</sup> *Arthur v. Toledo*, 782 F.2d 565, 575 (6th Cir. 1986).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*



AHF-based CUPs to force municipalities such as Montgomery to grant a zoning variance or an AHF-based CUP. Relying on public policy rationale, a strong counter-reason exists, however, for municipalities to not grant such an application. Articulated by Chief Justice Roberts, government actors making admissions-based decisions should not place their imprimaturs on decisions that discriminate in favor of one group's admission to an AHF over another group's admission to that same AHF.<sup>189</sup>

1. Alleged Age Discrimination for Persons Over Fifty-Five or Sixty-Two Years of Age

An ACF-based CUP applicant also may attempt to avail itself of the protections of 42 U.S.C. § 3607.<sup>190</sup> As applied to the Montgomery case study, however, nearly every home within 300 feet of the subject parcel contains residents who are over both fifty-five and sixty-two years of age.<sup>191</sup> A number of members of the Montgomery City Council are over either age fifty-five or sixty-two as well.<sup>192</sup> As a result, any claim of age discrimination simply does not pass muster.

2. Familial Status May Be Dependent on State Law

The FHAA defines “familial status” as one or more individuals under eighteen years old being domiciled with “(1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.”<sup>193</sup>

Regardless of whether one has personally evolved on the issue<sup>194</sup>—as have both of Ohio's U.S. Senators, Republican Rob Portman and Democrat Sherrod Brown, as well as Democratic President Barack Obama, and Republican former Vice President Dick Cheney—it remains true that Article XV, § 11 of the Ohio Constitution unambiguously reads: “This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the

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<sup>189</sup> See *supra* note 112 and accompanying text.

<sup>190</sup> 42 U.S.C. § 3607 (2006).

<sup>191</sup> See *id.* § 3607(b)(1)–(2).

<sup>192</sup> See also *City Council*, CITY OF MONTGOMERY, <http://www.montgomeryohio.org/government/city-council/>, archived at <http://perma.cc/P34P-WDUE> (last visited Mar. 15, 2015).

<sup>193</sup> 42 U.S.C. § 3602(k) (2006).

<sup>194</sup> See the Commonwealth of Mass. Dep't. of Pub. Health Reg. of Vital Rec. & Stats. Cert. of Marriage No. 972526 (July 11, 2011) (on file with author).

design, qualities, significance or effect of marriage.”<sup>195</sup> Of course, the case study does not deal with marriage per se. But, the case study does concern the public policy ramifications of how Ohio’s Constitution views traditional single families, which is relevant to any discussion of single-family residentially zoned housing.

In 2004, Ohio voters amended the state constitution, making it abundantly clear that as a matter of public policy, the state does not want to redefine what constitutes a “traditional family.”<sup>196</sup> Suppose that *X* is a member of the Ohio Bar, as well as New York, a jurisdiction that recognized non-traditional variations of single families after *X* became a member of the bar. To become a member of the bar in each jurisdiction, a lawyer must submit to and maintain an oath to uphold that state’s constitution, laws, and regulations. Thus, *X* in New York must accept that the state’s definition of a traditional single family changed materially during the time since *X* became a member of the New York bar. In contrast, having made a similar oath to become a member of the Ohio bar, *X* must interpret its constitution and the laws, rules, regulations, and policies that it permits or restricts as they exist—not how *X* or any other officer of the court may prefer them to be.

Applying the exceedingly strong public policy rationale underpinning Ohio’s constitution to any municipality’s zoning laws should make one recognize that approving an AHF-based zoning variance or CUP application in an area zoned for single family residential use—not multi-family or commercial use—would violate the public policy underpinning not only the entirety of state law, but also the state constitution on which that law rests. To some officers of the court, oaths and commitments made to a state bar trump personal or financial preferences (or both), as well as an individual’s personal distaste for certain laws or constitutional provisions. But within the past decade, voters in the Ohio made one thing abundantly clear to every sworn judge, lawyer, elected official, and administrative agent in the state: You cannot change the meaning or definition of a traditional single family in our state.<sup>197</sup>

#### IV. STATE ZONING ORDINANCES, ANTIDISCRIMINATION LAWS, AND OTHER PUBLIC POLICIES

Moving from the potential applicability of a state constitution’s definition of a family relative to a federal law, this Part provides a broad

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<sup>195</sup> OHIO CONST. art. XV, § 11.

<sup>196</sup> *See id.*

<sup>197</sup> *Cf.* discussion *supra* Part II.A.

overview of the subject state's zoning laws and court opinions, how they impact its municipalities, and why they raise concerns with how municipalities may proceed in this matter. This Part then briefly discusses state antidiscrimination laws and other public policies.<sup>198</sup> State law permits zoning boards or other municipalities to grant or deny CUPs in the case study's municipality.<sup>199</sup> Since granting CUPs may impact nearby properties significantly, Ohio's policy dictates the requirement of an administrative hearing on a CUP application.<sup>200</sup> This administrative permission by a municipal tribunal<sup>201</sup> permits property owners to engage their property in "a use which the regulations expressly permit under conditions specified in the zoning regulations."<sup>202</sup> Converse to the broad property rights recognized by engagement conforming to permitted-use zoning, CUPs originate from the Standard State Zoning Act ("SSZA").<sup>203</sup> As the Ohio Supreme Court indicated:

The inclusion of conditional use provisions in zoning legislation is based upon a legislative recognition that although certain uses are not necessarily inconsistent with the zoning objectives of a district, their nature is such that their compatibility in any particular area depends upon surrounding circumstances. Thus, the legislative body provides for their inclusion in a district only upon administrative

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<sup>198</sup> See OHIO REV. CODE ANN. § 4112.02 (LexisNexis 2007) (prohibiting discrimination in residential real estate-related transactions); 42 U.S.C. § 3605(a) (2006).

<sup>199</sup> See OHIO REV. CODE ANN. § 713.06 (LexisNexis 2008) (permitting municipal planning commissions to divide the municipality into zones or districts "in the interest of the public health, safety, convenience, comfort, prosperity, or general welfare"); § 713.07 (granting municipalities authorization to certify and regulate zoning and districting according to uses "in the interest of the promotion of the public health, safety, convenience, comfort, prosperity, or general welfare"); § 713.09 (describing setbacks, areas, lines, and building bulk and locations); § 713.10 (authorizing districting or zoning of municipalities on any combination of two or more purposes in § 713.07–713.09); § 713.12 (describing notice and hearing procedures for municipal zoning regulations); § 713.121 (indicating the statute of limitations for a procedural error by the administrative entity); § 713.13 (permitting owners of contiguous or neighboring property to sue for injunctive relief). See also OHIO REV. CODE ANN. § 303.14(C) (LexisNexis 2009) (dealing with counties' boards of zoning appeals); § 519.14(C) (concerning townships' boards of zoning appeals).

<sup>200</sup> *Kipp v. Bd. of Zoning Appeals of Stonelick Twp.*, No. CA2003-10-086, 2004 WL 2504499, at \*1 (Ohio Ct. App. Nov. 8, 2004).

<sup>201</sup> See OHIO CONST. art. XVIII, § 3.

<sup>202</sup> STUART MECK & KENNETH PEARLMAN, OHIO PLANNING AND ZONING LAW § 9:11 (2013).

<sup>203</sup> See ADVISORY COMM. ON ZONING, U.S. DEPT' OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS 9 (rev. ed. 1926), available at <http://landuselaw.wustl.edu/StndZoningEnablingAct1926.pdf>.

approval granted in accordance with legislatively prescribed standards and conditions.<sup>204</sup>

Emphasizing the administrative nature of this process, the court stated that a municipality's decision to deny a CUP application was "not a narrowing of a zoning classification," which would be an improper legislative exercise of government power,<sup>205</sup> and that the administrative decision was entitled to a presumption of validity.<sup>206</sup>

Beyond requiring such a presumption, the Ohio Court of Appeals has held that "the party challenging the board's determination has the burden of showing its invalidity."<sup>207</sup> In appealing such a decision, a trial or appellate court would "accordingly be obliged to affirm the action taken by the board, absent evidence that the board's decision was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence."<sup>208</sup> Therefore, under Ohio law, reviewing courts must presume the validity of a decision to deny a zoning variance application.<sup>209</sup>

Some courts have held that where a zoning resolution fails to impose a time limit on the business's operations, a municipal CUP approval cannot place a time limit on the business's operations.<sup>210</sup> Upon this recognition, discomfort likely would arise for municipalities and neighboring single family real property owners. A municipality's CUP approval authorizing operations of a 24-hour business places non-ACF residents in a regular

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<sup>204</sup> Gerzeny v. Richfield Twp., 405 N.E.2d 1034, 1036 (Ohio 1980) (footnotes omitted). Under Ohio law's interpretation of a "CUP," the term "use" is an activity. *Kipp*, 2004 WL 2504499, at \*1 (quoting both *Young v. Bd. of Zoning Appeals*, No. 17877, 2000 WL 125972, at \*1 (Ohio Ct. App. Feb. 4, 2000), and STUART MECK & KENNETH PEARLMAN, OHIO PLANNING AND ZONING LAW § 9:11 (2004)).

<sup>205</sup> Cmty. Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals, 613 N.E.2d 580, 583 (Ohio 1993).

<sup>206</sup> *Id.* at 584 (citing *C. Miller Chevrolet, Inc. v. Willoughby Hills*, 313 N.E.2d 400, 403–04 (Ohio 1974)); see also *BP Oil Co. v. Dayton Bd. of Zoning Appeals*, 672 N.E.2d 256, 259 (Ohio Ct. App. 1996).

<sup>207</sup> *Burnett v. LaGrange Twp. Bd. of Zoning Appeals*, No. 07CA009119, 2007 WL 4374427, at \*2 (Ohio Ct. App. Dec. 17, 2007) (citing *Consol. Mgmt., Inc. v. City of Cleveland*, 452 N.E.2d 1287, 1290 (Ohio 1983)).

<sup>208</sup> *Id.* (quoting *Consol. Mgmt., Inc.*, 452 N.E.2d at 1290).

<sup>209</sup> *Chafe Towing, LLC v. Springfield Twp.*, No. 20632, 2001 WL 1626942, at \*2 (Ohio Ct. App. Dec. 19, 2001) (citing *C. Miller Chevrolet, Inc.*, 313 N.E.2d at 401).

<sup>210</sup> See, e.g., *Millcreek Bd. of Twp. Trs. v. Davisson*, No. 14-06-50, 2007 WL 2983080, at \*6–7 (Ohio Ct. App. Oct. 15, 2007) (holding that the Board of Zoning Appeals had no authority to impose a time limitation on the CUP).

state of disturbance with customers, employees, independent contractors, and government officials of all sorts coming and going day and night. Such activity would violate the policy of promoting the “public health, safety, convenience, comfort, prosperity, or general welfare,”<sup>211</sup> with the municipality powerless to retroactively change the zoning to account for these issues.<sup>212</sup>

The exacerbation of this discomfort would not be unexpected. Courts have held that once a municipality has granted a CUP not only does that conditional use remain after transfer of ownership,<sup>213</sup> but the CUP also becomes “the functional equivalent of a permitted use.”<sup>214</sup> The combination of an ACF-CUP approval of a 24-hour business that permits various stakeholders to come and go at all hours of the day or night with the practical elimination of business-purpose provisions within company charters—permitting businesses to shift business lines without suffering legal consequences for acting *ultra vires*—is of grave concern for a natural person’s economic and real property rights, particularly for owners on a small cul-de-sac in a neighborhood well within the zoning for single-family residences.

Federal concerns echo Ohio’s statutory concerns regarding parking on the cul-de-sac and nearby streets. Specifically, the U.S. Department of Justice stated: “[N]eighbors and local government officials may be legitimately concerned that a group home for adults in certain circumstances may create more demand for on-street parking than would a typical family.”<sup>215</sup> Also discomfoting is the uncertainty as to whether a specific “operator” would apply for and receive the appropriate permits from Ohio’s relevant administrative agency, such as the Ohio Department of Mental Health and Addiction Services (“DMHAS”), given the questionable Integrated Enterprise discussed earlier.<sup>216</sup> To illustrate, as of October 1, 2013, My Family Home Operating Co., LLC has never before received approval from the DMHAS to operate an AFH under the then-existing statute<sup>217</sup>

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<sup>211</sup> OHIO REV. CODE ANN. § 713.06 (LexisNexis 2008).

<sup>212</sup> *Davisson*, 2007 WL 2983080, at \*7.

<sup>213</sup> *See, e.g.*, *Baughman v. Millcreek Bd. of Zoning Appeals*, No. 8-01-27, 2002 WL 1773043, at \*7 (Ohio Ct. App. Aug. 2, 2002).

<sup>214</sup> *Welling v. Perry Twp. Bd. of Zoning Appeals*, No. 2003CA00303, 2004 WL 540290, at \*2 (Ohio Ct. App. Mar. 15, 2004).

<sup>215</sup> *See Joint Statement of the Department of Justice and the Department of Housing and Urban Development*, U.S. DEP’T OF JUST., [http://www.justice.gov/crt/about/hce/final8\\_1.php](http://www.justice.gov/crt/about/hce/final8_1.php) (last visited Mar. 15, 2015) [hereinafter *Joint Statement*].

<sup>216</sup> OHIO REV. CODE ANN. § 5119.22(D)(1) (LexisNexis Supp. 2012); *see also* OHIO ADMIN. CODE 5122-33-03(B) (Supp. 2012).

<sup>217</sup> *ACF List by County as of Oct. 3, 2013*, OHIO DEP’T OF MENTAL HEALTH & ADDICTION SERVS., <http://mha.ohio.gov/Portals/0/assets/Regulation/LicensureAndCertification/acf-listing>

and the rules and regulations promulgated thereunder in Ohio's administrative code.<sup>218</sup>

The following three entities are listed as licensed by the DMHAS.<sup>219</sup> In addition to the Integrated Enterprise, two other entities also exist: Our Family Home, Inc. (an Ohio for-profit corporation)<sup>220</sup> and Our Family Home (an apparent non-corporation).<sup>221</sup> Although all three entities have different addresses, the similar names and telephone numbers listed for each entity are consistent. This would lead a reasonable person to question the integrated nature of the entities. To confuse matters more, another entity which is unlisted by DMHAS and, according to the relevant filing with the secretary of state, did not receive consent to use a protected name, is "Our Family Home, LLC."<sup>222</sup> Further, OFH Properties, LLC owns the subject property in the case study.<sup>223</sup>

## V. THE MUNICIPALITY'S ZONING CODES AND ORDINANCES

This Part of the Article provides a brief overview of local municipal ordinances at the heart of the case study. First, this Part reviews the municipality's general zoning. Next, this Part analyzes conditional use. Third, this Part reviews the meaning of "family homes" for "handicapped" persons. Finally, this Part synthesizes these items.

### A. *The Municipality's General Zoning*

The municipality's zoning code indicates that a zoning map establishes the municipality's zoning districts.<sup>224</sup> Per the zoning map, the

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-by-county.pdf(last visited Mar. 15, 2015) [hereinafter ACF List by County]; *see generally* OHIO REV. CODE ANN. § 5119.22 (Supp. 2012).

<sup>218</sup> OHIO ADMIN. CODE 5122-33-03 (Supp. 2012-2013).

<sup>219</sup> *See ACF List by County, supra* note 217.

<sup>220</sup> *Articles of Incorporation for Our Family Home, Inc.*, STATE OF OHIO CERTIFICATE (Doc. No. 200608202924), available at <http://www2.sos.state.oh.us/reports/rwservlet?imgc&Din=200608202924>, archived at <http://perma.cc/MF53-QN4Q>.

<sup>221</sup> *See, e.g.*, LARRY E. RIBSTEIN, *THE RISE OF THE UNCORPORATION 1* (Oxford Univ. Press 2009).

<sup>222</sup> *Articles of Organization for a Domestic Profit Limited Liability Company for Our Family Home Health Care, LLC*, OFFICE OF THE SEC'Y OF STATE OF OHIO, available at <http://www2.sos.state.oh.us/reports/rwservlet?imgc&Din=201003200606>, archived at <http://perma.cc/8Q5W-NM35>.

<sup>223</sup> *See* RHODES, *supra* note 16.

<sup>224</sup> MONTGOMERY, OHIO, MUN. ZONING CODE § 151.0101 (2011), <http://www.egovlink.com>



case study subject's real-property parcel is zoned well within "Zone A."<sup>225</sup> A parcel in Zone A must be a "Single Family Residential Residence" within a residential zone.<sup>226</sup> The municipality also provides for several types of other zoning, including multi-family residential<sup>227</sup> and business districts.<sup>228</sup>

The purposes of these districts include:

- (a) To regulate the bulk and location of dwellings . . .
- (b) To *provide for the proper location of institutions* and other community facilities so as to increase the general convenience, *safety*, and amenities within the community;
- (c) To protect the desirable characteristics and *promote the stability of existing residential development*;
- (d) To regulate the density and distribution of population . . . *to avoid congestion and provide adequate public services.*<sup>229</sup>

Although the municipality provides adequate public services,<sup>230</sup> the municipality regulations state that a use listed in § 151.1003 "shall be permitted as a conditional use in a district when denoted by the letter 'C', provided the Planning Commission and/or Council make the determination that the requirements of 151.20 have been met, according to the procedures set forth in Chapter 150.16."<sup>231</sup> Thus, in the Montgomery case study, while a family home for disabled persons is listed as a permitted conditional use in all zoning districts of Montgomery, the physical and mental conditions listed in the Application failed to use the inclusive language of disability; instead, it stated two specific categories, neither of which involves a currently recognized mental disorder diagnosis for living persons.<sup>232</sup>

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/public\_documents300/montgomery/published\_documents/Ordinances/CHAPTER%20151%20-%202013.pdf.

<sup>225</sup> *Zoning Map/Address Map of City of Montgomery, Ohio*, CITY OF MONTGOMERY, available at [http://www.egovlink.com/public\\_documents300/montgomery/published\\_documents/Business/ZONING\\_MAP.pdf](http://www.egovlink.com/public_documents300/montgomery/published_documents/Business/ZONING_MAP.pdf) (last visited Mar. 15, 2015).

<sup>226</sup> MUN. ZONING CODE § 151.0101.

<sup>227</sup> See *Zoning Map/Address Map*, *supra* note 225 (labeled under "Residential Districts" as D-2 and D-3).

<sup>228</sup> *Id.* (labeling "Business Districts" as (1) Office, (2) Limited Business, (3) General Business, (4) Core Old Montgomery, (5) Outer Old Montgomery, and (6) Old Montgomery Gateway).

<sup>229</sup> MUN. ZONING CODE § 151.1001 (emphasis added).

<sup>230</sup> MUN. ZONING CODE § 151.1002.

<sup>231</sup> MUN. ZONING CODE § 151.1002(b) (emphasis added).

<sup>232</sup> See discussion *supra* Part II (discussing how *the Application* was "to operate an Adult

*B. Analysis of Conditional Use*

The municipality's conditional use section includes a purpose statement relative to "safeguarding . . . the health, safety, and general welfare of the community."<sup>233</sup> The Purpose section also describes a "more detailed evaluation of each use . . . with respect to such considerations as location, design, size, method(s) of operation, intensity of use . . . and traffic generation."<sup>234</sup> In making its analysis, the Planning Commission shall:

[R]eview the particular facts and circumstances of each proposed use in terms of the following criteria and shall find adequate evidence that the use as proposed:

- (a) Will be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity, and that such use will not essentially change the character of the same area;
- (b) Will not be detrimental to property values in the immediate vicinity;<sup>235</sup>
- (c) Will not restrict or adversely affect the existing use of the adjacent property owners . . . ;
- . . .
- (f) The establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety or general welfare;
- (g) The hours of operation of the proposed use are similar to a use permitted in the district . . . ;
- . . .
- (k) The establishment of the conditional use should not be detrimental to the economic welfare of the community by creating excessive additional requirements at public cost for public facilities such as police, fire and schools; and
- (l) There is minimal potential for future hardship on the conditional use that could result from the proposed

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Family Home for up to five *Alzheimer's and/or dementia* patients at an existing single family house").

<sup>233</sup> MUN. ZONING CODE § 151.2001.

<sup>234</sup> *Id.* (emphasis added).

<sup>235</sup> MUN. ZONING CODE § 151.2002. *See generally* MUN. ZONING CODE §§ 151.2001–151.2008 (listing all "Conditional Use Regulations" under Chapter 151.20).

use being surrounded by uses permitted by right that may be incompatible.<sup>236</sup>

Analyzing each of the above sections relevant to the case study's municipality in turn reveals the following information. First, the changes, to comply with accommodations, likely would not be harmonious and appropriate in appearance with the existing or intended character of the general vicinity, and such use would, in essence, change the character of the same area. Specifically, the municipality has an existing articulation of the lot requirements for standard single-family-detached and two-family dwellings.<sup>237</sup> The minimum lot frontage requirement for standard single-family "A" zoned detached dwellings is fifty feet, the side yard requirement is fifteen feet, and the rear yard is thirty-five feet.<sup>238</sup> Here, one must question how the rear yard changes would comport with these provisions because the minimum setback requirements must not change for frontage of fifty feet, regardless of a CUP of this sort.<sup>239</sup> As a result, the applicant's ability to comply with this zoning provision appears highly improbable.

Additionally, "[i]n any residential district, the percentage of a lot covered by a nonresidential use, including buildings and parking, shall not exceed 40% of the total area of the lot."<sup>240</sup> Simply applying rough estimates support rejecting the application. The house itself occupies 13.24% of the lot.<sup>241</sup> Adding that tenants and paid caregivers would also use the lot for outdoor time raises this percentage to nearly 100%. Further, caregivers, service providers, friends, and family will likely use the driveway for parking and may even require the need for additional parking on the lot—likely beyond the required structural additions. A reasonable expectation exists that 40–100% of the lot's total area would be for a commercial purpose, a non-residential use, violating municipal zoning provisions.

Second, the likely changes would be detrimental to property values in the immediate vicinity.<sup>242</sup> As indicated, numerous studies demonstrate

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<sup>236</sup> MUN. ZONING CODE § 151.2002.

<sup>237</sup> See MUN. ZONING CODE § 151.1004 ("Lots created for single-family . . . and two-family dwellings where permitted shall comply with the area and dimension requirements specified in Schedule 151.1004 for the district in which the lot is located.").

<sup>238</sup> MUN. ZONING CODE § 151.1005 (using a schedule to establish, in feet, the yard requirements for standard single-family detached dwellings and two-family dwellings).

<sup>239</sup> See MUN. ZONING CODE §§ 151.2004, 151.2007(j).

<sup>240</sup> MUN. ZONING CODE § 151.2005 (2013).

<sup>241</sup> See RHODES, *supra* note 16. The house covers 2653 square feet on the .460 acre lot. Given that 43,560 square feet are in an acre and .460 of an acre is approximately 20,037 square feet, the building alone constitutes 13.24% ((2653÷20037)×100%) of the lot.

<sup>242</sup> See *supra* Part IV; MUN. ZONING CODE § 151.2002(b).

statistical significance relative to damaging negative externalities and spill-over effects impacting the intrinsic value of the neighboring real estate and improvements should the applicant, the Integrated Corporate Enterprise, or both engage in the business activities contemplated by the application.<sup>243</sup>

Third, the likely structural changes would restrict or adversely affect the existing use of the adjacent property by its owners, particularly as to parking on a five lot cul-de-sac or to children playing in yards that may encounter wandering tenants of the subject property. And again, the Department of Justice has stated that “neighbors and local government officials may be legitimately concerned that a group home for adults in certain circumstances may create more demand for on-street parking than would a typical family.”<sup>244</sup>

Fourth, the establishment, maintenance, or operation of the conditional use would be detrimental to or endanger the public health, safety or general welfare.<sup>245</sup>

Fifth, the hours of operation of the proposed use are in no way similar to a use permitted in the district. The Our Family Home website indicates that commercial activity occurs 24-hours a day at its facilities, and a myriad of legal problems exists once an Ohio municipality approves a CUP for a 24-hour business.

Sixth, any argument that the establishment of the conditional use would not be detrimental to the municipality’s economic welfare by creating excessive additional requirements at public cost for public facilities such as police, fire and schools is disingenuous; an applicant bears the burden of demonstrating that it would not be, based on its other affiliated commercial properties for AHF or ACF use.<sup>246</sup>

Finally, far more than minimal potential exists for future hardship.<sup>247</sup> For example, courts have held that where a zoning resolution fails to impose a time limit on a business’s operations, the CUP may not limit the business’s operations; this failure allows customers, employees, independent contractors, and government officials to come and go day or night,<sup>248</sup> thereby violating the state policy of promoting the “public health and

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<sup>243</sup> See *supra* Part IV.

<sup>244</sup> See *Joint Statement*, *supra* note 215.

<sup>245</sup> See *supra* discussion Part V.B.

<sup>246</sup> MUN. ZONING CODE § 151.2007(j).

<sup>247</sup> MUN. ZONING CODE § 151.1002.

<sup>248</sup> See, e.g., *Bd. of Twp. Trs. v. Davisson*, No. 14-06-50, 2007 WL 2983080, at \*7 (Ohio Ct. App. Oct. 15, 2007) (holding that the Board of Zoning Appeals had no authority to impose a time limitation on the CUP).

safety, . . . convenience, comfort, prosperity, or general welfare,”<sup>249</sup> and the CUP is powerless to change the zoning to account for this matter retroactively.<sup>250</sup> To amplify the real prospect of this future hardship from the proposed use, once a municipality has granted a CUP not only does the CUP become “the functional equivalent of a permitted use”<sup>251</sup> but that conditional use also remains after a transfer of ownership.<sup>252</sup>

C. *Analysis of Family Homes for “Handicapped Persons”*

Section 151.2007(g) articulates the provisions regarding family homes for handicapped persons:

- (1) The persons residing in such residential home shall live as a single housekeeping unit in a single dwelling unit and maintain said home as their sole, bona fide, permanent residence. The term “permanent residence” means:
  - (A) The resident intends to live at the dwelling on a continuing basis; and,
  - (B) The resident does not live at the dwelling in order to receive counseling, treatment, therapy or medical care.<sup>253</sup>

While (B) above contravenes the Our Family Home website, (A) above seems offensive but practically impossible since neither people with a prior diagnosis of dementia nor decedents receiving the post-mortem Alzheimer’s diagnosis could “intend” anything on a continuing basis under § 151.2007(g)(1)(A), per the DSM-5 or other science. Also, this situation appears to violate (B) because the “but-for-cause” of the person living at the ACF is to receive treatment or care.

Nothing mandates that a municipality, such as Montgomery, approve a CUP in light of the purposes set forth in the MZC. Given that a cemetery also receives similar treatment under the municipality’s zoning ordinance, one must ask: why would neighbors not apply for a cemetery CUP for their real property, given that approximately eighty-eight percent

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<sup>249</sup> OHIO REV. CODE ANN. § 303.02 (LexisNexis 2009).

<sup>250</sup> *Davisson*, 2007 WL 2983080, at \*7 (holding that the reasons provided were not sufficient to justify the imposition of a time limit).

<sup>251</sup> *Welling v. Perry Twp. Bd. of Zoning Appeals*, No. 2003CA00303, 2004 WL 540290, at \*2 (Ohio Ct. App. Mar. 15, 2004).

<sup>252</sup> *See Baughman v. Bd. of Zoning Appeals*, No. 8-01-27, 2002 WL 1773043, at \*3 (Ohio Ct. App. Aug. 2, 2002).

<sup>253</sup> *See* MUN. ZONING CODE § 151.2007(g) (2013).

of Our Family Home's residents die in Our Family Homes's homes?<sup>254</sup> Approving a CUP for a cemetery would not only be profitable for neighboring real property owners, thereby expanding the municipality's economic production possibilities, but also would be efficient in terms of opportunity costs by burying those former tenants quickly, adjacent to where the residents pass away. This admittedly absurd hypothetical could sadly represent a very real conclusion should a tribunal approve a CUP application in a municipality with such zoning ordinances, setting into effect other actions by affected parties, such as lawsuits involving private servitude.

### 1. Synthesis, Other Inconsistencies, and Concerns

With regard to each of the foregoing issues, the relevant federal circuit court placed the burden on the CUP applicant, not the municipality. Applied to the case study, it would appear that the applicant has an extremely high burden to overcome.

In an e-mail dated June 17, 2013, from Damante to Mr. Davis of Montgomery, Damante advanced several troubling or inconsistent statements.<sup>255</sup> Regardless of the type of ACF, Ohio has not required proof of any liability insurance coverage since October 16, 2009.<sup>256</sup> As of October 3, 2013, the MSHAS licensure certification listing lists Our Family Home in New Albany, Ohio and Our Family Home and Our Family Home, Inc. in Worthington, Ohio as licensed AFH-type ACFs.<sup>257</sup> While each of these entities list different addresses, each use the same telephone number, presumably serving as an integrated entity for legal purposes.<sup>258</sup> Yet in his e-mail to Davis, Damante stated that "our caregivers do not give medical care."<sup>259</sup>

While the Our Family Home's FAQ (Frequently Asked Questions) webpage is careful not to use the de jure lexicon of "medical care," in

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<sup>254</sup> Source on file with author.

<sup>255</sup> See E-mail, *supra* note 14.

<sup>256</sup> *Adult Care Facility Initial Application*, OHIO DEP'T OF MENTAL HEALTH, <http://mha.ohio.gov/Portals/0/assets/Regulation/LicensureAndCertification/acf-application-initial.pdf> (last visited Mar. 15, 2015).

<sup>257</sup> See *ACF List by County*, *supra* note 217.

<sup>258</sup> See generally PHILLIP I. BLUMBERG ET AL., *BLUMBERG ON CORPORATE GROUPS* § 28.02[A] (2d ed. Supp. 2011–2012) (discussing the "General Enterprise Doctrine").

<sup>259</sup> See E-mail, *supra* note 14; see also *supra* Part I.A (discussing potentially using revenue-generating residents to act as pretextual tenants serving as revenue drivers for the greater integrated enterprise during a holding period that would permit the Enterprise's property management and property services divisions to drive additional revenue for the Enterprise based on the Application's approval).



response to question four, addressing dementia/Alzheimer's training, the page states: "Our caregivers are trained by our Nurse Manager on a regular basis."<sup>260</sup> Assuming the training goes beyond informing the applicant's caregivers that dementia no longer is a mental disorder and that Alzheimer's can only be diagnosed post-mortem, why would a nurse be needed to provide training on matters that do not constitute medical care?

Additionally, Enterprise's response to question seven, which asks if a nurse is available at all times, states: "We have a licensed nurse on call 24/7 [who] comes to all the homes numerous times throughout the week to assess residents."<sup>261</sup> Assessing tenants based on the sole criteria of what used to be a mental disorder by providing some sort of medical care, at least in the common parlance; her coming-and-going "24/7" adds to the previously stated concerns of the permanent long-term effects of a municipality's approval of a CUP application for a 24-hour business in a single-family home, residentially zoned cul-de-sac.

Indeed, by virtue of an ACF/AHF license, Ohio's administrative code specifically states that ACFs provide certain care.<sup>262</sup> Yet, municipalities should gravely consider during its deliberative process on an ACF-based CUP application that caregivers at Ohio AHFs are not required to have any continuing education or training beyond CPR, leading a reasonable person to assume approval of an application will increase the resource usage of a municipality's fire department or EMTs.<sup>263</sup>

Furthermore, the CEO has claimed that California features more than 5,000 such similar residences.<sup>264</sup> In making that assertion, the CEO failed to discuss how many of these residences actually were located in zoned areas, required zone variances, or needed CUP application approvals. Far more importantly, however, the CEO, the applicant, Our Family Home,

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<sup>260</sup> *Frequently Asked Questions*, OUR FAMILY HOME, <http://www.ourfamilyhomeinc.com/faq.html>, archived at <http://perma.cc/4QFE-2ZF6> (last visited Mar. 15, 2015).

<sup>261</sup> *Id.*

<sup>262</sup> See OHIO ADMIN. CODE § 5122-33-01(E)(1) (Supp. 2012–2013).

<sup>263</sup> See Eric M. Carlson, *Critical Issues in Assisted Living: Who's In, Who's Out, and Who's Providing the Care* 72–73 (2005), available at <http://www.nslc.org/wp-content/uploads/2011/07/Critical-Issues-in-Assisted-Living.pdf> (providing a chart of names used by states); see also *id.* at 66 (showing Ohio lacking in training but requiring a CPR Certification, which may constitute medical care provision); *id.* at 69 (evidencing no Ohio requirement for continuing education for caregivers at adult care facilities, placing Ohio in the minority of states on that matter).

<sup>264</sup> *Group Home for Alzheimer's Patients Opens in Worthington*, 10TV.COM (Aug. 21, 2012, 5:47 PM), available at <http://www.10tv.com/content/stories/2012/08/21/worthington-group-home-for-alheimers-patients.html>, archived at <http://perma.cc/2CGF-KSEU>.

the Integrated Corporate Enterprise, or a combination of some or all of them, also apparently neglected to mention that the controlling law in California—as set forth by the Ninth Circuit and California’s Supreme Court—is vastly different from the controlling law set forth by the Sixth Circuit and Ohio’s Supreme Court.

#### CONCLUSION

This Article extended my prior case study-based research publications to analyze a trending problem in social entrepreneurship that represents a coming wave of activity in the United States. Specifically, the Article reviewed the property and financial rights implicated when ostensibly socially beneficent LLCs pretextually pose as small businesses desirous of serving people who suffer from disabilities. Brand-managed ostensible social entrepreneurs often represent arms of greater multi-million dollar integrated corporate enterprises that use the LLC and associated small business owner story to wield mental disability antidiscrimination law as a shield through which the integrated corporate enterprise can exploit small municipalities’ zoning ordinances and relative lack of funding and legal sophistication, threatening the municipality with costly legal action should the municipality fail to change its zoning ordinances and permit the corporate integrated enterprise to operate a 24-hour commercial business deep in the heart of property zoned for single-family residential use.

The integrated corporate enterprise’s actions leave all but the integrated corporate enterprise drowning in the spillover effects of the enterprise’s negative externalities, including the real risks of material physical harm and financial loss.

Despite using a limited case study analytic, this Article’s analysis should educate interdisciplinary scholars, tribunals, and municipalities of this emerging trend in social entrepreneurship with the nation’s demographics shift to aging baby boomers suffering from afflictions subject to existing laws that integrated corporate enterprises can perversely exploit to generate material cash flows from, as one such enterprise has called them, the “frail elderly.” These corporate enterprises are simultaneously attempting to use superior resources to dupe the municipalities and existing owners of single-family residential-zoned property. The Article also serves to assist legitimate healthcare providers to avoid the errors made by certain large corporate integrated enterprises so that people suffering from disabilities indeed receive the care and the housing they may seek.

Simply put, given the consistent line of cases which govern the FHAA's judicial application of standing in the relevant federal circuit court, state statutory law, or municipal zoning ordinances, municipalities should ensure that they do not become the victim of purported social entrepreneurs attempting to extract literal and figurative economic rent-seeking, which would lead to the municipality and existing property owners to either seek declaratory relief from the courts or engage in their own quiet riot.