of § 3602(b). The Country Club argued that they were not. Focusing upon what Congress intended the word "residence" to mean, we rejected this argument. We observed [**16]that "although the meaning of the term 'residence' is central to understanding [the definition of dwelling], the Act provides no statutory definition of that term." *915 F.2d at 881.* Applying a plain meaning analysis, the court looked to the definition of "residence" in Webster's Third New International Dictionary, which defines it as "a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit." *Columbus Country Club, 915 F.2d at 881* (citation omitted). This led us to hold "that the central inquiry is whether the defendant's annual members intend to remain in the bungalows for any significant period of time and whether they view their bungalows as a place to return to." Id.

We observed that since "annual members may spend up to five months in their bungalows," they were "not 'mere transients.'" Id. Furthermore, there was "no indication in the statutory language that Congress intended to limit coverage of the Act to year-round places of abode . . . ." Id. The court also noted that if we were to adopt the Country Club's argument, this "would create a broad exception[**17] to the Act" that, followed to its logical conclusion, could be interpreted to allow residents in a private development of summer homes to exclude members of minority groups from owning, renting or occupying summer homes without violating the FHAA, a result that Congress could not have intended. Id. We therefore held that the summer bungalows fell "within the ordinary meaning of 'residence' and must be considered dwellings for purposes of the Fair Housing Act." Id.

The Township of Brick's argument that the proposed nursing home is not a "dwelling" under the FHAA is similarly without merit. To the handicapped elderly persons who would reside there, Holiday Village would be their home, very often for the rest of their lives. We therefore hold that the proposed nursing home is a "dwelling" within the meaning of § 3602(b). See *United States v. Commonwealth of Puerto Rico, 764 F. Supp. 220 (D.P.R. 1991)* (applying FHAA to case challenging the closure of a nursing home). We therefore will affirm the judgment of the district court to the extent it held that the proposed nursing home is a "dwelling," as that term is defined by the FHAA.

B.

1.

Section 3604(f)(1) of the[**18] FHAA provides that it is unlawful

to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of--

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it has been sold, rented, or made available; or

(C) any person associated with that buyer or renter.

42 U.S.C. § 3604(f)(1). Section 3604(f)(3)(B) further provides that "for the purposes of this subsection, discrimination includes . . . a refusal to make reasonable accommodations in rules, policies, practices, or services, when [*1103]such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling[.]" Id. § 3604(f)(3)(B). n3

n3 The parties do not dispute that the nursing home patients at Holiday Village would be "handicapped" within the meaning of the FHAA. See *42 U.S.C. § 3602*(h) (defining the term "Handicap" under the FHAA); see also *Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1010 (3d Cir. 1995)* ("Obviously, everyone that applies for admission to a nursing home does so because of his or her disabilities. Indeed, no one would be able to meet a nursing home's admission requirements in the absence of some handicapping condition necessitating nursing home care.").

[**19]

Hovsons argues that the district court erred when it placed the burden upon the plaintiff to establish that the accommodation that it requested was "reasonable" under the FHAA. See Hovsons, No. 94-4265, slip op. at 4. We agree. Our precedents interpreting § 504 of the Rehabilitation Act have held that the burden of proving that a proposed accommodation is not reasonable rests with the defendant. See *Juvelis v. Snider, 68 F.3d 648, 653 & n.5 (3d Cir. 1995); Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1385 (3d Cir. 1991).* As we have already held that courts must look to the body of law developed under § 504 of the Rehabilitation Act as an interpretative guide to the "reasonable accommodations" provision of the FHAA, we further hold that the burden should have been placed upon the Township of Brick to prove that it was either unable to accommodate Hovsons or that the accommodation

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Hovsons proposed was unreasonable. We now turn to the question of whether there is a sufficient foundation in the record to support the factual finding of the district court that Brick Township complied with the FHAA's "reasonable accommodations" provision.

2.

The conclusion[**20] of the district court that the Township of Brick satisfied the FHAA's mandate that "reasonable accommodations" be provided to handicapped persons was clear error. Brick Township does not permit the construction of nursing homes in any of its residential areas. The Township nonetheless contends that the authorization for nursing home construction within its hospital support zone, an area zoned for hospitals and other medical support facilities, suffices to satisfy its legal obligation to handicapped persons. We disagree.

The reasoning and analysis of the district court evinces a fundamental misunderstanding of the intent of Congress in enacting the FHAA. The district court's statement that the FHAA "does not ask [municipalities] to disregard their own zoning requirements in order to provide sufficient accommodations for the disabled" runs counter to the entire thrust of the FHAA. Hovsons, No. 94-4265, slip op. at 6. The Township of Brick's blanket exclusion of nursing homes from its residential areas in general, and its refusal to permit the construction of the specific facility in question, is precisely the sort of isolation of handicapped persons from the mainstream of society[**21] that the FHAA was enacted to forbid. Furthermore, there is a dearth of evidence in the record to support Brick Township's sweeping claim as to the fundamental incompatibility of nursing homes and residential areas in general and the R-R-2 zone in particular.

A review of the record, case law interpreting the meaning of "reasonable accommodations" and the legislative history of the FHAA leads us to conclude that the Township of Brick failed to satisfy the requirements of § 3604(f)(3)(B) as a matter of law. Although the district court applied the incorrect legal standard, we need not remand for further proceedings. There was a full hearing on the merits in the district court during which each side presented expert testimony on the issue of the compatibility of a nursing home with the other uses in the R-R-2 zone, and the record is critically deficient of evidence that would support a ruling in Brick Township's favor. We therefore conclude that it is appropriate to direct entry of judgment in favor of Hovsons. n4 See Rohm [*1104]*and Haas Co. v Adco Chem. Co., 689 F.2d 424, 433 (3d Cir. 1982)* (directing that judgment be entered in favor of plaintiff when adverse result in district court[**22] was premised upon the application of an incorrect legal standard); *Sun Shipbuilding & Dry Dock Co. v. McCabe, 593 F.2d 234, 239 (3d Cir. 1979)* (remand unnecessary despite application of the incorrect legal standard "because the evidence on the record compelled the result").

n4 As we are holding that the Township of Brick's refusal to grant a variance violated the "reasonable accommodations" provision of the FHAA, we need not reach the issue of whether Hovsons established a claim of disparate impact discrimination.

The FHAA's "reasonable accommodations" provision prohibits the enforcement of "zoning ordinances and local housing policies in a manner that denies people with disabilities access to housing on par with that of those who are not disabled." Laurie C. Malkin, Troubles at the Doorstep: The Fair Housing Amendments Act of 1988 and Group Homes for Recovering Substance Abusers, *144 U. Pa. L. Rev. 757, 804 (1995)* (hereinafter Fair Housing Amendments Act). Pursuant to § 3604(f)(3)(B), the Township[**23] of Brick has "an affirmative duty" to make reasonable accommodations on behalf of handicapped persons. *United States v. California Mobile Home Park Management Co., 29 F.3d 1413, 1416 (9th Cir. 1994).* See *Juvelis, 68 F.3d at 653* (" § 504 requires some affirmative steps to accommodate handicapped persons.").

"The reasonable accommodation inquiry is highly fact-specific, requiring a case-by-case determination." *California Mobile Home Park Management Co., 29 F.3d at 1418.* Accord *Nathanson, 926 F.2d at 1385.* As in Rehabilitation Act cases, we must view the reasonable accommodations requirement "in light of two countervailing legislative concerns: (1) effectuation of the statute's objectives of assisting the handicapped; and (2) the need to impose reasonable boundaries in accomplishing this purpose." *Americans Disabled For Accessible Pub. Transp. (ADAPT) v. Skinner, 881 F.2d 1184, 1191 (3d Cir. 1989)* (in banc). We keep in mind the principle that satisfaction of the FHAA's reasonable accommodation requirement "can and often will involve some costs." *Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 335 (2d Cir. 1995).*

"Courts interpreting the reasonable accommodation[**24] provision of the Fair Housing Act have ruled that municipalities . . . must change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities." *Horizon House*

Developmental Servs., Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 699-700 (E.D. Pa. 1992) (collecting cases), aff'd, *995 F.2d 217 (3d Cir. 1993)* (Table). To establish that the accommodation proffered by Hovsons was not reasonable, the Township of Brick was required to prove that it could not have granted the variance "without imposing undue financial and administrative burdens," *Southeastern Community College v. Davis, 442 U.S. 397, 412, 99 S. Ct. 2361, 2370, 60 L. Ed. 2d 980 (1979),* imposing an "undue hardship" upon the Township, *Nathanson, 926 F.2d at 1383,* or requiring "a fundamental alteration in the nature of the program . . . ." *Davis, 442 U.S. at 410, 99 S. Ct. at 2369.* See *Alexander v. Choate, 469 U.S. 287, 300, 105 S. Ct. 712, 719-20, 83 L. Ed. 2d 661 (1985).* We conclude that the Township of Brick has failed to make such a showing.

We acknowledge that precisely what the "reasonable accommodations" standard requires is not[**25] a model of clarity. *Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1015 (3d Cir. 1995); ADAPT, 881 F.2d at 1193* (acknowledging "the difficulty in determining precisely the extent of accommodation mandated by section 504"); *O'Neal v. Alabama Dep't of Pub. Health, 826 F. Supp. 1368, 1376 (M.D. Ala. 1993)* ("As centuries of jurisprudence have taught us, the word 'reasonable' is subject to a wide variety of interpretations."). As one court has observed, "the FHAA imposes an affirmative duty to reasonably accommodate handicapped persons. However, because the precise obligations encompassed by this duty are ambiguous, many courts have looked to the legislative history of the Act for guidance." *United States v. City of Taylor, Michigan, 872 F. Supp. 423, 436 (E.D. Mich. 1995)* (citation omitted). We will also look to the legislative history of the FHAA to clarify the meaning of its "reasonable accommodations" requirement in the present factual setting.

[*1105] We have previously emphasized that the enactment of the FHAA was "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." *Helen L. v. [**26] DiDario, 46 F.3d 325, 333 n.14* (3d Cir.) (quoting H.R. Rep. No. 711, 100th Cong., 2d Sess. 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2179), cert. denied, *116 S. Ct. 64 (1995).* The House Report further states that the FHAA "is intended to prohibit the application of special requirements through land-use regulations . . . that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." H.R. Rep. No. 711, 100th Cong., 2d Sess. 24, reprinted in 1988 U.S.C.C.A.N. 2173, 2185 (emphasis added). Moreover, the FHAA was intended to "require that changes be made to . . . traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling." Id. at 2186.

In light of these Congressional pronouncements regarding the purpose and scope of the FHAA, it was clear error for the district court to conclude that Hovsons' request for a variance could not be accommodated. Granting a variance to Hovsons would not have saddled the Township of Brick with "undue financial and administrative burdens," or otherwise resulted in the imposition of an "undue hardship." On the contrary, [**27] the proprietors of Holiday Village will become taxpaying members of the local community. Furthermore, the district court acknowledged the "considerable efforts [Hovsons has made] to work with the township in order to make the site feasible . . . ." Hovsons, No. 94-4265, slip op. at 5. Holiday Village intends to manage its own affairs with a minimum of local governmental involvement. Hovsons has agreed to have Holiday Village arrange for its own garbage collection, street maintenance and snow removal. The nursing home would rely upon the municipal fire, police and emergency services, but its use of these services would be no different from that of the surrounding retirement developments. The mere fact that the employees and residents of Holiday Village will at times require the assistance of the local police and other emergency services does not rise to the level of imposing a cognizable administrative and financial burden upon the community.

Nor would granting a variance to Hovsons fundamentally undermine the Brick Township zoning scheme. The Supreme Court has observed that, in broad general terms, the purpose of zoning law is "to prevent problems caused by the 'pig in the parlor[**28] instead of the barnyard.'" City of Edmonds v. Oxford House, Inc., U.S. , , *115 S. Ct. 1776, 1781, 131 L. Ed. 2d 801 (1995)* (quoting *Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388, 47 S. Ct. 114, 118, 71 L. Ed. 303 (1926)).* As the record makes clear, however, permitting the construction of a nursing home in the R-R-2 zone would cause no such problems.

We reject the Township of Brick's contention that nursing homes are fundamentally incompatible with the other permitted uses in the R-R-2 zone. Brick Township appears to rely upon the blanket proposition that nursing homes are clearly out of place in residential zones. This is precisely the type of land use planning that the FHAA was enacted to prevent and, if necessary, overrule. Furthermore, the design construction of Holiday Village is similar to that of the local planned residential retirement communities, a permitted use in the R-R-2 zone. As both of these types of facilities cater to the elderly, Holiday Village could provide a useful resource

to members of the local retirement communities who do not want to locate in a new area, but who are no longer able to care for themselves.

As the Court of Appeals for the Sixth Circuit[**29] has observed, "the handicapped may have little choice but to live in a commercial home if they desire to live in a residential neighborhood. To provide the handicapped with equal housing opportunities, the City must make the necessary 'reasonable accommodations.'" *Smith & Lee Assocs., Inc. v. City of Taylor, Michigan, 13 F.3d 920, 930 (6th Cir. 1993).* We hold that under the facts in this case, § 3604(f)(3)(B) requires that the Township of Brick permit Hovsons to proceed with its plans to build a nursing home in [*1106] its R-R-2 zone. This result is consistent with "the broad remedial intent of Congress embodied in the [Fair Housing] Act." *Havens Realty Corp. v. Coleman, 455 U.S. 363, 380, 102 S. Ct. 1114, 1125, 71 L. Ed. 2d 214 (1982).* See City of Edmonds, U.S. at , 115 S. Ct. at 1780 (noting the Fair Housing Act's "'broad and inclusive' compass, and therefore according a 'generous construction' to the Act's complaint-filing provision") (quoting *Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209, 212, 93 S. Ct. 364, 367, 368, 34 L. Ed. 2d 415 (1972));* see also Fair Housing Amendments Act, supra, at 763 ("The scope of the statute is sweeping, not only in the broad protections it affords, [**30] but also in the limited exceptions it allows.").

It is uncontroverted that the Township of Brick has a substantial interest in enforcing its zoning code and that, under appropriate circumstances, local zoning codes are entitled to a considerable amount of deference. See, e.g., *Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8, 94 S. Ct. 1536, 1540, 39 L. Ed. 2d 797 (1974); Doe v. City of Butler, Pennsylvania, 892 F.2d 315, 318 (3d Cir. 1989).* We are also mindful of the fact that "in requiring reasonable accommodation, . . . Congress surely did not mandate a blanket waiver of all facially neutral zoning policies and rules, regardless of the facts." *Oxford House, Inc. v. City of Virginia Beach, Virginia, 825 F. Supp. 1251, 1261 (E.D. Va. 1993).* Nor did Congress intend to "give handicapped persons carte blanche to determine where and how they would live regardless of zoning ordinances to contrary." *Thornton v. City of Allegan, 863 F. Supp. 504, 510 (W.D. Mich. 1993).* Nonetheless, the FHAA's promise that "reasonable accommodations" be provided to handicapped persons would be an empty one indeed if Brick Township were permitted to do nothing to accommodate the elderly disabled who[**31] are in need of nursing home care and desire to live in one of the Township's residential zones.

The House Report to the FHAA expressly states that the Act "is intended to prohibit . . . [the imposition of] terms or conditions . . . which have the effect of excluding . . . congregate living arrangements for persons with handicaps." H.R. Rep. No. 711, 100th Cong., 2d Sess. 23, reprinted in 1988 U.S.C.C.A.N. 2173, 2184. As one court has explained, "strict adherence to a rule which has the effect of precluding handicapped individuals from residing in the residence [of their choice] was precisely the type of conduct which the Fair Housing Amendments Act sought to overcome with the enactment of § 3604(f)(3)(B)." *United States v. Village of Marshall, Wisconsin, 787 F. Supp. 872, 879 (W.D. Wis. 1991).*

IV.

We will reverse the August 16, 1995 order of the district court and remand this matter with instructions to enjoin the Township of Brick from interfering with the construction of the nursing home facility under the terms, conditions and specifications agreed to by the State of New Jersey. n5

> n5 Our decision is not to be interpreted as invalidating the Township of Brick's zoning scheme. The injunctive relief that we authorize is limited strictly to preventing the enforcement of the R-R-2 zoning ordinance that purported to bar construction of a nursing home at the specific location in question. Hovsons still must adhere to the size and capacity restrictions set forth in the State-issued certificate of need, building code requirements, and all other government regulations that relate to the construction and management of the nursing homes in New Jersey.

[**32]



Assisted Living Associates of Moorestown, L.L.C. v. Moorestown Tp.

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D.N.J.,1998.
March 19, 1998. (Approx. 38 pages)



"IN PERTINENT PART"

pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

I. Findings of Fact

A. The Parties and their Agents

1. Plaintiff, Assisted Living Associates of Moorestown, L.L.C. ("ALA"), is a limited liability company formed pursuant to the laws of Delaware and authorized to do business in New Jersey. Verified Complaint ¶ 5 (dated Sept. 4, 1997) (hereinafter Compl.).

2. Plaintiff, Laurel Construction Management, Inc. ("LCM"), is a New Jersey corporation, and is associated with ALA. *Id.* at ¶¶ 6, 10.

3. Plaintiffs, John and Jane Doe (the "Doe Plaintiffs"), are prospective residents at a facility to be constructed and managed by LCM and ALA. *Id.* at ¶¶ 7, 14.

4. Thomas H. Parkinson ("Parkinson") is the principal partner in ALA and the vice president of LCM. Certification of Thomas H. Parkinson ¶ 1 (dated Dec. 3, 1997) (hereinafter Parkinson 12/3/97 Certif.); Supplemental Certification of Thomas H. Parkinson ¶ 1 (dated Dec. 1, 1997) (hereinafter Parkinson 12/1/97 Certif.); Transcript 7-8 (dated Dec. 11 & 17, 1997) (hereinafter Trans.).

5. Defendant, Moorestown Township ("Moorestown" or the "Township"), is a municipal corporation with the power to zone pursuant to New Jersey's Municipal Land Use Law, N.J.S.A. 40:55D-1 *et seq.* Compl. at ¶ 8; Answer of Defendant, Moorestown Township ¶ 8 (dated Nov. 21, 1997). The Township is located in Burlington County.

6. Moorestown has a population of approximately 16,000 people, of which approximately 17% are over the age of 65. *See* Certification of John J. Lynch, Exh. A at 2-3 (dated Nov. 20, 1997) (hereinafter Lynch Certif.). In 1970, approximately 11.5% of the population of Moorestown was over the age of 65. *Id.*

7. Defendant, Moorestown Township Zoning Board of Adjustment (the "Zoning Board"), is a municipal body created pursuant to N.J.S.A. 40:55D-69, with the powers set forth in N.J.S.A. 40:55D-70 *et seq. See, e.g.,* Answer of Defendant, Moorestown Township Zoning Board of Adjustment ¶ 9 (dated Nov. 21, 1997).

8. Defendant, Moorestown Township Planning Board (the "Planning Board"), is a municipal body created pursuant to N.J.S.A. 40:55D-23 *et seq.,* with the powers set forth in N.J.S.A. 40:55D-25 *et seq. See, e.g.,* Answer of Defendant, Moorestown Township Planning Board ¶ 9 (dated Nov. 20, 1997).

9. Harry W. McVey ("McVey") is the Director of Community Development for the Township, Secretary to the Planning Board, and the Zoning Officer of the Township. Trans. at 150; Certification of Harry W. McVey ¶ 1 (dated Nov. 17, 1997) (hereinafter McVey Certif.). McVey exercises substantial influence in the planning and zoning of the Township. *See, e.g.,* Trans. at 251, 273-74.

B. The Nature of Assisted Living and Assisted Living in Moorestown

10. On May 3, 1996, pursuant to N.J.S.A. 26:2H-1 *et seq.,* the New Jersey Department of Health issued to LCM a certificate of need for the construction of an assisted living facility in Mount Laurel, Burlington County, New Jersey. 3 *See* Plaintiffs' Exh. 1 at 1; Trans. at 407.

11. The certificate of need authorizes LCM to construct an assisted living facility anywhere in Burlington County. *See* Trans. at 8, 59. In order to provide assisted living services, a facility must, in addition to a certificate of need, be licensed to provide those services. *See, e.g.,* Trans. at 392, 400-01; N.J.A.C. 8:36-2.2; *see also* Plaintiffs' Exh. 9.

12. Assisted living is a relatively recent development in the provision of long-term care services to the elderly and handicapped. Essentially, the concept allows a facility to provide a range of services wider than those which may be provided by, for example, a nursing home. The fact that the facility is more flexible in the types of services which it offers allows a resident to age "in place" without constantly moving from facility to facility as a resident's condition evolves. Also, since an assisted living resident may ***416** not need as much care as, for example, a patient in a nursing home, an assisted living facility is designed to ensure that a resident maintains as much independence, autonomy, individuality, privacy, and dignity as possible. The most obvious and important way a resident achieves these goals is by living in an independent, apartment-like unit with a private bathroom and kitchenette, rather than in a hospital-like room. Because the services provided are more particularly tailored to an individual's needs, the quality of life is better than for patients in a nursing home. *See generally* Trans. at 393-403; N.J.A.C. 8:36-1.3 (noting that "assisted living promotes resident self direction and participation in decisions that emphasize independence, individuality, privacy, dignity, and homelike surroundings").

13. An assisted living facility may provide services which resemble the services someone might

otherwise receive in a nursing home. *See* N.J.A.C. 8:36-4.1(b), (d); Trans. at 19, 396, 399.
14. A typical resident of an assisted living facility needs assistance with two or more basic daily activities, such as, toileting, bathing, or dressing, and is, on average, approximately 85 years old. *See* Trans. at 101, 397, 399- 400; *see generally* N.J.A.C. 8:36-4.1(a-d).
15. There are no assisted living facilities currently operating in Moorestown. *See, e.g.,* Plaintiffs' Exh. 32.
16. In approximately August, 1997, the Zoning Board approved the application of Brandywine Senior Care, Inc. ("Brandywine") for the eventual construction of an assisted living facility with a capacity of approximately 100 residents on a site located at the intersection of Church Street and New Albany Road in Moorestown. *See* Defendants' Exh. 7-8; Trans. at 106, 197-98, 272, 278.

C. ALA before the Planning and Zoning Boards

17. Sometime in mid-1996, LCM purchased a 14.75-acre parcel of land, Block 7100, Lot 1 ("Lot 1"), located approximately at the intersection, and immediately to the south and east, respectively, of Garwood Road and Westfield Road in Moorestown for approximately $435,000. Plaintiffs' Exh. 3-4.
18. Approximately 11.2 acres of Lot 1 are encumbered by a conservation easement granted in favor of the Township which prohibits, *inter alia,* various actions which are inconsistent with agricultural and equestrian uses. *See* Plaintiffs' Exh. 3; McVey Certif. at ¶ 12 & Exh. E. The remaining approximately 3.55 acres of Lot 1 are encumbered by a covenant running with the land which states that the land "shall not be further subdivided *EXCEPT* that a two lot residential subdivision shall be permitted, subject to subdivision approval by the" Township. *Id.* at Exh. F (emphasis in original); Trans at 67-68.
19. On or about September 17, 1996, ALA submitted an application to the Planning Board for a conditional use and site plan approval for the construction of an assisted living facility on the portion of Lot I which was not encumbered by the conservation easement, *i.e.,* the 3.55 acre portion. *See, e.g.,* Plaintiffs' Exh. 7; McVey Certif., Exh. C; Trans. at 24-25, 66.
20. At the time of the application, Township ordinances allowed in the R-1 zone as conditional uses, *inter alia,* a "nursing home or similar health facility; a home for ... the aged, the handicapped or similar institutional use under the sponsorship of a religious or nonprofit community service organization; ... or a continuing care facility for the elderly," if such uses complied with section 180-91 of the Moorestown Code. Moorestown Code § 180- 8.D(3).
21. A conditional use is a use which may be allowed upon the fulfillment of certain conditions, the satisfaction of which is determined by the Planning Board applying definite specifications and standards. *See, e.g.,* N.J.S.A. 40:55D-24, 40:55D-67; Moorestown Code § 180-107 (enunciating standards formerly applied by the Planning Board); Trans. at 304-09, 350.
22. The R-1 zone consists of one and one-half acre lots and generally comprises most of the eastern, more rural, relatively less densely developed part of Moorestown, that ***417** is, the areas east of Westfield Road. *See* Trans. at 151-52, 161; Plaintiffs' Exh. 4; *see generally* Plaintiffs' Exh. 36 at 9, 16 (noting that "intent of 1989 Master [Plan] was to preserve rural character in the eastern portion of the Township" and noting that "growth in residential district in the eastern portion of the Township raises the question of whether small scale retail and personal service uses should be established in reasonable proximity to new neighborhoods").
23. Section 180-91 requires, *inter alia,* that certain institutions, including an "assisted care or nursing home ... a continuing-care facility of the senior citizen; home for the aged, indigent or the handicapped" meet a minimum acreage requirement of five acres. Moorestown Code § 180-91(B); Plaintiffs' Exh. 35.
24. On October 28, 1997, McVey informed a representative of LCM that the application did not meet the minimum acreage requirement of section 180-91 because, in the opinion of the Planning Board's attorney, the 11.2 acres of Lot 1 restricted by the conservation easement could not be utilized to meet the minimum acreage requirement. The letter further informed LCM that it could apply to the Zoning Board for a use variance and site approval. *See* Plaintiffs' Exh. 10; Trans. at 24-25; *see generally* N.J.S.A. 40:55D- 70(c) (outlining general power of zoning boards of adjustment to grant variances from zoning ordinances); N.J.S.A. 40:55D-76 (providing for concurrent jurisdiction by zoning boards of adjustment to grant site approvals where applicants have also requested use variances).
25. Pursuant to N.J.S.A. 40:55D-70, an applicant, following a determination by the Planning Board, could either apply to the Zoning Board for a use variance, appeal the Planning Board's decision with respect to the minimum acreage requirement to the Zoning Board, or request from the Zoning Board an interpretation with respect to the minimum acreage requirement. *See* N.J.S.A. 40:55D-70(a)-(c). Advised by McVey of some or all of these options, ALA on or about November 4, 1997, opted to

Hovsons, 89 F.3d at 1104-06.

[22] 16. The ultimate burden at trial of proving that a proposed accommodation is not reasonable or that Plaintiffs cannot be accommodated rests with Defendants. *Hovsons,* 89 F.3d at 1103. *But see Bryant Woods,* 124 F.3d at 603-04; *Elderhaven, Inc. v. City of Lubbock, Texas,* 98 F.3d 175, 178 (5th Cir.1996).

[23] 17. The Doe Plaintiffs, prospective residents of the assisted living facility to be constructed by ALA and LCM, are handicapped within the meaning of the FHA. They will have "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h); *see* ¶¶ 12-14, *supra* (discussing nature of future residents of ALA and LCM's facility); *see, e.g., Hovsons,* 89 F.3d at 1103 & n. 3; *Wagner v. Fair Acres Geriatric Ctr.,* 49 F.3d 1002, 1010 (3d Cir.1995).

[24] 18. The accommodation requested, exemption from section 1 and section 2 of ordinance No. 1806-97, amending Moorestown Code §§ 180-8(D) and 180-91, is reasonable. This accommodation will exempt Plaintiffs from the requirements that the proposed assisted living facility be located within an existing sanitary sewer service area, as shown in the Township's approved Wastewater Management Plan and that the proposed assisted living facility connect to the Township's sanitary sewer system, and will allow Plaintiffs' proposed use to be conditionally allowable in the R-1 zone. The Township introduced evidence that the areas east of Westfield Road have generally been reserved for less intense uses, and accordingly, areas east of Westfield Road have not been and will not be provided with sewer service. *See* Trans. at 157, 258-59 (noting correlation between sewer service and intensity of development). It is equally clear, however, that, where it has been to the Township's benefit to do so, the Township has accommodated sewer service, more intense uses, and more dense developments east of Westfield Road, all of which are to some extent inconsistent with the Township's re-examined Master Plan, *see* Plaintiffs' Exh. 36 at 9. The Township permitted the development of the Moorestown Hunt and Laurel Creek residential developments, both east of Westfield Road, and took upon itself affirmative efforts to provide, or cause to be provided, sewer service to those developments in exchange for multi-million dollar contributions to a fund which the Township could use to satisfy completely unrelated legal obligations.
Furthermore, in terms of the less dense/more rural character of the land east of Westfield Road, the Township ordinance requires that institutions such as an assisted living facility be constructed on property of a minimum of five acres. ALA and LCM plan to construct their facility on a 16.29-acre plot of land, leaving approximately 11.2 acres wholly undeveloped. [FN17] This is consistent ***436** with the large-lot development east of Westfield Road. Thus, from these facts, it is clear that the construction of an assisted living facility on the Garwood-Westfield Roads site, and its connection to the Township's sewer system or, alternatively, the construction of an on-site septic system, will not substantially or fundamentally alter the nature of Moorestown's zoning scheme. *See, e.g., Judy B.,* 889 F.Supp. at 800 (accommodation requested would not do damage to character of surrounding community); *Oxford House, Inc. v. Township of Cherry Hill,* 799 F.Supp. 450, (D.N.J.1992) (Gerry, C.J.) (same).

> FN17. Also, it should be noted that among those removed from the list of conditional uses in the R-1 zone by section 2 of Ordinance No. 1806-97, the majority were institutions which could be logically connected to the elderly or handicapped. Schools, lodges, kennels, and cemeteries remained in the R-1 zone.

Additionally, while reasonable accommodations can result in the imposition of some costs on the accommodator, ALA and LCM have volunteered to assume the costs of constructing a septic system, or the costs of connecting to the Township's sewer system by extending a line approximately halfway across Westfield Road, *i.e.,* a 10-foot extension, thereby substantially minimizing any costs to the Township. *See* ¶ 77, *supra; see Oxford House-Evergreen,* 769 F.Supp. at 1344 (accommodation was



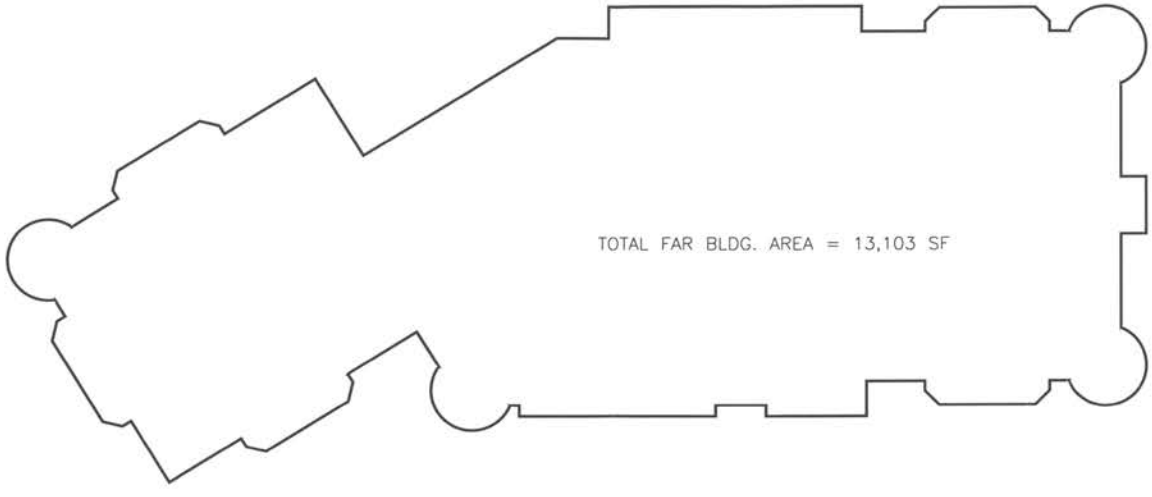


GREEN SPACE PLAN

SUNRISE
CONNECTICUT AVENUE, WASHINGTON, DC

0 20' 40' 80'
1"=20'-0"

BEERY, RIO AND ASSOCIATES ARCHITECTS



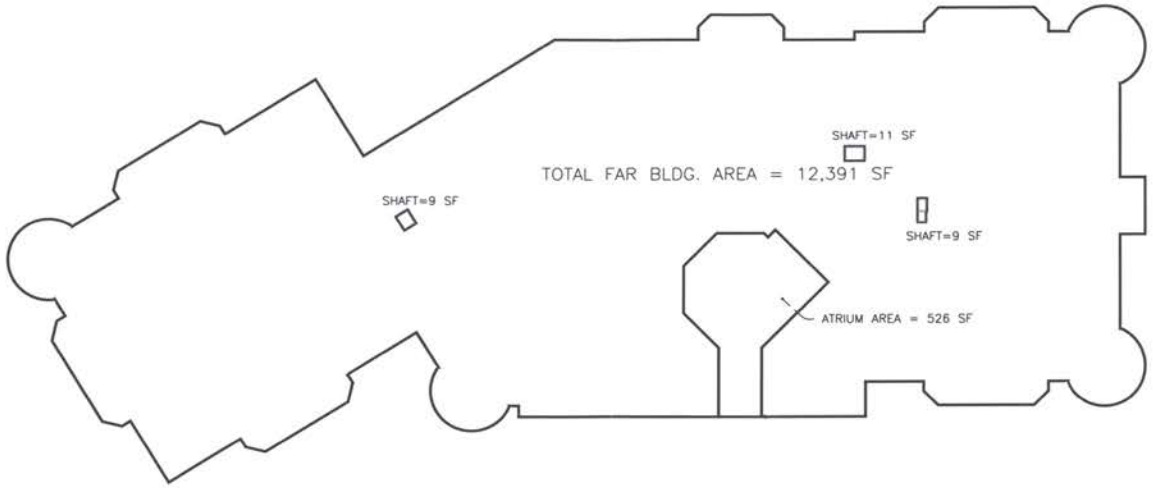
5111 CONNECTICUT AVENUE

1ST FLOOR PLAN

SUNRISE
CONNECTICUT AVENUE, WASHINGTON, DC

0 8' 16' 32'
1/8"=1'-0"

BEERY RIO AND ASSOCIATES ARCHITECTS



12,917	SF	TOTAL BLDG.
– 29	SF	SHAFTS
– 526	SF	ATRIUM
12,362	SF	ACTUAL FAR BLDG. AREA

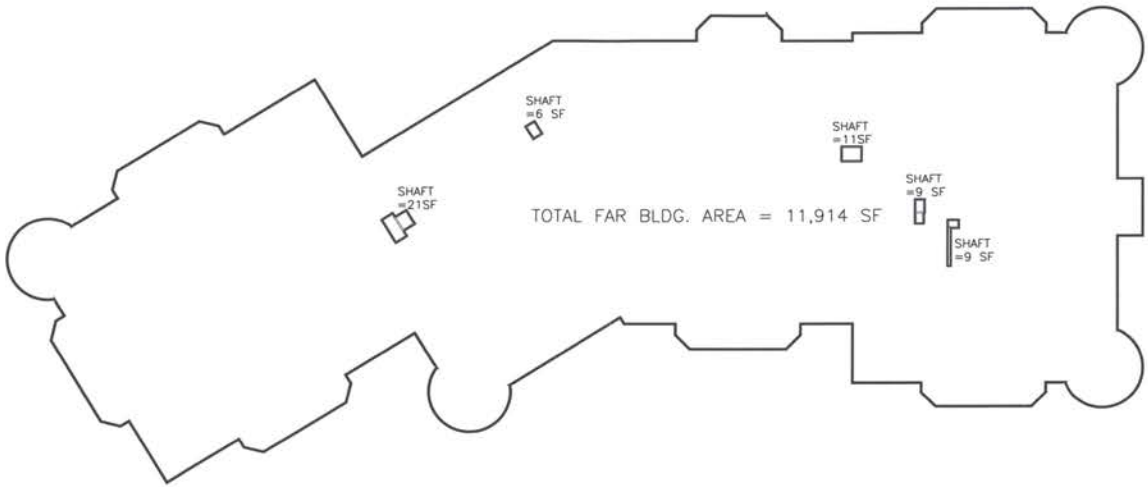
5111 CONNECTICUT AVENUE

2ND FLOOR PLAN

SUNRISE
CONNECTICUT AVENUE, WASHINGTON, DC

1/8"=1'-0"

BEERY RIO AND ASSOCIATES ARCHITECTS



11,914 SF	TOTAL BLDG.	
– 56 SF	SHAFTS	
11,858 SF	ACTUAL FAR BLDG. AREA	

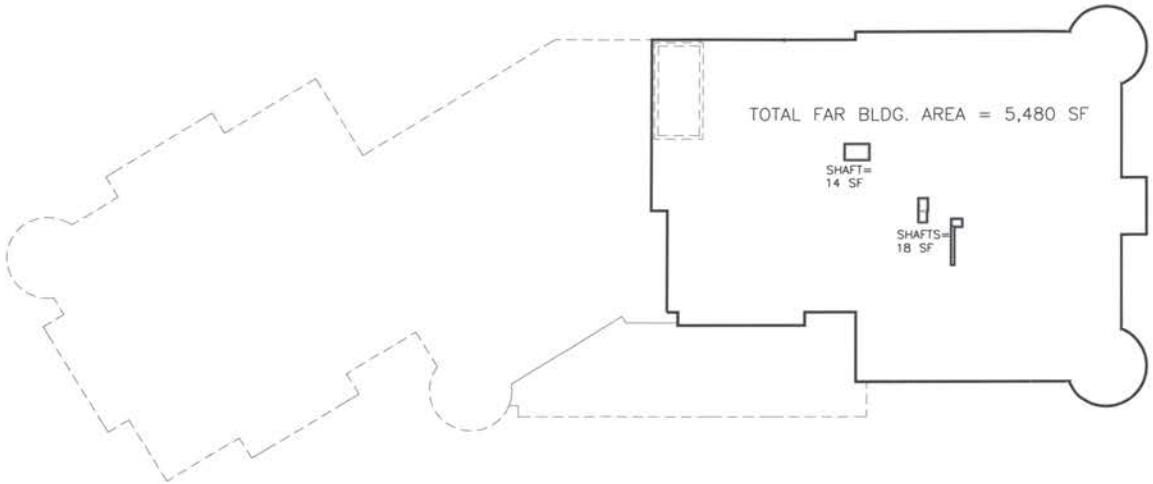
5111 CONNECTICUT AVENUE

3RD THRU 6TH FLOOR PLAN

SUNRISE
CONNECTICUT AVENUE, WASHINGTON, DC

1/8"=1'-0"

BEERY, RIO AND ASSOCIATES ARCHITECTS



5,480 SF		TOTAL BLDG.
– 32 SF		SHAFTS
5,432 SF		ACTUAL BLDG. AREA

5111 CONNECTICUT AVENUE

7TH FLOOR PLAN

SUNRISE
CONNECTICUT AVENUE, WASHINGTON, DC

1/8"=1'-0"

BEERY RIO AND ASSOCIATES ARCHITECTS