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## Zoning and the Aging Population: Are Residential Communities Zoning Elder Care Out?

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A PERFECT STORM OF NIMBY-ISM,<sup>1</sup> SUBURBAN SPRAWL, inflexible zoning codes—or judicial interpretations of them—and Medicare cutbacks have combined to prevent seniors and their families from receiving state of the art nursing care and social support in some residential communities. This article explores zoning practices and policies relating to nursing homes<sup>2</sup> in residential zoning districts.

Exclusionary zoning practices can act as a barrier to providing quality, lower cost health care in patients' own neighborhoods, an under-acknowledged factor with the potential to undermine recent state and federal initiatives to shift care from in-patient to community based settings, thereby reducing costs. Section I of this article decries this trend as poor policy for an aging population. Section II examines how exclusionary zoning practiced against nursing home uses also potentially violates the federal Fair Housing Act. Section III describes specific instances where efforts to develop or expand a nursing home generated controversy, and how some communities have approached nursing home zoning proactively through legislation. One ongoing zoning appeal from Delaware, discussed in detail in Section IV, demonstrates how exclusionary zoning practices can prevent the delivery of care and drive up the cost of developing new facilities. Section V will venture some hypotheses as to why nursing homes continue to generate opposition, despite being a traditional residential use. Section VI

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1. NIMBY is the acronym for "Not In My Back Yard," describing the opposition by local residents to a proposal for new development near them.

2. For purposes of this article, "nursing home" refers primarily to residential group homes for elderly persons and residential hospice care. Obviously, non-elderly persons also access nursing home care, and for reasons discussed herein the need for similar services for non-elderly populations have also increased.

provides a legislative checkup for communities and senior health care advocates to assure that the resources needed to support a community's elderly will be present as demand for nursing care in residential zones continues to increase. Section VII argues that if local and state governments do not provide remedies to ease nursing homes' zoning and permitting challenges, Congress should consider federal legislation.

## I. Demographics

Since the 1920s, a large portion of the population that self-identifies as middle class moved to the suburbs or extensions of cities now described as "metropolitan areas."<sup>3</sup> Once there, they often used their political clout to pass zoning codes restricting non-residential uses in their suburban communities.<sup>4</sup> Often this resulted in the market having difficulty responding to the need for basic services close to homes, such as new grocery stores, medical offices, and gasoline stations.<sup>5</sup> Residents in the burgeoning suburbs, of course, had to access these services, but many communities preferred, when possible, that someone else bear the perceived secondary effects of developing commercial services near their residential homes.<sup>6</sup> Expensive, prolonged political and legal fights ensued.<sup>7</sup> Some communities did manage the exclusion of most non-residential uses over time.<sup>8</sup> Nursing homes, however, are considered *residential* uses, and are often classified as such under local zoning codes.<sup>9</sup> The Fair Housing Act, as discussed in more detail in Section II below, recognizes nursing homes as residential uses, and protects them from exclusionary zoning laws and practices.

In the decades of post-World War II suburban growth, most communities accepted nursing homes as residential uses compatible with surrounding neighborhoods, even where pressure to zone out clearly non-residential uses was intense. New York City went as far as provid-

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3. See Peter Hall, *The City on the Highway*, in CITIES OF TOMORROW 274-318 (Peter Hall ed., 1990).

4. *Id.* at 296-97.

5. *Id.* at 302-03.

6. *Id.* at 297.

7. Joe R. Feagin, *Arenas of Conflict: Zoning and Land Use Reform in Critical Political-Economic Perspective*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 83 (Charles M. Haar & Jerold S. Kayden, eds. 1989).

8. See generally HOUSING ASSISTANCE COUNCIL, *Overcoming Exclusion in Rural Communities: NIMBY Case Studies* (Nov.1994), available at <http://216.92.48.246/pubs/development/nimby/nimby.pdf>.

9. Barbara A. Gall, *Zoning Obstacles Facing the Developer of Senior Housing Options*, FINDLAW (Mar. 26, 2008), <http://corporate.findlaw.com/litigation-disputes/zoning-obstacles-facing-the-developer-of-senior-housing-options.html>.

ing density bonuses to encourage nursing home development in residential zones.<sup>10</sup> The need for nursing homes has intensified for demographic reasons, yet in some communities, continued legislative grace for nursing care remains at odds with popular sentiment.<sup>11</sup> Why has this happened as the population continues to age while modern American family life has undermined traditional senior care?<sup>12</sup> People live longer while seniors' children have their own children later in life, work longer hours outside the home, and sometimes lack the care-giving skills to address their aging parents' needs; families, therefore, inevitably started looking for alternatives to caring for seniors with long term, intense medical and social demands in their own homes.<sup>13</sup> The locus of some care has shifted from residential homes to institutional settings due to these pressures, but more paid medical care is also being provided at home.<sup>14</sup> More caregivers who provide nursing services to the elderly earn monetary wages (as opposed to family members' unpaid work in the typical household).<sup>15</sup> One would expect that new facilities and remodeling designed to accommodate mere shifts in the identity of caregivers and the precise residential location of caregiving (home or nursing home) would not generate so much controversy.

Not only do modernized nursing homes provide a different platform to deliver traditional caregiving to the elderly, new in-patient facilities now even commonly emulate the home environment.<sup>16</sup> State of the art nursing homes may provide amenities designed to facilitate interaction with residents' extended families and the community while delivering

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10. See N.Y.C. Dep't of City Planning, Zoning Tools: Inclusionary Housing, [http://www.nyc.gov/html/dcp/html/zone/zh\\_inclu\\_housing.shtml](http://www.nyc.gov/html/dcp/html/zone/zh_inclu_housing.shtml) (last visited Jun. 2, 2012).

11. See *infra* Section V.

12. This article does not address challenges in providing adequate care for seniors faced by countries other than the United States.

13. Currently about 7.6 million people receive community based care to help with post-acute and chronic limitations, disabilities or terminal care. U.S. Dep't of HHS, *Nat'l Health Statistics Report, Number 38, Home Health Care and Discharged Hospice Care Patients: United States, 2000 and 2007* (2011), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr038.pdf>; see also 2010 Census Shows Nation's Population is Aging, U.S. CENSUS BUREAU NEWS (May 26, 2011) (discussing health statistics in community-based care).

14. See discussion *infra* Section IV. In 2010 the first of the "baby boomers" entered retirement age—assuming 65 years old is retirement age. This group makes up 13% of the population. See Libby Bierman & Sara Baker, *The Baby Boom = The BIG Boom In Healthcare*, FORBES, July 22, 2011; see also Elizabeth Olson, *Needed: Health Professionals to Treat the Aging*, N.Y. TIMES, March 7, 2012, at Special Section Retirement (discussing the location and amount of elder care provided).

15. Bierman & Baker, *supra* note 14.

16. Sue Scheible, *A Good Age: Making Nursing Homes More Like Home*, THE PATRIOT LEDGER (Feb. 23, 2010), <http://www.patriotledger.com/news/x1758106005/A-Good-Age-Making-nursing-homes-more-like-home>.

sophisticated medical care, such as expansive recreational areas, spaces for community events, and resident living spaces that resemble apartments instead of sterile rooms along linoleum corridors found in more dated facilities.<sup>17</sup>

New nursing home interiors may also accommodate teams of caregivers including social workers, counselors, nurses, and physicians as called for in the Independence at Home Act discussed in Section II. Recognizing that a major challenge to patients and their families lies in transitions between home, hospital, and nursing facility, modern best practices in senior care contemplate professional support for family caregivers while they remain primary, but offering increased medical and social support during transitions between the home and inpatient facilities.<sup>18</sup> Ideally, the same care team can support a patient both at home and in a nursing home to provide continuity of care. Zoning comes into play as providers attempt to incorporate innovations in care into facility design, revamp outdated nursing homes, or deploy non-family caregivers in new ways.

Health care finance is part of the story, too. In addition to local codes and demographic trends, the nature of health care payments also shapes the way the market has responded with new nursing facilities. Following the money used to pay to care for seniors leads down an odd rabbit hole with zoning implications. Government programs account for an increasing proportion of health care payments, especially for the elderly through Medicare.<sup>19</sup> Recently, Medicare reimbursements to nursing homes were reduced by Congress.<sup>20</sup> Those

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17. Leslie Albrecht, *Change To Location For Controversial Nursing Home Doesn't Dampen Opposition*, DNAINFO.COM NEW YORK NEIGHBORHOOD NEWS (July 20, 2011), <http://www.dnainfo.com/new-york/20110720/upper-west-side/change-location-for-controversial-nursing-home-doesnt-dampen-opposition> (detailing opposition to a 24-story skilled nursing facility based on "innovative" model known as Green House, where private rooms surround a living room and kitchen).

18. See THE ALLIANCE FOR QUALITY NURSING HOME CARE, CARE CONTEXT: NURSING FACILITIES EFFECTIVELY TREAT AN INCREASINGLY COMPLEX PATIENT POPULATION 6 (Sept. 2011) [hereinafter COST-EFFECTIVE TREATMENT], available at <http://www.aqnhc.org/pdfs/care-context-2011-09.pdf>.

19. Lawrence W. Vernaglia & Torrey L. Kaufman, *Payment and Reimbursement for Health Care Services*, in Mass. CLE 2011 2-5 (Foley & Lardner LLP, Boston 2011), available at [http://www.mcle.org/includes/pdf/2050182B00\\_S.pdf](http://www.mcle.org/includes/pdf/2050182B00_S.pdf). As of 2007, sixty-five percent of home health and hospice care was paid by Medicaid. U.S. Dep't of HHS, *Nat'l Health Statistics Report, Number 30, COMPARISON OF HOME HEALTH AND HOSPICE CARE AGENCIES BY ORGANIZATIONAL CHARACTERISTICS AND SERVICES PROVIDERS: UNITED STATES, 2007* (2010), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr030.pdf>.

20. *New Bipartisan National Poll On Medicare Funding And America's Nursing Home Care*, THE ALLIANCE FOR QUALITY NURSING HOME CARE (Feb. 2, 2012), <http://www.aqnhc.org/news/207>.

seeking to reduce Medicare costs recognize the need to reduce the number of permanently or frequently institutionalized persons to accomplish that goal.<sup>21</sup> Lower medical reimbursement rates have also cut the average length of a hospital stay. When patients are discharged, they therefore have on average more complex medical issues than before when hospital stays were longer.<sup>22</sup> Increasingly, patients are discharged from a hospital to a nursing home, and then back to the community more quickly, with longterm stays in an institutional setting becoming rarer.<sup>23</sup> That being the case, locating such facilities in residential areas would seem logical so health care providers and families can better plan for post-discharge care, and access in-patient facilities more easily.

With demand driven by demographics and the economic necessity of facilitating younger family members continuing to earn wages outside the home, why still the community opposition?<sup>24</sup> More mysteriously, why do local zoning boards and administrators sometimes side with those opposing nursing homes in residential zones?<sup>25</sup> When nursing facilities are zoned out of residential areas, in-patient placement must occur in commercially zoned areas with higher land prices, causing additional upward pressure on the cost of the in-patient care.<sup>26</sup> Combined with the lower reimbursement rates, potential new providers may never enter the market with a new facility at all.<sup>27</sup> Alternatively, new facilities spring up on green fields beyond metropolitan areas, contributing to sprawl.<sup>28</sup>

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21. Independence at Home Act of 2009, S. 1131 and H.R. 2560, codified at 42 U.S.C. § 1395cc-5, *et seq.* (amending XVIII of the Social Security Act to provide access to medical services in lower cost treatment settings such as the home for high cost patients requiring treatment for multiple chronic illness using a team approach). Recently, 16 practices were selected to participate in the Independence at Home Demonstration, including Christiana Care Health Services, in Wilmington, Delaware, which would have been identified as a high cost area of the country to have priority and qualify for the demonstration. 42 U.S.C. § 1395cc-5(d)(4)(A); *see* CTR. FOR MEDICARE & MEDICAID SERVS., Independence at Home Demonstrations (2012), available at [www.innovations.cms.gov/files/fact-sheet/IAHfactsheet.pdf](http://www.innovations.cms.gov/files/fact-sheet/IAHfactsheet.pdf). The statute required implementation of the demonstration project to begin in January 2012. 42 U.S.C. § 1395cc-5(e)(1).

22. *Id.*

23. *Id.*

24. William H. Grogan, Note, *The Tension Between Local Zoning and the Development of Elderly Housing: Analyzing the Use of the Fair Housing Act and Americans with Disabilities Act to Override Zoning Decisions*, 33 SUFFOLK U.L. REV. 317 (2000).

25. *Id.*

26. Michael Kling, *Zoned Out: Assisted Living Facilities and Zoning*, 10 ELDER L.J. 187, 200 (2002).

27. *Id.* at 215.

28. *Id.*

As demonstrated by the examples of opposition to plans for nursing homes discussed in Sections III and IV, residents do not always accept the crucial role of nursing homes in their residential communities. Though the Federal Fair Housing Act and many state housing acts protect such uses from discrimination in the zoning and land use approval process, litigation over nursing homes under the Act continues.

## II. The Role of the Fair Housing Act

Despite the obvious social benefits of locating nursing homes with a full range of amenities and services in residential zoning districts, an examination of Fair Housing Act litigation reveals frequent attempts to zone elder care out of residentially zoned districts. The Fair Housing Amendments Act of 1988 ("FHAA") was enacted to extend the protections of the 1968 Fair Housing Act, which prohibited discrimination only on the basis of race, color, religion, and national origin regarding various housing-related practices, to persons who are "handicapped" or disabled.<sup>29</sup> Acts prohibited by the FHAA include not only intentional discrimination,<sup>30</sup> but also discriminatory classifications of handicapped persons;<sup>31</sup> zoning laws that result in disparate treatment, even though they appear neutral on their face;<sup>32</sup> and the failure of governmental officials to reasonably accommodate the needs of handicapped persons.<sup>33</sup>

The term handicapped is defined very broadly by the FHAA to include persons with physical or mental impairments that substantially impair one or more of the person's major life activities.<sup>34</sup> "Major life activities" include, but are not limited to, caring for oneself, walking, seeing, hearing, speaking, breathing, learning, and working.<sup>35</sup> People who are recovering from substance abuse, the elderly, and the home-

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29. This article uses the terms handicapped and disabled interchangeably. The FHAA uses the term "handicapped." Both terms have the same legal meaning. *See* *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that the definition of "disability" in the Americans with Disabilities Act is drawn almost verbatim from "the definition of 'handicap[ped]' contained in the Fair Housing Amendments Act of 1988"). The FHAA does not cover only elderly housing. Nursing homes fall under the FHAA because they would be home to a certain number of handicapped elderly persons who would reside there, very often for rest of their lives. *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096, 1102 (3d Cir. 1996).

30. 42 U.S.C. § 3604.

31. *See, e.g., Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977); *King-Smith v. Aaron*, 455 F.2d 378 (3d Cir. 1972).

32. *See, e.g., Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565 (2d Cir. 2003).

33. 42 U.S.C. § 3604(f)(3)(B).

34. 42 U.S.C. § 3602(h).

35. 24 C.F.R. § 100.201.

less could be considered handicapped and courts around the country have determined that substance abuse treatment facilities, nursing homes, homeless shelters, hospices, and residential schools are subject to the FHAA.<sup>36</sup>

When Congress passed the FHAA, it recognized that “[t]he right to be free of housing discrimination is essential to the goal of independent living.”<sup>37</sup> Accordingly, the purpose of the FHAA is to prohibit restrictions on where people with disabilities choose to live. To that end, the FHAA prohibits a wide variety of activities adversely impacting housing for the disabled, including, but not limited to restrictive zoning. In fact the legislative history states that one of the purposes of the FHAA was to prohibit discrimination in zoning:

[T]he prohibition against discrimination against those with handicaps appl[ies] to zoning decisions and practices. 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 in the community.<sup>38</sup>

From a land use perspective, locating services near those who need and use them promotes the goal of reducing sprawl and travel times. Services not located this way visit the worst consequences of sprawl on families. Patients and their families must travel from their homes in residentially zoned districts to distantly located commercially or industrially zoned areas in order to receive care or support that substitutes or supplements care traditionally received in the home. As 2012 implementation of Congress’s Independence at Home Act continues, similar exclusionary zoning practices may also extend to residentially based home care health services.<sup>39</sup> Unfortunately, the community’s

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36. See, e.g., *Lakeside Resort Enters., LP v. Bd. of Supervisors*, 455 F.3d 154, 160 (3d Cir. 2006) (substance abuse treatment facility is dwelling under FHA); *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096, 1102 (3d Cir. 1996) (nursing home for disabled elderly people is dwelling under FHAA); *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 945 (9th Cir. 1996) (homeless shelter); *United States v. Columbus Country Club*, 915 F.2d 877, 880-81 (3d Cir. 1990) (summer bungalows run by a country club are dwellings subject to FHA); *Lauer Farms, Inc. v. Waushara Cnty. Bd. of Adjustment*, 986 F. Supp. 544, 559 (E.D. Wis. 1997) (migrant workers’ trailers are dwellings under FHA); *La. Acorn Fair Hous. v. Quarter House*, 952 F. Supp. 352, 359-60 (E.D. La. 1997) (units in a time-share resort are dwellings); *United States v. Mass. Indus. Fin. Agency*, 910 F. Supp. 21, 26 n.2 (D. Mass. 1996) (residential school for emotionally disturbed adolescents is dwelling); *Baxter v. City of Belleville*, 720 F. Supp. 720, 731 (S.D. Ill. 1989) (AIDS hospice is dwelling).

37. H.R. Res. 711 at 24, 100th Cong. (1988) (enacted).

38. *Id.*

39. See discussion *infra* Section V regarding the Independence at Home Act and description of an example where home care services connected with a proposed in-patient facility did become the target of exclusionary zoning practices.

needs do not always translate into universal community support for residentially sited nursing homes and health care providers. Therefore, the Fair Housing Act may continue to play the role of backstop to efforts to zone elder care out of residential neighborhoods though limitations on size, allowed uses, and undue permitting burdens.

### III. Local Zoning Laws: The Ground Game

Even localities that have long welcomed nursing homes recently began facing political backlashes against those initiatives. For example, recognizing the problems traditionally inherent in permitting “community facilities” like nursing homes, New York City enacted an ordinance allowing a density bonus for new development of such uses in residential neighborhoods.<sup>40</sup> Once the facilities began displacing residential apartments and townhomes—as did a project undertaken by Memorial Sloan-Kettering Hospital, for example—the push-back from community activists and groups intensified.<sup>41</sup>

Similar hostility routinely arises in other areas of the country even where the local codes do not contain incentives to facilitate nursing home uses. In Emerson, New Jersey, for example, residents objected to the demolition, expansion, and redevelopment of a nursing home on the same lot, challenging as illegal “spot zoning” the zoning change that made the nursing home a conditional rather than a non-conforming use.<sup>42</sup> Changes to zoning codes burdening or barring the construction of assisted living facilities have led to successful Fair Housing Act challenges.<sup>43</sup>

In Isla Verde, Puerto Rico, the neighbors of a nursing facility strongly opposed the licensing of the facility and requested that the home be closed.<sup>44</sup> “The Commonwealth of Puerto Rico’s zoning agency. . . refused to grant the nursing home’s owner permission to

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40. See N.Y.C. Dep’t of City Planning, *supra* note 10.

41. Julia Vitullo-Martin, *Rethinking Community-Facilities Zoning*, MANHATTAN INSTITUTE’S CENTER FOR RETHINKING DEVELOPMENT’S MONTHLY NEWSLETTER, August 2005. The New York City zoning code only gives certain relief from bulk requirements to non-profits, allegedly accelerating encroachment of nursing homes into residential areas in New York. *Id.*

42. Kimberly Redmond, *Resident questions legality of nursing home zoning in Emerson* (Sept. 7, 2011, 4:13 p.m.), [http://www.northjersey.com/news/129404408\\_Resident\\_questions\\_legality\\_of\\_nursing\\_home\\_zoning\\_in\\_Emerson.html](http://www.northjersey.com/news/129404408_Resident_questions_legality_of_nursing_home_zoning_in_Emerson.html).

43. *E.g.*, Sunrise Dev., Inc. v. Town of Huntington, 62 F. Supp. 2d 762, 774-76 (E.D.N.Y. 1999) (finding a FHA violation occurred when town amended code to forbid construction of an assisted living facility in a particular zoning district in response to community opposition).

44. See *U.S. v. Puerto Rico*, 764 F. Supp. 220, 221 (D. Puerto Rico 1991).



operate the home in its present, [residentially zoned site], and ordered the home closed.”<sup>45</sup> The United States Department of Justice filed a Fair Housing Act claim and was granted an injunction prohibiting the closing of the nursing home, while the Fair Housing Act suit proceeded.<sup>46</sup>

In St. Paul, Minnesota, the operator of adult foster care homes sued the City of St. Paul on Equal Protection grounds and under the Fair Housing Act and Fair Housing Amendments Act challenging the city’s attempt to close the homes for alleged zoning violations.<sup>47</sup> The plaintiffs alleged that the city had acceded to the “not in my backyard” animus of the neighbors in using its zoning authority in a thinly-veiled attempt to reduce the number of licenses for adult foster care granted for single family homes.<sup>48</sup>

The opposition to nursing facilities even extends to the military. In San Diego, California, residents have united in opposition to a proposed 40-bed Veterans Administration facility geared for those with post-traumatic stress disorder and mild traumatic brain injury.<sup>49</sup> The dispute is continuing and the San Diego City Council has deferred action on the matter for additional environmental review.<sup>50</sup>

There is no disagreement that the NIMBY opposition is real.<sup>51</sup> “[W]e have reached the point in some municipalities . . . that we cannot put [certain] land use activities anywhere.”<sup>52</sup> Today, zoning laws may still encourage nursing home construction in some residential areas for the same reasons as did New York City, with advantages such as density bonuses. If the opposite is true, however, and residents in a particular community push back against zoning laws allowing, much less favor-

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45. *Id.* at 220.

46. *See id.*

47. *See* *Essling’s Homes Plus, Inc. v. City of St. Paul*, 356 F. Supp. 2d 971 (D. Minn. 2004).

48. *Id.* at 983.

49. Rick Rogers, *Residents Turn Out to Oppose Veterans*, NORTH COUNTY TIMES (December 23, 2011), [http://www.nctimes.com/news/local/columnists/rogers/rogers-residents-turn-out-to-oppose-veterans/article\\_0f5cd4e8-90b0-53fd-92e9-3932358a4186.html](http://www.nctimes.com/news/local/columnists/rogers/rogers-residents-turn-out-to-oppose-veterans/article_0f5cd4e8-90b0-53fd-92e9-3932358a4186.html).

50. *Id.*; *see also* Dorian Hargrove, *Fight Over Old Town Transitional Housing Facility for Disabled Veterans Continues*, SAN DIEGO READER (Apr. 14, 2012), available at [www.sandiegoreader.com/weblogs/news-ticker/2012/apr/04/fight-over-old-town-military-housing-facility-cont](http://www.sandiegoreader.com/weblogs/news-ticker/2012/apr/04/fight-over-old-town-military-housing-facility-cont).

51. Orlando E. Delogu, Samuel B. Merrill & Philip R. Saucier, *Some Model Amendments to Maine (and Other States’) Land Use Control Legislation*, 56 ME. L. REV. 323, 348 (2004).

52. *Id.*; *see also* Dorian Hargrove, *Fight Over Old Town Transitional Housing Facility for Disabled Veterans Continues*; SAN DIEGO READER (Apr. 14, 2012), available at [www.sandiegoreader.com/weblogs/news-ticker/2012/apr/04/fight-over-old-town-military-housing-facility-cont](http://www.sandiegoreader.com/weblogs/news-ticker/2012/apr/04/fight-over-old-town-military-housing-facility-cont).

ing, such uses, and given potentially declining Medicare reimbursement rates and an increasing percentage of elderly persons, many communities may find themselves without sufficient local facilities to care for the elderly and chronically ill.

#### IV. Recent Example: Delaware

A case recently appealed to the Delaware Supreme Court demonstrates the confluence of these dynamics.<sup>53</sup> Delaware has three counties, and the largest non-profit hospice home care provider in the state opened a 16 bed in-patient hospice center in Milford, Delaware, which is located in one of the more rural/coastal counties, Kent.<sup>54</sup> While the center serves the needs of the dying and their families regardless of age, the majority of its in-patients is elderly.<sup>55</sup>

Approval of a similar center was sought in New Castle County, in the more densely populated northern part of the state.<sup>56</sup> Delaware Hospice had already implemented the model Congress is exploring with the demonstration project mandated in the Independence at Home Act aimed at reducing Medicare costs.<sup>57</sup> Hospice team members perform most medical care within patients' residences. The in-patient centers serve as a backup for situations where the home setting cannot meet the patient's or family's needs—usually a temporary situation.<sup>58</sup> This has been the state of the art in hospice care nationally for some time.

The new center was to be located in a residentially zoned district, and the county demanded that Hospice reduce the overall square footage of the center so it would contain 30% fewer square feet than the zoning code allows. The county also demanded removal of all administrative uses on the ground that those uses were not *residential* including planned space for the home health nurses and other team members to hold meetings and plan for patient care (even though the home health nurses would rarely actually go to the center).<sup>59</sup> On appeal of

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53. With briefing nearly complete, the parties agreed to a settlement contingent on actual approval of a downsized plan. See *Delaware Hospice v. New Castle Cnty.*, No. N 11A-02-007 CHT (Del. Super. Ct. 2012) (order of June 26, 2012). The settlement allows construction of a 24 bed in-patient facility with a maximum of 59,000 square feet. The parties then stipulated to dismissal of the suit.

54. *Id.*

55. *Id.* at 1.

56. *Id.*

57. Independence at Home Act of 2009, 42 U.S.C.A. § 1395cc-5 (West 2012).

58. See Transcript of New Castle Cnty. Bd. Of Adjustment, In re 273 Polly Drummond Hill Rd., Newark, 19711 (2010) (No. 2010-0760A) (on file with author).

59. Transcript at 76-85.

this decision to the Board of Adjustment, the county explained specifically that it would not allow Hospice employees and volunteers who primarily provide home care to work at the center, characterizing that as an impermissible “office” use in a residential district.<sup>60</sup>

With its home care operation up and running in New Castle County already, those same volunteers and employees routinely would already see patients in their homes within residentially zoned districts.<sup>61</sup> Since the hospice home care team normally remains involved with the care of patients and support of the family even during admission to an in-patient facility, barring home care team members from a hospice center just because of its location in a residential zone arguably burdens the ability to deliver in-patient hospice or home hospice services in *any* residentially zoned area in New Castle County. The Delaware Superior Court did not agree with this argument, however, and upheld the county’s downsizing requirement.<sup>62</sup>

A detailed explanation of its care model by Delaware Hospice representatives did not persuade the New Castle County Board of Adjustment to overturn the county’s denial.<sup>63</sup> A member of the Board of Adjustment even decried the desirability of providing support groups for the grieving at the center, stating during a packed public hearing that the grieving could just as well “cry at home.”<sup>64</sup>

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60. *Id.*

61. *Id.*

62. *See* Delaware Hospice v. New Castle Cnty., No. N 11A-02-007 CHT (Del. Super. Ct. 2012). The court focused its reasoning primarily on whether home health team member meetings and on site activities constitute a valid accessory use to the primary use of an in-patient hospice facility, deciding no. The court did not address the lack of connection between the 30% downsizing demand and the home health care component (which only a small portion of the building—approximately 6%—supported). Even that 6% could have just been converted to conference rooms. The court also specifically refused to consider issues of cost or efficiency in delivering health care services in its analysis. *Id.* Replication of such reasoning in other state courts will certainly not aid full implementation of the Independence at Home Act since it walls off home care from in-patient care when the home care support potentially constitutes an accessory use, but otherwise is not explicitly allowed under the zoning code. Few zoning codes address care team meetings in a nursing home, hence the accessory use analysis.

The court’s analysis on accessory use was narrow in light of specific Delaware precedent encouraging innovative accessory uses instead of allowing accessory use analysis to become mired in possible outdated modes of doing business. *See* Commissioners of Bellefonte v. Coppola, 453 A.2d 457, 460-61 (Del. 1982).

63. In re 273 Polly Drummond Hill Rd., New Castle Cnty. Bd. of Adjustment Decision, January 20, 2011.

64. *See* generally Transcript of New Castle Cnty. Bd. Of Adjustment, In re 273 Polly Drummond Hill Rd., Newark, 19711 (2010) (No. 2010-0760A) (on file with author).

Despite the fact that the Delaware Supreme Court had previously upheld even innovative land uses as potentially valid accessories to allowed primary uses, the Superior Court determined not only that hospice home care providers cannot work at a hospice in-patient center in a residentially zoned district,<sup>65</sup> but also that the zoning code did not even allow medical billing or the storing of medical records on site as a primary use.<sup>66</sup>

Perhaps realizing that her constituents could hardly expect to receive adequate care in in-patient facilities without any administrative

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65. Another innovation where zoning codes and zoning authorities seem not to have caught up with industry relates to what it really means to “work” in a particular location. In the Nineteenth Century, employers ranging from assembly line workers to bank clerks had an obvious geographic locus of employment—a physical proximity to the means of production. Exceptions often had the now quaint moniker of “traveling,” “monger,” or “itinerant” in their titles: salesman, circus, barber, teacher or preacher. At least the circus still travels and hair cannot be cut virtually. Others who traditionally travelled professionally in Western post-industrial economies can now use e-commerce, television, and social media in place of the train ticket, valise, and shoe leather. For a classic read regarding the cultural significance of certain kinds of employment-related travel in the 1930s and 1940s as well as the impact of the incipient but rising information-based economy in Western countries see ARTHUR MILLER, *DEATH OF A SALESMAN* (1949). Notably the plot relies in part on Willy Loman asking his boss if he can stop travelling out of town, at which point he is fired. Willy then runs into his neighbor’s grown up son also about to travel for his job—arguing a case before the U.S. Supreme Court. Miller presciently has an information age “have”—neighbor Bernard—confronted by a symbolic “have not”—Willy, a now unemployed, undereducated, traveling ladies’ stocking salesman, a job that soon would no longer exist in America. See also DOROTHY L. SAYERS, *THE COMPLETE STORIES* (Harper Collins 2001) (especially the Montague Egg stories beginning at page 474 where the sleuth/door-to-door wine and spirits salesman fondly recited maxims from the Salesman’s Handbook while sweeping off his fedora, or as Mr. Egg would say, “tribly,” to the housemaid); RICHARDSON WRIGHT, *HAWKERS AND WALKERS IN EARLY AMERICA* (1927). Those are the exceptions. The rule throughout most of the Nineteenth Century, and until recently, was that companies and their employees had an obvious physical presence in a set locale such as a factory or office. See Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N.Y. TIMES, April 29, 2012 at A1 (describing subtle changes in California law made at the behest of Silicon Valley companies such as Oracle and Apple, Inc. to claim tax havens such as Nevada as their “corporate headquarters”); Amy Limbert, *Home-based Businesses Face Struggles with Zoning*, GAZETTE.NET (Jan. 24, 2002), [http://ww2.gazette.net/gazette\\_archive/2002/200204/frederickcity/news/89090-1.html](http://ww2.gazette.net/gazette_archive/2002/200204/frederickcity/news/89090-1.html); Samuel R. Staley & Lynn Scarlett, *Market-Oriented Planning: Principles and Tools for the 21st Century*, PLANNING & MARKETS, Sept. 2003, available at <http://www.pam.usc.edu/volume1/v1i1a5print.html> (noting “[f]irms are not tied to place, nearness to raw materials is no longer critical”). Though the Nineteenth Century has passed, laws including zoning ordinances continue to harken back to outmoded ways of working by assigning workers and companies “locations” for various purposes that hardly exist in modern commerce.

66. The County had actually abandoned its objections to “administrative” uses, such as medical records storage at the administrative board level, perhaps recognizing that most going concerns in general and all in-patient medical facilities require substantial administrative activities to operate legally. See Opening Brief of Appellant at 6, 7, *Delaware Hospice v. New Castle Cnty.*, C.A. No.: 11A-02-007 CHT (Del. Super. Ct. 2011).

support, the county council member for the district in which the new center was to be located introduced legislation that would set a size limitation of 2,500 square feet per bed and make the limitation applicable to all current and future nursing homes unless the applicant obtained a conditional use approval.<sup>67</sup> Not coincidentally, applying that standard to the Delaware Hospice project would result in the 30% reduction the county had demanded, though existing law actually applies to Delaware Hospice's already-submitted application.<sup>68</sup> The county planning manager explained at the planning board hearing on the ordinance that 2,500 square feet is the estimated county average ratio between beds and overall square footage for existing nursing homes.<sup>69</sup> If the legislation is enacted, it will make approximately half of the existing nursing homes in New Castle County legally non-conforming, thereby limiting their ability to expand in the future to add new beds or new services. It appears that the ratio would apply strictly, regardless of whether the additional square footage on the site could potentially be characterized as an allowed use other than 'nursing home' that is legal in residentially zoned districts in New Castle County, such as public assembly. The legislation also states that in-patient nursing facilities may include a variety of administrative support services to facilitate patient care, as well as supporting delivery of comprehensive end-of-life care in residences. The legislation has not advanced to a County Council vote as of this writing, and it may not do so, or it may be amended.

While the legislation laudably seeks to undo the interpretive restriction against nursing homes supporting home health teams and adequate administration of nursing facilities, the size limitation threatens to either encourage facilities with a high number of beds per square foot with few amenities, or to drive location of such facilities outside of metropolitan Wilmington to the green fields of Southern Chester County, Pennsylvania and Maryland.<sup>70</sup> Opponents urged shrinking down the allowed size even more, boding badly for cost effective med-

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67. New Castle County, Del., Ordinance 11-115 (introduced Nov. 22, 2011), available at <http://stateplanning.delaware.gov/plus/projects/2011/2011-12-01.pdf> (not yet passed as law).

68. Transcript of New Cnty. Planning Bd., *To amend New Castle County Code Chapter 40 (also known as the Unified Development Code or "UDC") regarding Institutional Residential Type II Uses. Ord. 11-115 is a text amendment to require special use permit approval for institutional residential type II facilities when the total GFA of the facility exceeds 2,500 sf. per bed* (2010) (No. 2011-0673-T).

69. *Id.*

70. *Id.*

ical care and social support of the elderly in New Castle County in residentially zoned areas.<sup>71</sup>

This result shows how zoning can work against initiatives to improve the quality and lower the cost of health care. Localities replicating zoning scenarios like this one may become elder care “deserts.” New Castle County could become a bellwether locality to watch when determining the success of the Independence at Home Act demonstration project. Hopefully, the exclusionary zoning environment in New Castle County will not thwart Congress’s effort to increase the quality of care for chronically ill patients while reducing costs.

### V. Answering the “Why” Question

Why, given the obvious social need for modern nursing homes with a variety of services and amenities in residential areas, does opposition to these projects arise? More troubling, why do zoning administrators and board members sometimes side against the broader needs of the community and with the most vocal NIMBYs? The hostility of boards and zoning administrators in particular does not fit in with Molotch’s “growth machine” theory of zoning decision-making, in which many members of zoning boards and legislative bodies are driven by a desire for enhanced property tax revenue and increased professional opportunities for realtors, lawyers, engineers, and trade union members who often make up those boards.<sup>72</sup>

It is possible that zoning boards in areas that have reached the “zoning snob” stage of suburban sprawl, where exclusionary zoning practices dominate, disfavor approval of nursing facilities perceived as an unnecessary replacement, or supplement to unpaid work traditionally done in the home by women, such as care of the elderly and terminally ill.<sup>73</sup> Furthermore, healthcare providers who more

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71. *Id.*

72. Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976).

73. SEYMOUR I. TOLL, *ZONED AMERICAN* 279 (1969); see also generally JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC* (1994). Not to say nursing lacks a long history as wage paying work, but the struggle to increase real wages and the social standing of nurses is equally long. E.g. Leah L. Otis, *Municipal Wet Nurses in Fifteenth Century Montpellier*, in *WOMEN AND WORK IN PREINDUSTRIAL EUROPE* 83 (Barbara A. Hanawalt ed., Indiana Univ. Press, 1986) (noting “[m]uch of women’s salaried work in preindustrial societies—and even many industrial societies—mirrors those tasks women have traditionally performed in the context of their homes”).

fully understand the operation of nursing homes do not tend to make up a large portion of zoning board membership.<sup>74</sup>

Perhaps the very fear of aging and mortality by these same players activates a personal denial of the need for the facilities, like a person who does not want a foreclosure notice might avoid looking at a mailbox.<sup>75</sup> Another intangible factor could be the hostility to government spending on health care generally, especially given the fact that even a high percentage of those who rely on such programs do not self-identify as doing so.<sup>76</sup>

Nursing homes have not normally been found to create nuisances.<sup>77</sup> In the absence of a public record showing nursing homes constitute a nuisance when located in residential communities, speculation on the “why” question must continue, and perhaps be addressed by planners and activists who understand the relevant dynamics of money, aging, and demographics. Complete answers may only result from large, well-defined, and executed studies beyond the scope of this article, but the stakes for communities and seniors and efforts to deliver health care services more efficiently justify obtaining harder data.

## VI. Legislative Checkup

As the many Fair Housing Act cases cited above demonstrate, New Castle County, Delaware is not entirely alone in going in one direction with interpretation of its zoning code while the needs of its population go in another, preventing state-of-the-art facilities from being developed in residentially zoned districts. A zoning code more friendly to the future care of the elderly might include the following short list of features:

- In-patient nursing care facilities allowed as a matter of right<sup>78</sup> in all zoning districts,
- Allowed accessory uses are explicitly defined as all those that provide social and spiritual support to the elderly and their families such as children’s play rooms, general gathering areas, chapels,

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74. Stanley D. Abrams, *Impossible, Implausible Standards Imposed by the Courts*, 32 No. 10 ZPLR 1 (October 2009) (stating that zoning board members often have little or no experience in land use matters).

75. Craig Bowron, *Our unrealistic attitudes about death, through a doctor’s eyes*, WASH. POST, Feb. 17, 2012 (Opinion), available at [http://www.washingtonpost.com/opinions/our-unrealistic-views-of-death-through-a-doctors-eyes/2012/01/31/gIQAeaHpJR\\_story.html?wprss=rss\\_opinions](http://www.washingtonpost.com/opinions/our-unrealistic-views-of-death-through-a-doctors-eyes/2012/01/31/gIQAeaHpJR_story.html?wprss=rss_opinions).

76. Binyamin Appelbaum & Robert Gebeloff, *Even Critics of Safety Net Increasingly Depend on It*, N.Y. TIMES, February 12, 2012, at A1.

77. Kling, *supra* note 26, at 196, 198.

78. By right uses are not subject to discretionary hearings.

counseling services, and support for transitions from home to in-patient facility and back home, as the needs of the family or patient may require,

- Integration of home and in-patient care services allowed as a matter of right,
- Ability to construct up to full site capacity but with frontage on collector roads and increased opacity requirements to protect surrounding residential uses, and
- Increased diversity of zoning boards to include more women as well as paid and volunteer medical caregivers to educate government and community members about the changing realities of the industry.

Without similar protections, local zoning codes will fail to encourage development of the most basic infrastructure needed to address the needs of the aging Americans and could thwart implementation of needed care delivery reforms.

## VII. Federal Solutions

With several well-known exceptions where federal law preempts state and local zoning codes, local governments enact zoning laws and regulate land use under powers from the state. Some states have enacted state and regional land use planning initiatives as well. A modern, major exception—where federal law comprehensibly preempts local zoning laws—includes the Telecommunications Act (“TCA”), which retained local regulation, but placed limits on local zoning laws when new cellular sites had to be built to close gaps in coverage. The federal role prevents local zoning controversy and opposition from preventing a cellular network from being established.

Given the federal government’s involvement in health care spending and Congress’s enactment of the Affordable Care Act, new federal legislation, along the lines of the TCA, could assist in removing zoning barriers to creating the infrastructure currently necessary to meet the pressing social need of caring for the elderly. While the Religious Land Use and Institutionalized Persons Act could also serve as an alternate model for creating federal standards in certain zoning decision-making, the TCA approach has proven successful in increasing cellular towers without giving up local authority entirely.<sup>79</sup> Such an

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79. Ashira P. Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. LEGIS. 289, 293 (2011).



approach would require local governments to consider federal interests in providing accessible affordable health care in local communities.<sup>80</sup>

### VIII. Conclusion

Delivery of health care services to meet the growing demands of an aging population depends on the development and implementation of zoning policies that dovetail with state and federal initiatives to reduce costs by prioritizing home health care over nursing homes.<sup>81</sup> In-patient facilities must serve as a complement to—rather than a substitute for—care of the chronically ill elderly patient at home when possible. Zoning codes must not restrict support for those increasingly home based medical services to locations with commercial zoning, but distant from the residents to be served. Such a result would defeat the cost saving purpose of these initiatives, as well as undermine the quality of the care experience for patients and families. Through exclusionary zoning practices toward in-patient centers also providing support for home based medical care, however, the cost of community based health care could rise in a way Congress cannot control presently.

When zoning matters are handled project by project on the local level only, larger social goals give way to NIMBY-ism and short term political considerations. Legislators should therefore proactively enact codes and enforce inclusionary zoning policies promoting community based health care. If local governments will not act, the federal government must consider stepping as it did with railroads and telecommunications so the public will have access to the essential infrastructure for meeting the health care needs of the elderly. The Fair Housing Act alone has failed to deter widespread exclusionary practices toward nursing homes and may only imperfectly apply to support for nursing care within the home.

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80. *Id.* at 297-98. *But see* Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047, 1050 (1994) (“Few laws have failed so completely as the federal and state statutes designed to create new facilities for the disposal of hazardous and radioactive waste.”).

81. Henry Claypool, HHS Senior Advisor for Disability Policy, “Supporting Community Living,” April 6, 2012, [www.healthcare.gov](http://www.healthcare.gov); *see* 74 Fed. Reg. 29453 (Jun. 22, 2009) (a proposed new rule developed to amend Section 1951(c) of the Social Security Act to direct more resources to home health care with respite care services and personal care options); *see also* *Olmstead v. L.C.*, 527 U.S. 581 (1999) (affirming states’ obligation to serve individuals in the most integrated setting appropriate to their needs).

