

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

---

**95-5648 and 95-5666**

---

**HOVSONS, INC.,**

Appellant in No. 95-5648,

v.

**TOWNSHIP OF BRICK,**

Appellant in No. 95-5666.

---

Appeal From the United States District Court  
for the District Of New Jersey

---

**BRIEF OF AMICI CURIAE,  
THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC.  
THE AMERICAN SENIORS HOUSING ASSOCIATION,  
THE NATIONAL CITIZENS' COALITION FOR NURSING HOME REFORM, AND  
THE NATIONAL SENIOR CITIZENS LAW CENTER,  
IN SUPPORT OF HOVSONS, INC.**

---

Andrew D. Levy  
Dana Whitehead  
Martin H. Schreiber, II  
**BROWN, GOLDSTEIN & LEVY**  
The Maryland Bar Center  
520 West Fayette Street  
Suite 300  
Baltimore, Maryland 21201  
(410) 659-0717

Counsel for *Amici Curiae*

TABLE OF CONTENTS

|   |              |
|---|--------------|
| TABLE OF CONTENTS . . . . .   | i            |
| TABLE OF AUTHORITIES . . . . .  | ii           |
| STATEMENT OF INTEREST OF AMICI CURIAE . . . . .   | 1            |
| STATEMENT OF THE CASE . . . . .   | 2            |
| STATEMENT OF FACTS . . . . .  | 3            |
| ARGUMENT . . . . .  | 3            |
| I. Introduction . . . . .   | 3            |
| II. Brick Township's Zoning Requirement That All Nursing Homes<br>Be Located in a Non-Residential Area Devoted to Hospitals<br>and Hospital Support Services Violates the FHAA. . . . .                         | 5            |
| A. The Fair Housing Amendments Act. . . . .   | 5            |
| B. Brick's zoning scheme constitutes illegal disparate<br>treatment. . . . .  | 7            |
| III. There Are Significant Public Policy Reasons<br>Why Nursing Homes Should Not Be Excluded from Residential<br>Areas. . . . .   | 13           |
| A. Exiling nursing home residents from residential areas<br>reflects a self-fulfilling prophecy that nursing homes<br>are institutions, rather than homes, for individuals<br>with severe disabilities. . . . . | 14           |
| B. Integrating nursing homes into residential areas<br>benefits nursing home residents. . . . .   | 15           |
| C. Integrating of nursing homes into residential<br>communities benefits those in the community and the<br>nursing home. . . . .  | 19           |
| CONCLUSION . . . . .  | 24           |
| CERTIFICATE OF SERVICE . . . . .  | following 24 |

**TABLE OF AUTHORITIES**

**CASES**

Association of Relatives and Friends of AIDS Patients v. Relations and Permits Admin.,  
740 F. Supp. 95 (D.P.R. 1990) . . . . . 7

Bangerter v. Orem City Corp., 46 F.3d 1491  
(10th Cir. 1995) . . . . . 7-9

City of Cleburne v. Cleburne Living Ctr.,  
473 U.S. 432 (1985) . . . . . 8, 9, 14

City of Edmonds v. Washington State Building Codes Council, 18 F.3d 802 (9th Cir. 1994), aff'd,  
115 S. Ct. 1776 (1995) . . . . . 5

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) . . . . . 6

Horizon House v. Township of Southampton,  
804 F. Supp. 683 (E.D. Pa. 1992), aff'd,  
955 F.2d 217 (3d Cir. 1993) . . . . . 7-9

International Union, United Auto., Aerospace and Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187 (1991) . . . . . 8

Oxford House, Inc. v. Township of Cherry Hill,  
799 F. Supp. 450 (D.N.J. 1992) . . . . . 7

Potomac Group Home v. Montgomery County,  
823 F. Supp. 1285 (D. Md. 1993) . . . . . 8, 9

United States v. Schuylkill Township, 1990  
WL 180980 (E.D. Pa. Nov. 16, 1990) . . . . . 8

**STATUTES AND LEGISLATIVE HISTORY**

Americans with Disabilities Act of 1990,  
Pub. L. No. 101-336, 104 Stat. 327  
(codified at 42 U.S.C. §§ 12101 et seq.) . . . . . 13

Brick, N.J., Land Use Code Ch. 190. . . . . 10, 12

Fair Housing Amendments Act of 1988 ("FHAA"),  
Pub. L. No. 100-430, 102 Stat. 1619 (codified  
at 42 U.S.C. § 3601 et seq). . . . . 3, 5-9, 13, 15

H. R. Rep. No. 711, 100th Cong., 2d Sess. 18,  
reprinted in 1988 U.S. Code Cong. & Admin.  
News 2173 . . . . . 6, 7, 14, 15

|  |      |
|--|------|
| N.J. Stat. Ann. § 26:2H-7 . . . . .  | 5    |
| N.J. Stat. Ann. § 30:11A-1 . . . . .   | 3, 4 |
| N.J. Stat. Ann. § 30:13-1 . . . . .  | 3    |
| N.J. Stat. Ann. § 30:13-2.c . . . . .  | 4    |
| Rehabilitation Act of 1973, Pub. L. No. 93-112,<br>87 Stat. 357, (codified at 29 U.S.C.<br>§§ 701 et seq.) . . . . . | 13   |

**BOOKS, ARTICLES, AND OTHER SOURCES**

|   |                   |
|---|-------------------|
| Ainsworth, Thomas H., Jr., <u>Quality Assurance in<br/>Long Term Care</u> (1977) . . . . .  | 16                |
| Barney, Jane L., <u>Community Presence as a Key<br/>to Quality of Care in Nursing Homes</u> , 64 Am. J.<br>of Pub. Health 265 (1974) . . . . .  | 21, 22            |
| Barney, Jane L., <u>Community Presence in Nursing<br/>Homes</u> , 27 The Gerontologist 367 (1987) . . . . .   | 22                |
| Bennett, Clifford J., <u>Nursing Home Life: What It<br/>Is and What It Could Be</u> (1980) . . . . .  | 18-20             |
| Biedenharn, Paula J. & Janice Bastlin Normoyle,<br><u>Elderly Community Residents' Reactions to the<br/>Nursing Home: An Analysis of Nursing Home<br/>Related Beliefs</u> , 31 The Gerontologist 107 (1977) . . . . . | 14                |
| Breger, William N. & William R. Pomeranz, <u>Nursing<br/>Home Development</u> (1985) . . . . .  | 14, 16-18, 20, 21 |
| Cherry, Ralph L., <u>Community Presence and Nursing<br/>Home Quality of Care: The Ombudsman as a<br/>Complementary Role</u> , 34 J. of Health and Soc.<br>Behav. (1993) . . . . .                                     | 23                |
| <u>Dementia Specific Care Units: What Works and<br/>What Doesn't</u> , Housing the Elderly Report,<br>Aug. 1995 . . . . .   | 18                |
| Eisenberg, Myron G., <u>Disability as Stigma</u> , in<br><u>Disabled People as Second-Class Citizens</u><br>(Myron G. Eisenberg et al. eds., 1982) . . . . .  | 15                |
| Hook, Wade F., et al., <u>Frequency of Visitation<br/>in Nursing Homes</u> , 22 The Gerontologist 424 (1982) . . . . .  | 17                |

|   |              |
|---|--------------|
| Institute of Medicine of the National Academy<br>of Sciences, <u>Improving the Quality of Care in<br/>Nursing Homes</u> (1986) . . . . .                      | 4, 17, 19-22 |
| Miller, Dulcy B. & Jane T. Barry, <u>Nursing Home<br/>Organization and Operation</u> (1979) . . . . .   | 20, 21       |
| Nassau, Jean Baron, <u>Choosing a Nursing Home</u> (1975) . . . . .   | 17, 18       |
| Richards, Marty, et al., <u>Choosing a Nursing Home:<br/>A Guidebook for Families</u> (1985) . . . . .  | 17, 18       |
| Timothy M. Cook, <u>The Americans with Disabilities Act:<br/>the Move to Integration</u> , 64 Temple L. Rev. 393 (1991) . . . . .                             | 13, 14       |
| United States Bipartisan Commission on Health<br>Care (The Pepper Commission), <u>A Call For Action:<br/>Final Report</u> , S. Prt. 101-114, (1990) . . . . . | 4            |
| York, Jonathan L. & Robert J. Calsyn, <u>Family<br/>Involvement in Nursing Homes</u> , 17<br>The Gerontologist 500 (1977) . . . . .                           | 16           |

STATEMENT OF INTEREST OF AMICI CURIAE

The amici curiae represent a broad spectrum of groups interested in the subject matter of this case, including providers, consumers, advocates, and professionals:

The National Association of Social Workers, Inc. ("NASW"), a non-profit professional association with over 155,000 members, is the largest association of social workers in the world. The New Jersey Chapter has over 6,700 members. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession, and to improving the quality of life through utilization of social work knowledge and skills. The Association supports the rights of the elderly and people with disabilities to participate fully and equitably in society, including the freedom to live in environments that maximize independence and self-determination and to have full participation in issues related to housing, health care, and social services.

The American Seniors Housing Association ("ASHA") represents the interests of the nation's largest owners and operators of seniors housing. ASHA's members are engaged in all aspects of the development and operation of housing for the elderly, including ownership, building, financing, and management of hundreds of thousands of housing units. Since its formation in 1991, ASHA has been actively involved in all facets of public policy affecting the seniors housing industry.

The National Citizens' Coalition for Nursing Home Reform ("NCCNHR") is a national, non-profit membership organization

founded in 1975 to improve the long-term care system and the quality of life for nursing home residents. NCCNHR and its members represent the interests of nursing home residents and are actively involved in nursing home reform and advocacy throughout the United States, including promoting the best practices in care delivery and quality of life, pursuing public policy responsive to residents' needs, and enforcing quality standards.

The National Senior Citizens Law Center ("NSCLC") is a non-profit organization that provides advocacy on behalf of elderly poor people, with specific emphasis on women and racial and ethnic minorities. Since its formation in 1972, NSCLC has engaged in litigation, legislative and administrative advocacy, and training in many areas of elder law, including disability law, nursing home law, and housing law.

Although the *amici curiae* each represent the diverse interests of their respective members, they share a common goal: protecting the rights of elderly persons with disabilities to live where they choose in community-based homes among individuals without disabilities. The questions before this Court have a direct bearing on these rights.

The freedom to choose one's home and to remain in the community is a fundamental right of all persons. Land use restrictions requiring or resulting in discriminatory treatment of persons with disabilities are a major impediment to these individuals' rights and abilities to live in the community. The district court's opinion, if allowed to stand, will result in grave damage to the fair housing rights of persons with disabilities.

## STATEMENT OF THE CASE

The *amici curiae* adopt the Appellant's statement of the case.

## STATEMENT OF FACTS

The *amici curiae* adopt the Appellant's statement of facts.

## ARGUMENT

### I. Introduction

Among the ills intended to be addressed by the Fair Housing Amendments Act of 1988 ("FHAA"), Pub. L. No. 100-430, 102 Stat. 1619, codified at 42 U.S.C. § 3601 et seq., was the systematic exclusion of persons with disabilities from residential communities. Those with severe disabilities, no less than anyone else, have a federal statutory right to live in the community, in the least restrictive and most integrated environment possible. The Township of Brick's zoning scheme, which exiles the severely disabled to a non-residential, ghetto-like "Hospital Support Zone," and denies them even the dignity of a home,<sup>1</sup> represents precisely the kind of segregative, exclusionary behavior outlawed by the FHAA.

Under New Jersey law, elderly persons in need of long-term care have three principal housing choices available to them. They can remain in their home, move to a residential health care facility where they will receive assistance with their daily living needs, or reside in a nursing home. See N.J. Stat. Ann. §§ 30:11A-1 et seq., 30:13-1 et seq. The type of housing

---

<sup>1</sup>Contrary to both fact and common sense, Brick denies that nursing homes constitute a "dwelling". Among other things, this leads to the question of where then do nursing home residents live?

available to an individual in need of long-term care is likely to be directly related to the severity of his or her disability. Compare N.J. Stat. Ann. § 30:11A-1 (no skilled nursing care provided in a residential health care facility) with § 30:13-2.c. (medical and nursing treatment provided in nursing homes).

Throughout the United States, the demand for nursing home beds already exceeds the supply, and the demand continues to grow rapidly. Institute of Medicine of the National Academy of Sciences, Improving the Quality of Care in Nursing Homes 184, 196-98, 371 (1986) [hereinafter "Inst. of Medicine"]; United States Bipartisan Commission on Health Care (The Pepper Commission), A Call For Action: Final Report, S. Prt. 101-114, at 110 (1990) [hereinafter the "Pepper Commission"].<sup>2</sup> The primary cause of this increased demand is the growing number of elderly Americans,<sup>3</sup> who comprise 90 percent of nursing home residents. Inst. of Medicine, supra, at 196-97; Pepper Commission, supra, at 92, 108. In Brick Township alone, the population over age 65 increased by 46.4 percent in the years 1980 to 1990. App. H. A224.

Brick Township, which is located in Ocean County, suffers from a shortage of long-term care beds. In the "certificate of

---

<sup>2</sup>Copies of authorities cited herein (except for state and federal statutes and opinions) are reproduced in the Addendum to Brief of Amici Curiae.

<sup>3</sup>There are now 32 million Americans over age 65, and their number is expected to double by 2030. Pepper Commission, supra, at 108. In the same period, the population over age 85 will grow from 2.5 million to 12 million. Id. Brick's over-65 population constituted 17.3% of the total population in 1990. App. H. A224.

need" issued for the proposed facility, the State of New Jersey recognized that Monmouth and Ocean Counties needed 638 additional long-term care beds. Appendix for Hovsons, Inc. [hereinafter "App. H."] at A26.<sup>4</sup> In fact, "Brick Township has approximately 6.7 long-term care beds per 1,000 population, compared to the County average of 12 beds per 1,000 population." Id.

Although nursing homes may be the principal viable housing alternative for the elderly with multiple handicaps, particularly those requiring extensive skilled nursing care, this elderly population should not be treated any differently than the healthy elderly or those with less severe disabilities in terms of their right to live in a particular community. Brick Township's zoning scheme, which segregates nursing homes to a purgatory of the town where other dwellings are forbidden, is discriminatory on its face in violation of the FHAA and is contrary to public policy.

II. Brick Township's Zoning Requirement That All Nursing Homes Be Located in a Non-Residential Area Devoted to Hospitals and Hospital Support Services Violates the FHAA.

A. The Fair Housing Amendments Act.

In 1988, Congress amended the Fair Housing Act to add persons with disabilities as a protected class. The FHAA "protect[s] the right of handicapped persons to live in the residence of their choice in the community." City of Edmonds v.

---

<sup>4</sup>Under New Jersey Law, there may be no construction of a new nursing home or expansion of an existing nursing home, except upon issuance of a certificate of need by the State Commissioner of Health. See N.J. Stat. Ann. §§ 26:2H-7 et seq.

Washington State Building Codes Council, 18 F.3d 802, 806 (9th Cir. 1994), aff'd, 115 S. Ct. 1776 (1995). The FHAA reflected "a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream," H. R. Rep. No. 711, 100th Cong., 2d Sess. 18, reprinted in 1988 U.S. Code Cong. & Admin. News 2173, 2185 [hereinafter "House Report"], and is to be broadly construed to effectuate Congress's remedial purpose. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982).

Under the FHAA, it is illegal to deny -- or otherwise make unavailable -- housing, or to discriminate in the terms, conditions, or privileges of the sale or rental of housing, because of a disability of the buyer or renter, or of a person residing in or intending to reside in the housing, or of any person associated with the person seeking housing. 42 U.S.C. §§ 3604(f)(1) and 3604(f)(2). The FHAA also requires defendants to make "reasonable accommodations in rules, policies, practices, or services," when such accommodations would enable a person with disabilities to live where he or she chooses. 42 U.S.C. § 3604(f)(3)(B).

Congress specifically intended the application of the FHAA to reach a wide array of discriminatory housing practices, including zoning ordinances. The legislative history of the FHAA explains:

These new subsections would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the abili-

ty of individuals with handicaps to live in communities.

House Report at 24. See also Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 458 (D.N.J. 1992) ("[I]t is well-established that the [FHAA] prohibits discriminatory land use decisions by municipalities, even when such decisions are 'ostensibly authorized by local ordinance.'").

The FHAA prohibits both intentional discrimination ("disparate treatment") and practices which, although neutral on their face, have a discriminatory effect ("disparate impact"). Id. at 460.<sup>5</sup> Viewed as a whole, there can be no serious questions that Brick's zoning scheme constitutes disparate treatment.

B. Brick's zoning scheme constitutes illegal disparate treatment.

Intentional discrimination based on disparate treatment exists where a policy or practice treats similarly situated groups differently. Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995). For purposes of the FHAA, a plaintiff need merely show that he or she was treated differently because of a handicap. Horizon House v. Township of Southampton, 804 F. Supp. 683, 694 (E.D. Pa. 1992), aff'd, 955 F.2d 217 (3d Cir. 1993). "[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." Bangerter, 46 F.3d at 1501 (citing

---

<sup>5</sup>In analyzing claims of disability discrimination under the FHAA, courts should apply the standards developed in pre-1988 Fair Housing Act cases involving claims of race discrimination. See, e.g., Association of Relatives and Friends of AIDS Patients v. Relations and Permits Admin., 740 F. Supp. 95, 103 (D.P.R. 1990).

International Union, United Auto., Aerospace and Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991)).

Consequently, a plaintiff is not required to prove that the defendant acted with an evil motive. Horizon House, 804 F. Supp. at 696.<sup>6</sup> A showing that a protected group has been subjected to explicitly differential treatment (regardless of the reason) is sufficient to make a prima facie case of intentional discrimination under the FHAA. Bangerter, 46 F.3d at 1501.

Once the plaintiff makes a prima facie case of disparate treatment, the burden shifts to the defendant to justify its discriminatory policy. Because persons with disabilities are a protected class under the FHAA, a defendant cannot rebut the prima facie case merely by showing that its policy is rationally related to a legitimate governmental interest;<sup>7</sup> rather, a

---

<sup>6</sup>Indeed, the fact that a defendant's motive is ostensibly benign or paternalistic is irrelevant to the disparate treatment analysis. Potomac Group Home v. Montgomery County, 823 F. Supp. 1285, 1295 (D. Md. 1993).

<sup>7</sup>Defendants often argue that the proper standard to be applied under the FHAA is the rational basis test, relying on the ruling in City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), which held that government policies that discriminate against the handicapped should not receive heightened scrutiny under the Equal Protection Clause. However, this argument is flawed. Bangerter, 46 F.3d at 1503; United States v. Schuylkill Township, 1990 WL 180980, \*11 n. 10 (E.D. Pa. Nov. 16, 1990). As the court in Schuylkill Township, 1990 WL 180980 at \*11 n. 10, explained:

The Cleburne holding was based in its entirety on a challenge brought pursuant to the Equal Protection Clause. . . . With respect to handicapped persons, Equal Protection analysis and FHAA analysis are theoretically inapposite. Under the Equal Protection Clause, the handicapped are not considered to be a suspect or quasi-suspect class, therefore a rational basis analysis is warranted. Under the FHAA, the handicapped are

heightened level of scrutiny is required. Bangerter, 46 F.3d at 1503; Potomac Group Home v. Montgomery County, Md., 823 F. Supp. 1285, 1295 (D. Md. 1993); Horizon House, 804 F. Supp. at 695 n. 6. Therefore, the defendant should be required to justify its discriminatory policy by showing that (1) it advances a substantial governmental interest, Bangerter, 46 F.3d at 1503; Horizon House, 804 F. Supp. at 695; and (2) no less discriminatory alternative would serve that interest. Bangerter, 46 F.3d at 1504. If the defendant is able to satisfy this two-part test, the burden could then shift back to the plaintiff to show that the defendant's justification is pretextual.

It is apparent, in any event, that the district court's analysis of whether Brick's zoning ordinance violated the FHAA is legally flawed. In entering judgment against Hovsons, Inc. ("Hovsons") on its disparate treatment claim, the court offered the following explanation:

The township does not permit nursing homes in the RR-2 zone because of its desire to keep the high traffic volume and dense nature of that particular use away from residential areas. The court finds that the ordinance is rationally related to and serves legitimate governmental interests. Further, the court finds that the record is barren of any evidence of intentional discrimination by the township in enacting the zoning code. The court therefore finds as a matter of law that the township's zoning ordinance is facially valid and not the product of disparate treatment.

---

considered a 'protected class,' and should therefore be afforded a higher degree of protection than they are under the Equal Protection Clause. In addition, the FHAA was passed after Cleburne was decided. Therefore, the Supreme Court could not possibly have intended the Cleburne holding to be applied to cases brought pursuant to the FHAA.

Addendum to Brief of Hovsons, Inc. [hereinafter "Add. H."] at Add. 13.

The district court's opinion is flawed in at least two respects. First, the court suggests that discriminatory motive is necessary under a disparate treatment analysis, which is incorrect. Second, it gives Brick the benefit of the wrong burden of proof. But for these errors, Hovsons would have prevailed on its claim of disparate treatment.

Contrary to the finding of the district court, Brick's zoning scheme is discriminatory on its face. Its zoning ordinance prohibits nursing homes from being established in any area, other than its so-called "Hospital Support Zone." Nursing homes are not permitted in any residential area even as a conditional use. Furthermore, "dwellings," as defined by Brick's Zoning Code, are not permitted in the Hospital Support Zone. See Brick, N.J., Land Use Code § 190-3 and 190-27.<sup>8</sup> Consequently, residents of nursing homes are segregated from every other resident of Brick Township.

The township readily admits that this zoning restriction was based on its belief that the residents of nursing homes typically suffer from multiple disabilities and benefit from being closer to the hospital, which is located in the Hospital Support Zone (App. H. at A171-73) -- in other words, the segregation is for "their own good." This offensively paternalistic motive, coupled

---

<sup>8</sup>Relevant portions of the Brick Land Use Code are reproduced in the Addendum to Brief of Amici Curiae.

with the fact that it is indisputable that Brick's zoning ordinance treats the housing available to the elderly with severe disabilities differently than that available to the elderly without severe disabilities, ought to be sufficient as a matter of law to make a prima facie case of disparate treatment. The burden should then have shifted to Brick to demonstrate that this zoning restriction furthered a bona fide governmental interest which could not be achieved in a less discriminatory manner.

As the court below found, Brick's zoning scheme does not permit nursing homes in the RR-2 zone because of "its desire to keep the high traffic volume and dense nature of that particular use away from residential areas." Add. H. at Add. 13. Although Brick has a legitimate interest in regulating traffic volume and density, it may not do so by banishing persons with severe disabilities from residential communities absent a showing that its legitimate interests cannot be served in any other way. Not surprisingly, the record is devoid of any discussion of whether Brick could achieve these goals without segregating nursing homes from all residential areas, because this is a burden that Brick cannot possibly meet.

Indeed, the facts before the district court provide an ample basis to conclude that a less discriminatory restriction would advance Brick's interest. For example, Brick's own expert witness at trial compared the proposed nursing home to a multi-family dwelling for the proposition that multi-family dwellings were not permitted in the RR-2 zone for density reasons. App. H.

at A171. Although multi-family dwellings may not be permitted in the RR-2 zone, they certainly are permitted in the RM-ML16, AH-1, and AH-2 zones. Brick, N.J., Land Use Code §§ 190-76.11.A, -76.28.A, -76.35.1.F. Indeed, the size of the proposed nursing home would easily fall within the size and density requirements of the RM-ML16 and AH-1 zones. Furthermore, there is no evidence to suggest that the traffic created by a nursing home would be any greater than that associated with multi-family residential dwellings of similar size or larger. Permitting nursing homes in these higher density areas advances Brick's interest just as well as segregating them to the Hospital Support Zone.

Moreover, there is no valid reason why nursing homes should not be permitted as a conditional use in Brick's rural residential zones. Rightly or wrongly, Brick considers nursing homes to be akin to hospitals.<sup>9</sup> App. H. at A171-72. Yet Brick permits hospitals as a conditional use in rural residential zones RR-2 and RR-3, while at the same time barring nursing homes. Brick, N.J., Land Use Code §§ 190-44.8 (RR-2 Zone), -44.17 (RR-3 Zone). Brick has thus created an Alice-in-Wonderland-like zoning scheme in which nursing homes, which are indisputably more residential than hospitals, are barred from residential zones, while hospitals are permitted. Consequently, even under Brick's

---

<sup>9</sup>There are differences between a hospital and a nursing home. The most significant difference is that nursing homes, unlike hospitals, provide a long-term residence to those needing nursing care.

mythical notion of what a nursing home is like, such uses should be permitted in the rural residential zones.<sup>10</sup>

Brick Township's zoning scheme discriminates against elderly persons with disabilities. The township has failed to articulate a single reason for this discriminatory policy that could not be achieved in a less discriminatory manner. Therefore, Brick's zoning ordinance restricting nursing homes to the Hospital Support Zone is illegal.

III. There Are Significant Public Policy Reasons  
Why Nursing Homes Should Not Be Excluded from  
Residential Areas.

Individuals with disabilities have long been treated in this country as second class citizens -- never considered quite good enough to receive the same benefits afforded to those without disabilities. Timothy M. Cook, The Americans with Disabilities Act: the Move to Integration, 64 Temple L. Rev. 393, 399-407 (1991). Congress, recognizing that persons with disabilities are entitled to equal treatment, has enacted laws such as the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 357, (codified at 29 U.S.C. §§ 701 et seq.), the FHAA, and the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104

---

<sup>10</sup>Permitting a nursing home in Brick's RR-2 zone certainly appears to be consistent with the existing uses and density of the area. There are several large and densely populated planned retirement communities, as well as a 1000-student public school, surrounding the proposed nursing home site. App. H. at A105-08. The density of these communities ranges from four to fourteen dwelling units per acre, while the density of the proposed nursing home is only 9.5 beds per acre. Id. at A105. Thus, the density and use of the proposed project is consistent with the existing uses and density.

Stat. 327 (codified at 42 U.S.C. §§ 12101 et seq.), to eliminate the barriers which often isolate these individuals from the rest of society. See Cook, supra, at 407-31; Cleburne, 473 U.S. at 443; House Report at 22. The thrust of these laws is to integrate persons with disabilities in all areas of society.

The integration of nursing homes in residential areas of Brick serves an important purpose to both those with and without disabilities alike.

- A. Exiling nursing home residents from residential areas reflects a self-fulfilling prophecy that nursing homes are institutions, rather than homes, for individuals with severe disabilities.

To many Americans, the idea of living in a nursing home is a fate worse than death. Paula J. Biedenharn & Janice Bastlin Normoyle, Elderly Community Residents' Reactions to the Nursing Home: An Analysis of Nursing Home Related Beliefs, 31 The Gerontologist 107, 107 (1977). Their fear is based largely on misconceptions of today's concept of a nursing home. Nursing homes are no longer designed as institutions for those waiting to die. Rather, the current concept is that nursing homes provide a permanent residential community for those who are in need of extensive skilled nursing care and who, for economic or lack of family support reasons, live in a nursing home rather than their family home. William N. Breger & William R. Pomeranz, Nursing Home Development 1-2 (1985).

The nursing home that Hovsons intends to build is based on this current model. The lobby will be set up like "a beautiful living room" with a quaint antique style motif. App. H. at A49.

Handrails, which are necessary for many of the intended residents to ambulate, will be designed so that they blend in with the surrounding decor. Id. Each resident will have his own room. App. H. at A50. The room will be decorated with wallpaper and will contain a mahogany or cherry, four-poster bed so that the room will be like a bedroom in a typical home.<sup>11</sup> In addition to these features, the nursing home will provide its residents with recreation, entertainment, education, and fitness programs. App. H. at A47.

Excluding nursing homes from residential areas perpetuates the public's image that nursing homes are supposed to be warehouses for those who cannot participate equally in society. Furthermore, the lack of integration prevents those without disabilities from learning that nursing homes are just another form of housing in the continuum of care. Casting away individuals with disabilities to the Hospital Support Zone, creates a pernicious cycle of ignorance that both reflects and, in turn, encourages myths and stereotypes of persons with disabilities -- precisely the phenomenon the FHAA was intended to cure. See House Report at 18. See also Myron G. Eisenberg, Disability as Stigma, in Disabled People as Second-Class Citizens 3 (Myron G. Eisenberg et al. eds., 1982).

---

<sup>11</sup>Although this design is high scale, Hovsons has agreed to devote a high percentage of its beds to Medicaid-eligible residents. App. H. at A27.

B. Integrating nursing homes into residential areas benefits nursing home residents.

The location of a nursing home can have a significant impact on the physical and psychological health of its residents. For most individuals, moving to a nursing home is a stressful event.<sup>12</sup> Thomas H. Ainsworth, Jr., Quality Assurance in Long Term Care 18-21 (1977). They have lived most of their lives on their own without the need of daily medical or assisted living care. Indeed, the primary reason why a nursing home is a necessity for many individuals is that medical advances have made it possible for them to live longer, but often without the ability to take care of themselves without extensive medical or nursing care. Breger & Pomeranz, supra, at 13. Facing the reality that one has grown old and must rely on others for care is a difficult adjustment.

Isolating these individuals adds insult to injury, especially since isolation is one of the greatest fears of the elderly. Despite the common belief that families abandon disabled relatives in nursing homes, the empirical data reveal that most families strive to stay involved in their relatives' lives and visit frequently. Jonathan L. York & Robert J. Calsyn, Family Involvement in Nursing Homes, 17 *The Gerontologist* 500, 503 (1977). The single most important determinant of whether families will visit, however, is the distance they must travel to

---

<sup>12</sup>Scientific studies demonstrate that when elderly people relocate to any new home, institutional or otherwise, their rate of mortality increases. Gloria M. Gutman and Carol P. Herbert, Mortality Rates Among Relocated Extended-Care Patients, 31 *J. of Gerontology*, 352, 352 (1976). The harmful effects of relocation diminish, however, when the new location is closer (geographically and environmentally) to the old. Id. at 356-57.

the nursing home. Wade F. Hook *et al.*, Frequency of Visitation in Nursing Homes, 22 *The Gerontologist* 424, 426 (1982).

Residents from poor families suffer most when they cannot live near their relatives because the poor have the most difficulty getting to the nursing home if it is not nearby. *Id.* at 427.

Visitation is extremely important to nursing home residents' quality of life. Having family and friends come to visit reduces the sense of isolation and loneliness that residents experience upon moving into a nursing home. Inst. of Medicine, *supra*, at 184; Marty Richards *et al.*, Choosing a Nursing Home: A Guidebook for Families 73 (1985); Jean Baron Nassau, Choosing a Nursing Home 27 (1975). Empirical studies prove that visits by family and friends have a significant therapeutic effect on residents' degree of psychosocial impairment. Vernon L. Greene & Deborah J. Monahan, The Impact of Visitation on Patient Well-being in Nursing Homes, 22 *The Gerontologist*, 418, 422 (1982). Moreover, visitors play an important role as monitors of the quality of residents' care. Richards *et al.*, *supra*, at 73. Thus, studies have revealed further that residents who receive visitors are treated better by staff than those who do not. Greene & Monahan, *supra*, at 418; Inst. of Medicine, *supra*, at 184. Consequently, when elderly persons with disabilities and their families select a nursing home, their primary concern is choosing a home that is convenient for visiting and in a neighborhood where the resident and family feel comfortable. Breger & Pomeranz, *supra*, at 178.

Residential neighborhoods also provide a more salubrious environment for nursing home residents than a heavily developed commercial area, such as Brick Township's Hospital Support Zone.<sup>13</sup> A planning report on housing for the elderly published by the New Jersey Federation of Planning Officials states:

Locations that are not appropriate for housing younger adults are not appropriate for older people either. Isolated sites in highway commercial areas and small parcels within large-scale office and industrial areas are unlikely to be appropriate locations for any type of housing. Locating a residence for older people in such a setting, which lacks visual and pedestrian access to other residential uses, greatly increases the institutional feel of the housing.

Mary A. Winder, Housing New Jersey's Older People, Federation Information Planning Report, Summer 1991, at 10.

Nursing home residents, like everyone else, enjoy opportunities to be outdoors in good weather, especially since so much of their time may otherwise be spent inside. Therefore, nursing home sites should have enough space to accommodate landscaped outdoor areas suitable for rehabilitative exercising, walking, or sitting. Clifford J. Bennett, Nursing Home Life: What It Is and What It Could Be 129 (1980); Richards et al., supra, at 36; Nassau, supra, at 27. Outdoor spaces are especially important in caring for residents with Alzheimers disease, who need areas for "meaningful wandering" in safe outdoor spaces. Dementia Specific Care Units: What Works and

---

<sup>13</sup>Another factor affecting quality of life in a nursing home is the amount of noise pollution in the area. Sites where there are frequent ambulance sirens -- such as Brick Township's Hospital Support Zone -- should be avoided. Breger & Pomeranz, supra, at 182.

What Doesn't, Housing the Elderly Report, Aug. 1995, at 11.

Such spaces, however, are unavailable in heavily developed areas, where nursing homes are sometimes wedged between other buildings. Bennett, supra, at 129.

In short, nursing home residents, as much if not more than anyone else, enjoy the quiet seclusion of residential neighborhoods. Merely because they have disabilities requiring them to live in a nursing home does not lessen their desire to reside in residential areas.

- C. Integrating of nursing homes into residential communities benefits those in the community and the nursing home.

It is widely recognized that interaction between nursing home residents and their neighbors is beneficial to both. The Institute of Medicine of the National Academy of Sciences has reported:

Increasing community involvement with nursing homes on a regular, sustained basis is important for three reasons: (1) to enhance the quality of life of nursing home residents by reducing their sense of isolation from the community and providing opportunities for stimulating social interactions, (2) to help improve the quality of care in nursing homes by making staff-resident interactions more visible to members of the community, and (3) to increase the level of understanding in the community about the issues and complexities of long term care so as to facilitate the development of more appropriate public policies in this area.

Inst. of Medicine, supra, at 184. Restricting the location of nursing homes to areas where no one else is permitted to live, such as Brick Township's Hospital Support Zone, obviously creates a substantial barrier to community involvement.

Many nursing home residents enjoy volunteering in community activities found only in residential neighborhoods. For example, residents participate in Boy Scouts projects and provide weekly reading hours for neighborhood schoolchildren. Dulcy B. Miller & Jane T. Barry, Nursing Home Organization and Operation 219 (1979). Such participation is especially important to residents who were active in neighborhood activities before entering the nursing home and may be struggling to maintain a sense of worth to the community. Id.; Inst. of Medicine, supra, at 51. Moreover, residents want to maintain contact with their neighbors and have access to the activities and services of a residential neighborhood. Breger & Pomeranz, supra, at 179. Being near libraries, churches, and parks, for example, decreases the sense of isolation from the community that plagues residents of nursing homes located away from the rest of the community. Id.

Most important to many residents is the need to continue attending the same house of worship where they were congregants for many years. Bennett, supra, at 110-13. Religious services by visiting ministers inside nursing homes are poorly attended because they lack the sense of community that residents experienced in their own congregations near their former homes. Id. Brick Township's prohibition against locating nursing homes within residential communities, where the residents' houses of worship are located, frustrates the residents' need to remain a part of their religious congregations.

Just as residents seek opportunities to participate in activities in the community around them, so do they welcome the surrounding community's efforts to reach out to them. Thus, nursing home planners emphasize constructing homes that will be accessible to neighbors, rather than isolated from residential neighborhoods. Breger & Pomeranz, supra, at 198.

Many volunteers in nursing homes today are retirees, such as those who live in Brick Township's RR-2 zones. Miller & Barry, supra, at 228. Whereas volunteers used to be predominantly homemakers with time to spare, the entry of women into the workforce has made retirees from neighboring communities an important source of volunteers. Id. Students from local high schools also volunteer in nearby nursing homes. Id. at 229. Youthful student-volunteers are especially well-liked by older residents, and the students, in turn, learn to relate to their older and disabled neighbors on a meaningful level. Id. Finally, neighborhood church groups often "adopt" nearby nursing homes and provide volunteers for activities, friendly visiting, and religious services. Id. at 228. Forbidding nursing homes from locating in residential neighborhoods deprives residents and potential volunteers of the benefits that would inure to both.

Public health experts agree that maintaining a community presence in nursing homes is critical to insuring high quality of care and quality of life. Inst. of Medicine, supra, at 184; Jane L. Barney, Community Presence as a Key to Quality of Care in Nursing Homes, 64 Am. J. of Pub. Health 265 (1974) [hereinafter

"Barney (1974)"]. While government regulations are needed for maintaining minimum standards, they are ineffective in ameliorating the intangible aspects of nursing home life, such as a caring atmosphere, motivation of staff, and patient morale. Inst. of Medicine, supra, at 171; Barney (1974), supra, at 265. These aspects of quality of life are best maintained by having members of the community present inside nursing homes as much as possible. Inst. of Medicine, supra, at 184; Barney (1974), supra, at 265. As one expert has explained: "[W]e all depend on the interest and appreciation of other people to keep our morale and the quality of our work high. Dressing for dinner in the desert is not a standard most of us could keep to." Barney (1974), supra, at 267. So too would quality of care suffer in a nursing home exiled to a part of town where all others are forbidden from living.

Recent efforts at nursing home reform have emphasized the need for bringing community members inside their local nursing homes. One such effort is the "Nursing Home Community Council Project." Jane L. Barney, Community Presence in Nursing Homes, 27 *The Gerontologist* 367 (1987). Inspired by the parent-teacher councils common in neighborhood schools, the Project has established councils in individual nursing homes composed of neighborhood citizens, residents, and residents' families. Id. at 367-68. They have been extremely successful in ameliorating the daily frustrations of residents who otherwise would be isolated from the surrounding community. Id. at 368. See also

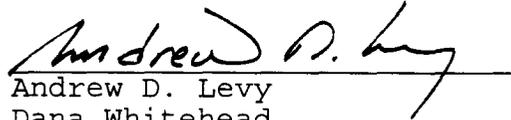
Ralph L. Cherry, Community Presence and Nursing Home Quality of Care: The Ombudsman as a Complementary Role, 34 J. of Health and Soc. Behav. 336, 337 (1993).

In light of the need for interaction between nursing homes and their surrounding communities, the conclusion of the trial court in the instant case that the proposed facility "does not bear a direct relationship to the adjoining residential community in the same sense as schools, municipal buildings and houses of worship," Add. H. at Add.22, is profoundly flawed. Increased involvement between nursing home residents and their neighbors would benefit both groups. But continuing to set nursing homes apart, physically and philosophically, from other community-oriented facilities, will prevent these benefits from ever being realized. Worst of all, forcing nursing homes to locate in an area where no one else may live dooms the residents to a life of isolation, poorer care, and diminished quality of life.

CONCLUSION

For all of the foregoing reasons, the *amici* respectfully urge this Court to reverse the judgment of the district court.

Respectfully submitted,



Andrew D. Levy  
Dana Whitehead  
Martin H. Schreiber II  
BROWN, GOLDSTEIN & LEVY  
300 Maryland Bar Center  
520 West Fayette Street  
Baltimore, Maryland 21201  
(410) 659-0717

Counsel for *Amici Curiae*

CERTIFICATE OF APPLICATION TO BAR

In accordance with Local Appellate Rule 28.3(d), I hereby certify that I have applied for membership to the bar of the United States Court of Appeals for the Third Circuit.

  
Andrew D. Levy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17<sup>th</sup> day of January, 1996, I caused two copies of the foregoing Brief of Amici Curiae to be mailed, first-class postage prepaid, to Thomas Monahan, Esquire, Gilmore & Monahan, Ten Allen Street, Toms River, New Jersey 08754, counsel to Township of Brick, and I caused a copy of the same to be hand-delivered to Beth Pepper, Esquire, Stein & Schonfeld, 310 Maryland Bar Center, 520 West Fayette Street, Baltimore, MD 21201, counsel of Record for Hovsons, Inc.

  
Andrew D. Levy