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Kinnally: Not in My Backyard: The Disabled's Quest for Rights in Local Zoning

NOT IN MY BACKYARD: THE DISABLED'S QUEST FOR RIGHTS IN LOCAL ZONING DISPUTES UNDER THE FAIR HOUSING, THE REHABILITATION, AND THE AMERICANS WITH DISABILITIES ACTS

I. INTRODUCTION

*The biggest obstacle for people with disabilities [is] not so much what God hath wrought, but rather what man has imposed by custom and law.*¹

While laws that affect the disabled have progressed from isolation to empowerment, vague areas exist that result in litigation and, ultimately, a step back in the disabled's journey toward independence. One of those areas that has resulted in much litigation with inconsistent resolution is the application of the Americans with Disabilities Act (ADA)² to zoning.³

¹ Lowell Weicker *quoted in* U.S. Senate Committee on Labor and Human Resources Subcommittee on the Handicapped (1989). Former President Bush stated, "Fears that the ADA is too vague or too costly and will lead to an explosion of litigation are misplaced." President George Bush, July 26, 1990, signing of the initial Americans with Disabilities Act. THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT AND COMPLIANCE 1 (1990) [Hereinafter ADA GUIDE]. Attitudes toward the disabled and law about the disabled are their biggest barriers in gaining rights. JOSEPH P. SHAPIRO, NO PITY 112 (1993).

² 42 U.S.C.A. § 12132 (1997). The statute states: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.* 28 C.F.R. § 35.130 (1997) interprets this statute:

General prohibitions against discrimination:

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded to others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities than is provided to others unless such

action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service. 28 C.F.R. § 35.130 (1997).

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different despite the existence of permissibly separate or different programs or activities. 28 C.F.R. § 35.130 (1997).

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State. 28 C.F.R. § 35.130 (1997).

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities. 28 C.F.R. § 35.130 (1997).

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability. 28 C.F.R. § 35.130 (1997).

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part. 28 C.F.R. § 35.130 (1997).

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to

Courts are split on whether the ADA applies to zoning for the disabled. Some hypotheticals will serve to illustrate the inconsistencies between zoning for group homes of recovering substance abusers and zoning for outpatient treatment centers of recovering substance abusers. Different federal acts, like the Fair Housing Act (FHA)⁴ and the Rehabilitation Act,⁵ address zoning for group homes. It is unclear, however, whether

avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130 (1997).

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individual with disabilities from full and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

28 C.F.R. § 35.130 (1997).

³ *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222 (S.D.N.Y. 1996), *aff'd*, 117 F.3d 37 (2d Cir. 1997); *Kessler Inst. for Rehabilitation, Inc. v. Borough of Essex Falls*, 876 F. Supp. 641 (D.N.J. 1995); *Musko v. McClandless*, 1995 WL 262520, at *1 (E.D. Pa. May 1, 1995); *Oak Ridge Care Ctr. v. Racine County*, 896 F. Supp. 867 (E.D. Wis. 1995); *Robinson v. City of Friendswood*, 890 F. Supp. 616 (S.D. Tex. 1995); *United States v. City of Charlotte*, 904 F. Supp. 482 (W.D.N.C. 1995); *Oxford House, Inc. v. City of Albany*, 155 F.R.D. 409 (N.D.N.Y. 1994); *Moyer v. Lower Oxford Township*, 1993 WL 5489, at *1 (E.D. Pa. Jan. 6, 1993); *Burnham v. City of Rohnert Park*, 1992 WL 672965, at *1 (N.D. Cal. May 18, 1992); *Pack v. Clayton Co.*, 1993 WL 837007, at *1 (N. D. Ga. Aug. 27, 1993); 42 U.S.C.A. § 3604 (1997).

[It shall be unlawful] [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision or services or facilities in connection with such dwelling, because of a handicap of (A) that person; or (B) a person residing or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that person.... [D]iscrimination includes...(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

Id.

⁴ See *supra* note 3.

⁵ 29 U.S.C. § 794 (1994).

No otherwise qualified individual with a disability...shall solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. *Id.* For the purposes of this section, the term "program or activity" means all the operations of (1)(A) a department, agency, special purpose district, or other instrumentality of a State or local government...which is

the ADA or its predecessor, the Rehabilitation Act, addresses a zoning dispute concerning a substance abuse treatment center. The two following scenarios, demonstrate the lack of clarity in federal laws to those who seek basic needs such as a home or a place the disabled can go for help.

In the first scenario, Clean & Sober, a support group for recovering alcoholics, decides to purchase a house in a residential neighborhood and allow members of the support group to live and recover together. By living together, these recovering alcoholics and substance abusers will have constant support in their journey toward recovery. Eight men decided to move into the home. After a few weeks in the neighborhood, neighbors begin complaining about the seedy looking crew that lives next door. Under existing local zoning laws, no more than five unrelated people can live in this residential neighborhood in the same house without a variance. The zoning board cites the group home with a violation. However, for economic reasons, the group needs all eight members to make the home profitable. Clean & Sober files suit for discrimination based on disability under two federal acts, the FHA⁶ and the Rehabilitation Act.⁷ The court construes the FHA broadly and decides to invalidate the zoning restriction under the FHA. The court

principally engaged in the business of providing education, health care, housing, *social services*, or parks and recreation....

29 U.S.C. § 794 (b) (1994) (emphasis added).

The Rehabilitation Act covers recovering alcoholics and substance abusers under their definition of handicapped:

(C)(i)[T]he term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use. (ii) Nothing in clause shall be construed to exclude as an individual with a disability an individual who (I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in such use; (II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (III) is erroneously regarded as engaging in such use....

29 U.S.C.A. § 706 (C) (1997).

⁶ Under the FHA, a recovering alcoholic or drug abuser is a handicapped person. According to this provision:

"Handicap" means, with respect to a person—(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance....

42 U.S.C.A. § 3602(h) (1997).

⁷ 29 U.S.C.A. § 794 (a) (1994). See *supra* note 5.

finds that the FHA outlaws housing discrimination against individuals because of their disability.⁸

In the second scenario, Clean & Sober opens an outpatient drug treatment center in an area zoned for offices only. The zoning requirement does not permit medical care facilities or places where drugs or physical medical care, or both, are provided. As a counseling service, Clean & Sober neither distributes drugs nor physically treats the substance abusers. Clean & Sober applies for zoning as an office. Amidst public opposition, the zoning board denies their request. Clean & Sober files suit under the ADA.⁹ The court interprets the ADA narrowly and refuses to allow zoning for the outpatient treatment center even though other places within the zoned area provide counseling services, but do not serve recovering alcohol and substance abusers. The court reasons that zoning is not included as a public activity under the ADA. Therefore, the local government does not have to amend zoning restrictions to accommodate the disabled.¹⁰

⁸ *Oxford House-C v. City of St. Louis*, 77 F.3d 249 (8th Cir. 1996) (holding that the ordinance is reasonable under the FHA); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995); *Oxford House, Inc. v. City of Albany*, 135 F.R.D. 409 (N.D.N.Y. 1994) (holding that the ADA does not apply to zoning for group homes); *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251 (E.D. Va. 1993); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993). *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992); *Oxford House* is a national, not-for-profit organization that buys homes in residential neighborhoods in order to assist recovering alcohol and substance abusers in their return to the community. *Township of Cherry Hill*, 799 F. Supp. at 453. Although the national organization assists the participants who live in these group homes initially, the group home repays the national organization and is a self-sustaining group home. *Id.* Many Oxford Houses do not apply for variances in order to avoid public scrutiny. *Id.* at 455. About 500 Oxford Houses exist in the United States. *Virginia Beach*, 825 F. Supp. at 1254.

⁹ Title I of the ADA protects people afflicted with the disease of alcoholism. 42 U.S.C.A. § 12114 (1997). In addition, Title I protects people who are former drug users and are undergoing rehabilitation for their drug problem. Title I states that covered entities shall not exclude:

as a qualified individual with a disability an individual who—(1) has successfully completed a supervised drug rehabilitation program and is not longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use....

42 U.S.C. § 12114 (1997).

¹⁰ *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222 (S.D.N.Y. 1996) *aff'd*, 117 F.3d 37 (2d Cir. 1997).

Under circumstances similar to the first scenario, the majority of courts have construed the FHA to cover any type of discrimination against the disabled that involves housing.¹¹ The courts have considered group homes as dwellings.¹² In the second scenario, the courts are split in the way they categorize outpatient treatment centers.¹³ On one hand, an outpatient treatment center fails to fit within the rubric of the FHA, which addresses discrimination against the disabled in dwellings. On the other hand, the ADA does not explicitly cover discrimination against outpatient treatment centers for the disabled trying to obtain zoning either.¹⁴ Some courts have construed the ADA narrowly and decided the Act does not affect discrimination against the disabled in the area of zoning.¹⁵ At least one appellate court has construed the ADA broadly and decided that zoning is an activity that falls within the scope of the ADA.¹⁶ The FHA and the ADA both help to alleviate discrimination against the forty-three million disabled living in the United States today.¹⁷ However, the FHA applies to residential zoning, and it is not clear whether the ADA covers zoning at all.¹⁸

Based on the scenarios at the beginning of this Section, recovering substance abusers have recourse under the FHA to state a discrimination claim when the city refuses to grant exceptions for their group homes.

¹¹ Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 455 (D.N.J. 1992). See *supra* note 3.

¹² *Cherry Hill*, 790 F. Supp. at 460.

¹³ *Innovative*, 931 F. Supp. at 222.

¹⁴ 42 U.S.C.A. § 12132 (1997). The ADA applies to zoning only if the courts construe zoning as a "service, program, or activity of a public entity." *Id.* The Rehabilitation Act, for which the ADA is structured, does not clearly cover the zoning problem for outpatient treatment centers either. *Id.* The Rehabilitation Act provides less coverage than the ADA, extending only to those acts funded by government. 29 U.S.C.A. § 794(a) (1997). See *infra* Section IV.

¹⁵ *Burnham v. City of Rohnert Park*, 1992 WL 672965, at *1 (N.D. Cal. May 18, 1992); *Moyer v. Lower Oxford Township*, 1993 WL 5489, at *1 (E.D. Pa. Jan. 6, 1993); *Oxford House, Inc. v. City of Albany*, 155 F.R.D. 409 (N.D.N.Y. 1994). Some legislative history suggests that the authors of the ADA left the issue of discrimination against the disabled in the area of zoning to the FHA, which clearly does not cover outpatient treatment centers.

¹⁶ *Musko v. McClandless*, 1995 WL 262520, at *1 (E.D. Pa. May 1, 1995); *Oak Ridge Care Ctr. v. Racine County*, 896 F. Supp. 867 (E.D. Wis. 1995).

¹⁷ 42 U.S.C.A. § 12101(a)(1) (1997). "The Congress finds that some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." *Id.*

¹⁸ *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222 (S.D.N.Y. 1996) *aff'd*, 117 F.3d 37 (2d Cir. 1997).

Courts have construed a group home as the equivalent of a "dwelling" for purposes of the FHA.¹⁹ Outpatient treatment centers, on the other hand, have, historically, had no recourse under the FHA because these centers are not considered "dwellings."²⁰ Additionally, outpatient treatment centers may not have recourse under the ADA to contest a local zoning decision because the statutory language of the ADA lacks specificity as to the scope of the "activities" that it addresses.²¹

This Note analyzes current judicial interpretation of the ADA in relation to zoning for non-residential treatment centers by looking at recent case law of both residential and outpatient recovery programs. It will attempt to reconcile the legislative history of the ADA with present zoning decisions. Finally, this Note will offer an amendment that allows the ADA to specifically protect residential as well as non-residential recovery programs for substance abusers and alcoholics.²² Section II addresses a brief history of zoning and the history of the disability rights movement.²³ Section III addresses the FHA and the case law that shows that courts have consistently applied the FHA to claims brought by group homes.²⁴ Section IV explains the Rehabilitation Act, the predecessor to the ADA, and the continual expansion of the

¹⁹ 42 U.S.C.A. § 3602(b) (1997). "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building structure or portion thereof." *Id.*

²⁰ *Id.*

²¹ H.R. REP. No. 101-485(II), at 84 (1990), reprinted in, 1990 U.S.C.C.A.N. 367. "This Committee has chosen not to list all the types of actions that are included within the term 'discrimination' as was done in title I and III...." *Id.*

²² *Innovative*, 931 F. Supp. at 236. In the cases concerning zoning under the ADA, the Rehabilitation Act, and the FHA, parties also bring claims for standing. *Id.* at 234-36. The majority of the courts have ruled that individual or corporations or both can use third-party standing to bring claims on behalf of the disabled. *Id.* This Note will not address this area of litigation as the law and the case history have more or less settled this area and allowed third-party standing to those bringing claims for the disabled under the ADA. *Sullivan v. City of Pittsburgh*, 811 F.2d 171 (3d Cir. 1987). Attorneys for *Innovative* viewed the settlement of their case as a victory for the disabled and for the agencies that provide services for the disabled. *Innovative*, 931 F. Supp. at 236. According to Sally Friedman and Susan L. Jacobs, counsel for *Innovative*, "The court also confirmed that not just people with disabilities, but also the agencies that serve them, can sue governments who discriminate against their clients'... 'This right is critical because service providers are often in a better position than their clients to bring legal action.'" *New York Treatment Center Wins Injunction in ADA Test Case; Innovative Health Systems, Inc., Americans with Disabilities Act*, ALCOHOLISM & DRUG ABUSE WEEK, June 24, 1996, at 3.

²³ See *infra* Section II and accompanying text.

²⁴ See *infra* Section III and accompanying text.

Rehabilitation Act.²⁵ Section V explains the history of the ADA, how the courts are interpreting the ADA, and its application to zoning.²⁶

II. BACKGROUND

This Section will briefly address the history of disability legislation that affected discriminatory zoning practices and eventually led to the ADA. In addition, this Section will address zoning and its place in American society.²⁷ This Section serves as a transition to the introduction of the three federal acts that affect zoning.

A. Zoning in the United States

Zoning became an integral part of American society as industry became an integral part of American cities.²⁸ In terms of land use, a zone is a district that has certain use restrictions applicable to land located within that district.²⁹ For example, a municipality may zone an area for residences only.³⁰ In 1916, New York City adopted the first comprehensive zoning code.³¹ Other cities rapidly began adopting zoning codes similar to New York City's comprehensive plan.³² During the 1920s, local government usually based its zoning codes on broad categories like residence, business, and industry.³³ As cities continued to develop, zoning codes became increasingly complicated with many more

²⁵ See *infra* Section IV and accompanying text.

²⁶ See *infra* Section V and accompanying text.

²⁷ Most articles address zoning in terms of racial and economic discrimination. Although not documented to the extent of racial and economic discrimination, disability discrimination in zoning practices is analogous to racial and economic discrimination in zoning practices.

²⁸ JAMES METZENBAUM, *THE LAW OF ZONING* 16-19 (1930). Municipalities enacted zoning laws in order to seclude dangerous uses from areas where high densities of people lived, or in order to prevent nuisances. *Id.*

²⁹ Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373, 404-405 (1994). Zoning is the most frequently used land use and development restriction in the United States. *Id.* at 404. According to Miller, "Much of the substantive zoning law derives from common law nuisance doctrines that were, of course, derived from disputes between neighboring landowners over the proper uses of land in a common district." Douglas E. Miller, *The Fair Housing Act, Oxford House, and the Limits of Local Control over Regulation of Group Homes for Recovering Addicts*, 36 WM. & MARY L. REV. 1467 (1995).

³⁰ Johnstone, *supra* note 29, at 405.

³¹ DAVID S. ARNOLD, ed., *THE PRACTICE OF LOCAL GOVERNMENT PLANNING* 36 (1979).

³² *Id.* at 36.

³³ *Id.* at 38.

provisions and restrictions.³⁴ Today local governments often restrict all land use within their municipality by zoning.³⁵ Traditionally, the motive for zoning is to preserve the character of certain parts of the city.³⁶ Zoning determines not only whether to allow business, industry, or residences in the area, but where they will be located, how they should be erected, and for what purpose the zoned areas will be used.³⁷

As zoning became more complex, local governments began to use it to exclude certain people from areas in addition to separating businesses, residences, and industries.³⁸ At times, municipalities use zoning as a way to separate people on the basis of socio-economic status.³⁹ Often zoning schemes may look neutral, but they may also discriminate against people on the basis of economics, race, ethnicity, or social class.⁴⁰

³⁴ Bernard H. Siegan, *Address, Non-Zoning Is the Best Zoning*, 31 CAL. W. L. REV. 127, 134 (1994). For example, New York City's first zoning code included three use districts, five classes for height districts, and three classes of area districts. *Id.* In 1997, New York City's zoning code was over 1000 pages long. *Id.*

³⁵ Patrick T. Bergin, *Exclusionary Zoning Laws: Irrationally-Based Barriers to Normalization of Mentally Retarded Citizens*, 3 J. LAND USE & ENVTL. L. 237, 244 (1987); R. WRIGHT & S. WRIGHT, *LAND USE* 175 (2d ed. 1985).

³⁶ DON T. ALLENSWORTH, *THE POLITICAL REALITIES OF URBAN PLANNING* 90 (1975).

³⁷ *Id.* at 90. According to Allensworth, "Whether or not a community will have a shopping center, gas stations, or offices will not necessarily be determined by need, but by zoning." *Id.*

³⁸ *Id.* Instead of a way of planning a city, zoning has inherently become a political term and a way of excluding people. *Id.* Many times government excludes people through zoning by charging exorbitant housing prices. EDWARD M. BERGMAN, *ELIMINATING EXCLUSIONARY ZONING: RECONCILING WORKPLACE AND RESIDENCE IN SUBURBAN AREAS* 4 (1974). According to Michael Dear:

Neighborhoods and political leaders are fighting with increased fervor to prevent unpopular projects from being sited in or near their communities. It's always hard to find places for jails, drug treatment centers, boarder babies, halfway houses, highways and sanitation truck garages, incinerators, and homeless shelters. But the NIMBY (not-in-my-backyard) syndrome makes it almost impossible to build or locate vital facilities that the city needs to function.

Michael Dear, *Understanding and Overcoming the NIMBY Syndrome; Not-In-My Backyard*, J. AM. PLANNING ASS'N, June 22, 1992, at 288.

³⁹ DANIEL R. MANDELKER, *LAND USE LAW* 283 (2d ed., 1988). "Exclusionary zoning excludes both low- and moderate-income groups and racial minorities." *Id.* at 284.

⁴⁰ ALLENSWORTH, *supra* note 36, at 90. This practice of using zoning to exclude certain people on the basis of race, disability, economic or social class is called exclusionary zoning. Bernard K. Ham, Comment, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L. J. 577, 588 (1997). The result of exclusionary zoning is segregation. *Id.* Some states recognize challenges to exclusionary zoning on the basis that the municipalities are improperly using their police power. Larry J. Smith & Mary Massaron Ross, *The Zoning Process: Exclusionary Zoning*,

Although on its face, zoning may seem to affect only buildings or uses, it affects other aspects of community life such as education, employment, and health care.⁴¹ Because education and health care depend on the tax base of the surrounding community, those in impoverished areas receive less tax funding because the tax base of the concomitant area in which they live is meager.⁴² Through zoning, local governments have been able to determine exactly how their community will develop through zoning policy set by the local planning commissions.⁴³ These local governments defer to the wishes of the constituents, many of whom influence their representatives with their money as well as their votes.⁴⁴ In actuality, zoning disputes result between people or businesses already in the areas who are trying to keep other "kinds" of people or businesses from moving into "their" area.⁴⁵ Zoning has progressed from a way to separate large industrial and business areas from residential areas to a method of excluding people on the basis of their socio-economic status. This practice of excluding certain facilities and people from an area through zoning manifests itself as the NIMBY syndrome or "not-in-my-backyard."⁴⁶

Initiatives and Referenda, Design Review, and Other Recent Developments in the Law, 27 URB. LAW. 811 (1995). Some states restrict exclusionary zoning by statute. *Id.* at 812.

⁴¹ Patrick F. Summers, Comment, *Civil Rights: Persons Infected with HIV: Stewart B. McKinney Foundation v. Town Plan & Zoning Commission: Forcing the AIDS Community to Live a Prophylactic Existence*, 46 OKLA. L. REV. 531, 532 (1993).

⁴² Ham, *supra* note 40, at 583. The wealth of the tax base links all of the town's public services. *Id.* According to Ham, "[L]ocal governments have a powerful incentive to block the migration of those they deem undesirable and those who tend to make greater demands on public services." *Id.*

⁴³ Ham, *supra* note 40, at 584. Many factors play into this zoning decision. *Id.* In the past, people have shown a paternalistic attitude pertaining the disabled and disadvantaged. *Id.* Citizens thought that the disabled and disadvantaged should live separately from the rest of society and required care. Dear, *supra* note 38, at 288.

⁴⁴ Ham, *supra* note 40, at 584.

⁴⁵ Siegan, *supra* note 34, at 136-37. Critics have coined the practice of residents or businesses in area trying to exclude other less desirable businesses or people from moving in with the phrase NIMBY (Not In My Backyard). *Id.* Other acronyms besides NIMBY have surfaced, showing the pervasive nature of exclusionary sentiments. Some of these acronyms are: NOOS (Not On Our Street), NOPE (Not On Planet Earth), LULU (Locally Unwanted Land Uses), for the politicians and their constituents NIMTOO (Not In My Term Of Office), the all-encompassing CAVE (Citizens Against Virtually Everything), and BANANA (Build Absolutely Nothing Anywhere Near Anyone). Michael J. Dear & Lois M. Takahashi, *The Changing Dynamics of Community Opposition to Human Service Facilities*, 63 J. AM. PLANNING ASS'N. 79 (1997).

⁴⁶ Dear, *supra* note 38, at 288. NIMBY is "the motivation of residents who want to protect their turf." *Id.* NIMBY formally alludes to:

Although the practice of exclusionary zoning or trying to keep certain people or businesses out of areas seems hard-hearted, residents and businesses who are already present in the area and are trying to keep others from moving in often may have valid reasons for trying to exclude others.⁴⁷ Allowing certain businesses and low-income families into the area may bring down the property value of the houses or businesses that people in the area worked hard to build or purchase.⁴⁸ People also want assurance that their neighborhood or business area will be free of crime, drugs, and traffic that often follow certain businesses or people moving into the area.⁴⁹ Human service facilities like drug treatment centers often pose a threat to overall neighborhood amenity from the neighbor's perspective.⁵⁰ Some neighbors will directly dispute the establishment of the facility; sophisticated opponents turn the table and explain that the areas in which the treatment center wishes to locate is not suitable for the treatment center.⁵¹ Of course, many of these reasons are a result of irrational fear, bias, close-mindedness, as well as

the protectionist attitudes and oppositional tactics adopted by community groups facing an unwelcome development in their neighborhood. Such controversial developments encompass a wide range of land-use proposals, including many human service facilities, landfill sites, hazardous waste facilities, low-income housing, nuclear facilities, and airports. Residents usually concede that these 'noxious' facilities are necessary, but not near their homes.

Id.

⁴⁷ Laurie C. Malkin, Comment, *Troubles at the Doorstep: the Fair Housing Amendments Act of 1988 and Group Homes for Recovering Substance Abusers*, 144 PA. L. REV. 757, 761 (1995). Malkin points out that it seems "inconsistent at best and dangerous at worst" for people to welcome into their neighborhoods former substance and alcohol abusers. *Id.*

⁴⁸ *Id.* at 761. Of course, human service facilities suffer from the NIMBY syndrome. Dear, *supra* note 38, at 288. Often residents withdraw needed funding or directors of the program must locate far from their clientele, forcing clients to travel great distances or, worse yet, forcing clients to discontinue their rehabilitation. *Id.* None of the many studies on real estate transactions suggest that human services facilities have directly caused property values to decline. *Id.* Dear suggests instances where property values have actually increased with a human services facility in the neighborhood because the proprietors of the facility fastidiously maintain or have renovated an older building. *Id.*

⁴⁹ Malkin, *supra* note 47, at 761; Miller, *supra* note 29, at 1506. People are most concerned about people who have exhibited dangerousness and unpredictability like substance abusers or ex-convicts. Dear, *supra* note 38, at 288.

⁵⁰ Dear, *supra* note 38, at 288. Neighbors worry about the physical appearance of the potential clients, antisocial behavior, and panhandling. *Id.* Neighbors also worry that the clients will have a harmful effect on children. *Id.* Businesses worry that loitering clients will drive away customers. *Id.*

⁵¹ Dear, *supra* note 38, at 288. "This is NIMBY with a caring face." *Id.*

political expediency.⁵² Although people understand that these treatment centers help humanity, the idea of one establishing itself so close to their family is unthinkable.⁵³

Exclusionary zoning and community opposition occur in cycles.⁵⁴ Communities often display heated and vehement opposition followed by relative tranquillity.⁵⁵ Important national events, like the deinstitutionalization of the mentally ill, often trigger special zoning or community opposition or both.⁵⁶ In the past, people have shown the most opposition to the entry of the people in the area with social diseases like crime, alcoholism, and drugs.⁵⁷ People also show different attitudes

⁵² Dear, *supra* note 38, at 288. Developers have become so disgruntled with public opposition that, in the 1970s, they began to bring a type of lawsuit called a SLAPP (Strategic Lawsuits Against Public Participation). *Id.* Developers have attempted to use these lawsuits to prevent public participation opposing their development. *Id.* The developers have lost the majority of these suits. *Id.* Human services like treatment centers often do not have financial resources of the developers to halt community opposition and must cave in to the community opposition. *Id.*

⁵³ ZBA Opposes Treatment Center at Lakeshore; Backer: Courtroom May Be Next Battleground, THE UNION LEADER, June 10, 1997, at C3. [hereinafter *Lakeshore*]. According to one treatment center activist, John J. Clancy, the president of the Manchester, New Hampshire, Education and Health Centers, "We know (treatment) is what we should be doing, for both humanity and the taxpayer....Taxpayers are tired of paying for more prisons. But there's the NIMBY factor-Not In My Back Yard. It's not a new issue, it's an old one." *Id.*

⁵⁴ Dear, *supra* note 38, at 288. Dear has divided the cycle into three stages. *Id.* The youth of the cycle occurs when news of the proposal breaks, "lighting the fuse of conflict." *Id.* Usually only a small group very near the unwanted site protests. *Id.* Their protests are often very reactionary and, therefore, very irrational. *Id.* The cycle reaches maturity as the group moves from private complaints to a public forum. *Id.* In a public forum, the types of complaints become more objective, moving from the expression of irrational fear and prejudice to concerns about property value and increased traffic. *Id.* The cycle then reaches old age, and usually the winner is the most persistent. *Id.* By old age, the two sides have resorted to arbitration or litigation. *Id.*

⁵⁵ Dear, *supra* note 38, at 288.

⁵⁶ *Id.* Other events that have triggered the exclusionary zoning cycle and community opposition are the restructuring of federal social welfare programs, the collapse of public housing programs, the extensive restructuring of the economy toward a service industry, the increase in homelessness, and the onslaught of the AIDS epidemic. *Id.*

⁵⁷ Dear, *supra* note 38, at 288. DANIEL YANKLOVICH GROUP, PUBLIC ATTITUDES TOWARD PEOPLE WITH CHRONIC MENTAL ILLNESS. EXECUTIVE SUMMARY: THE ROBERT WOOD JOHNSON FOUNDATION (1990) [hereinafter YANKLOVICH]. The "differences" exhibited by people entering the neighborhood that are most accepted by others are those with physical disabilities or problems that most people will encounter at some point in their life. *Id.* People with mental disabilities are in the middle range of acceptance by other neighbors. *Id.*

about the type of facility in their neighborhood.⁵⁸ For example, most people are receptive to day care centers and medical clinics while people vehemently oppose prison or group homes for people with AIDS. Some people are receptive to drug treatment centers and alcohol rehabilitation centers, but, largely, these facilities have received "mixed reviews."⁵⁹ In addition, suburban jurisdictions are less accepting than inner cities to all types of facilities.⁶⁰

Cities mitigate the exclusionary effects of zoning through variances, and most states have adopted the Standard Zoning Act.⁶¹ The Standard Zoning Act gives authority to grant variances to the Board of Adjustment or the Zoning Board of Appeals (ZBA).⁶² A variance is an exception to the prevailing zoning ordinance.⁶³ In order to receive a variance, the person must apply to the municipality following certain procedures established by that municipality.⁶⁴ Critics have noted that the procedures to obtain variances are cumbersome, slow, and expensive.⁶⁵ Once the municipality receives the application for a variance, the local zoning board holds a hearing to decide whether or not to grant a variance.⁶⁶ Critics of the hearing procedure claim that the municipality

⁵⁸ Dear, *supra* note 38, at 288. Unlike the type of clientele that she serves, the provider has direct control of the appearance of the facility. *Id.*

⁵⁹ Dear, *supra* note 38, at 288. The most welcome additions to a neighborhood or a zoned area are school, day care centers, nursing homes, hospitals, and medical clinics. *Id.* Places that receive "mixed reviews" or are accepted by some and opposed by others are group homes for the mentally retarded, homeless shelters, alcohol rehabilitation centers, drug treatment centers, and facilities for chronic mental illnesses. *Id.* People absolutely refuse to welcome shopping malls, group homes for AIDS patients, factories, garbage landfills, and prisons. *Id.*

⁶⁰ Dear, *supra* note 38, at 288. In the inner cities, the population is "high density" with a variety of land uses and social classes and racial groups. *Id.* In the suburbs, on the other hand, the population is "low density" and more "homogenous." *Id.* According Daniel Yankelovich Group national survey, the typical NIMBY advocate is "high income, male, well educated, professional, married, homeowner, living in large city or its suburbs." YANKELOVICH, *supra* note 57.

⁶¹ MANDELKER, *supra* note 39, at 239. The New York Court of Appeals gives the following definition of *variance*: "A variance is an authority to a property owner to use property in a manner forbidden by the ordinance...." *Id.*; *North Shore Steak House, Inc. v. Board of Appeals*, 282 N.E.2d 606, 609 (N.Y. 1972).

⁶² MANDELKER, *supra* note 39, at 239.

⁶³ Johnstone, *supra* note 29, at 412.

⁶⁴ *Id.* Because "community-based facilities" are a relatively new phenomenon in development, they often have zoning problems because they are not on the list of permissible uses. Dear, *supra* note 38, at 288.

⁶⁵ Johnstone, *supra* note 29, at 412.

⁶⁶ *Id.*

has too much decision-making power and that the decision-makers inconsistently apply the rules that supposedly govern the hearings.⁶⁷ Often angry citizens influence the decision-makers who are then likely to "bend" the rules in order to please their constituents. While variances on their face seem to mitigate the effects of exclusionary zoning, they are often not effective because of the cumbersome, slow application process and the denial or approval of the variance being based on political decisions.⁶⁸ In fact, critics have suggested that the application and the subsequent hearings are a discriminatory tactic by politicians and the neighbors opposed to the particular facility.⁶⁹

Before the promulgation of the three federal acts⁷⁰ that affect discriminatory zoning practices, the disabled had very few recourses to end discrimination in the area of zoning.⁷¹ One way to bring a successful claim for discriminatory zoning practices was through the Equal Protection Clause of the Fourteenth Amendment.⁷² The Supreme Court in *City of Cleburne v. Cleburne Living Center, Inc.*⁷³ struck down a zoning ordinance that prohibited a group home in a residential neighborhood.⁷⁴ However, the Court refused to find that the disabled were a protected class.⁷⁵ Because the Court concluded that the disabled failed to constitute

⁶⁷ *Id.* Critics also claim that the hearings are too informal and lack elementary due process. *Id.* The decision-makers, which are usually local government officials, often lack the expertise necessary to make these types of decisions. *Id.*

⁶⁸ *Dear, supra* note 38, at 288. With the promulgation of the ADA and FHA, many communities have exhibited a trend toward allowing zoning for human services. *Id.*

⁶⁹ *Dear, supra* note 38, at 288. The variance usually requires that the human service facility inform immediate neighbors of their presence. *Id.* Opposition ensues, and the local zoning board then holds public hearings to deal with objections. *Id.* The public hearings are usually the arena for ignition of community opposition. *Id.*

⁷⁰ The ADA, the FHA, and the Rehabilitation Act all potentially apply to zoning practices.

⁷¹ ADA GUIDE, *supra* note 1, at 2. Instead of attempting to bring claims for discriminatory zoning practices, service providers secretly open facilities hoping that discovery of their facility would occur after they had successfully integrated their facility into the particular area. *Dear, supra* note 38, at 288. Another strategy is the high-profile approach. *Id.* Service providers would announce their planned establishment and try to educate their neighbors, or to provide an outreach program, in order to gain their acceptance. *Id.* Still another strategy is to seek out risk-free locations. *Id.* The first two strategies, however, do not ensure that the establishment would avoid controversy. *Id.* The final strategy, moving to a risk-free site, resulted in the saturation of an area with human service facilities. *Id.* This saturation forced cities to make zoning regulations that prohibited the proximity of human service facilities because too many cropped up in one area. *Id.*

⁷² *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 442-43.

a protected class, the ordinance affecting the disabled only had to pass minimal scrutiny or in other words merely be rationally related to a legitimate government interest.⁷⁶ Even under this low level scrutiny, the Court invalidated the ordinance and allowed the establishment of a group home, finding that it did not have a rational relation to any legitimate government interest.⁷⁷

B. *The Evolution of the Disabilities Movement in the United States*

With the promulgation of the three federal acts and, most especially, the ADA, people with disabilities have more avenues to fight discrimination based on their disability. Until the 1970s, very few laws existed that protected the disabled.⁷⁸ However, before the 1970s, laws existed that exploited people with disabilities.⁷⁹ For example, in the early 1900s, many states had statutes that required mandatory institutionalization of people with disabilities.⁸⁰ The local authorities deemed the disabled genetically unfit for reproduction and mandated sterilization.⁸¹ Furthermore, many courts were reluctant to hand down a victory for the disabled at a loss for small businesses.⁸² Even if the disabled received a victory, mechanisms for enforcement of the verdict did not exist.⁸³ The trend in disability legislation from the colonial times

⁷⁶ *Id.* at 446.

⁷⁷ *Id.* at 450.

⁷⁸ *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985).

⁷⁹ Elizabeth J. Reed, *Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity*, 83 VA. L. REV. 799, 803 (1997).

⁸⁰ Reed, *supra* note 79, at 803. In the 1800s, doctors found a relation between genetics and mental retardation. *Id.* At this time in history, the public also had the misconception that mentally retarded people had tendencies toward criminality and promiscuity. *Id.* These advancements in science and these sentiments toward the mentally retarded triggered "policies of segregated institutional living arrangements and involuntary sterilizations for the mentally retarded. *Id.* Indiana passed the first mandatory sterilization law in 1907. *Id.* Forty-two states had passed similar laws by 1948. *Id.*

⁸¹ Stewart R. Hakola & Joseph F. Lavey II, *Forty-Three Million Strong: An Overview of Civil Rights Protections for Persons with Disabilities*, 70 MICH. B.J. 548 (1991). The general public believed that the disabled constituted a danger to society. *Id.*

⁸² *Id.* at 549, 550. The courts granted most of the judicial victories for the disabled under the theories of equal protection and due process of the Constitution. *Id.* Claimants could only recover under these legal theories for disability discrimination if the discriminator is the federal government. *Id.* The Constitution did not apply to the private sector, and those disabled discriminated against by the private sector in the years before the passage of the federal acts had no recourse. *Id.*

⁸³ ADA GUIDE, *supra* note 1, at 11. According to the ADA GUIDE, "The path from judicial declaration to actual implementation often proved to be long, winding, and thorny." *Id.*

to the 1970s has progressed from indifference to charity in the middle 1900s, and a recognition of civil rights in the 1970s.⁸⁴

Although people often compare the battle to gain rights for the disabled as an equivalent to the struggle for women and African-Americans to achieve equal treatment, some aspects of the disabled movement are unique.⁸⁵ The disabled, for the most part, live in isolation without the support of other disabled citizens.⁸⁶ This lack of a network among the disabled is distinctly different from the cultural network available to other minority groups.⁸⁷ In other words, the trait of being

⁸⁴ *Id.* at 14. As the disabilities movement progressed, the tactics of combating community opposition by those who provided services facilities progressed as well. Dear, *supra* note 38, at 288. In the 1960s, service providers used an autonomous approach when contemplating the establishment of a human services facility. *Id.* They simply moved into the area. *Id.* In the 1970s, community opposition became more vehement. *Id.* During this era, human services providers tried to use community outreach or education programs before they moved into an area. *Id.* Otherwise, the service providers chose sites that did not elicit much opposition and were fairly risk-free. *Id.* If opposition did occur, the service providers tried to accommodate their opponents. Dear, *supra* note 38, at 288. In the 1980s, literature began to develop about successful ways to integrate human service facilities into the community. *Id.* In the 1990s, the community services providers have practiced "aggressive autonomy," in which the service providers focus on the civil rights of their clients, or the disadvantaged group. *Id.* With the passage of the ADA and the FHA, service providers do not feel as compelled as they did in the seventies and eighties to cater to their opponents. *Id.* The FHA and the ADA, in effect, protect these human service facilities or treatment centers. *Id.* See *infra* note 54 and accompanying text.

⁸⁵ See Jane West, *The Evolution of Disability Rights in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 8* (Lawrence O. Gostin & Henry A. Beyer eds., 1993). Critics have compared the ADA's mandate that cities implement curb cuts to the school desegregation cases in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1953), in which the government required schools to integrate African American and white students. Jay Seaton, *Forcing Cities into Compliance with the Americans with Disabilities Act: What Should Courts Do?* 4 KAN. J.L. & PUB. POL'Y 71 (1995). The disabled are like other minorities in the sense that many Americans see their proper place in society as "an object of pity or a source of inspiration." SHAPIRO, *supra* note 1, at 30. Unlike other minorities, the disabled did not have a central figure like Martin Luther King, Jr. or episodes that marked their advancement as a group like Montgomery Bus Boycott for African Americans. *Id.* at 117. The press did not cover stories of the disability movement as other historical movements for group rights. *Id.*

⁸⁶ West, *supra* note 85, at 8. Some people with disabilities formed ties based on a disability related to their occupation like miners who suffered from black lung disease. U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *PSYCHIATRIC DISABILITIES, EMPLOYMENT, AND THE AMERICANS WITH DISABILITIES ACT 28* (1994) [hereinafter *TECHNOLOGY ASSESSMENT*]. Others rallied around a specific disability like blindness or deafness or status as a veteran with a disability. *Id.* For the most part, however, the disabled lived in isolation because their low socio-economic level and their lack of community ties kept them from organizing. *Id.* See *infra* notes 221-248 and accompanying text.

⁸⁷ West, *supra* note 85, at 8.

disabled has not been recognized as being immutable such as race or gender, when actually it is. Furthermore, unlike other minority groups who have been encouraged to identify with their history or their gender, the disabled have consistently been encouraged to overcome their disability instead of identifying with it and accepting it.⁸⁸ Because of the unique situation of the disabled, other civil rights laws like the Civil Rights Act of 1964 that protected many different groups of disadvantaged people were not adaptable to the disabled in their quest for individual rights, dignity, and social acceptance.⁸⁹

Notwithstanding the idiosyncrasy of the disability rights movement, many disability advocates drew strength from the other civil rights movements, which were occurring at different stages, but at the same time as the disability rights movement.⁹⁰ People with disabilities borrowed the peaceful demonstration tactic of other civil rights movements.⁹¹ During the 1960s, in the midst of the era of the civil rights' movement and the women's movement, the disabled also initiated a movement toward independent living.⁹² The disabled wanted to be treated like other members of the community and not forced to reside in institutions.⁹³ In short, the disabled wanted independence.⁹⁴ The

⁸⁸ *Id.* In Dear's article on zoning, he cites a comment from a disabled woman reacting to members of the community opposing a group home where she would live, "I've learned to live with myself, so I can learn to live with you." Dear, *supra* note 38, at 288.

⁸⁹ Robert L. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 430 (1991). For example, under application of traditional civil rights legal standards, the legislators would have a difficult time addressing "reasonable accommodations" or mandating the removal of physical barriers in public places. NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE A-35—A-39 (1986).

⁹⁰ Sara D. Watson, *Discrimination on the Basis of Disability: The Need for a Third Wave Movement: The Evolution of the Movement*, 3 CORNELL J.L. & PUB. POL'Y 254, 259-260 (1994).

⁹¹ Arlene Mayerson, *The History of the ADA in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 17* (Lawrence O. Gostin & Henry A. Beyer eds., 1993). The disabled staged "sit-ins" in federal buildings. *Id.* They blocked the movement of inaccessible buses and marched in the streets to protest the injustice. *Id.* The disabled also used the justice system to prevail in their fight for rights. *Id.*

⁹² West, *supra* note 85, at 9. The disabled wanted to have control over their life and to be able to make their own choices. *Id.* They also wanted to be able to participate in society. *Id.* In order to achieve their dream of independent living, the disabled need the help of the community to provide services that allow them to live independently. Mayerson, *supra* note 91, at 17. Furthermore, the economic dependency costs the nation a vast amount of money. Burgdorf, *supra* note 89, at 426.

⁹³ West, *supra* note 85, at 9.

⁹⁴ Mike McIntire, *City May Bar New Nonprofit Services; Hartford Council Fears Effect on Neighborhoods*, THE HARTFORD COURANT, December 28, 1995, at A1. A city council member

disability rights movement also gained strength from the sheer number of people becoming disabled.⁹⁵ Young people suffering from disabilities caused by the polio epidemic of the 1950s and veterans returning from Vietnam with disabilities joined the movement for rights for the disabled.⁹⁶ As baby boomers become older, aging and suffering from disabilities such as multiple sclerosis, AIDS, and other afflictions, which affect major life activities, they too seek rights and recognition in the disability movement.⁹⁷ With some forty-three million people, the disabled are the largest, most impoverished, and least educated minority in America.⁹⁸ As the disability rights movement grows and progresses, the language changes as well: declarations of empowerment are employed instead of stigmatizing language.⁹⁹ The disabled share many of the same goals as other civil rights' movements while also bringing a

in Hartford, Connecticut, asked, "Because you can't discriminate against them [the disabled], does that mean they should go everywhere?" The disabled answer affirmatively. Freedom to move is part of independence.

⁹⁵ TECHNOLOGY ASSESSMENT, *supra* note 86, at 29.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Hakola, *supra* note 81, at 549. Disabilities affect almost every area of life (even those without disabilities) "from access to health care to aging, from abortion to prenatal care, from education to work, from welfare to civil rights." SHAPIRO, *supra* note 1, at 10.

⁹⁹ TECHNOLOGY ASSESSMENT, *supra* note 86, at 29. Shapiro illustrated the general misunderstanding that Americans have of those with disabilities:

Nondisabled Americans do not understand disabled ones. That was clear at the memorial service when a longtime friend got up to pay him a heartfelt tribute. 'He never seemed disabled to me,' said one. 'He was the least disabled person I ever met,' pronounced another. It was the highest praise these nondisabled friends could think to give a disabled attorney who...had won landmark disability cases.... But more than a few heads in the crowded chapel bowed with an uneasy embarrassment at the supposed compliment. It was as if someone had tried to compliment a black man by saying, "You're the least black person I ever met," as false as telling a Jew, "I never think of you as Jewish," as clumsy as seeking to flatter a woman with "You don't act like a woman".... [A]s a result of an ongoing revolution in self-perception, they...no longer see their physical or mental limitations as a source of shame or as something to overcome in order to inspire others. Today they proclaim that it is okay, even good, to be disabled.

SHAPIRO, *supra* note 1, at 3-4 (1993).

uniqueness to their struggle.¹⁰⁰ Like other minority groups, the disabled cite discrimination as their biggest obstacle.¹⁰¹

The Rehabilitation Act and the FHA laid the foundation for the ADA in their mandates for full participation and independence for the disabled.¹⁰² The Rehabilitation Act was a forerunner for the ADA.¹⁰³ The FHA supplemented the Rehabilitation Act and provided recourse for people suffering from discrimination in the area of housing based on their disability.¹⁰⁴ The FHA was groundbreaking because, unlike the Rehabilitation Act, this Act applied to the private sector as well as those activities the government funded.¹⁰⁵ While the Rehabilitation Act and the FHA marked steps toward the elimination of discrimination,

¹⁰⁰ SHAPIRO, *supra* note 1, at 16. The disabled, for the most part do not want to be viewed as superheroes or courageous. *Id.* They want to lead normal lives. *Id.*

¹⁰¹ LOU HARRIS AND ASSOCIATES, N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES (1994). See also 42 U.S.C.A. § 12101 (1997).

¹⁰² West, *supra* note 85, at 10.

¹⁰³ *Id.* at 13-14. The Civil Rights Act of 1964 provided a framework for section 504 of the Rehabilitation Act of 1973 that addressed the discrimination that pervades the lives of people with disabilities. *Id.*, at 10; 29 U.S.C.A. § 794 (1997). The Civil Rights Act prohibited discrimination based on color, religion, or national origin. ADA GUIDE, *supra* note 1, at 11. Title VI of the Civil Rights Act of 1964 is the model for the Rehabilitation Act. *Id.* Several congressmen tried to amend the Civil Rights Act to include people with disabilities as among those protected parties that should not suffer from discrimination. *Id.* Representative Charles Vanik (D-Ohio) introduced a bill in the House in 1972, and Senator Hubert Humphrey (D-Minnesota) and Senator Charles Percy (D-Illinois) introduced a companion bill into the Senate in the same year. *Id.* at 13. The bills died in committee. *Id.* With the passage of section 504 of the Rehabilitation Act, Humphrey and Vanik testified that the intent of their bills to amend title VI of the Civil Rights Act of 1964 had been accomplished. ADA GUIDE, *supra* note 1, at 21, 22.

¹⁰⁴ ADA GUIDE, *supra* note 1, at 24-26. The Act took effect in March of 1989. *Id.* This Act helped to eradicate stereotypical images of people who lived in group homes. *Id.* Some devastating images of the mentally disabled emanate from classical literature. SHAPIRO, *supra* note 1, at 31. For example, the mentally retarded character, Lenny, in *Of Mice and Men*, lived in a group home and also unwittingly killed people and animals. ADA GUIDE, *supra* note 1, at 24-26. See also generally JOHN STEINBECK, *OF MICE AND MEN* (1938).

¹⁰⁵ ADA GUIDE *supra* note 1, at 24. The FHAA is an amendment to the Fair Housing Act (FHA) which is Title VIII of the Civil Rights Act of 1968. *Id.* The FHA originally prohibited discrimination on the basis of race, religion, sex, or national origin in the sale or rental of private housing. *Id.* The amendment continued to affect the private sector, but it also added the disabled to the list of those groups that needed a voice against discrimination. ADA GUIDE, *supra* note 1, at 29. 42 U.S.C.A. § 3604 (1997). See *supra* note 3 and accompanying text.

loopholes still existed.¹⁰⁶ The ADA filled the gaps that the Rehabilitation Act failed to address. For example, the ADA, unlike the Rehabilitation Act, applies to the private as well as the public sector.¹⁰⁷ Like the Rehabilitation Act and the FHA, the ADA includes as disabled those who are recovering from substance abuse and who have completed or are completing a successful rehabilitation program and are no longer engaged in illegal drug use.¹⁰⁸

Because of these three federal acts, the disabled have other options for claims concerning discriminatory zoning practices besides the equal protection claim brought by the Cleburne group homes. Plaintiffs who bring suit for zoning practices that allegedly discriminate against the disabled usually try to recover under three federal acts: the FHA, the ADA, and the Rehabilitation Act. In cases of zoning that involve dwellings or permanent residences, the plaintiffs usually recover under the FHA.¹⁰⁹ In cases involving treatment centers or other non-dwellings, plaintiffs try to recover under the Rehabilitation Act and the ADA, often without success.¹¹⁰ The next three sections will analyze these Acts and the case history that has attempted to divine a singular jurisprudence that recognizes the disabled as a group that truly requires legal protection.

III. FAIR HOUSING ACT (FHA)

This Section will analyze the language of the FHA in its application with respect to zoning for the disabled. In addition, this Section will address discriminatory zoning cases brought by the disabled under the FHA. Finally, this Section will show the limits of the FHA in its application to zoning for the disabled.

¹⁰⁶ ADA GUIDE, *supra* note 1, at 29. The National Council on Disability, formerly the National Council on the Handicapped, found that people with disabilities cited discrimination as their biggest problem. *Id.* See *supra* note 1 and accompanying text.

¹⁰⁷ 42 U.S.C.A. § 12132 (1997).

¹⁰⁸ 42 U.S.C.A. § 12210 (1997). See *supra* note 9.

¹⁰⁹ 42 U.S.C.A. § 3604 (1997). See *supra* note 3.

¹¹⁰ *Burnham v. City of Rohnert Park*, 1992 WL 672965, at *1 (N.D. Cal. May 18, 1992); *Robinson v. City of Friendswood*, 890 F. Supp. 616 (S.D. Tex. 1995); *United States v. City of Charlotte, North Carolina*, 904 F. Supp. 482 (W.D.N.C. 1995); *Oxford House, Inc. v. City of Albany*, 155 F.R.D. 409 (N.D.N.Y. 1994).

A. *Protection of Zoning for the Disabled under the FHA*

The FHA and its subsequent amendments protect certain groups from discrimination in housing. Often housing discrimination is a result of local zoning practice based on prejudice or political considerations. The FHA applies only to housing. It does not protect businesses or outpatient treatment centers like the one in Scenario Two.¹¹¹ Congress passed the FHA as Title VIII of the Civil Rights Act of 1968, which prevented discrimination on the basis of gender or origin.¹¹² In 1988, Congress amended the Act to provide protection for the disabled.¹¹³ The Act's mandate by the federal government to provide equality in housing has caused friction between municipalities and the federal government.¹¹⁴ Municipalities wish to avoid the confrontations between angry constituents crying, "Not In My Backyard" (NIMBY) and the interests of people with disabilities who want to live in a community.¹¹⁵ However, municipalities also feel like they are losing control of a primarily local function, zoning, to the grips of the federal government.¹¹⁶

The FHA applies to both the public and the private sector. The FHA mandates persons, including governments, to make "reasonable accommodations in rules, policies, practices, or services" when these accommodations are necessary to give the disabled an equal opportunity to live in a residence of their choice."¹¹⁷

¹¹¹ See *supra* Section I.

¹¹² 42 U.S.C. §§ 3601-3619 (1994); Miller, *supra* note 29, at 1473.

¹¹³ 42 U.S.C. §§ 3601-3631 (1994). The amendment to the FHA includes recovering substance abusers and alcoholics in the class of protected people under the FHA. Miller, *supra* note 29, at 1474.

¹¹⁴ *Id.* "The activities of local communities in the last few years demonstrate beyond question that many...will do whatever they can by means of exclusionary zoning laws and practices to frustrate efforts to establish community homes." DEVELOPMENTAL DISABILITIES STATE LEGISLATIVE PROJECT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE MENTALLY DISABLED, ZONING FOR COMMUNITY HOMES SERVING DEVELOPMENTALLY DISABLED PERSONS (1974).

¹¹⁵ Miller, *supra* note 29, at 1500.

¹¹⁶ *Id.*

¹¹⁷ 42 U.S.C.A. § 3604(3)(A) (1997). The FHA specifically defines discrimination as "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person an equal opportunity to use and enjoy a dwelling." *Id.*

Under the FHA, plaintiffs can show discrimination against the disabled in three ways.¹¹⁸ First, under a disparate treatment theory, the plaintiff can prove discriminatory intent by showing that prejudice against the disabled causes the defendant to deny the zoning exemption.¹¹⁹ Second, under a disparate impact theory, the plaintiff must prove that the defendant's zoning ordinances have had a greater adverse impact on the disabled than on other groups.¹²⁰ Third, under a reasonable modification theory, the plaintiff must show that the zoning board failed to make reasonable accommodations for the disabled in its rules and procedures.¹²¹ The plaintiff must also show that the accommodations would be less burdensome to the disabled.¹²²

B. Analysis of Cases Involving the Disabled Under the FHA; Group Homes and the Oxford House Cases

The FHA is an effective vehicle to end discrimination against group homes involved in zoning disputes. Courts have construed the FHA broadly to apply to group homes as dwellings.¹²³ A national organization, Oxford House, helps recovering substance abusers to begin group homes in residential areas.¹²⁴ Groups of men and women live

¹¹⁸ 42 U.S.C.A. § 3604(3)(A) (1997). The 1988 amendment to the Fair Housing Act included the disabled as a protected class. 42 U.S.C.A. § 3604(3)(A) (1997). See *supra* note 3.

¹¹⁹ North Shore Chicago Rehabilitation Inc. v. Village of Skokie, 827 F. Supp., 497, 507 (N.D. Ill. 1993).

¹²⁰ *Id.* at 499. Once the plaintiff has proved this adverse impact, the defendant must show a legitimate and non-discriminatory reason for the adverse impact. *Id.* at 500.

¹²¹ *Id.*

¹²² *Id.* at 508. In one case, residents of an Oxford House brought their claim under the "reasonable accommodations" theory only. *United States v. Village of Palatine*, 37 F.3d 1230 (7th Cir.1994). As a general policy, residents of Oxford Houses do not apply for special permits necessary for group homes in order to avoid the publicity that accompanies applications for the permits. *Id.* The city cited Oxford House for the zoning violation. *Id.* Instead of applying for the special permit, Oxford House sued the city under the FHA alleging that the zoning board failed to make reasonable accommodations for people with disabilities. *Id.* Because the Oxford House residents brought suit only under the "reasonable accommodations" theory, the court held that the residents would have to apply for the special permit and be denied before claiming that the defendants had not made reasonable accommodations. *Id.* Had the plaintiffs brought suit under all three theories of the FHA, they may have received the injunction they desired against the city without applying for the variance. *Id.*

¹²³ *United States v. Village of Palatine*, 37 F.3d 1230 (7th Cir. 1994). By the same token, the Rehabilitation Act also does not apply to dwellings. *Id.* See *supra* note 5.

¹²⁴ Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 453 (D.N.J. 1992). The Oxford Houses began in 1975 by a group of men and women recovering from drug or

together for a period of time in order to remain clean and sober.¹²⁵ Oxford attempts to place the recovering substance and alcohol abusers in drug-free, single-family neighborhoods.¹²⁶ This setting is a large part of their recovery.¹²⁷ The members of the group home can live there as long as they desire provided that they refrain from the use of drugs and alcohol.¹²⁸ The group usually consists of four to fifteen persons depending on the local zoning ordinances, the financial need of the members, and the size of the house.¹²⁹

Members live in groups for two reasons. First, they need the support of a group of other addicts recovering from substance and alcohol abuse.¹³⁰ Secondly, they need to reside in groups for financial reasons.¹³¹ The residents of the homes usually do not seek the required variances that are necessary in their pursuit of living as unrelated persons in neighborhoods that are zoned for single-family residences.¹³² The typical scenario is that Oxford House residents move into their homes, the neighbors complain, and the city government notifies the Oxford House residents that they are violating the zoning code.¹³³

alcohol addiction or both. *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1173 (E.D.N.Y. 1993). The state cut the funding of the halfway house where they resided. *Id.*

¹²⁵ *Cherry Hill*, 799 F. Supp. at 458. Some groups stay for six months; others have resided in the group home for years at a time. *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Town of Babylon*, 819 F. Supp. at 1181. The basic rules of the Oxford Houses are: (1) the members of the home must govern themselves; (2) the members must support themselves; (3) any member engaging in the use of drugs or alcohol must be expelled from the home immediately. *Id.*

¹²⁹ *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1256 (E.D. Va. 1993).

¹³⁰ *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 456 (D.N.J. 1992).

¹³¹ *Virginia Beach*, 825 F. Supp. at 1255.

¹³² *Id.* at 1255-56. Although Oxford House initially provides financial and technical support to help the recovering substance abusers begin their group homes, the affiliate breaks ties after the group has repaid the initial loan. *Id.* They do not want to bring the negative publicity that accompanies their application and prevents them from obtaining the necessary variances. *Id.* Furthermore, because the residents in the Oxford Houses act like a family, they feel that they should be treated like a family in every jurisdiction; and, therefore, they do not seek approval for zoning regulations before they move into the residential neighborhood. Miller, *supra* note 29, at 1477. However, Oxford House owners are not necessarily entitled to a "blanket exception" from applying for variances. *Id.* at 1478.

¹³³ *Id.* at 1251.

Ultimately, a lawsuit ensues after the city threatens to enforce the zoning ordinance.¹³⁴

In most cases, the Oxford House residents seek to enjoin the city from enforcing the ordinance.¹³⁵ The Oxford House residents violate the ordinance, because they have more residents than the maximum number of unrelated persons permitted to live together under the local zoning law.¹³⁶ Residents usually preface their claims under the FHA.¹³⁷ Despite a huge public outcry, the Oxford House residents have prevailed in their claims against local zoning boards and municipalities under the FHA.¹³⁸ Because of lawsuits brought by these Oxford Houses, the FHA has a solid foundation in case law.¹³⁹

The Oxford House cases are unusual, because some courts have enjoined cities from closing these group homes under the FHA even though the residents failed to follow the mandatory zoning

¹³⁴ *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995); *Oxford House-C v. City of St. Louis*, 77 F.3d 249 (8th Cir. 1996); *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251 (E.D. Va. 1993); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993). *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992).

¹³⁵ *Id.*

¹³⁶ *Id.* In *Oxford House, Inc. v. Township of Cherry Hill*, the Third Circuit called the ordinance that prohibited residences where people are not related a "a totally amorphous standard" that was not being enforced anywhere else except against the halfway house." *Court Rules Against N.J. Effort to Bar Oxford House*, ALCOHOLISM & DRUG ABUSE WEEK, March 3, 1993, at 7 [hereinafter *N.J. Effort*]. The number of unrelated residents that can live together vary greatly among localities.

¹³⁷ *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995); *Oxford House-C v. City of St. Louis*, 77 F.3d 249 (8th Cir. 1996); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993). *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992).

¹³⁸ *City of St. Louis*, 77 F.3d at 249. *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251 (E.D. Va. 1993); Oxford Houses have failed to prevail under the FHA in some cases where they have refused to apply for variances or in cases where the courts have considered the zoning ordinance reasonable under the FHA. *City of St. Louis*, 77 F.3d at 249.

¹³⁹ *City of Edmonds*, 514 U.S. at 725; *City of St. Louis*, 77 F.3d at 249; *City of Albany*, 155 F.R.D. at 409; *City of Virginia Beach*, 825 F. Supp. at 1251; *Town of Babylon*, 819 F. Supp. at 1179; *Township of Cherry Hill*, 799 F. Supp. at 450. Many politicians see the FHA as a way to silence the opposition to these group homes. *N.J. Effort*, *supra* note 136, at 7. The Zoning Boards of Appeal will no longer have to litigate the disagreement between the neighbors and the operators of the residence. *Id.* The politicians "can blame the feds and wash their hands of the problem." *Id.*

procedures.¹⁴⁰ In other words, Oxford House members have moved into their homes without applying for variances that the members know are necessary. The courts have analyzed these cases with a very literal interpretation of the FHA.¹⁴¹ Although the FHA prohibits discrimination in housing against individuals with disabilities,¹⁴² the Act exempts "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."¹⁴³ Next, the courts analyze the ordinances to see whether the lawmakers define "family" by the total number of occupants who live in the house regardless of the denomination of the term *family*.¹⁴⁴ A zoning ordinance that describes a numerical ceiling, which serves to prevent overcrowding in living quarters, will survive the requirements of the FHA.¹⁴⁵ Contrariwise, an ordinance that bases numerical requirements in living quarters on the composition of the family is not a reasonable restriction under the FHA.¹⁴⁶

In most Oxford House cases, the municipalities which created zoning ordinances specifically to prevent too many unrelated people from living together usually have failed to show a legitimate governmental interest by defining numerical limitations under the rubric

¹⁴⁰ *Township of Cherry Hill*, 799 F. Supp. at 462; *Town of Babylon*, 819 F. Supp. at 1186. The courts in *Township of Cherry Hill* and *Town of Babylon* decided in 1992 and 1993 respectively that an application for a variance was not a necessary requirement for bringing suit for housing discrimination under the FHA. *Id.* Oxford House CEO Paul Molloy admits that the Oxford House strategy is to quietly acquire property and to move the group members into the home without alerting neighbors by applying for variances or going to the media. *N.J. Effort*, *supra* note 136, at 7.

¹⁴¹ *N.J. Effort*, *supra* note 136, at 7.

¹⁴² *N.J. Effort*, *supra* note 136, at 7. Sometimes the problem may be more than discrimination against the disabled. *Id.* According to Oxford House CEO Paul Molloy:

[M]ost local opposition is rooted not in discrimination toward drug abusers per se, but against racial minorities. The problem is acute because Oxford House philosophy requires that houses be sited in neighborhoods safely isolated from the temptations of the inner city, including drugs and crime. "In all of the cases we have dealt with, what triggers the neighborhood reaction is when they see a black person moving in.... [I]f Oxford Houses were all white they would "go unnoticed" because neighbors would assume they were college students or the like sharing a house.

Id.

¹⁴³ 42 U.S.C.A. § 3607 (1997); *City of Edmonds*, 514 U.S. at 728.

¹⁴⁴ *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995).

¹⁴⁵ *Id.* at 735.

¹⁴⁶ *Id.*

of what constitutes a "family."¹⁴⁷ Municipalities have no reason to create ordinances based on who is a family member instead of the number of people in the household. Although the courts have not always held that the group homes are allowed to violate the city's ordinances *per se*, the courts have consistently held that the FHA applies to group homes. The difference in the court's opinions as to the validity of the ordinances is usually a result of local zoning definition, which truncates the concept of a family's makeup in numerical terms. Moreover, courts have found fault with local zoning ordinances that attempt to define a "dwelling" in narrow and contradictory terms.¹⁴⁸ The FHA applies only to zoning for the residences of the disabled. The FHA does not protect zoning for treatment centers that serve the disabled but do not qualify as "dwellings." These treatment centers, thus, have difficulty in establishing their facilities without a recourse in zoning disputes as one provided for residences under the FHA.

IV. THE REHABILITATION ACT

*While the Rehabilitation Act has unlocked the door for handicapped persons to enter the mainstream of society, it has failed in its goal of opening the door wide.*¹⁴⁹

The Rehabilitation Act of 1973, as opposed to the FHA, is an Act that the courts and Congress have constantly expanded; eventually, Congress promulgated the ADA as an even further expansion of the Rehabilitation Act. This Section will analyze the language of the Rehabilitation Act and its applicability to zoning for the disabled, the subsequent case law that expanded the Rehabilitation Act, and the limits of the Rehabilitation Act in its application to zoning for the disabled.

¹⁴⁷ 42 U.S.C.A. § 3602 (1997). According to FHA,

"family" or "familial status" "means one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

Id.

¹⁴⁸ For example, a city may construe an ordinance that would not consider a trailer as a dwelling because it is mobile.

¹⁴⁹ TECHNOLOGY ASSESSMENT, *supra* note 86, at 28.

A. *Protection of Zoning for the Disabled under the Rehabilitation Act*

The Rehabilitation Act intended to prohibit discrimination against the handicapped in any program or activity receiving federal financial assistance.¹⁵⁰ Section 504 of the Rehabilitation Act was the most progressive legislation dealing with the disabled.¹⁵¹ Section 504 recognized the disabled as a minority; it recognized that, while disabilities diverged, the disabled as a group faced similar kinds of discrimination.¹⁵² Section 504 prohibits discrimination against qualified individuals with a disability in any program that receives federal financial assistance.¹⁵³ Disability advocates hailed section 504 as "landmark legislation," the first time that the disabled had a voice in this country.¹⁵⁴ However, problems still existed.¹⁵⁵ Initially, the Rehabilitation Act had no enforcement provisions.¹⁵⁶ The rules for

¹⁵⁰ 29 U.S.C.A. § 794(b)(1997). The Rehabilitation Act limits the service, program, or activity to operations of a government while the ADA applies to the private and the public sector. *Id.* Congress passed the first version of the Rehabilitation Act in 1972, but President Nixon pocket-vetoed it in October of that year. Robert E. Rains, *Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications*, 11 ST. LOUIS U. PUB. L. REV. 185, 188-89 (1992). Congress passed another version of the Rehabilitation Act in 1973, and once again Nixon vetoed the bill. *Id.* at 189. Later that year, Congress passed another version of the Rehabilitation Act, and Nixon signed this version in September, 1973. *Id.* The Rehabilitation Act extended protection to people with disabilities almost 10 years after the passage of the Civil Rights Act of 1964. *Id.*

¹⁵¹ TECHNOLOGY ASSESSMENT, *supra* note 86, at 28. 29 U.S.C.A. § 794 (1994).

¹⁵² Mayerson, *supra* note 91, at 18. Before the promulgation of section 504, the government addressed the needs of people with disabilities through diagnosis. *Id.* Every disability was separate. *Id.*

¹⁵³ 29 U.S.C.A. § 794 (1994). The Rehabilitation Act applied only to prohibit disability discrimination by "federal executive agencies, federal grantees and federal contractors." Rains, *supra* note 150, at 190. Thus, the private sector was still free to discriminate against the disabled as long as they did not receive governmental assistance. *Id.*

¹⁵⁴ ADA GUIDE, *supra* note 1, at 22.

¹⁵⁵ According to the Office of Technology Assessment:

[The] Rehabilitation Act was implemented slowly only after several years and a court challenge... Many commentators conclude that the impact of the law on people with disabilities was not overwhelming. The existing research and analyses implicate several factors in the modest effect of the Rehabilitation Act, including: attitudinal barriers toward people with disabilities; less than vigorous enforcement; the relative obscurity of the law...; its complexity and limited scope; and the lack of dedicated, Federal leadership....

TECHNOLOGY ASSESSMENT, *supra* note 86, at 26.

¹⁵⁶ Rains, *supra* note 150, at 190. In addition, section 504 took a long time to promulgate; the proposed rules elicited more than 700 written comments and 22 public hearings. Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between*

enforcement of the Rehabilitation Act finally took effect in 1977.¹⁵⁷ When Congress passed the Rehabilitation Act, it failed to appropriate any money to help make the transition.¹⁵⁸ Businesses had to make changes to accommodate the disabled without any additional assistance from the government besides what they were receiving before the passage of the Act. While the Rehabilitation Act prohibited discrimination by the federal government or by any program that received financial assistance from the federal government, the private sector was still free to discriminate against the disabled.¹⁵⁹ Moreover, it was unclear whether an entire program had to refrain from discriminating even if only a section of the entire program received financial assistance from the government.¹⁶⁰ *Grove City College v. Bell*¹⁶¹ demonstrates how the courts narrowly interpreted the meaning of federal financial assistance component under the Rehabilitation Act.¹⁶² Later, Congress gave further explanation of what constituted federal assistance with the passage of the Civil Rights Restoration Act.

B. Early Court Decisions Construe the Rehabilitation Act Narrowly

In *Grove City College v. Bell*, a private college and four students sued the Department of Education after the Department canceled the students' financial assistance based on the college's failure to comply with a statute prohibiting sex discrimination in any program receiving financial assistance.¹⁶³ The Court observed that the college received federal assistance indirectly through the students who receive federal financial assistance.¹⁶⁴ In short, the college only received payments from the students who applied for federal aid and received it. Next, the Court declared that the indirect financial assistance that the college received through the students failed to exempt the college as an institution from

Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, 36 WM. & MARY L. REV. 1089, 1094 (1995).

¹⁵⁷ *Id.* at 1095.

¹⁵⁸ Rains, *supra* note 150, at 190. Rains states, "This lack of funding created real hardships for federal grantees who would be caught in the 'Catch 22' of either not complying with the regulations or using funds that had been obtained for other purposes in order to comply." *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Grove City College v. Bell*, 465 U.S. 555 (1984).

¹⁶¹ 465 U.S. 555 (1984).

¹⁶² Later Congress overturned these cases through the Civil Rights Restoration Act and forced courts to construe federal assistance more broadly.

¹⁶³ *Grove City College*, 465 U.S. at 561

¹⁶⁴ *Id.* at 568.

complying with the sex discrimination statute.¹⁶⁵ The Court held, however, that the program or activity receiving the federal financial assistance was not the entire college.¹⁶⁶ Only the student financial aid program was receiving federal assistance by virtue of the students' payments.¹⁶⁷ Therefore, only the department that received the federal financial assistance, which in this case is the financial aid department of the college, had to comply with the sex discrimination statute.¹⁶⁸ When only a part of a program received federal financial assistance, the entire program cannot be regulated.¹⁶⁹ The significance of the *Grove City College* opinion to the rights of the disabled under the Rehabilitation Act is paramount. The sex discrimination statute that the Court interpreted and the Rehabilitation Act share the exact language as to what amounts to federal financial assistance in programs and activities. In addition, the *Grove City College* decision is significant for the disabled, because it results in a very narrow interpretation of what constitutes the payment of federal financial assistance. In so doing, the Court's holding lessens the remedies available to the disabled under the Rehabilitation Act.

The Supreme Court specifically held that the ban on discrimination applicable to a government program or activity only applies to those specific programs or activities that directly receive federal financial aid.¹⁷⁰ Thus, an entire program would not have to follow non-discriminatory practices if only a part of the program received federal financial assistance. Although the Court sidestepped the "specific program requirement" by refusing to define the dispute under any program, the intent of the decision was clear.¹⁷¹ The Rehabilitation Act was not meant to apply to entire programs or activities receiving financial assistance, only to specific segments of the program.¹⁷²

C. *The Civil Rights Restoration Act Expands the Rehabilitation Act*

Congressional response to *Grove City College* was swift and thorough. In 1987, it addressed the "specific program" dilemma of *Grove City College* and its progeny by enacting the Civil Rights Restoration

¹⁶⁵ *Id.* at 564.

¹⁶⁶ *Grove City College v. Bell*, 465 U.S. 555, 571 (1984).

¹⁶⁷ *Id.* at 556.

¹⁶⁸ *Id.* at 573-574.

¹⁶⁹ *Id.* at 573.

¹⁷⁰ *Id.* at 603.

¹⁷¹ *Id.*

¹⁷² *Grove City College v. Bell*, 465 U.S. 555, 573 (1984).

Act.¹⁷³ This Act explained and broadened the definition of “programs and activities” in section 504 of the Rehabilitation Act and other civil rights laws.¹⁷⁴ The Act expanded the reach of the Rehabilitation Act, forcing those institutions receiving government funding to comply with the mandates of the Rehabilitation Act whether they were receiving these supplements directly or indirectly. The Act forced all parts of programs to comply with the Rehabilitation Act even if the government aid only affected lone parts of the program.

In *Bentley v. Cleveland County Board of County Commissioners*,¹⁷⁵ the Tenth Circuit held that an employer should be forced to follow anti-discrimination laws even if it only received indirect federal financial assistance.¹⁷⁶ The specificity requirement of earlier case law no longer applied.¹⁷⁷ The wife of the deceased petitioner claimed that her husband was laid off before other workers because he had previously suffered a heart attack and the supervisor feared that a subsequent heart attack would cost the employer more money.¹⁷⁸ Although the county received funding from the federal government for its transportation department, the county argued that Congress did not intend for the entire county government to be covered as “programs and activities” under the Act and that the county received funds only indirectly from the Department of Transportation.¹⁷⁹

¹⁷³ Consolidated R.R. Corp. v. Darrone, 465 U.S. 624 (1984). Innovative Health Sys., Inc. v. City of White Plains, 931 F. Supp. 222, 234 (S.D.N.Y. 1996), *aff'd*, 117 F.3d 37 (2d Cir. 1997). The Civil Rights Restoration Act Amendment expanded the definition of “program or activity” receiving federal financial assistance under the Rehabilitation Act. 29 U.S.C.A. § 794(b)(1)(A) (1997); *Innovative*, 931 F. Supp. at 234. This amendment was designed to overturn *Grove City College and Consolidated Railroad Corp.* 29 U.S.C.A. § 794(b)(1)(A) (1997)

¹⁷⁴ Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 389 (1991). During this period, Congress also enacted the FHA and other Acts intended to supplement the Rehabilitation Act and other civil rights laws that needed to be expanded from their original form. *Id.*

¹⁷⁵ 41 F.3d 600 (10th Cir. 1994).

¹⁷⁶ *Id.* at 603-04. See also *Leake v. Long Island Jewish Med. Ctr.*, 869 F.2d 130, 131 (2d Cir. 1989) (holding that the Civil Rights Restoration Act requires that any institution receiving federal financial assistance, regardless of the specificity of the assistance for a given program, follow the guidelines of the Rehabilitation Act). *Bentley v. Cleveland County Bd. of County Comm’r*, 41 F.3d 600 (10th Cir. 1994)

¹⁷⁷ *Bentley*, 41 F.3d at 600.

¹⁷⁸ *Id.* at 602.

¹⁷⁹ *Id.* at 603.

The Court held that the Civil Rights Restoration Act amended the Rehabilitation Act to include all operations of a state or local government receiving federal financial aid.¹⁸⁰ This amendment meant that a specific department in a program receiving federal financial aid could subject the entire entity to compliance with the anti-discrimination laws of the Rehabilitation Act.¹⁸¹ The Court then held that each part of the county was subject to compliance with anti-discrimination laws under the Rehabilitation Act because of the federal funding that it received indirectly.¹⁸² The court reasoned that the Civil Rights Restoration Act was meant to explicitly overrule the limits placed on the Rehabilitation Act in *Grove City College v. Bell*.¹⁸³ The Court used a "bright line" test that focused on "whether there is a sufficient nexus between the federal funds and the discriminatory practice as outlined in the Restoration Act and its legislative history."¹⁸⁴

In effect, the Civil Rights Restoration Act expanded the Rehabilitation Act after the courts misinterpreted the wide scope intended by Congress in cases like *Grove City College*. As actual situations arose that involved the Rehabilitation Act, Congress used subsequent acts, like the Civil Rights Restoration Act, to define areas that proved to be ambiguous as promulgated in the original act. Eventually, Congress saw that the disabled needed something substantially more expansive than the Rehabilitation Act. The ADA would be the congressional vehicle designed to expand and encompass the Rehabilitation Act.

¹⁸⁰ *Id.*

¹⁸¹ *Bentley*, 41 F.3d at 600; 29 U.S.C. § 794(b) (1994). The Civil Rights Restoration Act states: For the purposes of this section, the term "program or activity" means all of the operations of—(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government.

Id.

¹⁸² *Bentley*, 41 F.3d at 603.

¹⁸³ 726 F.2d 191, 194-95 (5th Cir. 1984), *vacated on other grounds*, 473 U.S. 432 (1985). See *supra* note 2.

¹⁸⁴ *Bentley*, 41 F.3d at 603.

V. AMERICANS WITH DISABILITIES ACT

[L]et the shameful wall of exclusion finally come tumbling down.¹⁸⁵

This Section will analyze the ADA as an enlargement of the Rehabilitation Act, the legislative history of the ADA, a current case¹⁸⁶ that defines zoning as an activity under the ADA, and current case law dealing with zoning for the disabled under the ADA. This Section will ultimately suggest that the ADA protects zoning as a service, program, or activity under the ADA. In formulating the ADA, Congress used the Rehabilitation Act as a framework.¹⁸⁷ The purpose of the ADA was to include and expand the policy of the Rehabilitation Act and the subsequent acts, like the Civil Rights Restoration Act, to promote the rights of disabled persons.¹⁸⁸ With the promulgation of the ADA, Congress forced any program or activity to comply with federal laws that prohibit discrimination against the disabled.¹⁸⁹ The ADA extended coverage for the disabled from those programs or activities that were federally funded to all programs or activities at a private, state, or local level, except for the very smallest of businesses consisting of less than fifteen employees.¹⁹⁰ The ADA sweeps broadly in promoting the interests of the disabled much like the Rehabilitation Act was intended to do.¹⁹¹ The courts have shown little inclination to thwart such intention.

¹⁸⁵ George Bush, NATIONAL COUNCIL ON DISABILITY, VOICES OF FREEDOM: AMERICA SPEAKS OUT ON THE ADA: A REPORT TO THE PRESIDENT AND CONGRESS 1 (1995). [hereinafter VOICES OF FREEDOM]. See also ADA GUIDE, *supra* note 1.

¹⁸⁶ Innovative Health Sys., Inc. v. City of White Plains, 931 F. Supp. 222 (S.D.N.Y. 1996).

¹⁸⁷ West, *supra* note 85, at 11.

¹⁸⁸ *Id.* at 12. The FHA and its subsequent amendments are not necessarily included as Acts that affect the Rehabilitation Act. *Id.* Congress did not necessarily mean to include these housing acts in its expansion of the ADA. *Id.* at 12-13. In fact, the legislative history shows that the FHA was thought to be sufficient to cover the disabled and discrimination in housing. *Id.* at 12-13.

¹⁸⁹ TECHNOLOGY ASSESSMENT, *supra* note 86, at 20. The Department of Justice (DOJ), in charge of enforcing the ADA, set out guidelines for public entities in order to avoid discrimination. 28 C.F.R. § 35.130 (1997).

¹⁹⁰ 28 C.F.R. § 35.130(a) (1997). Other differences between the Rehabilitation Act and the ADA include that the Rehabilitation Act mandates affirmative action while the ADA only calls for "reasonable accommodation." TECHNOLOGY ASSESSMENT, *supra* note 86, at 26, n.4. The Rehabilitation Act mandated a wider breadth of coverage for protection of current alcohol and drug users. *Id.* See *supra* notes 3-5.

¹⁹¹ 42 U.S.C.A. § 12101(b)(4) (1997). According to the statute, "It is the purpose of this chapter to invoke the sweep of congressional authority...." *Id.*

A. *The ADA as an Expansion of the Rehabilitation Act*

At least one federal court defined zoning as an activity under the Rehabilitation Act. In *Cleburne Living Center, Inc. v. City of Cleburne*,¹⁹² the plaintiffs sought a zoning permit for a group home for the mentally retarded and brought the action under the Rehabilitation Act.¹⁹³ The lower court dismissed the Rehabilitation Act claim because a zoning decision did not implicate federal funding.¹⁹⁴ Notwithstanding, the Court considered municipal zoning a public activity, just one without federal funding.¹⁹⁵ The denial of the zoning permit was eventually held invalid by the Supreme Court on constitutional grounds rather than on grounds involving statutory construction.¹⁹⁶

In 1995, after the promulgation of the ADA and the Civil Rights Restoration Act, a federal court in Wisconsin decided a case that was analogous to the lower court's decision in *Cleburne*.¹⁹⁷ In *Oak Ridge Center v. Racine County*,¹⁹⁸ an elder care facility filed suit against the county for failing to issue a permit for a drug and alcohol rehabilitation program that wished to purchase the property from the elder care facility.¹⁹⁹ The drug and alcohol rehabilitation center had agreed to purchase the property where the elder care facility was located provided that the rehabilitation center could obtain a conditional use permit from the county.²⁰⁰ After a public hearing where community members voiced opposition to the rehabilitation center, the county denied the conditional use permit.²⁰¹ The court held that the conditional use permit was a benefit from a public entity's activity, *i.e.*, zoning.²⁰² In other words, a conditional use permit constituted an activity within the meaning of the

¹⁹² 726 F.2d 191, 194-95 (5th Cir. 1984), *vacated on other grounds*, 473 U.S. 432 (1985).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* The zoning ordinance was held invalid under the Equal Protection Clause of the Fourteenth Amendment by the Supreme Court. *Id.* They reasoned that the denial of the zoning permit was not rationally related to a legitimate state interest and, therefore, could not be constitutionally valid. *Id.* For a more detailed discussion of *Cleburne*, see *supra* notes 70-77 and accompanying text.

¹⁹⁶ *Id.*

¹⁹⁷ *Oak Ridge Care Ctr. v. Racine County*, 896 F. Supp. 867 (E.D. Wis. 1995).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 870.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 870.

²⁰² *Id.* at 872.

ADA.²⁰³ In a footnote, the court compared its finding that zoning constituted an activity under the ADA to the lower court's decision in *Cleburne*. However, zoning did not fall under the coverage of the Rehabilitation Act because it was not federally funded.²⁰⁴ The ADA, on the other hand, does not require that the activity be federally funded, only that it constitute a service, program, or activity.²⁰⁵ By analogy, the court in *Oakridge* observed that the ADA should apply to zoning decisions, because they are considered public activities.²⁰⁶ The court held the elder care facility had a cause of action under the ADA.²⁰⁷ Unlike *Cleburne*, the court's decision rested solely on construction of the statute. The court did not reach the constitutional question under the Equal Protection Clause that the court had to address in *Cleburne*.

Other courts have addressed the ADA as an expansion of the Rehabilitation Act. In the federal district of New York,²⁰⁸ the court addressed the scope of a program, service, or activity as defined under the ADA and the Rehabilitation Act in *Civic Ass'n of the Deaf v. Giuliani*.²⁰⁹ The dispute in this case involved a request from a deaf advocacy group to enjoin the city from removing alarm boxes from city streets.²¹⁰ The plaintiffs alleged that, as a group of disabled individuals, they would be excluded from participation in a service, program, or activity by reason of their deafness.²¹¹ The parties' dispute centered around whether a service, program, or activity should be defined broadly or narrowly under the ADA.²¹² The court saw it otherwise, however, holding that regardless of a broad or a narrow definition of service, program, or activity, the deaf would be denied the service of being able to make reports from the streets if the city removed the alarm boxes.²¹³ The court

²⁰³ *Oak Ridge Care Ctr. v. Racine County*, 896 F. Supp. 867 (E.D. Wis. 1995).

²⁰⁴ *Id.* at 873, n.3.

²⁰⁵ *Id.* at 873.

²⁰⁶ *Id.* The court further reasoned that, even if Congress does not consider zoning as a public activity under the ADA, then zoning should be considered a part of a public service, which the ADA also protects from discrimination. *Id.* at 867.

²⁰⁷ *Id.* at 873. The court also found that the elder care facility also had a cause of action under the FHA. *Id.* at 873.

²⁰⁸ *Civic Ass'n of the Deaf v. Giuliani*, 915 F. Supp. 622 (S.D.N.Y. 1996).

²⁰⁹ *Id.* at 635.

²¹⁰ *Id.* at 622.

²¹¹ *Id.* at 635.

²¹² *Id.* at 634.

²¹³ *Id.* at 635.

refused to define service, program, or activity, leaving the zoning dispute unresolved.²¹⁴

While the ADA is an expansion of the Rehabilitation Act and covers all the cases of discrimination that the Rehabilitation Act would cover, the same is not true for the FHA. When Congress promulgated the ADA and its subsequent amendments, it chose specifically not to address zoning pertaining to dwellings because the FHA and its subsequent amendments covered these areas.²¹⁵ However, in choosing not to address zoning for dwellings, Congress also left ambiguous whether the ADA addressed other types of zoning, namely zoning that cannot be classified as group homes or dwellings for the disabled but nevertheless serve disabled individuals.²¹⁶

²¹⁴ *Civic Ass'n of the Deaf v. Giuliani*, 915 F. Supp. 622, 635 (S.D.N.Y. 1996). The court, instead, analyzed the problems of alarm boxes in confusing language phrased in terms of benefits and loss. *Id.* In relying on the language of benefit and loss, the court relied on the TA Manual, an explanation of the ADA, published by the Justice Department. *Id.* The TA Manual states:

General prohibitions against discrimination

A public entity shall not:

- (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from aid, service, benefit, or service;
- (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
- (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; [or]
- (iv) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

28 C.F.R. § 35.130(b)(1)(1997).

²¹⁵ *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 231 (S.D.N.Y. 1996).

²¹⁶ *Id.* Recent newspaper articles have suggested that lawmakers view the ADA as covering dwellings like the FHA. P.J. Lassek, *Critic of Special Housing Eases Off*, TULSA WORLD, December 3, 1997, at A13. According to the article, a city councilor is no longer pursuing a plan to impose a moratorium on group homes and other residential living centers because the FHA and the ADA limit local and state restrictions on housing for disabled people. *Id.* While the ADA appears to protect all types of life activities involving the disabled, the case law and the regulations are not clear. *Id.* Like the city councilor in Tulsa, many authorities are "playing it safe" by assuming the ADA protects these types of residential treatment centers. *Id.*

While the FHA clearly applies to group homes like Oxford Houses, which are used as residences, the FHA would probably not apply to a treatment center for the disabled, because most courts do not consider such a facility to be a residence.²¹⁷ Consequently, operators of outpatient treatment centers seeking zoning are confronted with varying and imprecise bases upon which to bring a claim for discrimination when a local variance is denied.²¹⁸ *Innovative Health Systems, Inc. v. City of White Plains*, however, provides clarity to this dilemma because the court construed the ADA to apply to zoning in instances relating to outpatient treatment centers for the disabled.²¹⁹ *Innovative* is also a groundbreaking case, because it was the first time that plaintiffs recovered in a zoning dispute filed under the ADA at an appellate level. The court based its decision to construe the ADA to apply to zoning on the legislative history of the ADA.²²⁰ The following Section will analyze the legislative history of the ADA in conjunction with some of the more recent cases, including *Innovative*, that discuss whether the ADA applies to zoning that FHA does not cover or to zoning for places not considered "dwellings."

B. The Legislative History of the ADA

Advocates have called the ADA the "emancipation proclamation" for people with disabilities.²²¹ The promulgation of the ADA took nearly two decades of effort by the disability rights movement. Congress introduced bills in 1988 based on an exhaustive study made by the National Council on Disability.²²² Although support continually grew for the ADA bill, it was not enough the first time. The bill eventually died in committee.²²³ Advocates reintroduced the bill in the 101st Congress with revisions, the support of more than fifty national organizations representing people with various disabilities, and the support of the Leadership Conference on Civil Rights.²²⁴ While the previous bill that

²¹⁷ *Innovative*, 931 F. Supp. at 222; *Moyer v. Lower Oxford Township*, 1993 WL 5489 at *1 (E.D. Pa. Jan 6, 1993); *Burnham v. City of Rohnert Park*, 1992 WL 672965, at *1 (N.D. Cal. May 18, 1992).

²¹⁸ *Innovative*, 931 F. Supp at 222.

²¹⁹ *Id.*

²²⁰ *Id.* at 232. Past cases have limited the reach of the ADA and held that the ADA does not apply to zoning. *Id.* at 231. However, in the past cases, legislative history has not been mentioned. *Id.*

²²¹ ADA GUIDE, *supra* note 1, at 2.

²²² *Id.* at 29.

²²³ *Id.* at 30.

²²⁴ *Id.* Representative Tony Coelho (D-California) and Senator Tom Harkin (D-Iowa) introduced the revised ADA on May 9, 1989. *Id.* The Leadership Conference on Civil

died in committee provided for a title on housing discrimination, the revised bill did not provide a title for housing discrimination; it relied on the FHA to address the housing situation of the disabled.²²⁵

The goal of the ADA was to provide rights to the disabled equivalent to those granted to women and minorities.²²⁶ At the time of the bill's introduction, the political climate for anti-discrimination measures was hostile.²²⁷ The Reagan administration had expended much effort in an attempt to eviscerate the Rehabilitation Act.²²⁸ The disabled, however, had armed their forces. Because of earlier legislation, like the Rehabilitation Act and FHA, the disabled had strong, experienced advocates in Congress.²²⁹ Furthermore, the disability interest groups and advocates had made the legislature aware of the magnitude of the disabled constituency, estimated at more than forty million and growing as the nation aged.²³⁰ Another positive aspect of the ADA was the proposition that it was actually cost-effective and bipartisan.²³¹ Businesses could see the disabled as customers and workers.²³² In addition, disability advocates convinced the legislators that the ADA was

Rights is an organization that represented 185 groups participating in the area of civil rights. *Id.* Other influential advocates in Congress were Senator Lowell Weicker, Representative Steny Hoyer, Senator Edward Kennedy, Senator Orrin Hatch, and Senator Robert Dole. Watson, *supra* note 90, at 31. All of these congressmen either suffered from a disability or had family members who suffered from disabilities. *Id.*

²²⁵ ADA GUIDE, *supra* note 1, at 38. The Senate passed the final proposal by an overwhelming majority (91-6) while the House of Representatives passed the final proposal with a vote of 377-28. *Id.* The bill went through many House committees: Labor, Rules, Judiciary, Public Works and Transportation, and Energy and Commerce. Mayerson, *supra* note 91, at 23.

²²⁶ *Id.* at 22. This bill was different from bills like the Rehabilitation Act because businesses would have to spend money without the possibility of receiving government funding. SHAPIRO, *supra* note 1, at 114. Businesses could not expect to be reimbursed by the government for any changes. *Id.*

²²⁷ Watson, *supra* note 90, at 259.

²²⁸ Watson, *supra* note 90, at 259.

²²⁹ *Id.* at 28. These advocates fought for the bill as a civil rights bill. SHAPIRO, *supra* note 1, at 116. Most people would not vocally oppose a civil rights bill. *Id.*

²³⁰ Watson, *supra* note 90, at 259.

²³¹ *Id.* For taxpayers and the government, accommodating the disabled and employing them was more efficient in terms of economics than institutionalizing them. *Id.* "It is not difficult to convince people that money spent on drug and alcohol rehabilitation is a better investment than building more prisons," according to John J. Clancy, the president of the Manchester, New Hampshire Education and Health Centers, who is trying to establish a rehabilitation center for ex-convicts who are substance abusers or alcoholics. *Lakeshore*, *supra* note 53, at C3.

²³² SHAPIRO, *supra* note 1, at 117.

a civil rights bill not a charity bill.²³³ Furthermore, the disabled, as a class, had special appeal because everyone has a chance of suffering from a disability at some point in his life. After approval by the House and the Senate, President Bush signed the bill on July 26, 1990.²³⁴

Certain studies and findings influenced Congress in the trek toward the enactment of the ADA. Surveys taken during the process of considering the ADA showed the disabled are among the most severely disadvantaged socially, economically, vocationally, and educationally.²³⁵ Discrimination affects all areas of their lives.²³⁶ Because of the

²³³ Watson *supra* note 90, at 259. They propounded this argument by suggesting that anyone could become disabled. *Id.* In 1986, the National Council on the Handicapped reported that establishing initiatives that promoted equal opportunity, self-sufficiency, independence, and prevention of injury would address the needs of the disabled better than economic support in the form of charity. NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS (1986) [hereinafter NATIONAL COUNCIL].

²³⁴ ADA GUIDE, *supra* note 1, at 62.

²³⁵ 42 U.S.C.A. § 12101(a)(6) (1997). According to West,

Fifty percent of adults with disabilities had household incomes of \$15,000 or less. Only 25% of persons without had household incomes in this bracket (U.S. Senate Committee on Labor and Human Resources, 1989, p. 9).

Two thirds of all Americans with disabilities between the ages of 16 and 64 were not working at all. Sixty-six percent of these would have liked to work (Louis Harris and Associates, Inc., 1986).

Whereas only 15% of all adults age 18 and over had less than a high school education, 40% of all persons with disabilities age 16 and over had not finished high school (Louis Harris and Associates, Inc., 1986).

Whereas 56% of all students participated in post-secondary education programs, only 15% of students with disabilities did so (Wagner 1989).

Persons with disabilities participated in social events (*e.g.* dining out, movies, attending sporting events) far less frequently than did persons without disabilities (Louis Harris and Associates, Inc., 1986).

West, *supra* note 85, at 4. See also AMERICANS WITH DISABILITIES, BUREAU OF THE CENSUS: STATISTICAL BRIEF (U.S. Department of Commerce, January 1994).

By making accommodations so that the disabled can work, the government would save money on the federal disability and welfare checks that support the disabled because they cannot work. SHAPIRO, *supra* note 1, at 28. The government spends almost \$60 billion dollars to support the disabled who cannot work. *Id.* The government also spends \$110 billion dollars on medical bills for the disabled. *Id.* Allowing the disabled to work and contribute to society will also assist the government by decreasing the amount that it pays to care for those with disabilities. *Id.*

²³⁶ West, *supra* note 85, at 4. Congress found that:

[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the

historically negative image of the disabled, proponents of the ADA wanted a mandate that would use language to empower the disabled and change people's perception of the disabled as people who should be pitied, patronized, and excluded from life activities.²³⁷ Moreover, the language of the ADA shows a conscious effort to change the way people perceive the disabled.²³⁸

Although the language is slightly different, the Rehabilitation Act provided a framework for the ADA.²³⁹ Cases that involve the ADA usually also include the Rehabilitation Act with a uniform result.²⁴⁰ The legislature placed section 504 on analogous ground to the ADA, at least in Titles I and II, which are major sections of the federal Act.²⁴¹ Because Congress found that the disabled constituted a discreet and insular minority, it invoked complete Congressional authority, including the heightened scrutiny standard of the Fourteenth Amendment and the power to regulate commerce as means of addressing disability discrimination.²⁴² The Department of Justice interprets the Act and

discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C.A. § 12101 (1997).

²³⁷ West, *supra* note 85, at 3.

²³⁸ *Id.* at 6. The language attempts to persuade people without disabilities to recognize the disabled instead of ignoring them. *Id.* at 6-7. At the same time, the disabled should also not be lauded for overcoming obstacles. *Id.* at 7. Another goal of the ADA is to increase people's familiarity with the disabled. According to Dear, "Familiarity tends to increase tolerance." Dear, *supra* note 38, at 288.

²³⁹ Weber, *supra* note 156, at 1117.

²⁴⁰ *Id.*

²⁴¹ *Id.* The DOJ suggests that many of the provisions of section 504 and title II are identical. DEPARTMENT OF JUSTICE, AMERICANS WITH DISABILITIES HANDBOOK [Hereinafter ADA HANDBOOK]. If they are different, the DOJ suggests that the ADA should be interpreted to provide greater or equal protection to section 504. *Id.*

²⁴² Rains, *supra* note 150, at 199-200. Congress meant the ADA to be a "clear and comprehensive mandate for the elimination of discrimination" against the disabled. TECHNOLOGY ASSESSMENT, *supra* note 86, at 21. The ADA should also provide strong enforcement standards in which the federal government plays a role in their effectiveness. *Id.* The ADA should also invoke the "sweep of Congressional authority." *Id.*

enforces it.²⁴³ Their interpretation became part of the legislative history of the ADA.²⁴⁴

The ADA defines a disability as an "impairment that substantially interferes with the accomplishment of a major life activity."²⁴⁵ In other words, a disability restricts the "conditions, manner, or duration" of the performance of the life activity compared to most people.²⁴⁶ The severity, duration, and permanency of the impairment should be considered in determining whether it restricts a major life activity and constitutes a disability.²⁴⁷ For example, Title I of the ADA defines alcoholics and recovering substance abusers that are not currently using illegal substances as people with disabilities.²⁴⁸ In *Innovative Health Systems, Inc. v. City of White Plains*,²⁴⁹ both the district and the appellate courts discuss Title II of the ADA and its application to zoning a facility for former substance abusers.

C. *Zoning Is an Activity under the ADA: Innovative Health Systems, Inc. v. City of White Plains.*

Title II is the subsection of the ADA applicable to the facts in *Innovative*.²⁵⁰ Title II of the ADA covers public entities, including all of

²⁴³ 28 C.F.R. § 35.190 (b) (1997). "The Federal agencies [which include the DOJ]...shall have responsibility...for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas. *Id.* The DOJ's authority includes: "All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry...planning, development, and regulation...state and local government support services...all other government functions not assigned to other designated agencies." *Id.* at (b)(6).

²⁴⁴ 28 C.F.R. § 35.190 (b)(6) (1997). *See supra* note 2.

²⁴⁵ MARILYN GOLDEN ET AL., EXPLANATION OF THE CONTENTS OF THE AMERICANS WITH DISABILITIES ACT OF 1990, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND 10 (1990).

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 12.

²⁴⁸ TECHNOLOGY ASSESSMENT, *supra* note 86, at 22; Cindy Glover, *Bregman Says Treatment Centers Legal*, ALBUQUERQUE J., February 7, 1997, at C1; McIntire, *supra* note 94. The ADA protects recovering drug abusers, alcoholics and people with AIDS; Mike McIntire, *Hartford Council Fears Effect on Neighborhoods*, THE HARTFORD COURANT, December 28, 1995, at A1; 42 U.S.C.A. § 12101 (1997).

²⁴⁹ 931 F. Supp. 222 (S.D.N.Y. 1996), *aff'd*, 37 F.3d 117 (2d Cir. 1997).

²⁵⁰ *Id.* Burgdorf, *supra* note 89, at 434. Title I covers Employment. *Id.* Title II covers Public Services. *Id.* Title III covers Public Accommodations and Services Operated by Private Entities. *Id.* Title IV covers Telecommunications Relay Services; title V covers Miscellaneous Provisions. *Id.*

the instrumentalities of state or local government.²⁵¹ The ADA also covers every state or local activity, program, or service including the administration of government benefits or social service programs.²⁵² Title III addresses public accommodations by the private sector, and Title IV of the ADA deals with telecommunications.²⁵³ Finally, Title II covers almost all parts of public life.²⁵⁴ Title II incorporates almost every aspect of section 504 of the Rehabilitation Act and expands on its propositions.²⁵⁵ Title II requires that a public entity make its programs, services, or activities accessible except where to do so would create undue administrative or financial burden.²⁵⁶ A public entity must make

²⁵¹ GOLDEN, ET AL., *supra* note 245, at 117. Title II has a strong foundation in section 504 of the Rehabilitation Act. Weber, *supra* note 156, at 1095. The legislative history also suggests that the courts must interpret the provisions of title II with an emphasis on the necessity of accommodating the disabled and provided services in "integrated settings." *Id.*

In addition, the term 'public entity' means any department, agency, special purpose district, or other instrumentality of a state or local government.... This broad definition is intended to cover every type of state and local government entity including: all types of state agencies; counties; municipalities and cities; boroughs; all types of special purpose districts...; and *executive, legislative, and judicial branches of state and local governments.*

GOLDEN, ET AL., *supra* note 245, at 117 (emphasis added).

²⁵² GOLDEN, ET AL., *supra* note 245, at 118-19.

²⁵³ Seth J. Elin, Comment, *Curb Cuts Under Title II of the Americans with Disabilities Act: Are They Bringing Justice or Bankruptcy to Our Municipalities?*, 28 URB. LAW. 293, 294 (1996).

²⁵⁴ TECHNOLOGY ASSESSMENT, *supra* note 86, at 25. The Departments of Justice and Transportation have the role of enforcing title II. *Id.*

²⁵⁵ Weber, *supra* note 156, at 1100. Title II must at least be consistent and parallel with section 504 if not more expansive. *Id.* According to the ADA Handbook:

Congress did not intend to displace any of the rights or remedies provided by other Federal laws (including section 504) or other State laws...that provide greater or equal protection to individuals with disabilities.... [T]he standards adopted by title II of the ADA for State and local government services are generally the same as those required under section 504 for federally assisted programs and activities.

ADA HANDBOOK, *supra* note 241, at 11.

²⁵⁶ ADA HANDBOOK, *supra* note 241, at II-57. Nothing in the text or legislative history of the statute excludes zoning from coverage by the ADA. Compiled from National Law Journal staff, correspondent and Associated Press Reports, *ADA Used in Zoning Debate*, NAT'L L. J., July 1, 1996, at A8. Examples of the programs, activities, and services that local and state governments perform include:

activities of state legislatures; voting and election of state and local officials; activities of state or local courts including traffic, municipal, superior, appellate, and supreme courts...; town meetings; board meetings of a special purpose district...; the activities of police and

its services readily accessible to individuals with disabilities.²⁵⁷ *Innovative* is precedent-setting in its demonstration of the broadest interpretation of Title II made by an appellate court so far.²⁵⁸

1. Factual History of *Innovative Health Systems, Inc. v. City of White Plains*

The plaintiff, Innovative Health Systems (Innovative), is a treatment program certified by the state of New York for rehabilitating individuals recovering from drug or alcohol dependency, or both.²⁵⁹ Three prospective and two current clients²⁶⁰ of Innovative initiated an action against the City of White Plains, the Planning Board, and the Zoning Board of Appeals in the U. S. District Court.²⁶¹ The plaintiffs claimed the City of White Plains violated the ADA and section 504 of the Rehabilitation Act by refusing to allow Innovative to operate their treatment program in the downtown area of White Plains.²⁶² The

fire departments; all planning or advisory boards; licensure and registration activities...; and administration of public benefits and social service programs.

GOLDEN, ET AL., *supra* note 245, at 118-19 (emphasis added).

²⁵⁷ 28 C.F.R. § 35.150(a) (1997). This section mandates that public entities make existing facilities accessible to the disabled. See *supra* note 2. Elin, *supra* note 253, at 308-09. In order to make these existing facilities accessible, it may be necessary to *reassign services to accessible buildings*, etc. *Id.* (emphasis added)

²⁵⁸ *Drug Treatment Center Settles Zoning Discrimination Suit*, WORKPLACE SUBSTANCE ABUSE ADVISOR, December 18, 1997 [hereinafter *Zoning Discrimination*]. Other groups have recognized the reach of the ADA and advised citizens to take advantage of its breadth. Jill Hayman, *Establishing a Medical Practice: Special Real Estate Considerations*, N.Y.L.J., Sept. 16, 1996, at S1. By the same token, these critics have also admonished businesses to recognize the breadth of the ADA and to conform their business practices. *Id.* One article addresses the ADA and establishing a medical practice reminding practitioners that the ADA makes it "an illegal practice to refuse to sell or lease land or commercial space, or to otherwise withhold from any person or group of persons, land or commercial space on account of disability. Any restrictions on use should not create an unlawful discriminatory practice." *Id.*

²⁵⁹ *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 228 (S.D.N.Y. 1996).

²⁶⁰ *Id.* The court identified the two current clients of Innovative as Martin A. and Maria B. The court identified the prospective clients as John Does 1-3. *Id.*

²⁶¹ *Id.* In addition to the City, the Planning Board, and the Zoning Board of Appeals, the plaintiffs also sued the past chairman of the Zoning Board of Appeals and the chairman of the Planning Board. *Id.*

²⁶² *Id.*

plaintiffs prayed for a preliminary injunction.²⁶³ The defendants filed a Motion to Dismiss.²⁶⁴

Since 1985 Innovative housed its treatment program on the outskirts of White Plains, New York.²⁶⁵ In January 1994, Innovative rented the first floor of a building in downtown White Plains in order to move its treatment center.²⁶⁶ The building that Innovative leased was located in a "high density, mixed use" zone.²⁶⁷ That zoning area permitted residences, retail, offices, governmental, and service businesses.²⁶⁸

In April 1994, Innovative filed an application with the White Plains Building Department to change the use of the building.²⁶⁹ The building commissioner referred Innovative's application to the Planning Board, pursuant to the requirements of the city's zoning code.²⁷⁰ The building commissioner concluded that the zoning code permitted Innovative's use of the building falling under the category of "office use."²⁷¹

The Planning Board held two public meetings about Innovative's proposed use of the building.²⁷² Businesses and members of the community²⁷³ strenuously objected to Innovative's proposed use of the building on the basis of "condition and appearance" of Innovative's clients and the possibility that a treatment program in the area would depress the market value of their residences and businesses.²⁷⁴

²⁶³ FED. R. CIV. P. 65; *Innovative*, 931 F. Supp. at 228.

²⁶⁴ FED. R. CIV. P. 12(b)(6), 12(b)(1); *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 228-29. (S.D.N.Y. 1996).

²⁶⁵ *Innovative*, 931 F. Supp. at 229.

²⁶⁶ *Id.* A group of residences, known as Cameo House, leased a separate part of the building but shares no common space with Innovative. *Id.* The director of Innovative Health Systems, Ross Fishman, proposed the move downtown because "poor public transportation to the current facility...[was] keeping people away from counseling services." Mary T. Prenon, *IHS Settles Discrimination Lawsuit with City of White Plains*, WESTCHESTER COUNTY BUS. J., October 27, 1997, at 10.

²⁶⁷ *Innovative*, 931 F. Supp. at 229.

²⁶⁸ White Plains, N.Y., Zoning Ordinance 5.5.1.9; *Innovative*, 931 F. Supp. at 229.

²⁶⁹ *Id.* Before Innovative leased the building, it had been used as a furniture store. *Id.*

²⁷⁰ *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 229 (S.D.N.Y. 1996); White Plains, N.Y., Zoning Ordinance 7.2.2.

²⁷¹ *Innovative*, 931 F. Supp. at 229.

²⁷² *Id.*

²⁷³ *Id.* Opposition came from Cameo House, the residential complex sharing the building with Innovative, and from Fashion Mall Partner, the owners of the "The Westchester." *Id.*

²⁷⁴ *Id.* The director of Innovative also suggested that people opposing Innovative's new site thought that the new treatment center would trigger an increase in crime. Prenon, *supra* note 265, at 1. Fishman also noted that Innovative operated at its current facility for

Furthermore, the members of the community felt that the building commissioner had zoned the treatment as an "office" incorrectly.²⁷⁵ The objecting members of the community argued that a treatment program should be considered a "clinic" under the zoning ordinance's definition of "hospitals or sanitararia."²⁷⁶ As a clinic falling under the definition of "hospitals or sanitararia," the zoning ordinance would not permit Innovative to establish the treatment program in the proposed location.²⁷⁷

The Planning Board, in response to the public meetings, requested that the Building Commissioner reconsider his determination that Innovative's treatment program fell within the ordinance's definition of "office."²⁷⁸ The Building Commissioner reaffirmed his determination that Innovative's program be zoned as an "office."²⁷⁹ Innovative withdrew its application for change of use at this point because of the mounting community opposition, costs, and delay caused by the Planning Board's review of the application.²⁸⁰

In August 1994, Innovative applied to the Building Commissioner for a building permit to renovate part of the leased premises, which had previously been used as offices.²⁸¹ The community members opposed the treatment center and wrote letters to the Building Commissioner and the Mayor expressing their views about the treatment center.²⁸² The chairperson of the Planning Board also wrote a memorandum to the Building Commissioner expressing the Board's opposition to the proposed use of the building as a treatment center.²⁸³ After receiving legal advice, the Building Commissioner again reaffirmed his decision to zone the treatment program as an office in December of 1994.²⁸⁴ The

12 years without any problems caused by clients. *Id.* He stated "The city is responding to generalized stereotypes and irrational fears." *Id.*

²⁷⁵ *Innovative*, 931 F. Supp. at 229.

²⁷⁶ *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 229 (S.D.N.Y. 1996).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* Innovative already had the necessary approval from the Building Commissioner for zoning from the grant of the previous request for change of use. *Id.*

²⁸² *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 229 (S.D.N.Y. 1996).

²⁸³ *Id.*

²⁸⁴ *Id.*

Building Department issued a permit for Innovative to renovate its space in January of 1995.

In late December, 1994, two of the community groups opposing the location of the treatment center, Cameo House Owners and Fashion Mall Partners, appealed the Building Commissioner's decision to allow the treatment center to be zoned as an office to the Zoning Board of Appeals (ZBA).²⁸⁵ Pursuant to the regulations in the zoning ordinance, the ZBA held a public hearing.²⁸⁶ Written testimony of the hearing showed that the basis of many of the community members opposing the location of the treatment program originated in prejudice and hostility toward those clients of Innovative seeking drug and alcohol rehabilitation.²⁸⁷ In 1995, the ZBA voted to reverse the prior decision of the Building Commissioner that Innovative's treatment program was considered an office use for zoning purposes.²⁸⁸

Innovative argued that the treatment program should be considered an office use citing previous decisions of the city to permit uses such as counseling services and outpatient medical care facilities in the same area to be zoned as "office use."²⁸⁹ Psychiatrists and social workers engaged in counseling patients, similar to the service Innovative would provide, had offices on the first floor of the Cameo House in the same building with Innovative.²⁹⁰ An insurance company operated a medical facility a few blocks from Innovative's proposed site.²⁹¹ Also, the city permitted a medical clinic run by the Veteran's Administration in the same zoning district in which Innovative wanted to operate its treatment program.²⁹² Local zoning officials rejected these arguments.

Innovative filed a complaint seeking declaratory, injunctive, and monetary relief under the ADA and the Rehabilitation Act.²⁹³ The plaintiffs alleged that the Defendants discriminated against them in its

²⁸⁵ *Id.* at 230.

²⁸⁶ *Innovative*, 931 F. Supp. at 230; White Plains Zoning Ordinance 10.4.3.

²⁸⁷ *Innovative*, 931 F. Supp. at 230.

²⁸⁸ *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 230 (S.D.N.Y. 1996). The ZBA voted 4-1 to reverse the decision of the Building Commissioner. *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* at 230. The defendants also alleged that the plaintiffs lacked standing. *Id.* The standing claims brought under the ADA and the Rehabilitation Act have, by and large, been unsuccessful. *Id.* at 234-38.

²⁹³ *Id.*

failure to make reasonable modifications to its policies and practices and by Defendants' failure to reasonably accommodate plaintiff's disabilities.²⁹⁴ Defendants argued that the plaintiff's claim, based upon a zoning ordinance, does not fall within the scope of either the ADA or the Rehabilitation Act, and that neither the ADA nor the Rehabilitation Act required the Board to accord special treatment to the plaintiffs.²⁹⁵ Furthermore, the Defendants argued that, under the ADA and the Rehabilitation Act, the plaintiffs had no likelihood of success on the merits.²⁹⁶

2. The Federal District Court's Holding and Reasoning in *Innovative*

Because previous case law was inconclusive on whether the ADA applies to zoning decisions, the court first determined whether zoning was a part of the ADA's scope as a matter of statutory construction.²⁹⁷ In its analysis of the ADA's text, the court turned to the legislative history of the ADA and found that the ADA covered zoning. The court then granted *Innovative* a preliminary injunction.²⁹⁸

The court reasoned that the language of the ADA was meant to sweep broadly.²⁹⁹ According to the Court, Congress enacted the ADA as "a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities."³⁰⁰ The ADA

²⁹⁴ *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 230 (S.D.N.Y. 1996).

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 230-31. The court construed the ADA to define recovering alcoholics and substance abusers as a class of the disabled. *Id.* at 231. The court also found that the parties presenting the previous cases that dealt with the ADA and zoning inadequately briefed the issue. *Id.* The courts, in turn, failed to analyze the specific language and legislative history of the act in their search for application of the ADA to zoning laws. *Id.* The Court held that the ADA was meant to sweep broadly and affect zoning. *Id.* at 232.

²⁹⁸ *Id.* at 245. The court found that Congress enacted the ADA to prevent the pervasive discrimination against people with disabilities who have historically been isolated and segregated from the main population. *Id.* at 232. 42 U.S.C.A. § 12101(a)(1) (1997). *Civic Ass'n of the Deaf v. Giuliani*, 915 F. Supp. 622, 634 (S.D.N.Y. 1996) (stating that "the ADA must be broadly construed to effectuate its purpose").

²⁹⁹ *Innovative*, 931 F. Supp. at 232. See also *Civic Ass'n of the Deaf*, 915 F. Supp. at 634.

³⁰⁰ 42 U.S.C.A. § 12101(b)(1) (1997); *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 232 (S.D.N.Y. 1996).

mandated that no individual with a disability should be subjected to discrimination by a public entity.³⁰¹

The court analyzed the legislative history of the federal Act and found that Congress chose not to list all the types of actions that constitute discrimination against the disabled.³⁰² Fashioned after section 504 of the Rehabilitation Act, the court observed that the ADA was meant to enlarge the scope of the Rehabilitation Act in most areas.³⁰³ Unlike the Rehabilitation Act, the ADA applies to all actions of state and local government as well as the federal government.³⁰⁴ Another provision of the ADA requires that those public entities bound by the ADA must make reasonable modifications to policies, practices, and procedures when the changes are necessary in order to avoid discriminating against the disabled.³⁰⁵ These policies, practices, and procedures include zoning.³⁰⁶ Because zoning is not mentioned in the statute of the ADA, the regulations, or the legislative history, the trial court cited the Technical Assistance Manual (TA Manual).³⁰⁷ The court looked to the TA Manual drafted by the Department of Justice (DOJ) as a referent because Congress gave the DOJ the authority and responsibility to draft regulations to implement the ADA.³⁰⁸ The Court reasoned that the TA Manual should be cited when the statute, the regulations, and the

³⁰¹*Id.* White Plains also argued that the clients did not qualify as disabled because they were not completely drug-free. Prenon, *supra* note 265, at 10. The court reasoned that the small number of failures, or those who return to drug use, should not eliminate the support for the majority who succeed in overcoming their problem. *Id.*

³⁰²H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367. Furthermore, the court emphasized that Congress meant for title II of the ADA to apply to all activities of the state and local governments that would constitute discrimination against qualified individuals under section 504 of the Rehabilitation Act. *Id.* at 151, *reprinted in* 1990 U.S.C.C.A.N. at 434.

³⁰³*Innovative*, 931 F. Supp. at 232.

³⁰⁴*Id.* at 233.

³⁰⁵28 C.F.R. § 35.130(b)(7) (1997). *See also supra* note 2.

³⁰⁶ADA TA Manual II-3.6100 (1993). The TA Manual uses zoning specifically as an example to local and state governments about the ways they can implement their policies, practices, and procedures in a non-discriminatory manner. *Id.* *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 232-33 (S.D.N.Y. 1996). The court construed the FHA to cover local zoning decisions as well; however, the court admitted that zoning was not specifically mentioned in the act. *Id.* Although the FHA prohibits discrimination against the disabled in dwellings, the issue in *Innovative* deals with an office-type of setting and not a home. 42 U.S.C.A. § 3604(f)(3)(B) (1997). *See supra* note 3.

³⁰⁷GOLDEN, ET AL., *supra* note 245, at 116. The TA Manual published by the DOJ should be cited when the statute, the regulations, and the legislative history do not contain the information. *Id.*

³⁰⁸*Id.*

legislative history do not contain the information necessary to assist the court in interpreting the ADA.³⁰⁹ The TA Manual uses a municipal zoning ordinance as an example of an activity covered by the ADA.³¹⁰

The court also held that section 504 of the Rehabilitation Act prohibits discrimination against persons with disabilities in any program or activity that receives federal funding. Even if only a section of the program receives federal funding, the entire program must refrain from discrimination.³¹¹ Because the plaintiffs received federal financial aid, the city must not discriminate against disabled persons in the use of its programs, activities, or instrumentalities.³¹²

The court found that the plaintiffs sufficiently stated a claim under the ADA and the Rehabilitation Act.³¹³ To utilize a disparate impact theory, the court concluded that the plaintiffs must demonstrate that

³⁰⁹ *Id.*

³¹⁰ ADA TA Manual II-3.6100, at 14. The TA Manual gives an example of a situation covered by title II of the ADA:

Illustration 1: A municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district. In order to install a ramp to the front entrance of a pharmacy, the owner must encroach on the set-back by three feet. Granting a variance in the zoning requirement may be a reasonable modification of town policy.

Id.

³¹¹ 29 U.S.C. § 794 (1994). The legislative history of the Rehabilitation Act does not exclude zoning from its coverage of the disabled in activities and programs involving the federal government. 29 U.S.C. § 794 (1994); *Innovative*, 931 F. Supp. at 234.

³¹² 29 U.S.C. § 794 (1994). Under the Civil Rights Restoration Act, any entity that receives federal funding must not discriminate against the disabled in any way regardless of the specificity of the purpose or program that receives that aid. *Id.*

³¹³ *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. at 222, 238 (S.D. N.Y. 1996). Under the ADA, the plaintiffs stated a claim because they satisfactorily showed that "(1) they are 'qualified individuals with a disability'; (2) they are being excluded from participation in or denied the benefits of some service, program, or activity by reason of their disability; and (3) the entity which provides the service, program or activity is a public entity." *Id.* Under the Rehabilitation Act, the court found that the plaintiffs satisfactorily showed that:

(1) they are "individuals with a disability" under the Act; (2) they are "otherwise qualified" to participate in the activity or program or to enjoy the services or benefits offered; (3) they are being excluded from participation, denied the benefits of, or subjected to discrimination under, any program or activity solely by reason of their disability; and (4) the entity denying plaintiffs' participation or enjoyment receives financial assistance.

Id.

similarly situated groups have been treated differently.³¹⁴ In order for plaintiffs to prevail on their claim of disparate impact, they needed to show only that the substance and alcohol-dependent status of Innovative's clients was a motivating factor in denying Innovative zoning for its treatment program.³¹⁵ In its assessment of the treatment program, the court looked at the transcripts from the ZBA meeting.³¹⁶ The district court found that the ZBA classified Innovative as a "clinic" which falls under "hospital and sanitarium" and must be zoned differently.³¹⁷ Yet, the ZBA failed to state any reason why it classified the treatment program as a "hospital or sanitarium" when Innovative neither physically examined patients nor distributed medicine, which were customary requirements for a "hospital or sanitarium." Finding no basis for the ZBA's classification of the treatment center as a hospital or sanitarium, the court granted the plaintiff's request for a preliminary injunction and denied the defendant's Motion to Dismiss.³¹⁸ The court decided that the zoning was a reasonable accommodation to Innovative.³¹⁹

3. The City of White Plains' Appeal

The defendant City of White Plains appealed.³²⁰ The appellate court acknowledged that ADA case law was ambiguous concerning zoning issues.³²¹ The Court of Appeals, like the district court, analyzed the term

³¹⁴ *Id.* at 241.

³¹⁵ *Id.* The appellate court admonished the City for their discriminatory practices, explaining that "[t]he public hearings and submitted letters were replete with discriminatory comments about drug- and alcohol-dependent persons based on stereotypes and general, unsupported fears.... Although the city may certainly consider legitimate safety concerns in its zoning decisions, it may not base its decisions on the perceived harm from such stereotypes and generalized fears." *Zoning Discrimination, supra* note 258. Brief for Appellant at 34, 117 F.3d 37 (2d Cir. 1997) (No. 96-7797). Municipalities cannot "placate" stereotypes about the disabled. *Id.* at 33-34. (citing *United States v. Borough of Audobon*, 797 F. Supp. 353, 360-61 (D.N.J. 1991), *aff'd*, 968 F.2d 14 (3d Cir. 1992); *Easter Seal Soc. v. Township of No. Bergen*, 798 F. Supp. 228, 232-234 (D.N.J. 1992).

³¹⁶ *Innovative*, 931 F. Supp. at 241.

³¹⁷ *Id.* at 242.

³¹⁸ *Id.* 15 243, 245. While the ZBA classified Innovative as a "clinic", the ZBA made no allusion to the actual definition of a clinic as provided by local ordinances. *Id.* at 242.

³¹⁹ 28 C.F.R. § 35.130(b)(7) (1997). *Sullivan v. City of Pittsburgh*, 811 F.2d 171 (3d Cir. 1987); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993).

³²⁰ *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 244 (S.D.N.Y. 1996). *City Properly Enjoined from Barring Treatment Center*, NAT'L L. J., July 14, 1997, at B23.

³²¹ *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997)

"zoning" as a part of a "service, program, or activity" under the ADA.³²² The Rehabilitation Act, however, defines similar terms.³²³ The Rehabilitation Act defines "program or activity" as "all of the operations of [specific entities, including] a department, agency, special purpose district, or other instrumentality of a State or of a local government."³²⁴ The Rehabilitation Act includes zoning as an activity supplemented by federal funds; the ADA includes zoning as an activity that is a normal part of a government entity.³²⁵ The Court ruled that the ADA protected zoning as an activity of a public entity by drawing on literature like the TA Manual published by the DOJ as a supplement to the statutory language of the federal act. Other district court cases involving the ADA and zoning have reached different results in deciding whether the ADA protects zoning as a service, program, or activity.³²⁶

In *Innovative*, the plaintiff eventually depleted its funds midway through the appeal process. The struggle was too costly financially. Innovative settled with the City of White Plains who paid them money to remain in their old location, a location that made the program inaccessible to many of the recovering addicts who originally sued the City of White Plains.³²⁷ Had Congress clearly mandated the ADA's

³²² *Id.*

³²³ *Id.*

³²⁴ 29 U.S.C. § 794(b)(1)(A) (1994). See *supra* note 5. According to *Webster's Third International Dictionary*, the meaning of "activity" is "a natural or normal function or operation." *Innovative*, 117 F.3d at 44.

³²⁵ *Innovative*, 117 F.3d at 37. In their appellate brief, Innovative argues that zoning is an activity under the ADA in an unpublished opinion affirmed by the appellate court. Brief for Appellant at 26, *Innovative Health Sys. Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997) (No. 96-7797), citing *United States v. Gomez*, No. 93-4913, slip op. at 19-20 (N.D. Ga., August 27, 1993), *aff'd*, 47 F.3d 430 (Table) (11th Cir. 1995). In this case, a company developing an AIDS hospice brought suit after they felt that the county subjected them to different zoning requirements than other "similarly situated" facilities. *Id.* Innovative quotes the court in their appellate brief. *Id.* The court held that the ADA would not allow licensing and zoning permit procedures in a way that discriminates against the disabled on the basis of their disability. *Id.*

³²⁶ See *infra* note 15 and accompanying text.

³²⁷ According to Sally Friedman, an attorney for the Legal Action Center, which represented Innovative, the settlement was "a vindication for people with drug and alcohol problems who want nothing more than equal treatment under the law." *Zoning Discrimination*, *supra* note 258. Innovative, however, could not claim a total victory because they had to remain in their old location and sublease the 12,000 square foot building downtown to a fitness club. Prenon, *supra* note 266, at 10. According to Susan Jacobs, an attorney that works for the Legal Action Center which represented Innovative, "You hope for the whole loaf but you have to be realistic.... We see this as a victory

application to zoning, *Innovative* would not have had to forfeit its new location through an expensive litigation process.³²⁸

D. *Analysis of the Case Law Involving the ADA and Zoning*

Before *Innovative*, the district courts diverged in their decisions on whether the ADA applied to zoning. In one of the Oxford House cases³²⁹ brought in a New York district court, the plaintiff made a claim under the ADA even though group home claims are generally brought under the FHA.³³⁰ In the plaintiffs' first appearance, the attorneys tried to show that the ADA applied to zoning but failed to cite the TA Manual that utilized the example of zoning as a covered activity.³³¹ The court then granted the defendant's motion to dismiss.³³² In a motion for reconsideration, the plaintiffs brought in supplemental materials designed to explain the implementation of the ADA. The attorney planned a strategy similar to the one brought by the plaintiff in *Innovative*.³³³ The judge recognized that, in light of the supplemental material brought forth in the motion for reconsideration, the plaintiffs may have had a legitimate claim.³³⁴ However, the court concluded that the plaintiff's brought their supplemental material to the court's attention too late.³³⁵ The court declared the supplemental material could have

because it's precedent-setting and will help other treatment programs.'" *Id.* The court battle counteracts NIMBY sentiments. *Id.*

³²⁸ 42 U.S.C.A. § 12101 (b) (1997). Congress found that the purpose of the ADA is:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established...on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id.

³²⁹ *Oxford House, Inc. v. City of Albany*, 155 F.R.D. 409 (N.D.N.Y. 1994).

³³⁰ See *supra* notes Section IV and accompanying text.

³³¹ *City of Albany*, 155 F.R.D. at 410. Chief Judge McAvoy states: "It must here be highlighted that plaintiffs, in their opposition papers to defendants motion to dismiss, had completely failed to cite to any authority indicating that the ADA should be applied to a zoning context such as exists here." *Id.*

³³² *Id.* at 411.

³³³ *Id.* *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222 (S.D.N.Y. 1996).

³³⁴ *City of Albany*, 155 F.R.D. at 411.

³³⁵ *Oxford House, Inc. v. City of Albany*, 155 F.R.D. 411 (N.D.N.Y. 1994).

been discovered earlier.³³⁶ Because the material was not new, the court denied the plaintiffs' motion to reconsider. Had the attorneys brought the supplemental materials to the attention of the court in the beginning, the judge in all likelihood would have recognized a legitimate claim under the ADA.³³⁷ Although the plaintiffs lost their claim under the ADA in this case, they still had recourse under the FHA.³³⁸

In this case, unlike the claimants in *Innovative*, the plaintiffs who failed to invoke the supplemental materials of the ADA were lucky because they had an alternative claim under the FHA. An outpatient treatment center like the one in *Innovative* can use only the Rehabilitation Act and the ADA as a basis for legal action. If, for some reason, the attorneys fail to bring to the attention of the court the legislative history of the ADA, the court may refuse to find that the outpatient treatment center has a claim for discriminatory zoning practices under the ADA. Moreover, if the attorneys bring the supplemental material of the ADA to the judge's attention, and the judge refuses to give it weight, then the outpatient treatment center may still not have a claim under the ADA. Finally, if the court recognizes a different part of the ADA's legislative history when the congressional committees dropped the inclusion of housing requirements from the ADA with the confidence that the FHA would cover zoning under the ADA, then the outpatient treatment centers are once again left without recourse. The following cases illustrate the diverging judiciary interpretations of the ADA and its application to zoning. Additionally, these cases show that the judiciary is reluctant to become involved in local zoning disputes where federal policy does not clearly dictate a result.

In *Moyer v. Lower Oxford Township*³³⁹ and *Burnham v. City of Rohnert Park*,³⁴⁰ the courts, in the absence of any authority cited by attorneys that zoning was a service, program, or activity under the ADA, refused to read the ADA to include zoning. In *Moyer*,³⁴¹ a federal district court in Pennsylvania denied the plaintiff's motion for partial summary judgment in a zoning dispute.³⁴² Regarding the application of the ADA to zoning, the court held that the ADA protects against discriminatory practices in

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Moyer v. Lower Oxford Township*, 1993 WL 5489, at *1 (E.D. Pa. Jan. 6, 1993).

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

public services, programs, or activities, but it would not construe zoning as a public service, program, or activity protected by the ADA.³⁴³ The court reasoned that the plaintiff had not cited any authority to show that the ADA would be applicable in a zoning context.³⁴⁴ The FHA, however, would apply because it protects zoning for dwellings, and the court considered a hospice a dwelling.³⁴⁵ The disabled should be able to find housing regardless of whether the housing includes treatment.³⁴⁶ The city demonstrated a violation of the FHA in that the potential residents' status as AIDS patients³⁴⁷ is part of the reason the county rejected their zoning request.³⁴⁸

In *Burnham v. City of Rohnert Park*,³⁴⁹ the court again chose not to apply the ADA to discriminatory zoning practices.³⁵⁰ The plaintiff sought a preliminary injunction requiring the defendant City to allow her to continue living in a mobile home located in the driveway in a residential district despite the violation of local zoning ordinances.³⁵¹ An illness required the plaintiff to live in an environment as toxin-free and allergen-free as possible and, thus, allegedly qualified her as a disabled individual. The plaintiff filed for discriminatory zoning practices against a disabled person under the FHA, the ADA, and the Rehabilitation Act.³⁵² While the court held that the plaintiff failed to state a claim under all three acts, it noted that, if her factual allegations of qualifying for a disability had been sufficient, she could have recovered under the FHA.³⁵³ In a footnote after the opinion, the court blasted the claims under the Rehabilitation Act and the ADA as "clearly meritless."³⁵⁴ The claim under the ADA failed because the court did not construe zoning as a part of the "public services, programs, or activities" in which the

³⁴³ *Id.*

³⁴⁴ *Id.* at 2.

³⁴⁵ *Moyer v. Lower Oxford Township*, 1993 WL 5489, at *2 (E.D. Pa. Jan. 6, 1993)

³⁴⁶ While a hospice may also be a treatment center for terminally ill AIDS patients, it is also a home.

³⁴⁷ 42 U.S.C.A. § 12101 (1997). AIDS is considered a disability under the ADA. *Id.* *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763 (E.D. Tex. 1996).

³⁴⁸ *Id.*

³⁴⁹ *Burnham v. City of Rohnert Park*, 1992 WL 672965 at *1 (N.D. Cal. May 18, 1992).

³⁵⁰ *Id.* at *5, n.9.

³⁵¹ *Id.*

³⁵² *Id.* at *1.

³⁵³ *Id.* at *5, n.9.

³⁵⁴ *Id.* The court found that the defendant city was not a recipient of financial aid from the government and, therefore, the claim failed under the Rehabilitation Act. *Id.*

government prohibits discrimination under the ADA.³⁵⁵ The court completely dismissed the notion that zoning could be construed as public service, program, or activity under the ADA.³⁵⁶

In at least one case where attorneys have brought the legislative history of the ADA and discriminatory zoning practices to the attention of the court, the court has still refused to read zoning as an activity protected by the ADA.³⁵⁷ The district court in western North Carolina chose to construe the ADA very narrowly in its application to zoning in *United States v. City of Charlotte*.³⁵⁸ The plaintiff brought a claim against the city for discriminatory housing practices pertaining to construction of a facility for AIDS patients under the FHA, the ADA, and the Rehabilitation Act.³⁵⁹ The court dismissed the ADA claim holding that a zoning decision does not constitute a service, program, or activity of a municipality.³⁶⁰ The court reasoned that the dictionary definition of the terms "program, service, and activity" would stretch their meanings too far in applying them to zoning.³⁶¹ Furthermore, the court refused to look at either the Justice Department's regulations embodied in the TA Manual that act as a guide to the ADA or the legislative history that place zoning as an activity, service, or program of a public entity.³⁶² The court instead reasoned that where the "statutory language is unambiguous, the court's inquiry 'terminates.'"³⁶³ Thus, analyzing congressional intent is unnecessary. The Rehabilitation Act, however, survived a Motion to Dismiss even though the same language of "program and activity" exists in the Rehabilitation Act as it does in the ADA.³⁶⁴ The court reasoned that a sufficient nexus must exist between the federal funds and the discriminatory practice. Here, the court failed

³⁵⁵ *Burnham v. City of Rohnert Park*, 1992 WL 672965, at *5, n.9 (N.D. Cal. May 18, 1992).

³⁵⁶ *Burnham*, 1992 WL 672965, at *1; *Robinson v. City of Friendswood*, 890 F. Supp. 616, 623 (S.D. Tex. 1995) (holding that the plaintiffs have read the ADA too broadly to bring a claim for discriminatory zoning practices).

³⁵⁷ *United States v. City of Charlotte*, 904 F. Supp. 482 (W.D.N.C. 1995).

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 483. The plaintiff also brought claims under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 484.

³⁶⁰ *Id.* at 485.

³⁶¹ *Id.* at 484-85.

³⁶² *Id.*

³⁶³ *United States v. City of Charlotte*, 904 F. Supp. 482, 485 (W.D.N.C. 1995), citing *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994).

³⁶⁴ *City of Charlotte*, 904 F. Supp. at 487.

to discuss why zoning constitutes a program or activity under the Rehabilitation Act and not the ADA.³⁶⁵

Other cases have applied the ADA to zoning situations.³⁶⁶ In a federal district case in Georgia,³⁶⁷ the defendant, Clayton County, refused to issue an AIDS's hospice a Conditional Use Permit, the equivalent of a variance, because the community did not want people with AIDS in area zoned for single family residences.³⁶⁸ The court held that the ADA would apply in this situation even though the hospice could also be considered a dwelling under the FHA.³⁶⁹ The court reasoned that the ADA prohibits local governments from using licensing and zoning procedures in a way that subject people to discrimination based on their disability, citing the Code of Federal Regulations.³⁷⁰ Thus, in this case, the court found that the ADA, as well as the FHA, applied to zoning for group homes.³⁷¹

In *Musko v. McClandless*, a Pennsylvania district court case,³⁷² the court found the ADA applied to zoning activities.³⁷³ The plaintiff alleged the defendant conspired to eject him from the community by selectively enforcing zoning ordinances and waging a conspiracy to have him committed to a mental health facility.³⁷⁴ The court reasoned that the facts were sufficient for an ADA claim, because the township treated him

³⁶⁵ *Id.*

³⁶⁶ McIntire, *supra* note 94, at A1. Tanina Rostain, the supervising attorney of the University of Connecticut's Civil Rights Clinic, advised people as early as 1995 that "local ordinances cannot be used to keep the disabled out of specific neighborhoods." *Id.* Rostain won a settlement from the city for a zoning problem for a walk-in treatment center for the mentally disabled. *Id.* The settlement overturned a zoning board decision that denied zoning for the treatment center. Now the treatment center can open its facilities almost anywhere in the city. *Id.*

³⁶⁷ Pack v. Clayton County, 1993 WL 837007 (N.D. Ga. Aug. 27, 1993).

³⁶⁸ *Id.* at *4. The plaintiffs had some problems with the home conforming with the building code. *Id.*

³⁶⁹ *Id.* at *7-8.

³⁷⁰ *Id.* at *8; 28 C.F.R. § 35.130(b)(6) (1997). See *supra* note 2.

³⁷¹ Glover, *supra* note 248, at C1. In Albuquerque, New Mexico, citizens packed a public meeting to express opposition to group homes for troubled children. *Id.* The city government recognized that the ADA and the FHA prevent them from closing these facilities even though citizens are unhappy about their location. *Id.* More recent newspaper and magazine articles are increasingly becoming aware of the breadth of the ADA. *Id.*

³⁷² Musko v. McClandless, 1995 WL 262520, at *1 (E.D. Pa. May 1, 1995). Many cases have signaled to the "nation that the ADA has teeth." Seaton, *supra* note 85, at 71.

³⁷³ Musko, 1995 WL 262520, at *6.

³⁷⁴ *Id.* at *1.

different than others who were subject to zoning codes based on his disability.³⁷⁵ Thus, the plaintiff had a claim under the ADA that pertained to zoning. Because of the courts varying interpretations of the ADA, many plaintiffs, who cannot bring their claims under the FHA, are being denied the use of the ADA in their claims that expressly concern people with disabilities. The case history suggests no fixed pattern and the courts have not achieved uniformity in their respective rulings.

In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, a case from the district court in West Virginia, the court recognized that the a fire regulation scheme qualified as an "activity" by a local licensing board.³⁷⁶ Buckhannon operates as a residential board and care home. Under West Virginia law, all of the residents must have the ability to escape from "situations involving imminent danger" without assistance in compliance with the West Virginia law for fire regulation schemes.³⁷⁷ When Buckhannon tried to renew its operation license, the Office of Health Facility Licensure and Certification (OHFLAC) denied their license because some of the residents would not be able to remove themselves from the home without assistance. In assessing the defendant's motion to dismiss, the court found that the Buckhannon had sufficiently stated a claim under the FHA and the ADA.³⁷⁸

In assessing the plaintiff's claim under the ADA, the court specifically outlined the holding in *Innovative Health Systems, Inc. v. City of White Plains*.³⁷⁹ The court held that the law imposed requirements on Buckhannon as a facility that serves the disabled, which were not imposed on other facilities that serve the disabled.³⁸⁰ Furthermore, the court held that the parties did not dispute that OHFLAC is a public entity.³⁸¹ This court found that the licensing scheme of OHFLAC constituted an activity under the ADA. Unlike the court in *Innovative*, which relied on the legislative history, in part, to determine that zoning was an "activity" under the ADA, the court in *Buckhannon* did not find that the legislative history was a necessary factor in determining that a

³⁷⁵ *Id.* at *6.

³⁷⁶ *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 19 F. Supp. 2d 567 (N.D. W.Va. 1998).

³⁷⁷ *Id.* at 570.

³⁷⁸ *Id.* at 571.

³⁷⁹ *Id.* at 573-76.

³⁸⁰ *Id.* at 573.

³⁸¹ *Id.*

licensing procedure constituted an "activity" under the ADA.³⁸² According to this district court, the language of the ADA unambiguously covered this licensing and fire regulation scheme as part of a public entity's activities.³⁸³ While the *Buckhannon* court construed the ADA broadly to include a fire regulation scheme as an "activity" and relied on the *Innovative* decision in the process, enough ambiguity exists in zoning and licensing schemes to warrant action by Congress to settle the ambiguity that the Second Circuit suggested in *Innovative*.³⁸⁴ Because of the many different types of procedures used by public entities to regulate the way the disabled live, from the fire regulations in *Buckhannon* to the zoning procedures in *Innovative*, Congress should address those areas of ambiguity like zoning that exist in allowing the disabled to live in the community.

Although the legislative history of the ADA suggests that zoning is a "service, program, or activity" under the ADA,³⁸⁵ Congress should amend the ADA to specifically include zoning as an activity and grant a cause of action for outpatient treatment centers who are discriminated against on the basis of a disability because the applicability of zoning to the ADA is unclear. At the same time, the courts should continue to use the FHA to apply to group homes as it has done in the past.

VI. PROPOSED STATUTORY AMENDMENT

The ADA is a relatively new federal Act that Congress passed in the early 1990s.³⁸⁶ After a period of transition, the public can now finally assess how the ADA has affected the lives of disabled people.³⁸⁷ Because

³⁸² *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 19 F. Supp. 2d 567, 574 (N.D. W.Va. 1998).

³⁸³ *Id.*

³⁸⁴ *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997).

³⁸⁵ 28 C.F.R. § 35.130 (a) (1997). The DOJ in its analysis of title II of the ADA has interpreted it to reach all actions by public entities including zoning enforcement actions. *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 233 (S.D.N.Y. 1996), *aff'd*, 117 F.3d 37 (2d. Cir. 1997). See *supra* note 1.

³⁸⁶ VOICES OF FREEDOM, *supra* note 185, at 1.

³⁸⁷ *Id.* According to a pamphlet that periodically assesses the implementation of the ADA:

Although five years is certainly not enough time to expect complete attainment of these far-reaching goals, five years do provide a sufficient time frame to assess the degree to which efforts to implement the law have resulted in progress toward long term success. Without such a "reality check," it is possible that promising approaches currently is[sic] use could go unnoticed and loose[sic]

application of the ADA case law and statutory material and its application to zoning is so ambiguous, Congress should clarify the Act and specifically provide that zoning is a service, program, or activity of a public entity and that the ADA protects the disabled from discrimination in the area of zoning. Congress must specify how the ADA applies to zoning or cases will end with the same plight as *Innovative*.³⁸⁸

Now that the ADA is fully operational, the DOJ, the agency that enforces the ADA, is bracing for litigation.³⁸⁹ The federal authorities are arming themselves to try ADA cases and to set precedents.³⁹⁰ *Innovative* is the first appellate court decision to use the extensive material that the government has published on the Act in order to specify how local governments, states, and businesses should comply with the Act.³⁹¹ However, litigation is not the answer for human service facilities like

support, or that misplaced efforts at implementation could lead the Nation away from the attainment of the goals of the Act.

Id.

³⁸⁸ See *supra* Section V and accompanying text.

³⁸⁹ T.J. Howard, *Fear over Disability Law Eases, But Work Remains*, CHI. TRIB., July 11, 1993, at S16. The DOJ has increased the size of its legal department. *Id.* The ADA gave "express power" to the courts "to modify discriminatory practices." Bill Alden, *Disability Act Used to Fight Zoning Case: White Plains' Bid to Bar Drug Facility Fails*, N.Y.L.J., June 18, 1996, at 1, col. 5. The ADA affects much more than local regulations and administrative rules. *Id.* The National Council on Disability suggests that, unlike the Rehabilitation Act, people have voluntarily complied with the ADA. VOICES OF FREEDOM, *supra* note 185, at 22. The Council credits the perseverance of the disabled in their quest for civil rights and the covered entities who have expended the money to comply with the ADA. *Id.*

³⁹⁰ Howard, *supra* note 389, at S16. The cases may make people aware of the top priority that government has for compliance with the mandates of the ADA. *Id.* Some people will not comply with the law unless the government and disability interest groups act as watchdogs. *Id.* Others say that the mandates for the ADA are too vague, and the courts will ultimately have to define the prerogative of the ADA. Wilma Randle, *After a Year, ADA's Impact Is Barely Felt*, CHI. TRIB., July 26, 1993, at S. Weber, *supra* note 156, at 1117.

³⁹¹ *Treatment Provider, N.Y. Community Settle Bitter ADA Dispute*, ALCOHOLISM & DRUG ABUSE WK., October 13, 1997, at 4. According to Fishman, director of Innovative Health Systems, "[A]gencies that help people with disabilities frequently confront hostile communities who convince their local governments to deny zoning permits. Now municipalities should stop and think. Discriminating against people with disabilities not only violates civil rights but harms the entire community." *Id.* The appellate court judges for the Second Circuit agreed that "the city had little evidence to support the theory that the decision to deny the permits was anything more than capitulation to public pressure." *Drug Treatment Center Settles Zoning Discrimination Suit*, AIDS POL'Y & L., November 28, 1997.

Innovative.³⁹² While decisions in *Innovative* should help other treatment providers that are trying to establish programs and encountering neighborhood opposition, most human service facilities do not have the funds to engage in expensive litigation if opposition occurs.³⁹³ In any event, the lawsuit would inevitably delay the opening or discontinue the operation of such facility.³⁹⁴ While *Innovative* may have helped other treatment centers with zoning problems, *Innovative* ultimately lost and had to remain in its old location.³⁹⁵

Although the explanation in the TA Manual indicates that zoning is an activity covered by the ADA, the issue of zoning is still vague when coupled with other legislative history that indicates that Congress intended the FHA to supplement the ADA in the area of zoning.³⁹⁶ In order to achieve uniformity and clarity in the interpretation of the ADA, Congress should amend the Act to clarify that the ADA protects zoning that benefits the disabled in the case of housing, businesses, treatment centers, and other aspects of public life.³⁹⁷

³⁹² *Id.* Fishman lamented the toll of the litigation on the treatment facility: "Our dreams were shattered a long time ago, and little by little, I've given up the dream of having a program as I visualize [downtown and closer to its participants]." *Id.*

³⁹³ *Appellate Court Ruling Boosts Providers in Local Zoning Disputes*, ALCOHOLISM & DRUG ABUSE WK., July 14, 1997, at 1 [hereinafter *Providers*]. According to Fishman, "I think the city portrayed this settlement as a business decision'... 'We were on a winning track, but we had to settle because we were running into financial difficulty. It's less than we wanted, but we've been paying rent for the past three years.'" Prenon, *supra* note 266, at 10.

³⁹⁴ Dear, *supra* note 38, at 288. "Many land-use decisions involve some sort of litigation.... Generally...the courts should be avoided if at all possible. Lawsuits are expensive, time consuming, and almost always counter-productive to the goal of community integration. They also tend to delay a facility's opening while the case is being considered." *Id.*

³⁹⁵ *Providers*, *supra* note 393, at 1. *Innovative* settled after three long years of appeal and depleted funds. *Id.* The treatment center gained \$300,000 in exchange for agreeing not to move to the leased site downtown. Prenon, *supra* note 266, at 10. Fishman added, "I think people with prejudice are more dangerous to society than those with diseases'... 'The City of White Plains has left a legacy for behaving in an inappropriate way.'" *Id.*

³⁹⁶ Under title II, the House Report even admits that title II, pertaining to discrimination, is purposely vague: "The Committee has chosen not to list all the types of actions that are included within the term 'discrimination,' as was done in titles I and III, because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments." H.R. REP. NO. 101-485 (II), at 84 (1990), reprinted in 1990 U.S.S.C.A.N. 367.

³⁹⁷ Seaton, *supra* note 85, at 72. Admittedly, the ADA has gone "to great lengths to assure that the accommodations required of public entities in no way cause a division between services provided for disabled persons and those provided for the rest of the population."

In order to include zoning in the statute, Congress should make the broad language of Title II more specific to ensure that public entities do not discriminate in zoning. Title II, embodied in 42 U.S.C.A. § 12132 (1997), states:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

In order to include zoning, Congress should amend this provision to state:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity. *The activities of a public entity include, but are not limited to, all zoning decisions.*

In order to meet the goals of the ADA and to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,"³⁹⁸ the language of the statute should explicitly define zoning.³⁹⁹ A specific allusion to zoning will force uniformity in city zoning decisions and clarity for the courts. This change in Title II of the ADA would allow places like Innovative Health Systems to operate in areas most conducive to serve their patients. Furthermore, allowing the ADA to cover zoning for outpatient treatment centers serves one of the major goals behind the ADA: to allow the disabled to live independently.⁴⁰⁰ Congress has indicated their intention for non-residential zoning based on the FHA, the Rehabilitation Act, the Civil Rights Restoration Act, and the ADA. If the disabled are to achieve independence and a community is to accept the disabled as they are, this

Id. However, now the drafters need to clarify the breadth of their mandate, keeping in mind their desire to integrate the disabled in mainstream society. *Id.*

³⁹⁸ 42 U.S.C.A. § 12101 (1997).

³⁹⁹ See *supra* Sections II-IV.

⁴⁰⁰ 42 U.S.C.A. § 12101 (1997). See *supra* Section V.

is the only interpretation that makes sense both in a historical context and a textual interpretation.

The Rehabilitation Act faced similar obstacles after its enactment. Congress passed the Civil Rights Restoration Act to counter the interpretation that the Court used in its definition of financial assistance under the Rehabilitation Act in *Grove City College*.⁴⁰¹ Presently, under the ADA, Congress must address an area that has proven to be vague and subject to confusion by the courts.⁴⁰² Congress must define a "service, program, or activity" to include within its protection zoning under the ADA in order to protect treatment centers like Innovative from extensive litigation and the denial of proper zoning as a result of discrimination. Although the ADA's directives suggest that the inclusion of zoning to protect the disabled would further its mission to full participation in society and independent living, Congress must clarify this message to courts who are unwilling to invoke the broad sweep that Congress recommended that courts use in interpreting the ADA. Unless Congress initiates an amendment that mandates comprehensive coverage of zoning under the ADA, lawsuits will continue to emerge and frustrated judges will have to interpret the confusing language of three federal acts.⁴⁰³

VII. CONCLUSION

The Rehabilitation Act supported the disability rights movement and its quest for autonomy. With the promulgation of the FHA and its subsequent amendments, the disabled gained more rights, granting them freedom from discrimination in the area of housing.⁴⁰⁴ Congress has

⁴⁰¹ 465 U.S. 555 (1984).

⁴⁰² In other areas, the ADA has given specific mandates. For example, the ADA set guidelines for curb cuts, even making a date that cities have to install curb cuts on their sidewalks. Seaton, *supra* note 85, at 72. Tyler v. City of Manhattan, 849 F. Supp. 1429, 1431 (D. Kan. 1994). "Curb cuts are ramps in a curb that create a gradual downward slope until the sidewalk is flush with the street. A ramp's slope is gradual enough that its use requires no strain, and wide enough to enable one to maneuver a wheelchair with ease." Elin, *supra* note 253, at 296. Kinney v. Yerusalim, 9 F.3d 1067 (3d Cir. 1993) (holding that the city must make curb cuts in a street every time it resurfaces a street). In other areas, like zoning, the ADA gives no particular mandates.

⁴⁰³ Burgdorf, *supra* note 89, at 430. Burgdorf states: "Legal commentators have extensively described and lamented the flaws in the wording, interpretation, and implementation of federal disability nondiscrimination statutes prior to the ADA." *Id.* at 431.

⁴⁰⁴ *Id.* Further, the FHA is intended to discourage obstructions from the community or neighborhood that occur when the disabled want to reside in a particular area. *Id.*

suggested that the ADA has wide breadth and grants the disabled autonomy and a chance to fully participate in society. At least in the area of zoning, the breadth of the ADA is unclear.

Innovative would have had an easier time establishing a facility for recovering addicts, the disabled of the community, with a clear mandate of congressional intent for the ADA's application to zoning. Furthermore, including zoning within the ADA also prevents courts from lawmaking and delegates this role to its proper place, the legislature. Courts are reluctant to become involved defining an unfunded federal act that dictates policy to local government.⁴⁰⁵ Congress should provide a precise definition as to what constitutes a "program, service, and activity" under Title II of the ADA in order to remove the ambiguity of the statute and to allow courts to render consistent meaningful decisions in this area. By removing this vagueness, the ADA will fulfill the congressional intent of eliminating the discrimination that has affected the disabled historically.⁴⁰⁶

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⁴⁰⁵ Neighborhoods are frustrated that the local government cannot stop the establishment of treatment facilities. Ed Asher, *Youth-Home Law Needs to Be Reviewed, Councilor Says*, ALBUQUERQUE TRIB., Feb 18, 1997, at A1. Federal legislation has bound the states to practices unfavorable to their constituents. In addition, many municipalities do not have the funds necessary to make their city accessible to the disabled. Elin, *supra* note 252, at 306. Although the cities can make an "undue burden," the cities must show that the cost will bring "significant difficulty or expense." *Id.* at 306. The "undue burden" standard is a very difficult one to meet. *Id.*

⁴⁰⁶ According to Shapiro, "There is no pity or tragedy in disability, and that it is society's myths, fears, and stereotypes that most make being disabled difficult." SHAPIRO, *supra* note 1, at 5.