

Principles to Guide Zoning for Community Residences: Boulder City, Nevada

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Introduction

This report explains the rationale for the proposed text amendments to Title 11, “Zoning and Subdivisions,” of Boulder City’s city code. The purpose of these amendments is to make the reasonable accommodations for community residences for people with disabilities that are necessary to bring the city’s zoning into compliance with national law and sound zoning practices. The recommended zoning approach is based upon a careful review of:

- ◆ The functions and needs of community residences and the people with disabilities who live in them
- ◆ Sound city planning and zoning principles and policies
- ◆ The Fair Housing Amendments Act of 1988 (FHAA) and amended Title VIII of the Civil Rights Act of 1968, 42 U.S.C. Sections 3601–3619 (1982)
- ◆ Report No. 100–711 of the House Judiciary Committee interpreting the FHAA amendments
- ◆ The HUD regulations implementing the amendments, 24 C.F.R. Sections 100–121 (January 23, 1989)
- ◆ Existing Nevada state law regarding community residences, particularly NRS 278.02386 (formerly 278.021), NRS 449.008, NRS 449.009, NRS 449.0105, NRS 449.0115, and NRS 449.017
- ◆ Case law interpreting the 1988 Fair Housing Act amendments relative to community residences for people with disabilities including decisions and settlements involving Clark County
- ◆ The existing provisions of Title 11, “Zoning and Subdivisions” of Boulder City’s code
- ◆ The goals, objectives, and policies of the *Boulder City Master Plan*, 2003, updated 2009

Community Residences

Community residences are crucial to achieving the adopted goals of the State of Nevada and the United States of America to enable people with disabilities to live as normal life as possible in the least restrictive living environment. We have made great strides from the days when people with disabilities were warehoused in inappropriate and excessively restrictive institutions, out of sight and out of mind.

People with substantial disabilities often need a living arrangement where they receive staff support to engage in the everyday life activities most of us take for granted. These sorts of living arrangements fall under the broad phrase “community residence” — a term that reflects their *residential nature* rather than the institutional nature of a nursing home or hospital. Their primary use is as a residence or a home like yours and mine, not a treatment center nor an institution.

One of the essential elements of community residences is that they seek to emulate a family. The staff (or in the case of a recovery community, the officers) function as parents, doing the same things our parents did for us and we do for our children. The residents with disabilities are in the role of the siblings, being taught or retaught the same life skills and social behaviors our parents taught us and we try to teach our children.

Community residences seek to achieve “normalization” of their residents and incorporate them into the social fabric of the surrounding community. They are operated under the auspices of a legal entity such as a non-profit association, for-profit private care provider, or a government entity.

It is important to note that the definition of “family” in Boulder City’s zoning code allows up to five unrelated persons to live together as a single housekeeping unit.¹ Any group of as many as five unrelated individuals can live together as of right, namely as a permitted use in all zoning districts that allow any kind of residential use. Consequently, any community residence with no more than five unrelated residents is allowed as a permitted use in residential districts. Placing any additional zoning requirements on them would be discriminatory on their face. This report focuses on community residences that exceed this cap of five unrelated individuals.

However, the vast majority of all community residences for people with disabilities house more than five unrelated people for both therapeutic and financial reasons. The specific number of residents usually depends on the type of disability the folks living in the community residence have.² Like other cities across the nation, Boulder City needs to adjust its zoning to enable community residences for people with disabilities to locate in residential zoning districts.

Since 1989, the nation’s Fair Housing Act has required all cities, counties, and states to make a “reasonable accommodation” in their zoning when the number of residents is greater than the local cap on the number of unrelated people who can live together so that community residences for people with disabilities can locate in all residential zoning districts.

When President Reagan signed the Fair Housing Amendments Act of 1988 (FHAA), he added people with disabilities to the classes protected by the nation’s Fair Housing Act (FHA). The 1988 amendments recognized that many people with disabilities need a community residence (group home, halfway

1 The U.S. Supreme Court sanctioned this type of restriction in *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974) and later modified its ruling in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977).

2 While the trend for people with developmental disabilities is toward smaller group home households, valid therapeutic and financial reasons lead to community residences for people with mental illness or people in recovery from drug and/or alcohol addiction to typically house eight to 12 residents. However, a community residence must comply with minimum floor area requirements like any other residence. If the local building code would allow only eight people in a house, then that’s the maximum number of people who can live in that house when it’s a community residence for people with disabilities.

house, recovery community) in order to live in the community in a family–like environment rather than being forced into an inappropriate institution.

Consequently, the act requires all cities, counties, and states to allow for community residences (group homes, recovery homes, and halfway houses) for people with disabilities by making some exceptions in their zoning ordinance provisions that, for example, may limit how many unrelated people can live together in a dwelling unit or even prohibit unrelated individuals from living together.

People without disabilities and people with disabilities who pose “a direct threat to the health or safety of others” are not covered by the 1988 amendments to the Fair Housing Act. Therefore, cities do not have to make the same zoning allowances for them as they do for people with disabilities who do not pose “a direct threat to the health or safety of others” such as prison pre–parolees. The zoning amendments that will go before the Planning Commission and City Council will not permit halfway houses for people who fall into these dangerous categories.

The FHAA’s legislative history states that:

“The Act is intended to prohibit the application of special requirements through land–use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice within the community.”³

While many advocates for people with disabilities suggest that the FHAA prohibits all zoning regulation of community residences, the FHAA’s legislative history suggests otherwise:

“Another method of making housing unavailable has been the application or enforcement of otherwise neutral rules and regulations on health, safety, and land–use in a manner which discriminates against people with disabilities. Such discrimination often results from false or overprotective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited.”⁴

Many states, counties, and cities across the nation continue to base their zoning regulations for community residences on these “unfounded fears.” The 1988 amendments require all levels of government to make a *reasonable accommodation* in their zoning rules and regulations to enable community resi-

3 H.R. Report No. 711, 100th Cong., 2d Sess. 311 (1988), reprinted in 1988 U.S.C.C.A.N. 2173.

4 Ibid.

dences for people with disabilities to locate in the same residential districts as any other residential use.⁵

It is well settled that for zoning purposes, a community residence is a residential use, not a business use. The Fair Housing Amendments Act of 1988 specifically invalidates restrictive covenants that would exclude community residences from a residential district. The Fair Housing Act renders these restrictive covenants unenforceable against community residences for people with disabilities.⁶

Type of community residences

Within the broad category of community residences are two types of living arrangements that warrant slightly different zoning treatments tailored to their specific characteristics:

- ◆ **Family community residences** which include such uses commonly known as group homes and recovery communities, and
- ◆ **Transitional community residences** which include such uses commonly known as halfway houses

Family Community Residences

A *family community residence* offers a relatively permanent living arrangement for people with disabilities that emulates a family. They are usually operated under the auspices of an association, corporation, or other legal entity, or their parents or individual legal guardians. Some, like recovery communities for people in recovery from alcohol and/or drug addiction, are self-governing.

Residence, not treatment, is the home's primary function. *There is no limit to how long a resident can live in a family community residence. Tenancy is measured in years, not months.* Family community residences are most often used to house people with developmental disabilities (mental retardation, autism, etc.), mental illness, physical disabilities including the frail elderly, and individuals in recovery from addiction to alcohol or drugs (legal or illegal) who are not currently "using." These recovery communities are often the only house on a block that is completely free of alcohol use and illegal drugs.

Family community residences are often called *group homes* and, in the case of people with alcohol or drug addictions, *recovery communities*. Their key distinction from *transitional community residences* is that people with disabilities can live in a family community residence for years, not months or weeks. In a nation where the typical household lives in its home for five to seven years,

5 42 U.S.C. §3604(f)(B) (1988).

6 H.R. Report No. 711, 100th Cong., 2d Sess. 311 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2184.

these are long-term, relatively permanent residences. There is no limit on how long someone can dwell in a family community residence as long as they obey the rules and do not constitute a danger to others or themselves.

To be successful, a community residence must be located in a conventional residential neighborhood so that normalization can take place. The underlying rationale for a community residence is that by placing people with disabilities in as “normal” a living environment as possible, they will be able to develop to their full capacities as individuals and citizens. The atmosphere and aim of a community residence is very much the opposite of an institution.

The family community residence emulates a family in most every way. The activities in a family community residence are essentially the same as those in a dwelling occupied by a biologically-related family. Essential life skills are taught, just like we teach our children. Most family community residences provide “habilitative” services for their residents to enable them to develop their life skills to their full capacity. *Habilitation* involves learning life skills for the first time as opposed to *rehabilitation* which involves relearning life skills.

While recovery communities are like group homes in most respects, they tend to engage more in rehabilitation where residents relearn the essential life skills we tend to take for granted, although for some very long-term alcoholics or drug addicts in recovery, they may be learning some of these life skills for the first time. Recovery communities are often referred to as *three-quarter houses* because they are more family-like and permanent than the better known *half-way house* which falls under the *transitional community residence* category. The residents periodically elect officers who act in the parental role while the other residents are in the role of siblings. In a group home, staff functions in the parental role.

Interaction between the people who live in a family community residence is essential to achieving normalization. The relationship of a community residence’s inhabitants is much closer than the sort of casual acquaintances that occur between the residents of a boarding or lodging house where interaction between residents is merely incidental. In both family and transitional community residences, the residents share household chores and duties, learn from each other, and provide one another with emotional support — family-like relationships not essential for nor present in lodging houses, boarding houses, fraternities, sororities, nursing homes, or other institutional uses.

As the courts have consistently concluded, community residences foster the same family values that even the most restrictive residential zoning districts promote. Family community residences comply with the purpose statements for each of Boulder City’s residential districts.⁷ Even before passage of the 1988 amendments to the Fair Housing Act, most courts concluded that family com-

⁷ See §11-3-2, §11-4-2, §11-5-2, §11-6-2, §11-7-2, and §11-37-2.

munity residences for people with disabilities should be allowed as of right in all residential zones.

Transitional Community Residences

In contrast to the group homes and recovery communities that fall in the category of family community residences, *transitional community residences* such as halfway houses are a comparatively temporary living arrangement that is not quite as family-like as a group home or recovery community. Residency is measured in weeks or months, not years. Nearly all halfway houses impose a limit on how long someone can live there.

A halfway house offers a temporary living opportunity in the community for individuals who need supportive living while they prepare to reenter society and live on their own or with their family. The residents need to relearn life skills they may have lost — halfway houses offer rehabilitative services rather than habilitation. Like all community residences, a halfway house is operated by some legal entity such as a non-profit association, a for-profit company, or a government agency. Typical of the people with disabilities who need a halfway house are people with mental illness who leave an institution and need only a short stay in a community residence before moving to a less restrictive living environment. Similarly, people recovering from addictions to alcohol or drugs move to a halfway house following detoxification in an institution until they are capable of living in a recovery community or other less restrictive environment.

Halfway houses are also used for prison pre-parolees. However, such individuals are not, as a class, people with disabilities. Zoning can be more restrictive of halfway houses for them since they are not covered by the Fair Housing Act. Consequently the proposed zoning amendments do *not* change Boulder City’s exclusion of halfway houses for prison pre-parolees. The zoning amendments will make it clear that halfway houses for prison pre-parolees or as an alternative to jail are not permitted in Boulder City.

“Direct threat” exclusion

Individuals with disabilities who “constitute a direct threat to the health or safety of others” are not covered by the Fair Housing Amendments Act of 1988. 42 U.S.C. § 3602(f)(9) (1988). Consequently, licensing rules that prohibit such individuals from living in community residences are legal.

Halfway houses are residential uses that must locate in residential neighborhoods if they are to succeed. But since they do not emulate a family as closely as a group home or recovery community does, and the length of tenancy is relatively temporary, it is likely that a jurisdiction can require a conditional use permit for halfway houses in single-family districts while allowing them as a permitted use in multiple family districts subject to the two requisite conditions explained later in this report. *However, it is important to remember that a conditional use permit cannot be denied on the basis of neighborhood opposition rooted in unfounded myths and misconceptions about the residents of a proposed halfway house.*

Rational Foundations for Regulating Community Residences

No small land use has been studied as much as community residences. To understand the rationale for the guidelines for regulating community residences that are suggested in this document, it is vital to review what is known about community residences related to their appropriate location, number of residents needed to succeed both therapeutically and financially, means of protecting their vulnerable populations from mistreatment or neglect as well as excluding dangerous individuals from living in them, and their impacts, if any, on the surrounding community.

Relative location of community residences. For over 35 years, researchers have found that some community residence operators will locate their community residences close to other community residences, especially when zoning does not allow community residences for people with disabilities as of right in all residential districts. They tend to be clustered in a community's lower cost or older neighborhoods and in areas around colleges.⁸ In the course of preparing the *Clark County, Nevada Analysis of Impediments to Fair Housing Choice 2010*, Planning/Communications found numerous instances where community residences were clustered on a block or in a small neighborhood. In every jurisdiction for which Planning/Communications has conducted an Analysis of Impediments, it has found clustering of community residences in those cities that do *not* require a spacing distance between community residences that are allowed as of right.

Why clustering is detrimental. Placing community residences too close to each other can easily hinder their ability to achieve normalization for their residents and create a *de facto* social service district. In today's society, people tend to get to know nearby neighbors on their block within a few doors of their home (unless they have children together in school or engage in walking, jogging, or other neighborhood activities). Neighbors that close to a community residence serve as role models to the community residence dwellers.

For normalization to occur, it is essential that community residence residents have such so-called "able-bodied" neighbors as role models. But if another community residence is opened very close to an existing group home — such as next door or within a few doors of it — the residents of the new home may replace the "able-bodied" role models with other people with disabilities

⁸ See General Accounting Office, *Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled* (August 17, 1983) which found that 36.2 percent of the group homes for people with developmental disabilities surveyed were located within two blocks of another community residence or an institutional use. At 19. Also see D. Lauber and F. Bangs, Jr., *Zoning for Family and Group Care Facilities*, American Society of Planning Officials Planning Advisory Service Report No. 300 (1974) at 14; and *Family Style of St. Paul, Inc., v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991) where 21 group homes that housed 130 people with mental illness were established on just two blocks.

and quite possibly hamper the normalization efforts of the existing community residence. Clustering three or more community residences on the same block not only undermines normalization but could inadvertently create a *de facto* social service district and alter the residential character of the neighborhood. All the evidence recorded to date shows that one or two community residences for people with disabilities on a block do *not* alter the residential character of a neighborhood.⁹

As long as community residences are not clustered on the same block (the idea is to assure there are at least several lots between community residences on a linear block) they will not generate these adverse impacts. Consequently, it is reasonable to require a spacing distance between community residences allowed as of right that keeps them about 600–660 feet apart in terms of actual walking distance.¹⁰

If the operator of a proposed community residence wishes to locate it within the spacing distance, then the heightened scrutiny of a conditional use permit is warranted. The conditional use permit process allows the city to evaluate the cumulative effect of locating so close to an existing community residence and whether the proposed community residence would interfere with normalization at the existing community residence or affect the character of the neighborhood. For example, if there is a geographic feature such as a freeway, drainage channel, or hill between the proposed and existing community residences that acts as a barrier between the two, it is unlikely that allowing the proposed community residence would interfere with normalization or alter the community's character — and the conditional use permit should be granted.

To avoid any ambiguity, when a community residence is proposed, this spacing distance is measured from the front door of the closest community residence along the public or private rights of way. The idea is to measure the actual distance people would have to travel to go from one community residence to another, as opposed to measuring as the crow flies. Therefore, it is necessary for the operator of every proposed community residence to complete the Zoning Compliance Application form that is recommended for Boulder City to use so the city can measure spacing distances from existing community residences. The city should also establish a database and map of the locations of all existing community residences so it can apply the spacing distance to any proposed

9 See General Accounting Office, *Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled* 27 (August 17, 1983).

10 Some cities and counties establish a different spacing distance between community residences allowed as of right based on the density of the zoning district. The denser the district, the shorter the spacing distance. See Peter Natarrelli, *Zoning for a New Kind of Family* 17 (Westchester County Department of Planning, Occasional Paper 5, 1976) where spacing distances vary by the number of persons per square mile. Also see *An Ordinance Amending Title 6 of the Village of Lincolnshire Village Code (Community Residential Homes)*, Ordinance No. 90-1182-66, adopted December 10, 1990, Lincolnshire, Illinois, which established spacing distances ranging from 500 to 1,500 feet between community residences depending on the zoning district. Probably due to the complexity involved, very few jurisdictions establish different spacing distances in different zoning districts. Most use the same spacing distance throughout the city or county.

community residence.

The technical explanation. Normalization and community integration require that persons with disabilities severe enough to require a supportive living arrangement like a community residence be absorbed into the neighborhood's social structure. Generally speaking, the existing social structure of a neighborhood can accommodate no more than one or two community residences on a single block. Neighborhoods seem to have a limited absorption capacity for service-dependent people that should not be exceeded.¹¹

Social scientists note that this capacity level exists, but an absolute, precise level cannot be identified. Writing about service-dependent populations in general, Jennifer Wolch notes, "At some level of concentration, a community may become saturated by services and populations and evolve into a service-dependent ghetto."¹²

According to one leading planning study, "While it is difficult to precisely identify or explain, 'saturation' is the point at which a community's existing social structure is unable to properly support additional residential care facilities [community residence]. Overconcentration is not a constant but varies according to a community's population density, socio-economic level, quantity and quality of municipal services and other characteristics." There are no universally accepted criteria for determining how many community residences are appropriate for a given area.¹³

This research strongly suggests that there is a legitimate government interest to assure that group homes do not cluster. While the research on the impact of group homes makes it abundantly clear that two group homes separated by at least several other houses on a block produce no negative impacts, there is very credible concern that group homes located more closely together on the same block could generate adverse impacts on both the surrounding neighborhood and on the ability of the group homes to facilitate the normalization of their residents, which is, after all, their raison d'être.

Maximum number of residents. The majority view of the courts, both before and after enactment of the Fair Housing Amendments Act of 1988, is that community residences constitute a functional family and that zoning should treat the occupants of a community residence as a "family." Still, the U.S. Supreme Court has ruled that a jurisdiction can establish a cap on the number of

11 Kurt Wehbring, *Alternative Residential Facilities for the Mentally Retarded and Mentally Ill* 14 (no date) (mimeographed).

12 Jennifer Wolch, "Residential Location of the Service-Dependent Poor," 70 *Annals of the Association of American Geographers*, at 330, 332 (Sept. 1982).

13 S. Hettinger, *A Place They Call Home: Planning for Residential Care Facilities* 43 (Westchester County Department of Planning 1983). See also D. Lauber and F. Bangs, Jr., *Zoning for Family and Group Care Facilities* at 25.

unrelated persons who can occupy a dwelling unit.¹⁴ The Fair Housing Act requires jurisdictions to make a reasonable accommodation for community residences for people with disabilities by making exceptions to these caps.

In *Belle Terre*, the Court upheld this resort community’s zoning definition of “family” that permitted no more than two unrelated persons to live together. It’s hard to quarrel with the Court’s concern that the specter of “boarding housing, fraternity houses, and the like” would pose a threat to establishing a “quiet place where yards are wide, people few, and motor vehicles restricted.... These are legitimate guidelines in a land–use project addressed to family needs....”¹⁵ Unlike the six sociology students who rented a house during summer vacation in Belle Terre, Long Island, a community residence emulates a family, is not a home for transients, and is very much the antithesis of an institution. In fact, community residences for people with disabilities foster the same goals that zoning districts and the U.S. Supreme Court attribute to single–family zoning.

One of the first community residence court cases to distinguish *Belle Terre* clearly explained the difference between community residences and other group living arrangements like boarding houses. In *City of White Plains v. Ferraioli*,¹⁶ New York’s highest court refused to enforce the city’s definition of “family” against a community residence for abandoned and neglected children. The city’s definition limited occupancy of single–family dwellings to related individuals. The court found that it “is significant that the group home is structured as a single housekeeping unit and is, to all outward appearances, a relatively normal, stable, and permanent family unit....”¹⁷

Moreover, the court found that:

“There would be none of the permanency of community that characterizes a residential neighborhood of private homes. Nor is it like the so–called ‘commune’ style of living. The group home is a permanent arrangement and akin to the traditional family, which also may be sundered by death, divorce, or emancipation of the young.... The purpose is to emulate the traditional family and not to introduce a different ‘life style.’”¹⁸

The New York Court of Appeals explained that the group home does not conflict with the character of the single–family neighborhood that *Belle Terre*

¹⁴ *Belle Terre v. Borass*, 416 U.S. 1 (1974).

¹⁵ *Id.* at 7–9.

¹⁶ 313 N.E.2d 756 (N.Y. 1974).

¹⁷ *Id.* at 758–759.

¹⁸ *Id.* at 758 [citation omitted].

sought to protect, “and, indeed, is deliberately designed to conform with it.”¹⁹

In *Moore v. City of East Cleveland*,²⁰ Justice Stevens favorably cited *White Plains* in his concurring opinion. He specifically referred to the New York Court of Appeals’ language:

“Zoning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings. So long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance.”²¹

Justice Stevens’ focus on *White Plains* echoes the sentiments of New York Chief Justice Breitel who concluded that “the purpose of the group home is to be quite the contrary of an institution and to be a home like other homes.”²²

Since 1974, the vast majority of state and federal courts have followed the lead of *City of White Plains v. Ferraioli* and treated community residences as “functional families” that should be allowed in single-family zoning districts despite zoning ordinance definitions of “family” that place a cap on the number of unrelated residents in a dwelling unit. In a very real sense, the FHAA essentially codifies the majority judicial treatment of zoning ordinance definitions with “capped” definitions of “family.”

Boulder City’s zoning allows up to five unrelated individuals to occupy a dwelling unit. As noted earlier, any community residence that complies with that cap must be treated the same as any other “family” and no additional zoning requirements can be imposed. But any community residence that would house more than five unrelated individuals is entitled to a “reasonable accommodation” which is what this report proposes for Boulder City’s zoning code. It is important to remember, however, that no matter what the cap a city’s zoning code establishes, the number of residents in any type of residence is ultimately limited by the housing or building code that applies to all residential uses as discussed below.

The U.S. Supreme Court brought this point home in its 1995 decision in *Edmonds v. Oxford House*.²³ The Court ruled that housing codes that “ordinarily apply uniformly to all residents of all dwelling units ... to protect health

19 Id.

20 431 U.S. 494 (1977) at 517 n. 9.

21 Id.

22 *City of White Plains v. Ferraioli*, 313 N.E. 2d at 758.

23 514 U.S. 725, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995).

and safety by preventing dwelling overcrowding” are legal.²⁴ Zoning ordinance restrictions that focus on the “composition of households rather than on the total number of occupants living quarters can contain” are subject to the Fair Housing Act.²⁵

Protecting the residents and neighbors. People with disabilities who live in community residences constitute a vulnerable population that needs protection from possible abuse and exploitation. Community residences for these vulnerable individuals need to be regulated to assure that their residents receive adequate care and supervision. Licensing and certification are the regulatory vehicles used to assure adequate care and supervision. Sometimes a state hasn’t established licensing or certification for a particular population served by group homes. In these situations, certification by an appropriate national certifying organization or agency that is more than simply a trade group should be used in lieu of formal licensing. Licensing or certification also tends to prohibit from community residences people who pose a danger to others or themselves, or to property. Such people are *not* covered by the Fair Housing Act.

Therefore, there is a legitimate government interest in requiring that a community residence or its operator be licensed by the State of Nevada. If state licensing does not exist for a particular type of community residence, the residence can meet the certification of an appropriate national certifying agency, if one exists, or is otherwise sanctioned by the federal or state government.²⁶ If there is no governmental or quasi-governmental body that requires licensing or certification for a particular type of community residence, then the heightened scrutiny of a conditional use permit is warranted so the city can make sure that the residents of a proposed home are protected.

Impacts of community residences. The impacts of most types of community residences have been studied more than those of any other small land use. Over 50 statistically-valid studies have found that licensed community residences not clustered on a block produce no adverse impacts on the surrounding neighborhood. They do not affect property values, nor the ability to sell even the houses adjacent to them. They do not affect neighborhood safety nor neighborhood character — as long as they are licensed and not clustered on a block. They do not create excessive demand on public utilities, sewer systems, water supply, street capacity, or parking. They do not produce any more noise than a conventional family of the same size. All told, licensed, unclustered group homes, recovery communities, and halfway houses have consistently been found to be good neighbors.

Clustering community residences only undermines their ability to achieve

24 *Id.* at 1781 [emphasis added]. See the discussion of minimum floor area requirements beginning on page 16.

25 *Id.* at 1782.

26 For example, the U.S. Congress has recognized and sanctioned the recovery communities that operate under the auspices of Oxford House.

their central goals of normalization and community integration. A community residence needs to be surrounded by so-called “normal” or conventional households, the sort of households this living arrangement seeks to emulate (group homes and recovery communities emulate it more closely than halfway houses do). Clustering community residences adjacent to one another or within a few doors of each other increases the chances that their residents will interact with other service-dependent people living in a nearby community residence rather than conventional households with non-service dependent people.

Appendix B proffers an annotated bibliography of representative studies. The evidence is so overwhelming that few studies have been conducted in recent years since the issue is well settled: *Community residences that are licensed and not clustered on a block simply do not generate any adverse impacts on the surrounding community.*

Recommended regulatory approach

The 1988 amendments to the federal Fair Housing Act require all government jurisdictions to make a “reasonable accommodation” in their zoning codes and other rules and regulations to enable group homes and other community residences for people with disabilities to locate in the residential districts where they belong. The amendments proposed here allow for the reasonable accommodation the Fair Housing Amendments Act of 1988 requires for those people with disabilities who wish to live in a community residence. The legislative history of the FHAA makes it clear that jurisdictions cannot require a conditional use permit in residential districts for family community residences for people with disabilities. It does not, however, prohibit requiring conditional use permits in single-family districts for transitional community residences. Nor does the FHAA require that a city allow community residences for persons who do not have disabilities.

Like any other dwelling, when a community residence — whether it be “family” or “transitional” — complies with the cap on the number of unrelated persons that constitutes a “family” under the zoning code definition of “family,” it is allowed as of right in all residential districts. No additional zoning restrictions can be imposed on them. Licensing cannot be required; a spacing distance cannot be imposed. There is no doubt that any additional zoning requirements for community residences that comply with Boulder City’s definition of “family” would be “facially discriminatory.”

But when a proposed community residence would house more than the five unrelated individuals that Boulder City’s zoning code allows, Boulder City must make a “reasonable accommodation” to enable these homes to locate in the residential districts in which they belong. A thorough review of case law suggests that any reasonable accommodation must meet three tests:

- ◆ The proposed zoning restriction must be intended to achieve a legitimate government purpose.

- ◆ The proposed zoning restriction must actually achieve that legitimate government purpose.
- ◆ The proposed zoning restriction must be the least drastic means necessary to achieve that legitimate government purpose.

In *Bangerter v. Orem City Corporation*, the federal Court of Appeals said the same thing a bit differently, “Restrictions that are narrowly tailored to the particular individuals affected could be acceptable under the FHAA if the benefits to the handicapped in their housing opportunities clearly outweigh whatever burden may result to them.”²⁷

The proposed zoning amendments seek to enable community residences to locate in all residential zoning districts through the least drastic regulation needed to accomplish the legitimate government interests in preventing clustering (which undermines the ability of community residences to achieve their purposes and function properly and to maintain the residential character of a neighborhood) and in protecting the residents of the community residences from improper or incompetent care and from abuse. They are narrowly tailored to the needs of the residents with disabilities to provide greater benefits than any burden that might be placed upon them.

Family community residences

To make this reasonable accommodation for people with disabilities who wish to live in a community residence, these proposed zoning ordinance amendments will make family community residences for more than five unrelated people with disabilities a permitted use in all Boulder City zoning districts where residential uses are currently allowed, subject to two objective, nondiscretionary administrative criteria:

- ◆ The operator of the family community residence itself must receive any license or certification required by the State of Nevada, certification from an appropriate national accrediting agency, or recognition or sanctioning by Congress to operate the proposed family community residence; and
- ◆ The proposed family community residence is not located within a rationally-based specified distance of an existing community residence as measured from front door to front door along the public and private right of way.

²⁷ 46 F.3d 1491 (10th Cir. 1995) at 1504.

Transitional community residences

Residency in transitional community residences is more transitory than in family community residences because transitional community residences impose a maximum time limit on how long people can live in them.²⁸ Tenancy is measured in months or weeks, not years. This key characteristic makes a transitional community residence for more than five people with disabilities more akin to multiple-family residential uses than single-family dwellings. Even though multiple-family uses are not allowed in single-family districts, the Fair Housing Act requires every city and county to make a “reasonable accommodation” for transitional community residences for people with disabilities. This reasonable accommodation can be accomplished via the heightened scrutiny of a conditional use permit when an operator wishes to locate a transitional community residence in a single-family district.

However, in multiple-family districts, a transitional community residence should be allowed as a permitted use subject to two objective, nondiscretionary administrative criteria:

- ◆ The operator of the family community residence itself must receive any license or certification required by the State of Nevada, certification from an appropriate national accrediting agency, or recognition or sanctioning by Congress to operate the proposed family community residence; and
- ◆ The proposed transitional community residence is not located within a rationally-based specified distance of an existing community residence as measured from front door to front door along the public and private right of way.

Conditional use permit backup

Sometimes an operator will seek to establish a new community residence within the spacing distance of an existing community residence. For some types of community residences, neither the State of Nevada nor the federal government requires a license, certification, or accreditation, or recognizes or sanctions the living arrangement. In these situations, the heightened scrutiny of a conditional use permit review is warranted. There are two circumstances under which a conditional use permit could be sought:

- (1) **Locating within the spacing distance.** To determine whether a community residence should be allowed within the spacing distance from an existing community residence, Boulder City needs to consider whether allowing the proposed community residence will hinder the normalization for resi-

²⁸ Time limits typically range from 30 days to 90 days, and as long as six or nine months, depending on the nature of the specific transitional community residence and the population it serves. With no time limit, residents of family community residences can live in them for many years, even decades.

dents in the existing community residence and/or whether the proposed community residence would actually alter the character of the neighborhood.

(2) When no state or federal licensing, certification, or accreditation program or recognition applies. If the operator of a community residence seeks to establish a community residence in Boulder City for which neither Nevada nor the federal government requires a license or certification (nor shows its approval through sanctioning the use), the operator must show that the proposed community residence will be operated in a manner that protects the health, safety, and welfare of its residents.

If a required Nevada or federal license, certification, or accreditation has been denied to a proposed community residence or its operator, it is ineligible for a conditional use permit and cannot be located in Boulder City.

It is vital to stress that the decision on a conditional use permit must be based on a record of factual evidence and not on the basis of neighborhood opposition rooted in unfounded myths and misconceptions about people with disabilities.

Maximum number of occupants of a community residence

Nevada state statute sets the maximum number of individuals who can live in a community residence at ten.²⁹ Even with that state-imposed cap, the number of residents cannot exceed the number permissible under Boulder City's *Administrative Building Code*. For example, if the city's building code limits the number of residents in a dwelling unit to six, no more than six people can live there whether it's a conventional residence or a community residence.

Under fair housing case law, it is quite clear that *for determining the maximum number of occupants*, community residences established in single-family structures are to be treated the same as all other single-family residences. Those located in a multiple-family structure are to be treated the same as all other multiple-family residences. The number of occupants is typically regulated for health and safety reasons.

Throughout the nation, most cities and counties prevent overcrowding and protect residential health and safety by establishing a minimum number of square feet per bedroom occupant. The most common formulation is to require a minimum of 70 square feet of bedroom space (excluding closets) for the first occupant of a bedroom and an additional 50 (or often 70) square feet for the second occupant of the bedroom. Under this formula, a bedroom could be no smaller than 7 feet by 10 feet if only one person sleeps in it. A bedroom in which

²⁹ NRS §278.02386, formerly NRS §278.021.

two people sleep could be no smaller than 120 square feet, or 10 feet by 12 feet, for example.³⁰ Keep in mind that these are minimums based on health and safety standards. Bedrooms, of course, are usually larger than these minimums. This sort of provision is the type that the U.S. Supreme Court has ruled applies to all residences including community residences.³¹

Currently Boulder City does not have such a provision in its city code. To assure a consistent standard, it is highly recommended that Boulder City amend its codes to establish the type of minimum floor area requirements discussed in the above paragraph. This occupancy standard would have to apply to all residences, not just community residences.

It is clearly illegal to apply building or housing code standards for institutions, lodging houses, boarding houses, rooming houses or fraternities and sororities to community residences for people with disabilities.

Other zoning regulations for community residences

All regulations of the zoning district apply to a community residence including height, lot size, yards, building coverage, habitable floor area, off-street parking, and signage. Residents of most community residences do not drive cars. Consequently, there is no reason to require more off-street parking for a community residence than for a single-family house, assuming the community residence is located in a single-family house. No amendments to Boulder City's off-street parking requirements are warranted for community residences. Requiring more off-street parking for community residences would not be legally supportable.

Summary

The proposed regulatory approach offers the least restrictive means needed to achieve the legitimate government interests of protecting people with disabilities from unscrupulous operators and assuring that their health and safety needs are met, and enabling normalization to occur by preventing clustering of community

30 Obviously these dimensions are examples. A 120 square foot room could also be 8 feet by 15 feet as well as other dimensions that total 120 square feet.

31 *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995). "Maximum occupancy restrictions... cap the number of occupants per dwelling, typically in relation to available floor space or the number and type of rooms. See, e. g., International Conference of Building Officials, Uniform Housing Code § 503(b) (1988); Building Officials and Code Administrators International, Inc., BOCA National Property Maintenance Code §§ PM-405.3, PM-405.5 (1993) (hereinafter BOCA Code); Southern Building Code Congress, International, Inc., Standard Housing Code §§ 306.1, 306.2 (1991); E. Mood, APHA—CDC Recommended Minimum Housing Standards § 9.02, p. 37 (1986) (hereinafter APHA—CDC Standards).[6] *These restrictions ordinarily apply uniformly to all residents of all dwelling units. Their purpose is to protect health and safety by preventing dwelling overcrowding.* See, e. g., BOCA Code §§ PM-101.3, PM-405.3, PM-405.5 and commentary; Abbott, Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B. U. L. Rev. 1, 41-45 (1976)." At 733. [*Emphasis added*]

residences. These provisions help assure that no adverse impacts will be generated. As with all zoning issues, city staff will assure zoning code compliance.

The proposed amendments will treat community residences that comply with the definition of "family" the same as any other family. They impose no additional zoning requirements upon them.

However, when the number of unrelated occupants in a proposed community residence exceeds the maximum number of five unrelated dwellers allowed under Boulder City's zoning ordinance definition of "family," the proposed amendments will make "family community residences" for people with disabilities a permitted use in all residential districts subject to rationally-based licensing and spacing criteria. Transitional community residences will be permitted as of right in all multiple-family districts subject to these same two criteria and allowed in single-family districts by conditional use permit.

When a proposed community residence does not satisfy the spacing and licensing criteria to be permitted as of right, the heightened scrutiny achieved by requiring a conditional use permit is warranted. Consequently, the operator would have to obtain a conditional use permit if her proposed community residence would be located within the spacing distance or if the proposed home does not fit within any licensing, certification, or accreditation program of the State of Nevada or the federal government. The burden rests on the operator to show that the proposed home would meet the standards Boulder City requires for issuing a conditional use permit. Note, however, that if a required license, certification, or accreditation has been denied to a proposed community residence, the residence is *not* even eligible to apply for a conditional use permit. A home that is denied a required license, certification, or accreditation would not be allowed in Boulder City at all. But if there is no certification, licensing, or accreditation required or available, then the community residence operator can seek a conditional use permit under the conditional use permit backup provision.

Since the zoning amendments that will be proposed are strictly for community residences *for people with disabilities*, halfway houses for prison pre-parolees will continue to be prohibited from locating in Boulder City.

To implement these amendments, the city will need to maintain a map and database of all community residences within its jurisdiction.

Appendix A: Sample Form for Zoning Compliance Application

The next two pages offer a sample form that Boulder City can adapt to use in addition to its current zoning compliance application forms. The information that the form requests makes it easy for planning officials to objectively determine if the proposed community residence complies with the zoning code and whether it should be allowed as of right or must obtain a conditional use permit

It is crucial that the operators of all proposed community residences be required to complete this form so the city can identify spacing distances between community residences and determine appropriate zoning treatment. Completing this form places no burden on people with disabilities while offering them substantial benefits by helping to prevent clustering so that essential normalization and community integration can occur.

Zoning Determination Application — Boulder City, Nevada

Applicants: Please complete this form

To establish a community residence for people with disabilities, the owner and/or operator must file this application for a zoning determination. If the application meets the criteria for a community residence for people with disabilities allowed by right in the Boulder City Zoning Code, the Planning Department will issue a statement of approval within 15 calendar days. No public hearing is required. If staff determines that a conditional use permit is required, a public hearing is necessary and staff will provide instructions on how to apply for a conditional use permit. Be sure to keep a copy of this completed application for your records.

The applicant must provide all information requested. Please type or print clearly.

Date application submitted to Boulder City Community Development Department: _____

Full address of proposed community residence:

Zoning district in which the proposed community residence would be located: _____

Applicant information:

Print name of group or individual that will operate the proposed community residence:

Address: _____

City–State–Zip Code: _____

Telephone: _____ Cell phone: _____

Print applicant's name and title: _____

Applicant's signature: _____

Evidence of licensing or certification for proposed community residence or its operator:

Check here if the State of Nevada requires a license or certification to operate the proposed community residence

Check here if there is no applicable national accreditation agency or body for the proposed use.

State or local licensing program under which the proposed community residence will be operated:

Please submit a copy of any state or federal license or certification you have received to operate the proposed community residence.

Identify the licensing or certification agency (include address, telephone phone number, and, if possible, the contact person) which licenses or certifies the proposed use. If the applicant has not received a required license or certification, please explain why not.

Check and fill in the maximum length of time residents can live in the proposed community residence:

___ months ___ years ___ no limitation / indefinitely

Please provide the information requested in the following table:

	Dimensions in feet of each bedroom <u>excluding</u> closets	Total square feet in bedroom <u>excluding</u> closets	Number of residents to sleep in the bedroom
1			
2			
3			
4			
5			
6			
Total number of people with disabilities to live in this residence:			

Describe general nature of the residents' disabilities (do not discuss specific individuals):

Maximum number of support staff who will live in the home (excludes shift staff): _____

The findings below indicate whether the applicant can establish the proposed community residence as a permitted use or whether a conditional use permit is required. The proposed home must also comply with all other applicable Boulder City codes.

FOR STAFF USE ONLY:

Findings: [Planning Department staff person shall fill in or initial the appropriate boxes.]

_____ Zoning district in which proposed use would be located
 _____ Number of residents including live-in staff
 _____ Number of residents who are people with disabilities

Proposed use or operator is or will be properly licensed, certified, accredited, or recognized by the State of Nevada or the federal government (includes uses sanctioned by Congress such as Oxford House)

Proposed residence is:

Family community residence
 Transitional community residence
 Not a community residence

The State of Nevada does not require a license, certification, accreditation, or recognition for this type of community residence

Closest existing community residence is located _____ linear feet from the proposed community residence, as measured from front door to front door walking along the public or private right of way. List the addresses of all existing community residences within 660 feet:

Determination

Proposed use is allowed as of right
 Applicant must seek a conditional use permit
 Proposed use is not allowed as of right nor is it eligible for a conditional use permit.
 Application denied.

Staff review conducted by: _____
 Signed: _____
 Date: _____

Appendix B: Representative Studies of the Impacts of Community Residences

Over 50 scientific studies have been conducted to identify whether the presence of a group home, recovery community, or halfway house has any effect on property values, neighborhood turnover, or neighborhood safety. No matter which scientifically-sound methodology has been used, the studies have concluded that community residences that meet the health and safety standards imposed by licensing and that are not clustered together have no effect on property values — even for the house next door— nor on the marketability of nearby homes, neighborhood safety, neighborhood character, parking, traffic, public utilities, nor municipal services. The following studies constitute a representative sample. Few studies have been conducted recently simply because this issue has been studied so exhaustively and the findings have been so consistent that they generate no negative impacts.

Daniel Lauber, *Impacts on the Surrounding Neighborhood of Group Homes for Persons With Developmental Disabilities*, (Governor's Planning Council on Developmental Disabilities, Springfield, Illinois, Sept. 1986) (found no effect on property values or turnover due to any of 14 group homes for up to eight residents; also found crime rate among group home residents to be, at most, 16 percent of that for the general population).

Christopher Wagner and Christine Mitchell, *Non-Effect of Group Homes on Neighboring Residential Property Values in Franklin County* (Metropolitan Human Services Commission, Columbus, Ohio, Aug. 1979) (halfway house for persons with mental illness; group homes for neglected, unruly male wards of the county, 12–18 years old).

Eric Knowles and Ronald Baba, *The Social Impact of Group Homes: a study of small residential service programs in first residential areas* (Green Bay, Wisconsin Plan Commission June 1973) (disadvantaged children from urban areas, teenage boys and girls under court commitment, infants and children with severe medical problems requiring nursing care, convicts in work release or study release programs).

Minnesota Developmental Disabilities Program, *Analysis of Minnesota Property Values of Community Intermediate Care Facilities for Mentally Retarded (ICF-MRs)* (Dept. of Energy, Planning and Development 1982) (no difference in property values and turnover rates in 14 neighborhoods with group homes during the two years before and after homes opened, as compared to 14 comparable control neighborhoods without group homes).

Dirk Wiener, Ronald Anderson, and John Nietupski, *Impact of Community-Based Residential Facilities for Mentally Retarded Adults on Surrounding Property Values Using Realtor Analysis Methods*, 17 *Education and Training of the Mentally Retarded* 278 (Dec. 1982) (used realtors' "comparable market analysis" method to examine neighborhoods surrounding eight group homes in two medium-sized Iowa communities; found property values in six subject neighborhoods comparable to those in control areas; found property values higher in two subject neighborhoods than in control areas).

Montgomery County Board of Mental Retardation and Developmental Disabilities, *Property Sales Study of the Impact of Group Homes in Montgomery County* (1981) (property

Appendix B: Representative Studies of the Impacts of Community Residences

appraiser from Magin Realty Company examined neighborhoods surrounding seven group homes; found no difference in property values and turnover rates between group home neighborhoods and control neighborhoods without any group homes).

Martin Lindauer, Pauline Tung, and Frank O'Donnell, *Effect of Community Residences for the Mentally Retarded on Real-Estate Values in the Neighborhoods in Which They are Located* (State University College at Brockport, N.Y. 1980) (examined neighborhoods around seven group homes opened between 1967 and 1980 and two control neighborhoods; found no effect on prices; found a selling wave just before group homes opened, but no decline in selling prices and no difficulty in selling houses; selling wave ended after homes opened; no decline in property values or increase in turnover after homes opened).

L. Dolan and J. Wolpert, *Long Term Neighborhood Property Impacts of Group Homes for Mentally Retarded People*, (Woodrow Wilson School Discussion Paper Series, Princeton University, Nov. 1982) (examined long-term effects on neighborhoods surrounding 32 group homes for five years after the homes were opened and found same results as in Wolpert, *infra*).

Julian Wolpert, *Group Homes for the Mentally Retarded: An Investigation of Neighborhood Property Impacts* (New York State Office of Mental Retardation and Developmental Disabilities Aug. 31, 1978) (most thorough study of all; covered 1570 transactions in neighborhoods of ten New York municipalities surrounding 42 group homes; compared neighborhoods surrounding group homes and comparable control neighborhoods without any group homes; found no effect on property values; proximity to group home had no effect on turnover or sales price; no effect on property value or turnover of houses adjacent to group homes).

Burleigh Gardner and Albert Robles, *The Neighbors and the Small Group Homes for the Handicapped: A Survey* (Illinois Association for Retarded Citizens Sept. 1979) (real estate brokers and neighbors of existing group homes for the retarded, reported that group homes had no effect on property values or ability to sell a house; unlike all the other studies noted here, this is based solely on opinions of real estate agents and neighbors; because no objective statistical research was undertaken, this study is of limited value).

Zack Cauklins, John Noak and Bobby Wilkerson, *Impact of Residential Care Facilities in Decatur* (Macon County Community Mental Health Board Dec. 9, 1976) (examined neighborhoods surrounding one group home and four intermediate care facilities for 60 to 117 persons with mental disabilities; members of Decatur Board of Realtors report no effect on housing values or turnover).

Suffolk Community Council, Inc., *Impact of Community Residences Upon Neighborhood Property Values* (July 1984) (compared sales 18 months before and after group homes opened in seven neighborhoods and comparable control neighborhoods without group homes; found no difference in property values or turnover between group home and control neighborhoods).

Metropolitan Human Services Commission, *Group Homes and Property Values: A Second Look* (Aug. 1980) (Columbus, Ohio) (halfway house for persons with mental illness; group homes for neglected, unruly male wards of the county, 12–18 years old).

Tom Goodale and Sherry Wickware, *Group Homes and Property Values in Residential Areas*, 19 Plan Canada 154–163 (June 1979) (group homes for children, prison pre-parolees).

City of Lansing Planning Department, *Influence of Halfway Houses and Foster Care Facilities Upon Property Values* (Lansing, Mich. Oct. 1976) (No adverse impacts on property values due to halfway houses and group homes for adult ex-offenders, youth offenders, alcoholics).

Michael Dear and S. Martin Taylor, *Not on Our Street*, 133–144 (1982) (group homes for persons with mental illness have no effect on property values or turnover).

John Boeckh, Michael Dear, and S. Martin Taylor, *Property Values and Mental Health Facilities in Metropolitan Toronto*, 24 The Canadian Geographer 270 (Fall 1980) (residential mental health facilities

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have no effect on the volume of sales activities or property values; distance from the facility and type of facility had no significant effect on price).

Michael Dear, *Impact of Mental Health Facilities on Property Values*, 13 *Community Mental Health Journal* 150 (1977) (persons with mental illness; found indeterminate impact on property values).

Stuart Breslow, *The Effect of Siting Group Homes on the Surrounding Environs* (1976) (unpublished) (although data limitations render his results inconclusive, the author suggests that communities can absorb a "limited" number of group homes without measurable effects on property values).

P. Magin, *Market Study of Homes in the Area Surrounding 9525 Sheehan Road in Washington Township, Ohio* (May 1975) (available from County Prosecutors Office, Dayton, Ohio). (found no adverse effects on property values.)