

**Siting Drug and Alcohol Treatment Programs:
Legal Challenges to the
NIMBY Syndrome**

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Introduction

All neighborhoods and most families in the United States today have witnessed or suffered the tragic effects of alcohol and drug abuse. In fact, as recently as 1990, a Washington Post-ABC News poll found that 40% of Americans believed that drug abuse was the most serious problem facing the nation.¹ Yet, while many recognize the pervasiveness of alcohol and drug problems, such widespread concern has not always resulted in communities welcoming alcohol and drug treatment programs into their neighborhoods. Community opposition — commonly known as the "NIMBY" (Not In My Backyard) Syndrome — often prevent or delay the siting of a treatment program.

This manual examines the legal remedies available to alcohol and drug treatment providers who wish to challenge discriminatory zoning and siting decisions that result from the NIMBY syndrome.

The NIMBY Syndrome is not new and does not arise solely in opposition to alcohol and substance abuse treatment programs. Community resistance is often mobilized to prevent the opening or expansion of many types of health and social services facilities, including homeless shelters, group homes for the mentally ill, half-way houses for ex-offenders and health-related facilities for persons with AIDS.

¹ Noted in National Association of State Alcohol and Drug Abuse Directors, Treatment Works 3 (1990).

The opening of an alcohol and drug treatment program, regardless of modality, is often met by community resistance. Neighborhood opposition has delayed or prevented the siting of many treatment programs, and even disrupted the relocation of existing programs. Unfortunately, even if a program ultimately prevails, the fight can be costly, not only in terms of resources, but in its effects on the clients as well. In one instance, a New Jersey town's campaign of harassment against a small group home caused each of the home's residents to relapse.²

Communities may battle to keep out alcohol and drug treatment programs for a number of reasons. Residents may fear that property values will decline, and merchants may be concerned that crime will increase. A community may believe that a treatment program will bring in "outsiders" — perhaps outsiders of a different class or ethnic group. The community may believe that there is already an over concentration of services in the vicinity, or it may simply confuse the solution to the problem with its manifestations. One provider remembers an opponent to his program stating, "this program shouldn't be here. There's already a homeless shelter and a crack house down the street."

In almost every instance, a community's fear of having an alcohol or drug treatment program located within its borders is unfounded. In reality, treatment programs pose no legitimate danger to the health or welfare of the residents, nor do

² June 1993, Telephone conversation with Steve Polin, Oxford House, Inc.

they draw addicts and pushers to the area. In fact, alcohol and drug treatment programs improve neighborhoods by helping people get well.

If a locality attempts to keep out a treatment facility through discriminatory zoning ordinances and practices, these actions may be more than just unreasonable: they also may be unlawful. Federal disability-based anti-discrimination laws, including the Fair Housing Act, the Rehabilitation Act and the Americans With Disabilities Act, and the equal protection clause of the United States Constitution, and many individual state laws have been used successfully to overturn the actions of local governments that preclude the siting of both out-patient and residential alcohol and drug treatment programs.

This manual discusses ways an alcohol or drug treatment provider can use the law to challenge the NIMBY Syndrome or to overcome it through other means. This manual is intended to provide technical assistance to treatment providers. While it is as comprehensive as possible, it is no substitute for professional legal advice on your specific situation. The interpretation of the laws may vary slightly from state to state, and the case law is always evolving. Therefore, it is essential that treatment providers consult an attorney throughout the siting process.

This information is presented in four chapters.

Chapter I: Zoning and Other Requirements That Affect Siting

This chapter provides general information on zoning ordinances and other codes that affect program siting. While these regulations vary from locality to

locality, this chapter offers information helpful to understanding the basis for zoning ordinances and decisions, explains variances and special use permits, and summarizes the procedures such applications might entail.

Chapter II: Legal Challenges to Siting Barriers

This chapter describes the federal laws and constitutional protections that a program can use to challenge a town's refusal to allow the siting of a facility. These laws include the Fair Housing Act, the Americans with Disabilities Act, the Rehabilitation Act, the Equal Protection Clause of the 14th Amendment of the Constitution, and state zoning enforcement procedures. This chapter also includes a review of the case law developed under each statute.

Chapter III: Application of The Legal Principles

This chapter applies the legal principles outlined in Chapter II to two representative case studies for in-patient and out-patient programs.

Chapter IV: Building A Case: To Site or Sue

Lawsuits may be won or lost long before they are filed. Using a model developed by the National Institute on Drug Abuse (NIDA), this chapter provides advice on finding allies in the community, assuaging neighbors' fears, and averting local opposition. It also helps programs assemble information

and documents throughout the siting process which may later prove crucial to building a case.

The primary message of this manual is that, while some communities may continue to oppose the opening of new programs, treatment providers should not be discouraged. There are various ways to defuse, confront and overcome the NIMBY Syndrome short of going to court. Furthermore, if a treatment provider must file suit, he or she should be confident in the knowledge that in case after case, in the face of groundless and irrational community fears, treatment programs have won the right to open their facilities and treat addicts in need.

Chapter I

Zoning and Other Requirements That Affect Siting

Zoning ordinances are by far the most common barriers treatment programs face in attempting to site or relocate their facilities. Sometimes, a town's zoning ordinances are written specifically to exclude facilities such as an alcohol or drug treatment program. Other times a municipality will interpret its zoning laws to keep out a program or deny a program the variance necessary to comply with the zoning requirements. In either case, a treatment program may face a difficult battle winning the permission it needs to open its doors. It may even be forced to engage in a prolonged and costly legal battle before it can prevail.

This chapter discusses how zoning and other ordinances may affect the siting of alcohol and drug programs. The chapter outlines the legal basis of zoning ordinances, explains how such ordinances are applied, defines such terms as special use permits and variances, and introduces some of the basic concepts central to challenging unfavorable zoning decisions. This chapter also addresses other types of codes that a newly opened program may have to meet, and attempts to identify points throughout the siting process that may require public hearings or otherwise present an opportunity for community opposition to rally against a program. In contrast, advance planning can also create the conditions to enable the director of a proposed alcohol and drug facility to gain community support.

I. Legal Basis of Zoning Ordinances

Zoning ordinances are local laws that regulate the ways in which a landowner may use his or her property. Zoning regulations commonly divide a community into areas where specific types of development are allowed to occur: they limit the construction of houses to residential areas, the placement of shopping malls in commercial zones, the location of a garment factory to a manufacturing zone and a steel mill to a zone designated for heavy industry. These limits are called land use restrictions. In addition to land use restrictions, zoning ordinances may impose numerous requirements on the way a building is constructed or situated on the property. For example, a zoning ordinance might limit the maximum height and floor size of a building, or require that it be set back a certain number of feet from the road and adjoining lots.

The authority to make zoning decisions is usually conferred upon a local government through a city charter, provisions in the state constitution, or through legislation. Such authorization is called an "enabling act."³ Most enabling statutes are modeled on the Standard Zoning Enabling Act, a federal law drafted in 1922 by the Hoover Commission to provide a benchmark for the patchwork of zoning laws that were springing up throughout the country at that time.

³ Robert R. Wright & Susan Webber Wright, Land Use 136 (2d ed. 1985).

However, the existence of an enabling act does not provide a local government with unlimited and unchallengeable prerogatives in zoning. Zoning ordinances must have a rational basis in their enactment and enforcement. If not, they may be challenged in court on the ground that the town has overstepped its authority, sometimes referred to as the "police power." The police power is a legal concept which gives government the right to make decisions that advance and protect "the health, morals, safety and general welfare of the community,"⁴ as long as such decisions are not arbitrary, unreasonable or capricious. If a zoning ordinance is unjustifiable or has no rational underpinnings, then it is an abuse of the police power and may be struck down by a court.

For example, a town could prohibit a hospital or a nursing home from being located on a flood plain. Such an ordinance would be a legitimate use of the police power in that the town is acting out of a reasonable concern for the safety of vulnerable residents, or to protect important facilities.

On the other hand, zoning decisions may be open to attack on the grounds that they are unreasonable if a town chooses to interpret or apply its ordinances selectively or inconsistently. For example, a court in upstate New York found that a city zoning board arbitrarily and capriciously exercised its authority when it denied a drug treatment program's application for permission to site a facility, since the program had met all the requirements set out in the zoning ordinance and because

⁴ Id. at 133.

other similarly classified facilities (including two nursing homes) had been allowed to open.⁵

II. Zoning and Discrimination

For the most part, a community cannot use its zoning ordinances to discriminate against classes of people that it does not want to accept, such as alcohol and drug dependent persons. Courts have consistently ruled that if an ordinance is intended to exclude certain groups from the community, or in some cases, if an otherwise "neutral" ordinance has a discriminatory effect, then the zoning decision may be voided on the grounds that it violates anti-discrimination statutes or rights and protections guaranteed by the United States Constitution.

Chapter Two of this manual explains how specific provisions of the anti-discrimination laws and the Constitution relate to zoning and discuss their use in challenging zoning decisions.

III. What a Zoning Ordinance Entails

Zoning ordinances divide localities into different districts, usually based upon the type of land use permitted within each area. For example, one zone might be reserved for multiple-family dwellings and another for small-scale commercial use. In most instances, the ordinance will be accompanied by a map that delineates the

⁵ Vento v. Graziano, No. 87-225 (N.Y. Sup. Ct. April 17, 1987).

boundaries of each zoning district. A town may have any number of zoning districts, and each district may vary in the diversity of uses permitted within it.

On the whole, the responsibility for zoning rests almost entirely with local governments. This means that the specific requirements of zoning ordinances will vary from municipality to municipality, and your ability to site your program in a desired location will depend upon the local ordinances governing the use of that land. For example, New York City allows both residential and out-patient, non-profit drug treatment programs to be sited in all residential and most commercial zones, but not in areas zoned for manufacturing. Other localities might be more restrictive, e.g., a town that limited "health care facilities" to a specific kind of commercial zone might require a methadone maintenance treatment program (MMTP) to be sited in that particular area, along with doctor's offices, hospitals or family planning clinics.

Zoning ordinances typically regulate the following aspects of development:

- site layout (such as set-back and lot size restrictions)
- structural requirements (such as limits on the height of a building, the number of units and floor area ratios);
- uses to which the property may be put and any permitted exceptions, e.g., an area zoned for single family residences might make exceptions for light commercial structures such as convenience stores.
- important procedural issues (who determines whether a building plan conforms with the ordinance, whether public hearings are required prior to approval, and the mechanisms for appealing an adverse determination)⁶.

⁶ John M. Levy, Contemporary Urban Planning 103 (2d ed. 1991).

The ordinance also may describe the purpose and intent of the requirements included in the ordinance. Such language may be drawn from the "master plan," a statement reflecting the town's goals and objectives for controlling growth (usually developed by the local planning commission or a planning consultant). The master plan, which is ideally implemented after public hearings that allow the community an opportunity to voice its concerns or approval, provides a coherent foundation for the town's zoning ordinances, thereby protecting the town from legal attack on the ground of irrational decision-making. However, a master plan is not essential as long as the town can demonstrate that its zoning ordinances are the product of comprehensive and reasonable decision making.

Individuals can usually review the zoning ordinance and the zoning map at a local library or the town planning office.

IV. Exceptions to Zoning Ordinances

Once a program has selected a potential site on which to locate, it will then have to consider whether the use of that site conforms with the uses allowed under the governing zoning ordinance. As mentioned earlier, most of the zoning problems that treatment programs encounter involve complying with (or applying for exceptions to) land use restrictions.

If a facility does conform, then it may proceed "as of right." Building "as of right" means that the program to be sited falls within the land uses allowed within the

zoning district. For example, if an alcohol and drug treatment program wanted to open a large, residential treatment center in an area zoned for high-density apartments or multiple family dwellings, then it is likely that the proposed facility would fall within that classification and would not conflict with the land use restrictions of the zoning ordinance. However, the program might still have to meet other criteria in the ordinance, e.g., site plan and structural requirements (though these are often flexible and can sometimes be negotiated with the town's planning or zoning board).

It is important to remember that the locality decides how a proposed development or project should be classified. Usually, a town officer (such as a building inspector or a planner) will review the plans for the proposed development and make a determination as to whether the plans meet criteria set forth in the zoning ordinance, including the land use restrictions. For example, a town could decide that the residential treatment center, in the example above, is a business and must therefore be located in a commercial rather than a residential zone. A program that receives an adverse decision, can appeal to an administrative body, commonly called a zoning board of adjustment.

If your program is not permitted "as of right" on the property you have selected, then you may have to ask the municipality for an exception to the zoning ordinance. Two common types of exceptions are "special use permits" and "variances."

A. Special Use Permits

Special use permits (or conditional use or special exception permits) enable certain types of development to occur in zones where they would not normally be eligible for siting. The specific types of land uses eligible for a special use permit usually are stated in the zoning ordinance, along with the criteria for approval. Special use permits are designed to allow the community some flexibility in zoning, while maintaining regulatory control. For example, a community may choose to allow day care centers, gas stations and restaurants to be located in a residential zone through special use permits, so that the residents can have those services close at hand, while the community's planners can limit their proliferation and the impact they have on the neighborhood.

In reviewing an application for a special use permit, the board of adjustment or the planning agency will examine: (1) whether the zoning ordinance allows a special use permit to be granted for the category of land use that is being proposed; (2) the effect of the proposed development on neighboring property use and values; (3) the compatibility of the proposed development with neighboring uses and facilities; and (4) its impact on "public health, safety, morals, or general welfare."⁷ These or similar standards should be included in the actual ordinance, and you should be prepared to address them in the process of applying for a special use permit.

⁷ Peter Salsich, Jr., Land Use Regulation 193 (1991).

For example, suppose you are attempting to locate an out-patient facility on a crowded main street which is zoned for commercial use and the ordinance requires any "health, educational or social services facility" to obtain a special use permit. It is likely that the board of adjustment will be concerned about the impact your program could have on traffic patterns and parking availability. To address this concern, you may want to inform the board about the percentage of your clients who use public transportation or commission a planning consultant to do a trip generation study.

In addition, the board of adjustment may also be required to hold a public hearing before a special use permit can be granted. If this is the case, you should be prepared to encounter community residents who may oppose the siting of your program. Chapter Three describes objections that communities typically voice in opposition to treatment programs and suggests strategies to allay such fears.

B. Variances

If a zoning ordinance does not provide for the issuance of a special use permit, you may want to consider asking the board of adjustment to grant a different type of exception, called a "variance."

There are two types of variances: "area" variances and "use" variances. An "area" variance eases the layout or structural requirements that make building on a piece of property difficult "due to some odd configuration of the lot or some peculiar

natural condition which prevents normal construction in compliance with zoning restrictions."⁸

"Use" variances allow exceptions to the land use restrictions contained in a zoning ordinance. For example, if you wanted to open a small residential facility in an area solely zoned for single family residences, and the ordinance makes no allowances for any other use through a special use permit, you would need to apply for a use variance before you could open your program.

Variances are most commonly granted where the enforcement of the zoning ordinance would result in an "unnecessary hardship" for the property owner. "Unnecessary hardship" is usually interpreted to mean that a strict adherence to the limitations imposed by the zoning ordinance would likely deny the landowner a reasonable return on the value of his or her property.⁹

However, some states allow variances to be granted in instances where the proposed land use will contribute to the public good or the welfare of the region (as long as the variance does not contradict the purpose and intent of the zoning plan and the ordinance).¹⁰ This standard is clearly more applicable to an alcohol and drug treatment program than the unnecessary hardship standard, and more advantageous, since a treatment program should not have difficulty demonstrating that it would provide a public service or address a need in the community.

⁸ Wright & Wright, supra, at 146.

⁹ Salsich, supra, at 195-96.

¹⁰ Id. at 196.

In order to obtain a variance, you will have to make an application to the local zoning board of adjustment. This process may be time consuming and will likely involve public hearings. Since use variances allow exceptions to existing zoning laws without the explicit approval of the ordinance, they are often highly controversial.

V. Other Barriers to Siting

While zoning laws present the most common obstacles to treatment program siting, they are not the only legal and procedural requirements with which your program may have to comply. Before a program can be opened, it may also have to meet state certification or licensure requirements, provide an environmental impact statement, obtain building permits and certificates of occupancy, and comply with health, safety and fire codes.

In some cases, these requirements pose more formidable barriers than zoning ordinances. In a limited survey of 45 alcohol and drug treatment providers seeking licensure, the California Department of Alcohol and Drug Programs' NIMBY Working Group found that the number of programs needing to bring their facilities up to local fire standards in order to obtain fire clearances was greater than the number of programs that identified problems with zoning restrictions or community opposition¹¹. In New York State, actions taken by state agencies (such as the licensure of a drug treatment facility) must be accompanied by an environmental

¹¹ Memorandum from the NIMBY Workgroup, Department of Alcohol and Drug Programs, State of California Health and Welfare Agency 4 (Mar. 24, 1993) (on file with author).

quality review, which includes an examination of a proposed facility's impact on the character of its location. Some communities, unable to deny a special use permit or a variance to an unwanted drug treatment program, have attempted to exploit the environmental quality review process in order to delay or stop the treatment program from siting its facility.

In addition, environmental approvals or applications for state licensure may require the town to conduct public hearings or the program to submit proof of community acceptance. In New York City, all organizations operating facilities under contract with the municipal government must undergo an extensive process of public review and consultation, called "Fair Share," before a new program can be opened or an existing one expanded. While this process has successfully defused much community distrust and resistance in New York City, public notice requirements often provide foes in the community with an opportunity to intervene and influence the process to the detriment of the proposed facility.

Conclusion

Local zoning ordinances and other regulatory requirements will greatly affect your ability to site your program successfully. You may encounter instances where zoning ordinances are employed by a resistant community to delay or prevent your treatment program from opening; or you may face legitimate zoning difficulties that could require you to modify your plans for the facility, apply to the zoning board of adjustment for a special use permit or a variance, or choose another site altogether.

In either case, preparation is critical. When you select the location for your program, make sure you know the zoning restrictions governing the use of land in that area and the types of exceptions allowed through special use permit. Familiarize yourself with other aspects of the zoning ordinance: how many residents will the zoning ordinance allow in your facility, or how much parking must you make available for clients and staff? Make sure you know what offices must review your plans — is it the planning commission, the building inspector or the community board? Be ready to provide information about the effect your program will have on neighbors and the burden it will place on local services.

Understanding the process does not guarantee a successful outcome. However, choosing a location that is appropriately zoned, meeting with the town's planners and incorporating their suggestions into your building plans, attending public hearings and addressing community concerns, all improve your chances. If the community still refuses to approve your facility, you will have at least complied with all necessary procedural requirements and begun to set the groundwork for your legal challenge.

Chapter II

Legal Challenges to Siting Barriers

It is clear that efforts to site alcohol and drug treatment programs will not always be successful and legal interventions may be necessary to force local officials to approve a zoning variance, grant a special or conditional use permit, implement fire and safety codes fairly or stop interfering with siting plans. Understanding the various legal grounds for challenging an adverse siting decision is important at all stages of the siting process. If a program identifies potentially illegal or discriminatory activity early in the process, it can alert local officials and possibly persuade them to comply with the law. This will avoid expensive and protracted legal battles for all.

There are several legal avenues that can be pursued to challenge adverse siting decisions by local officials and/or actions by some private individuals or groups that seek to block the establishment of treatment programs. First, lawsuits may be filed in state court to appeal a zoning decision as violating local zoning ordinances, state zoning laws or state constitutional equal protection guarantees.

Second, lawsuits may be filed in state or federal court challenging zoning decisions and other private actions as discriminatory on the basis of disability under the Rehabilitation Act,¹² the Fair Housing Amendments Act¹³ (hereafter "FHAA") or

¹² 29 U.S.C. §§ 701-796 (1988). The Rehabilitation Act was enacted in 1973 and has been amended on several occasions to both clarify coverage of individuals with drug and alcohol problems and, most recently, to remove coverage for individuals who currently use drugs illegally.

¹³ 42 U.S.C. §§ 3601-3631 (1988). The Fair Housing Amendments Act was enacted in 1988.

the Americans With Disabilities Act¹⁴ (hereafter "ADA"). These laws protect individuals with disabilities — including individuals with alcohol and drug problems — against discrimination in housing, in the provision and enjoyment of benefits and services that receive federal financial assistance, and in any official state or local action. Such official action includes, for example, the way in which a local government implements its zoning ordinances and health and safety codes or decides whether and where a treatment program may be established. Cases may also be brought in federal court challenging adverse decisions under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The following legal discussion focuses first and primarily on how programs can use the three federal anti-discrimination laws to challenge the refusal to site alcohol and drug treatment programs. These statutes establish general anti-discrimination principles that apply to all zoning decisions regardless of a program's location. They have been enacted for the very purpose of challenging actions that are based on the irrational fears and stereotypical attitudes about persons with alcohol or drug problems, which so often underlie opposition to the siting of programs. In addition, these statutes enable individuals and programs with limited resources to initiate legal challenges by permitting the prevailing party to recover attorney fees and many other costs associated with litigation.

¹⁴ 42 U.S.C. §§ 12101-12213 (Supp. 1991). The Americans With Disabilities Act was enacted in July 1990.

The legal discussion also briefly addresses state court actions and constitutional challenges to adverse siting decisions. It is difficult to provide more than a general framework for resolving disputes in a state court zoning action because state and local zoning standards vary dramatically. With regard to constitutional challenges, few cases will be resolved on this basis because most courts will not consider a constitutional claim if the case can be resolved instead on a statutory claim — such as a claim under the Rehabilitation Act, the Fair Housing Amendments Act or the Americans with Disabilities Act.¹⁵ In most cases, the statutory claims overlap with the constitutional claims and, indeed, provide greater protection, making a constitutional challenge unnecessary.

I. Anti-Discrimination Laws

The Rehabilitation Act, the Fair Housing Amendments Act and the Americans With Disabilities Act are three powerful tools to challenge both official and private barriers to siting treatment programs. Taken together, the three laws establish the basis for challenging virtually all discriminatory siting decisions. The three laws build on one another by applying consistent definitions and non-discrimination standards. While there is substantial overlap in terms of who is protected against discrimination, who can sue and be sued under the three laws and how discrimination is proved, there are important differences in applying each law.

¹⁵ It is a standard principle of jurisprudence that courts should avoid making constitutional decisions unless necessary.

It is important to understand the following seven issues when deciding how to apply these laws to your particular situation.

- Who is protected against discrimination?
- What actions constitute discrimination?
- Who can be sued?
- Who can sue?
- How is a claim of discrimination proven?
- What are the enforcement procedures?
- What relief is given if discrimination is proven?

The following discussion will answer each question for each of the laws.

A. Who is Protected against Discrimination

1. Definition of "Disability"

All three laws protect qualified individuals with current, past or perceived disabilities against discrimination. As a general matter, individuals currently using illegal drugs are **not** protected against discrimination under any of the laws.¹⁶

However, under the Rehabilitation Act and the ADA, even people currently using illegal drugs cannot be excluded from or denied health services or services provided in connection with drug rehabilitation, if they are otherwise entitled to such services.¹⁷

¹⁶ The Rehabilitation Act and the ADA specifically exclude an individual who is currently engaging in the illegal use of drugs, when a covered entity makes a decision on the basis of such current use. 29 U.S.C. § 706(8)(C)(i); 42 U.S.C. § 12210(a). The FHAA specifically excludes individuals who currently engage in the current, illegal use of or are addicted to a controlled substance. 42 U.S.C. § 3602(h).

¹⁷ Rehabilitation Act, 29 U.S.C. § 706(8)(C)(iii); Americans With Disabilities Act, 42 U.S.C. § 12210(c).

Furthermore, individuals with current alcohol problems,¹⁸ and those with past or perceived alcohol or illegal drug use problems, **are** protected against discrimination under each law, as is anyone participating in a supervised rehabilitation program who is not currently engaging in the illegal use of drugs.¹⁹

All three laws define disability in the same way.²⁰ A disability is:

- (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual;
- (2) a record of such an impairment;²¹ or
- (3) being regarded as having such an impairment.²²

¹⁸ Congress sought to deny protection to only those individuals who engaged in illegal activity. Therefore, all three statutes define "drug" as a "controlled substance," and illegal drug use as use that violates the Controlled Substances Act. Individuals who use a drug under the supervision of a licensed health care professional or in other ways that are authorized under the Controlled Substances Act are not considered to be using drugs illegally. 29 U.S.C. § 706(22)(A) and (B); 42 U.S.C. § 12210(d); 42 U.S.C. § 3602(h). Since alcohol is not a controlled substance, individuals who have a current alcohol problem are protected against discrimination just as an individual with any other covered disability.

¹⁹ The Rehabilitation Act and the ADA provide explicit coverage for an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and an individual who is participating in a supervised rehabilitation program. 29 U.S.C. § 706(8)(C)(ii); 42 U.S.C. § 12210(b). The FHAA does not contain the same explicit language, but the legislative history makes clear that Congress did not intend to exclude individuals who "have recovered from an addiction [sic] or are participating in a treatment program or a self-help group such as Narcotics Anonymous." H. Rpt. 100-711 (1988), U.S.C.C.A.N. 2173, 2183. In addition, one court has looked to the scope of coverage for individuals with drug problems under the ADA and the Rehabilitation Act to conclude that individuals who are participating in treatment are protected against discrimination under the FHAA. United States v. Southern Management Corp., 955 F.2d 914, 921-23 (4th Cir. 1992).

²⁰ 29 U.S.C. § 706(8); 42 U.S.C. § 12102(2); 42 U.S.C. § 3602(h). The FHAA uses the term "handicap" instead of "disability" but the terms are synonymous.

²¹ Federal regulations that implement the Rehabilitation Act, the FHAA and the ADA define the phrase "record of an impairment" as having a history of, or having been misclassified as having a physical or mental impairment that substantially limits a major life activity. See 1 C.F.R. § 326.103 (1993) 24 C.F.R. § 100.201 (1992); 28 C.F.R. § 35.104 (1992).

²² Federal regulations define the "regarded as" prong as meaning (1) a physical or mental impairment that does not substantially limit a major life activity but is treated by another person or public entity as constituting such a limitation; (2) a physical or mental impairment that substantially

Thus, an individual must prove two things: (1) he or she has a physical or mental impairment — either current, past or perceived — and (2) the impairment substantially limits a major life activity or does so because of the attitudes of others toward the impairment. Major life activities are defined as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.²³

Drug addiction and alcoholism are considered "physical or mental impairments" under all three laws,²⁴ and most courts have concluded, without much analysis, that individuals with alcohol and other drug problems have an impairment that substantially limits a major life activity.²⁵ Courts that have taken a closer look at this issue in the context of the FHAA have identified several ways in which alcohol and drug problems affect major life activities:

limits a major life activity only as a result of the attitudes of others toward such impairment; and (3) not having an impairment but is treated by another person or public entity as having such an impairment. 1 C.F.R. § 326.103; 24 C.F.R. § 100.201; 28 C.F.R. § 35.104.

²³ Id.

²⁴ Id.

²⁵ See, e.g., Sullivan v. City of Pittsburgh, 811 F.2d 171, 182 (3rd Cir.) (recovering alcoholics whose treatment program was being closed because of a denial of a conditional use permit were handicapped individuals), cert. denied, 484 U.S. 849 (1987); Nisperos v. Buck, 720 F. Supp. 1424, 1427 (N.D. Cal. 1989) (attorney who was participating in a drug treatment program is a handicapped individual because employer regarded him as having an impairment), aff'd, 936 F.2d 579 (9th Cir. 1991); Whitlock v. Donovan, 598 F. Supp. 126, 129 (D.D.C. 1984) (employee with a current alcohol problem is a handicapped employee), aff'd, 790 F.2d 964 (D.C. Cir. 1986); Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226, 1231 n.8 (7th Cir. 1980) (employee with a current alcohol problem is a handicapped person); and Wallace v. Veterans Admin., 683 F. Supp. 758 (D.Kan. 1988) (nurse in recovery from a drug problem is a "handicapped individual").

- In United States v. Borough of Audubon, N.J.,²⁶ the court concluded that recovering alcohol and drug dependent individuals who sought to reside in a group recovery home were "handicapped" under the FHAA because they were substantially limited in their ability to live independently or with their families. Moreover, because they could not live independently, the Court concluded that they were unable to care for themselves.²⁷

- In Oxford House, Inc. v. Township of Cherry Hill,²⁸ the court concluded that alcohol and drug dependent individuals who sought to reside in an Oxford House were "handicapped" because drug addiction and alcoholism disrupt personal relationships and impair one's ability to advance in education and employment and that such limitations continue at least through the early stages of recovery. An individual's desire to live in a supportive, group home setting in order to prevent relapse indicated to the court that these limitations continued even after an individual stopped using alcohol or drugs.²⁹

- In United States v. Southern Management, Corp.,³⁰ the court relied upon the external limitation imposed by the management company on recovering individuals, who were prohibited from residing in an apartment complex, rather than examine the individuals' functional limitations. The Court determined, under the "regarded as" prong that the recovering individuals were handicapped because they were denied the opportunity to obtain an apartment — a major life activity — as a result of the management company's perception that they would be undesirable tenants.³¹

²⁶ 797 F. Supp. 353 (D.N.J. 1991).

²⁷ Id. at 359.

²⁸ 799 F. Supp. 450 (D.N.J. 1992).

²⁹ Id. at 460.

³⁰ 955 F.2d 914 (4th Cir. 1992).

³¹ Id. at 919.

These same analyses can be applied to claims brought under the Rehabilitation Act and the ADA.

2. "Current" Illegal Use of Drugs

As noted above, individuals currently engaging in the illegal use of drugs are excluded from protection against discrimination under the FHAA. As a result, they, as well as programs that treat individuals who are beginning the recovery process and may still use drugs illegally, would not be able to challenge an adverse siting decision under the FHAA, at least on behalf of individuals who are still using drugs illegally.³² In several cases brought under the FHAA on behalf of individuals in recovery, the courts have made clear that anyone who resides in a recovery home or transitional house and seeks to find an appropriate site for the program will not be protected if he or she currently uses drugs.³³ In addition, entities that have sought to establish adult care facilities for individuals with AIDS or to establish recovery homes for drug addicts and alcoholics have implemented clear policies that require the immediate eviction of individuals who use drugs illegally in order to deal with community opposition.³⁴

³² See discussion infra at p. 47-57 regarding who can sue to challenge a discriminatory siting decision.

³³ Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 460 (D.N.J. 1992); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1342 (D.N.J. 1991).

³⁴ See, e.g., Support Ministries v. Village of Waterford, N.Y., 808 F. Supp. 120, 127 (N.D.N.Y. 1992) (adult care facility for persons with AIDS would be drug and alcohol free, with as-needed testing for use, and the residents, who would be required to sign a contract agreeing to honor the policy, would be evicted for violation of the policy); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. at 453 (under Oxford House policy, individuals who resume the use of alcohol and drugs are required to leave the house); Baxter v. City of Belleville, Ill., 720 F. Supp. 720, 733 (S.D. Ill. 1989) (operator of residence for persons with AIDS would reject any current illegal drug users as a resident).

The ADA and the Rehabilitation Act fill in the gap to a great extent in this area,³⁵ since both laws protect individuals who currently use drugs illegally to the extent they seek to obtain health services or other services associated with drug rehabilitation. This coverage is very important for purposes of challenging adverse siting decisions, since the refusal to site a program would deny health services to an individual with a current drug problem. Therefore, even individuals with current problems and programs who seek to provide treatment services to them can challenge discrimination in siting under the Rehabilitation Act and the ADA.

To ensure that individuals with drug problems get the maximum protection available under the FHAA, it is necessary to understand what constitutes "current" illegal use of drugs. Neither the FHAA nor the regulations enforcing the Act define the term "current." However, the regulations that enforce Title II of the ADA — the provisions under which siting challenges would be brought under that Act — do provide a definition that can be applied under the FHAA.³⁶ The term "current illegal use of drugs" is defined as:

³⁵ There may be some cases in which a private entity could discriminate against individuals with a current drug problem, but not be subject to suit under the ADA or the Rehabilitation Act. See discussion infra at p. 45-57 regarding who can be sued.

³⁶ Just as the Court in United States v. Southern Management Corp., 955 F.2d at 922, relied on the ADA's statutory language to conclude that Congress intended to protect a rehabilitated addict under the FHAA, courts should look to the ADA to fill in other gaps. This is particularly important to develop a consistent interpretation of disability discrimination statutes.

illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is a real and ongoing problem.³⁷

While the definition is not precise, each person must be assessed on an individual basis to determine whether he or she is using drugs and likely to do so in the future.

There may well be a tendency for communities, individuals and local officials who seek to prevent the siting of treatment programs and recovery homes to try to define this term broadly and thereby exclude protection for individuals who may have indeed stopped using illegal drugs in the recent past. Some may try to establish a blanket period of abstinence, e.g., the preceding 30 days, as a means for determining who is or is not "currently" using drugs. However, this approach would be inconsistent with the law, because it fails to make an individualized determination and would undoubtedly exclude individuals who have recently entered a treatment program and have actually stopped using drugs illegally.

In addition, courts have examined the relevant time frame for determining whether an individual is "currently" using drugs, in the context of employment discrimination cases. They have concluded that an individual's drug use status must be evaluated at the point in time at which the adverse decision is actually and finally made. If an individual was using drugs at the time an adverse decision was initiated, but was not doing so when the final decision was made because he or she had

³⁷ 28 C.F.R. § 35.104.

received or was participating in treatment, the individual would be protected against discrimination.³⁸

Applying this principle to the program siting context, individuals who were using drugs illegally at the time an initial adverse siting decision was made, but terminated their use by the time of the final decision, could sue under the FHAA. In addition, they could not be denied housing by a rehabilitation program that decided to exclude current users in response to community opposition.

³⁸ Teahan v. Metro-North Commuter Railroad Co., No. 91-7431, 1991 WL 279031 (2nd Cir. 1991) (employee who sought treatment before receiving discharge notice and successfully completed treatment before being actually discharged was not a continuing substance abuser, even though an administrative appeal process delayed the termination); Nisperos v. Buck, 720 F. Supp. 1424, 1427 (N.D. Cal. 1989) (attorney who was fired two days after completing a treatment program even though employer knew of his cocaine use during the three previous months and took no action, was considered "rehabilitating or rehabilitated" under the Rehabilitation Act and not a current user), aff'd, 936 F.2d 579 (9th Cir. 1991).

3. Individuals Convicted of Drug Crimes

One other group of individuals is excluded from protection under the FHAA: those who have been convicted of the illegal manufacture or distribution of a controlled substance.³⁹ As with current illegal drug users, these individuals would not be able to challenge an adverse siting decision if it was based on the fact that they had a prior conviction record. In addition, they could be excluded from a treatment program that was facing siting opposition without being able to challenge such an exclusion as discriminatory. At least one community that fought the siting of an Oxford House in a residential neighborhood used this exception to argue that the Oxford House residents were not protected under the FHAA and, thus, could not challenge the adverse zoning decision under that Act.⁴⁰

This exclusion is potentially dangerous because many individuals with alcohol and drug problems have been convicted of drug distribution crimes. However, as with current illegal drug users, the ADA and the Rehabilitation Act do not uniformly exclude these individuals and, therefore, can fill in the gap to protect those in or seeking to enter treatment, even if they have been convicted of such an offense. A program would have to prove that such individuals have alcohol or drug problems and are "disabled."⁴¹ And, to the extent the conviction record of a program's prospective

³⁹ 42 U.S.C. § 3607(d)(4).

⁴⁰ In Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. at 1342-43, the court rejected as too speculative the city's argument that it should be permitted to prohibit nine men from residing in an Oxford House because it was likely that they would have been convicted for drug distribution or sale and, thus, not protected under the FHAA.

⁴¹ A conviction record is not considered a "disability" under the ADA or the Rehabilitation Act, so

participants is the rationale given for refusing to site a program, the program would have to demonstrate that the alcohol or drug problems of its participants are either the sole or an additional reason underlying the adverse decision. This should not be difficult to prove because communities often identify several reasons for making a decision, or the facts surrounding a decision will point to more than one reason.⁴²

4. Qualified Individuals With Disabilities

Not all disabled individuals are protected against discrimination under the FHAA, the Rehabilitation Act and the ADA. Both the Rehabilitation Act and the ADA explicitly provide that only "qualified individuals with disabilities" are protected.⁴³ A "qualified" individual with a disability is one who can, either with or without a reasonable accommodation, meet the essential eligibility requirements for receipt of the services or benefits at issue.⁴⁴ While the FHAA does not contain this provision, it

the program must prove that the individual is "disabled" by virtue of alcohol or drug dependence in order to be covered under the laws.

⁴² To prove a case of disability discrimination under the FHAA and the ADA, the program does not have to prove that the desire to exclude individuals with drug and alcohol problems was the sole reason for the decision, only that it was a reason. However, under the Rehabilitation Act a program must arguably prove that the desire to exclude individuals with drug or alcohol problems was the sole reason for the decision. See discussion infra at p. 76-79.

⁴³ Section 504 of the Rehabilitation Act states that "no otherwise qualified individual with a disability" shall be subjected to discrimination. 29 U.S.C. § 794. And Title II of the ADA states that "no qualified individual with a disability" shall be subjected to discrimination. 28 U.S.C. § 12132.

⁴⁴ The Rehabilitation Act does not define "otherwise qualified" but the case law defines it as noted above. School Board of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987); Southeastern Community College v. Davis, 442 U.S. 3997 (1979). The ADA incorporated this definition into its statutory definition and provides in relevant part:

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

has a provision that serves a similar purpose by permitting the exclusion of individuals "whose tenancy would constitute a direct threat to the health or safety of other individuals or ... would result in substantial physical damage to the property of others."⁴⁵

In the program siting context, a disabled individual's qualifications will most likely be raised as a reason for not permitting a program to be established in a particular location. Prospective neighbors, for example, might allege that persons with alcohol and drug problems will engage in illegal activities, bring drugs into the neighborhood or reduce the value of property. All three laws prohibit decisions on the basis of such stereotypical attitudes and, thus, require direct and objective evidence that an individual does not meet tenancy qualifications or qualifications to receive a service.

B. What Actions Constitute Discrimination

All three laws prohibit a wide range of activities that discriminate on the basis of disability. The critical fact for purposes of this manual is that under all three laws it is **discriminatory** to deny an individual or entity the right to site a treatment program because it will serve individuals with alcohol or drug problems.

All three laws are intended to address — and end discriminatory treatment in — the implementation of land use, zoning laws and health and safety codes that have

42 U.S.C. § 12131(2).

⁴⁵ 42 U.S.C. § 3604(f)(9).

been used to construct barriers to siting programs. The following describes the specific provisions under each law that provide the basis for challenging adverse siting decisions.

1. Fair Housing Amendments Act

Three statutory provisions of the FHAA have been crafted specifically to challenge an adverse zoning decision on the basis of disability.⁴⁶ First, the FHAA makes it unlawful:

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

- (A) that buyer or renter,
- (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
- (C) any person associated with that buyer or renter.⁴⁷

Congress intended this provision to apply to zoning practices, state and local land use requirements and health and safety laws that make housing unavailable to individuals with disabilities.⁴⁸ The United States Supreme Court affirmed that zoning and land

⁴⁶ In addition to these three provisions, all other provisions of the Fair Housing Act have been amended so as to prohibit discrimination on the basis of disability. They may provide other statutory bases for suing, and programs should carefully evaluate whether these provisions apply to your particular case.

⁴⁷ 42 U.S.C. § 3604(f)(1).

⁴⁸ The legislative history states that the new subsections, 42 U.S.C. §3604(f)(1), (f)(2): would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.

The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the

use requirements are subject to the FHAA in City of Edmonds v. Oxford House, Inc.⁴⁹ The case clarified that one particular zoning ordinance — an ordinance that defines the number of unrelated individuals constituting a "family" (which localities frequently use to prevent groups of unrelated individuals from living in a single-family dwelling) — is a land use requirement that must comply with the FHAA, not a "maximum occupancy requirement"⁵⁰ that is exempt from the Act.⁵¹

application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.
H. Rpt. 100-711 (1988), U.S.C.C.A.N. 2173, 2185.

⁴⁹ 115 S. Ct. 776 (1995).

⁵⁰ Section 3607(b)(1) of the FHAA provides that:

Nothing in this title limits the applicability of any reasonable local, State, or Federal restriction regarding the maximum number of occupants permitted to occupy a dwelling....

The legislative history indicates that the exemption was intended to deal with the limitations jurisdictions frequently impose that "limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status." H. Rpt. 100-711 (1988), 1988 U.S.C.C.A.N. 2192.

⁵¹ In Edmonds, a local ordinance limited the number of unrelated individuals who could live in a single-family residence to five. Oxford House, which had twelve residents, asked the City to provide a reasonable accommodation under the FHAA by permitting more than five individuals to live in the single-family dwelling. The City refused, claiming that its zoning ordinance was exempt from the FHAA because it limited the maximum number of occupants who could reside in a dwelling.

The Supreme Court rejected the City's position, finding that its zoning ordinance was the very type of land use requirement the Fair Housing Act intended to regulate. In deciding this case, the Court distinguished two types of zoning laws: laws regulating the use of land and those regulating the number of occupants allowed to live in a dwelling. It reasoned that where land is zoned for single-family residences, a city must define the term "family," therefore making family composition rules an essential part of land use law. The fact that the ordinance capped the number of unrelated individuals who could live together did not turn it into an maximum occupancy restriction. Such restrictions must apply to all individuals, not just unrelated individuals. Because the City's ordinance only limited the number of unrelated individuals who could live together in the single-family neighborhood, the court concluded that the City's ordinance was a land use restriction and not exempt from the Fair Housing Act. Edmonds, 115 S. Ct. at 778-80.

Numerous cases have been filed under the FHAA challenging zoning practices, land use ordinances and health and safety code that discriminate on the basis of disability.

- In Horizon House Developmental Services, Inc. v. Township of Upper Southampton, a corporation providing residential services to people with mental retardation challenged the implementation of a town ordinance that imposed a 1,000 foot spacing requirement on group homes.⁵²

- In Marbrunak, Inc. v. City of Stow, Ohio, an organization of parents of mentally retarded individuals challenged the city's zoning ordinance that imposed extensive safety requirements on single family homes housing developmentally disabled individuals.⁵³

- In Oxford House, Inc. v. Township of Cherry Hill and Oxford House-Evergreen v. City of Plainfield, group homes for recovering alcohol and drug dependent persons challenged the refusal to provide a certificate of occupancy and a building permit, respectively, which were denied because the group homes did not satisfy the locality's definition of a "single family" and were not consistent with single family residential zoning.⁵⁴

- In Casa Marie, Inc. v. Superior Court of Puerto Rico, a residential elder-care facility for disabled persons challenged a state court order requiring the closure of the facility on the grounds that its operation violated a restrictive covenant and the owners had failed to obtain a use variance for modifications to the building.⁵⁵

- In Association of Relatives and Friends of AIDS Patients v. Regulations and Permits Administration, an AIDS hospice challenged the denial of a special use permit to locate the facility in an area zoned for agriculture.⁵⁶

⁵² 804 F. Supp. 683 (E.D. Pa. 1992), aff'd, 995 F.2d 217 (3rd Cir. 1993).

⁵³ 974 F.2d 43 (6th Cir. 1992).

⁵⁴ Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D.N.J. 1991).

⁵⁵ 752 F. Supp. 1152 (D. Puerto Rico 1990).

⁵⁶ 740 F. Supp. 95 (D. Puerto Rico 1990).

Second, the FHAA requires entities to make reasonable accommodations that are necessary to provide equal housing opportunities. It states that discrimination includes:

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.⁵⁷

The reasonable accommodation requirement applies to all aspects of housing, including zoning and land use requirements.⁵⁸ Often the refusal to make an accommodation in a zoning ordinance or other land use restriction stands in the way of establishing a treatment program. A reasonable accommodation has been defined in the case law to mean a change that would not impose an undue burden or hardship upon the entity making the accommodation or undermine the basic purpose the requirement seeks to achieve.⁵⁹

Numerous cases have used the FHAA to challenge a locality's refusal to make a reasonable accommodation in its zoning ordinances and other land use policies when that refusal prevented the establishment of residential facilities for individuals with disabilities. For example:

⁵⁷ 42 U.S.C. § 3604(f)(3)(B).

⁵⁸ Oxford House, Inc. v. Town of Babylon, 1993 WL 127711 (E.D.N.Y.); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. at 462-63; Horizon House Dev. Servs., Inc. v. Township of Upper Southampton, 804 F. Supp. at 699-70; Stewart B. McKinney Found., Inc. v. Town Plan and Zoning Comm'n of the Town of Fairfield, 790 F. Supp. 1197, 1221-22 (D. Conn. 1992); United States v. Village of Marshall, 787 F. Supp. 872, 878 (W.D. Wis. 1991).

⁵⁹ Village of Marshall, 787 F. Supp. at 878.

- In Oxford House, Inc. v. Town of Babylon, residents in a group home for recovering drug and alcohol dependent individuals challenged the city's refusal to modify its definition of "family" to enable a group of unrelated individuals to reside in a single family neighborhood.⁶⁰

- In United States v. Village of Marshall, the Attorney General challenged the village's refusal to grant an exemption to a state statutory spacing restriction imposed on community living arrangements so that a group home could be established for mentally ill individuals.⁶¹

- In United States v. City of Taylor, the Attorney General challenged the city's refusal to expand the number of unrelated disabled individuals who could reside together in a single family zone from 6 to 12 persons so that an adult care facility could continue to operate.⁶²

Third, the FHAA prohibits activities that interfere with the right of individuals to live in the neighborhood of their choice. Under the FHAA, it is unlawful to

coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by section 803, 804, 805 or 806 of this title.⁶³

⁶⁰ 1993 WL 127711 (E.D.N.Y).

⁶¹ 787 F. Supp. 880 (W.D. Wis. 1991).

⁶² 798 F. Supp. 442 (E.D. Mich. 1992), rev'd and remanded sub nom. Smith & Lee Associates, Inc. v. City of Taylor, Mich., 13 F.3d 920 (6th Cir. 1993), on remand U.S. v. City of Taylor, Mich. and Smith & Lee Assocs., Inc. v. City of Taylor, Mich., 872 F. Supp. 423 (E.D. Mich. 1995).

⁶³ 42 U.S.C. § 3617.

This provision prohibits a wide range of activities that constitute interference: everything from egregious actions, such as fire-bombing an African-American's car to drive him away from the previously all-white neighborhood, to actions which involve no violence, but include harassment by neighbors and local officials.⁶⁴ Examples of such cases include:

- In People Helpers Foundation v. City of Richmond, a corporation that helped find affordable housing for disabled individuals alleged interference with its efforts when one neighbor made derogatory remarks about the residents, organized other neighbors to stand in front of the building to intimidate the corporation's volunteers, photographed residents as they moved into the building and filed reports with the police who investigated the complaints daily.⁶⁵

⁶⁴ This provision regulates activities that may involve First Amendment free speech rights of individuals who are affected by, though not involved in, a real estate transaction. In April 1995, following complaints that a FHAA investigation interfered with the First Amendment rights of individuals who expressed opposition to the siting of a group home for disabled individuals, the United States Department of Housing and Urban Development issued new standards restricting the types of complaints the federal government would investigate.

Under Notice 95-2 (April 3, 1995), HUD will not investigate or accept any complaint that involves public activities that are directed at achieving governmental action unless those actions involve force, physical harm, or a clear threat of force or physical harm to one or more individuals. Protected activities include distributing information to the public at large, holding community or neighborhood meetings, writing newspaper articles, demonstrating peacefully, testifying at public hearings and filing non-frivolous litigation. According to the HUD guidance, hostile, distasteful and bigoted comments that make individuals protected by the Fair Housing Act feel unwelcome in a neighborhood are not sufficient for the federal government to file or investigate a claim.

While these activities cannot be the basis of a federal action, HUD investigators still investigate public records and collect evidence of public hostility and opposition to determine whether officials acted with discriminatory intent in making decisions. (See discussion infra at 63-66.)

Finally, while the federal government will not file a complaint based on "protected" public activities, private claims may still be filed. The HUD guidance states it "is not meant to circumscribe the right of any individual who believes that his/her rights under the Fair Housing Act have been violated to seek redress through private legal action." Notice 95-2 at 1, n.1.

⁶⁵ 781 F. Supp. 1132; 789 F. Supp. 725 (E.D. Va. 1992). According to Notice 95-2, the public actions in this case would be sufficient for the federal government to investigate and file a coercion/intimidation claim.

- In United States v. Borough of Audubon, N.J., the Attorney General alleged interference in the use of a single family home as an Oxford House when city officials issued weekly citations for violations of noise, parking, occupancy and zoning ordinances and summonses for running a boarding home, implemented enforcement mechanisms for zoning violations that had never been used before, and solicited help from the local state senator.⁶⁶

- In United States v. Scott, the Attorney General alleged that residents of a subdivision had interfered with the establishment of a group home for disabled individuals by threatening to sue to stop the sale of a dwelling and by subsequently filing an action to enforce a restrictive covenant that precluded the use of the dwelling as a group home.⁶⁷

In any given case, a treatment program may use one or all of the above statutory protections to challenge an adverse siting decision depending upon the particular facts of the case.

2. Rehabilitation Act

Section 504 of the Rehabilitation Act makes it unlawful for any entity receiving federal financial assistance to discriminate on the basis of disability. The law provides:

No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any

⁶⁶ 797 F. Supp. 353 (D.N.J. 1991).

⁶⁷ 788 F. Supp. 1555, 809 F. Supp. 1404 (D. Kan. 1992). According to Notice 95-2, the filing of frivolous litigation by the homeowners in this case would provide the basis for federal action.

program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency⁶⁸

Section 504 is intended to eliminate a broad range of federally supported activities in the areas of education, employment, housing, transportation and health and social services that prohibit disabled individuals from enjoying the same benefits as individuals without disabilities. Indeed, discriminatory zoning decisions made and carried out by entities receiving federal financial assistance have been challenged under the law.

In Sullivan v. City of Pittsburgh,⁶⁹ alcoholics who were enrolled in treatment programs challenged the city's refusal to issue conditional use permits for several existing facilities and to release community development block grant (CDBG) funds needed to renovate the facilities. Without such permits, the programs would be closed pursuant to a city ordinance.

While the city's planning department had approved the release of CDBG funds, the city refused to issue permits or release the funds because community organizations opposed the program's presence in the neighborhoods. The city then filed a state court action seeking to close the facilities for failure to meet fire and building codes, which could not be satisfied without the federal funding. After several attempts by the programs' administrator to obtain zoning approval, which would have resulted in the release of the CDBG funds, program participants who needed

⁶⁸ 29 U.S.C. § 794(a).

⁶⁹ 811 F.2d 171 (3rd Cir. 1987).

treatment services and could not obtain them elsewhere sued under Section 504 of the Rehabilitation Act.

The Court found that the Rehabilitation Act could be used to challenge the city's refusal to issue conditional use permits and CDBG funds. It concluded that Section 504 extended to any federal program or activity including the federal CDBG program, which would have provided funding to the program and benefitted the plaintiffs but for the city's discriminatory actions.⁷⁰

Sullivan presents a case in which the zoning and federal funding decisions were linked: i.e. the federal funds were to be used to renovate facilities that were at the heart of the siting dispute. It is important to note, however, that a locality's zoning and land use process in general confers the type of benefit — i.e. being able to site and operate a treatment program in a community — that cannot be denied for discriminatory reasons under Section 504, even if federal funds are not at issue in the particular zoning case. As long as the entity making the zoning decision receives federal funding in some form, it cannot discriminate on the basis of disability. The treatment program or the clients a program serves need not be seeking the federal funding, as in Sullivan, in order to allege discrimination under the Rehabilitation Act. Thus, a treatment program that was denied a special use permit for an allegedly discriminatory reason by a city zoning board that receives any form of federal funding

⁷⁰ Id. at 183. The case was decided under the Rehabilitation Act. Neither the FHAA nor the ADA had been enacted. If this case were filed today, all three statutes would be applicable.

could allege a violation of Section 504, even if the treatment program did not seek or was not eligible for the particular federal funding received by the zoning board.⁷¹

Regulations that implement Section 504 provide several additional bases for challenging discriminatory siting decisions.⁷² First, the regulations require recipients of federal funds to make reasonable accommodations to the known disabilities of qualified individuals unless the accommodation would impose an undue hardship.⁷³ This provision would impose the same requirements on entities covered under Section 504 as those imposed under the FHAA.⁷⁴ Second, the regulations prohibit any recipient of federal funding from utilizing criteria or methods of administration that have the effect of discriminating on the basis of disability.⁷⁵ The term "criteria" clearly encompasses zoning and land use ordinances that preclude treatment programs from being established on the basis of disability.

⁷¹ The Civil Rights Restoration Act, P.L. 100-259, redefined the term "program or activity" in Section 504 to require institution-wide coverage to the public and private entities that receive federal financial assistance. Thus, when any part of a state or local government receives federal financial assistance, the entire agency or department is covered. Accordingly, the existence of any federal funding within a city zoning board is sufficient to cover the board's activities under the Rehabilitation Act. See 29 U.S.C. § 794(a) and (b); S. Rpt. 100-64 (1988), U.S.C.C.A.N. 3, 18.

⁷² Section 41.51 of the so-called Rehabilitation Act "coordinating regulations" sets out a long list of activities that constitute discrimination. While the above text identifies several provisions that are most applicable to challenging a siting decision, programs should examine all the provisions to determine whether other protections apply to their particular case.

⁷³ 28 C.F.R. § 41.53.

⁷⁴ While the Rehabilitation Act does not affirmatively state that discrimination includes the failure to provide a reasonable accommodation, as in the FHAA, Section 504 cases that have applied the reasonable accommodation requirement have found that the failure to provide a reasonable accommodation constitutes discrimination. See discussion in School Board of Nassau County, Fla. v. Arline, 480 U.S. 273, 287-88 (1987).

⁷⁵ 28 C.F.R. § 41.51(3)(i).

3. Americans With Disabilities Act

Title II of the ADA prohibits discrimination on the basis of disability by any public entity, such as a state or local government or any unit of the governing body. The law provides:

[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.⁷⁶

Title II is intended to end discrimination by state and local governments in the same areas of life as the Rehabilitation Act — education, housing, employment, transportation, health and social services.⁷⁷ However, Title II has a broader reach than Section 504 **because it does not require any federal funds to flow into the government entity.**⁷⁸ Therefore, all activities of a state or local government must be free of discrimination on the basis of disability. Zoning and land use decisions clearly fall into the range of activities that must be implemented in a non-discriminatory fashion.

⁷⁶ 42 U.S.C. § 12132.

⁷⁷ Title II was intended to parallel the Rehabilitation Act closely because most State and local government activities are recipients of federal financial assistance and, thus, covered under Section 504 of the Rehabilitation Act already. Section 203 of the ADA, 42 U.S.C. § 12133, explicitly requires the remedies under Title II to be the same as those under the Rehabilitation Act for violations of Section 504, and Section 204 of the ADA, 42 U.S.C. § 12134(b), requires the Title II regulations to be consistent with those developed by the then-Department of Health, Education and Welfare to coordinate the implementation of Section 504 among federal agencies.

⁷⁸ As noted infra, The FHAA also does not require any federal funding link.

The regulations that implement Title II provide several specific grounds for challenging adverse siting decisions, in addition to the general prohibition against discrimination.

- As with the Rehabilitation Act, state and local governments are prohibited from using criteria that have the effect of subjecting qualified individuals with disabilities to discrimination.⁷⁹ For example, zoning ordinances that define "families" in a manner to prevent unrelated individuals from residing in a group recovery home,⁸⁰ or require treatment facilities to comply with spacing requirements,⁸¹ would be criteria that cannot be applied if they have the effect of discriminating against individuals with alcohol and drug problems.

- State and local governments are prohibited from using licensing or other arrangements to "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."⁸² This provision would enable a program to challenge the denial of a license or a permit to operate a treatment facility in a particular location or enforcement of a restrictive covenant because it would limit the ability of individuals with alcohol and drug problems to receive health care services that others receive.

⁷⁹ 28 C.F.R. § 35.130(3)(i).

⁸⁰ Oxford House, Inc. v. Town of Babylon, 1993 WL 127711 (E.D.N.Y.); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450 (D. N.J. 1991).

⁸¹ Horizon House Dev. Servs., Inc., v. Township of Upper Southampton, 804 F. Supp. 683; United States v. Village of Marshall, 787 F. Supp. 872 (W.D. Wis. 1991).

⁸² 28 C.F.R. § 35.130(b)(vii).

- State and local agencies are also required to administer services, programs and activities in the most integrated settings appropriate to the needs of qualified individuals with disabilities.⁸³ Thus, for example, occupants of a group recovery home that were denied an occupancy permit in a single family residential area because they did not fit the locality's definition of "family" could sue for not being allowed to reside in the most integrated setting.

- A public entity is also required, as under the FHAA and the Rehabilitation Act, to make reasonable modifications in policies, practices or procedures when such changes are necessary to avoid discrimination, unless such modifications would fundamentally alter the nature of the service, program or activity.⁸⁴ Zoning and land use ordinances would be subject to modification in the same manner as required under the FHAA and the Rehabilitation Act.

- Finally, a public entity is prohibited from excluding or denying equal services, programs or activities to an individual on the basis of his or her known association with an individual with a disability.⁸⁵ According to the Department of Justice's explanation of the regulations, this provision is intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide services to persons with disabilities are not subjected to discrimination

⁸³ 28 C.F.R. § 35.130(d).

⁸⁴ 28 C.F.R. § 35.130(b)(7).

⁸⁵ 28 C.F.R. § 35.130(g).

because of their professional association with these individuals.⁸⁶ Thus, for example, a methadone maintenance treatment program could sue a city under this provision if it was denied permission to site or operate a program because neighbors oppose alcohol and drug dependent individuals coming into the neighborhood.

C. Who Can Be Sued

The three laws target different, yet overlapping, persons or entities who are prohibited from engaging in discriminatory actions.

1. Fair Housing Amendments Act

The FHAA prohibits both public and private entities from discriminating in (a) the sale, rental or advertising of dwellings; (b) the provision of brokerage services; and (3) the availability of residential real estate-related transactions.⁸⁷ In addition to those persons who are actually involved in the wide range of activities involved in selling or renting dwellings, third parties who are not related to the transaction can be sued also if they interfere with anyone who is protected under the law or anyone who is aiding those protected in their efforts to obtain housing of their choice. **The FHAA does not require any federal funding link and, therefore, covers a far broader range of persons or entities than the Rehabilitation Act.**

The only people (in terms of siting activities) who cannot be sued under the FHAA are:

⁸⁶ Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35694, 35706 (1991).

⁸⁷ 42 U.S.C. §§ 3604, 3605 and 3606; 24 C.F.R. § 100.5(b).

(1) an owner who sells or rents any single family house, provided (a) the owner handles the transaction without the assistance of a real estate broker or the facilities of any person in the business of selling or renting dwellings, and (b) the owner does not have an interest in more than three single family houses at one time; and

(2) an owner who resides in a dwelling that contains living quarters for no more than four families living independently of one another, as long as the owner actually occupies one living quarter as his or her residence.⁸⁸

The most common group to be sued under the FHAA for discrimination in siting will be localities and local officials (such as the city council or zoning board members) who are enforcing zoning ordinances that discriminate on the basis of disability or are applying zoning or fire and safety rules in a discriminatory manner. However, private corporations can also establish siting barriers that can be challenged under the FHAA, and private individuals can be sued for interfering with the right of disabled individuals to obtain housing. Examples of these cases follow:

Case 1

The Situation

A group that provides housing to individuals in recovery wants to convert a house that had been duplex (each unit housing up to four people) into a single family dwelling for six tenants. A city ordinance limits the number of unrelated individuals who can reside in a single-family dwelling to four people. The group asks the city to

⁸⁸ 24 C.F.R. § 100.10(c)(1) and (2).

grant a variance to allow six tenants. The city refuses and denies an occupancy permit.

Who Can Be Sued

The city can be sued under the FHAA for enforcing an ordinance that has the effect of discriminating on the basis of disability and for refusing to make a reasonable accommodation.⁸⁹

Case 2

The Situation

A private, for-profit apartment management company manages six large apartment complexes in a community. A long-term residential drug treatment program rents apartments for clients who, after being drug-free for one year, reside together in the community as part of the "reentry" phase of the program. The treatment program tried to rent five apartment units for its clients, but was turned down by the management company.

Who Can Be Sued

The management company can be sued under the FHAA for refusing to rent to the treatment program because of the disabilities of its clients.⁹⁰

⁸⁹ See Parish of Jefferson v. Allied Health Care, 1992 U.S. Dist. LEXIS 9124 (E.D. La. Jun. 10, 1992).

⁹⁰ United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992).

Case 3

The Situation

A treatment program has purchased a small apartment building so that clients who have completed the first phase of a residential treatment program and are ready to move into the community could reside in a "decent" neighborhood. After several clients moved into the building, the neighbor across the street began to take pictures of all the residents and gather other neighbors together to monitor their every movement. The neighbor complained daily to city officials about the "druggies" who were residing in the house and claimed that they were involved in illegal activities. Police investigated the complaints, and while finding them without merit, harassed the residents and searched their apartments.

Who Can Be Sued

The treatment program can sue both the private citizens and the city (based on the conduct of city officials) for interfering with the recovering individuals residing in the apartment building.⁹¹

2. Rehabilitation Act

Section 504 of the Rehabilitation Act prohibits any recipient of federal financial assistance — both public and private — from discriminating on the basis of

⁹¹ People Helpers, Inc. v. City of Richmond, 789 F. Supp. 725 (E.D. Va. 1992).

disability.⁹² For purposes of challenging siting decisions, the relevant entities that are covered under the law, include:

- a state or local government department, agency, special purpose district or other unit that receives federal funds directly from the federal government or indirectly from the state or locality; and

- a corporation, partnership or other private organization or sole proprietorship that receives federal funds.⁹³

The following examples illustrate the above standards.

⁹² The statute uses the term "program or activity" to define the entities that are the recipients of federal financial assistance, and, thus, covered under the Act.

⁹³ 29 U.S.C. § 794(a) and (b).

Case 1

The Situation

A city receives federal financial assistance in the form of community development block grant (CDBG) funds, and the city's planning commission has authority to approve applications for CDBG funds. The city's planning commission, which oversees the city's zoning, also approves requests for conditional use and occupancy permits. A non-profit corporation that establishes and operates alcohol and drug treatment programs has applied to the planning commission for CDBG funds to renovate two facilities for use as a group home and a short term residential program and for conditional use and occupancy permits for both facilities. Although the planning commission recommended approval of both the CDBG funding application and the permits, the city council refused to approve either, on the grounds that approval would diminish surrounding property values and hinder orderly development.

Who Can Be Sued

The city, the planning commission, and the city council, can be sued under the Rehabilitation Act because these entities (1) receive federal financial assistance in the form of CDBG funds and (2) deny disabled individuals, who are qualified to receive CDBG funds, the benefit of the community development programs they fund with such dollars on the basis of their drug problem.⁹⁴

⁹⁴ Sullivan v. City of Pittsburgh, 811 F.2d 171 (3rd Cir. 1987).

Case 2

The Situation

A non-profit corporation that operates group home facilities for disabled individuals receives federal funds under the Supportive Housing for Persons with Disabilities Program. The corporation uses the funds to acquire dwellings and finance construction and improvement of the sites to expand the supply of supportive housing. A drug treatment program is interested in renting one of the recently completed supportive housing facilities as a group home for recovering individuals. The non-profit corporation refuses to rent to the treatment program on the ground that the presence of drug addicts and alcoholics will lower property values, increase crime and put the neighborhood's children at risk.

Who Can Be Sued

The non-profit corporation can be sued because it receives federal funds under the Supportive Housing for Persons with Disabilities Program and refuses to permit disabled individuals to benefit from that program because of their disability.

3. Americans With Disabilities Act

Title II of the ADA prohibits any "public entity" from discriminating in any way against qualified individuals with disabilities, including denying them the benefits of the services, programs or activities of the public entity. "Public entity" means any State or local government or any department, agency, special purpose district or other instrumentality of a State or local government.⁹⁵ As with the FHAA, no federal funding link is required.

Therefore, state and local officials who are responsible for siting decisions can be sued if those decisions discriminate against individuals with alcohol and drug problems on the basis of their disability, even if no federal funds flow into the planning department, zoning board or other agency that makes siting decision. The local officials described above in Case 1 under the FHAA can also be sued under the ADA.

D. Who Can Sue

⁹⁵ 42 U.S.C. § 12131.

All three statutes permit both disabled individuals and the treatment programs or other providers that seek to serve them to challenge discriminatory siting decisions. The FHAA contains explicit statutory language that defines the broad range of persons who can sue. Under the Rehabilitation Act, cases have established a similar standard and those standards will apply under Title II of the ADA.⁹⁶

Title II of the ADA explicitly protects individuals and entities from discrimination because of the association or relationship they have with an individual with a known disability. This protection affords those individuals and entities, such as treatment programs, the ability to sue under the ADA. Finally, the Attorney General has authority to challenge discriminatory actions under all three statutes.⁹⁷ These general principles are discussed below.

1. Fair Housing Amendments Act

Under the FHAA, an "aggrieved person" has the legal right — commonly known as "standing" — to sue.⁹⁸ An "aggrieved person" includes any person who (1)

⁹⁶ Standards developed under the Rehabilitation Act will apply under Title II because Congress intended Title II to "extend ... the anti-discrimination prohibition embodied in Section 504 to all actions of state and local governments." H. Rpt. 101-485, Part II, at 84 (1990). To ensure consistency, Section 204(b), 42 U.S.C. § 12134(b), of the ADA specifically requires that the regulations developed to implement Title II be consistent with those that implemented Section 504 of the Rehabilitation Act. The Department of Justice noted in issuing the Title II regulations that the rule "hews closely to the provisions of existing section 504 regulations" for these reasons. 56 Fed. Reg. at 35694.

⁹⁷ See discussion infra at pp. 79-83.

⁹⁸ Individuals who seek to sue must satisfy the "standing" requirement, i.e., those individuals who are actually injured by an action must be the ones to challenge it, and the federal courts will make decisions only when a real controversy exists between the parties. This ensures that courts operate within the authority granted under the Constitution. Some statutes clearly establish who can sue, while others set forth general protections and leave the determination of who can sue to the standards that

claims to have been injured by a discriminatory housing practice or (2) believes that such a person will be injured by a discriminatory housing practice that is about to occur.⁹⁹ Discriminatory housing practices include denying housing to any buyer or renter because of "a handicap of (A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that person."¹⁰⁰

In the context of a discriminatory siting decision, two groups can sue as an "aggrieved person": (1) the recovering individuals who are or will be precluded from residing in a dwelling because of the adverse decision; and (2) the treatment program or group that is prohibited from renting or purchasing a dwelling because individuals with alcohol and drug problems will eventually reside in it. Clearly, the FHAA has a broad reach that enables non-disabled persons and entities to enforce the rights of disabled persons to get housing, where non-disabled persons and entities face

have been developed under case law. See discussion of those standards infra at pp. 53-54.

⁹⁹ 42 U.S.C. § 3602(i). Under the federal doctrine of "ripeness," an individual must have an actual, concrete injury in order to state a claim under the FHAA or other discrimination laws. Depending upon the action that is being challenged, an individual may need to comply with zoning requirements and be denied favorable action before being able to challenge such requirements as discriminatory.

For example, in Oxford House, Inc. v. City of Virginia Beach, Va., 825 F. Supp. 1251 (E.D. Va. 1993), an ordinance required all groups of more than four unrelated people to apply for a conditional use permit to establish a group home. Oxford House established a group home that had more than four occupants without obtaining a conditional use permit. Upon learning that the City intended to take action for failing to have a permit, Oxford House filed an administrative complaint and thereafter a suit challenging the ordinance as violative of the FHAA. The Court held that the FHAA claim was not "ripe" because Oxford House had not applied for a conditional use permit, and, thus, could not demonstrate that it actually had been injured, i.e., been denied the permit and opportunity to establish a group home. Id. at 1260-65.

¹⁰⁰ 42 U.S.C. § 3604(f)(1).

discrimination and suffer an injury — the inability to rent or buy a dwelling — because of the disability of another individual.

Many cases have affirmed that providers of housing to disabled individuals have standing to challenge adverse siting decisions under the FHAA, even though the provider is not itself disabled. For example, in Horizon House v. Township of Upper Southampton,¹⁰¹ the court found that a corporation that provides residential services to people with mental retardation had standing to challenge a local ordinance that imposed a spacing limitation on group homes. The ordinance precluded the corporation from establishing a new group home in the township and jeopardized the corporation's existing homes for not complying with the spacing requirement.¹⁰² In the context of drug and alcohol services, the court in Oxford House, Inc. v. Township of Cherry Hill¹⁰³ held that Oxford House, Inc., a corporation that assists in the establishment of group homes for recovering individuals, had standing to sue because the Township's zoning ordinance precluded the establishment of an Oxford House in a single family residential zone.¹⁰⁴

¹⁰¹ 804 F. Supp. 683 (E.D.Pa. 1992).

¹⁰² Id. at 691-93. See also Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43 (6th Cir. 1992) (non-profit corporation that was prevented from establishing a residence for mentally retarded women because of city's fire and safety codes had standing to sue); Support Ministries for Persons with AIDS v. Village of Waterford, N.Y., 808 F. Supp. 120 (N.D.N.Y. 1992) (corporation that was prevented from establishing an adult care facility for persons with AIDS because the facility did not conform to zoning ordinances had standing to sue).

¹⁰³ 799 F. Supp. 450 (D.N.J. 1992).

¹⁰⁴ Id.

Because the FHAA prohibits discrimination in housing, it is also necessary to understand which programs and disabled individuals will be able to claim that "housing" is being denied by an adverse siting decision. The answer to this question turns on the definitions of "dwelling," "dwelling unit" and "residence."

A "dwelling" is defined as a building that is occupied as or intended to be occupied as a residence by one or more families.¹⁰⁵ A "dwelling unit" is defined as a single unit of residence for a family or one or more persons. Dwelling units include single family homes, apartment units and sleeping rooms in buildings in which sleeping accommodations are provided but toilet or cooking facilities are shared by occupants and shelters.¹⁰⁶ The term "residence" is not defined in the FHAA regulations, but it has been defined in cases to be "a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit."¹⁰⁷

¹⁰⁵ The definition under the FHAA regulations is:

Dwelling means any building, structure or portion thereof which is occupied as, or designed or intended for occupancy as, a 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.

24 C.F.R. § 100.20.

¹⁰⁶ 24 C.F.R. § 100.201.

¹⁰⁷ United States v. Hughes Memorial Home, 396 F. Supp. 544, 549 (W.D. Va. 1975) (home for needy and dependent children is a dwelling because it is the residence of children); see also Patel v. Holley House Motels, 483 F. Supp. 374, 381 (S.D. Ala. 1979) (motel was not a dwelling because it provides lodging to transient guests); United States v. Columbus Country Club, 915 F.2d 877, 881 (3rd Cir. 1990) (summer bungalows that were occupied five months per year were dwellings because owners were not "mere transients"); Baxter v. City of Belleville, Ill., 720 F. Supp. 720, 731 (S.D. Ill. 1989) (hospice for individuals with AIDS was a dwelling because residents will not be living there as "mere transients" even though the length of residence may vary).

The cases that have been brought under the FHAA make clear that as long as a program can demonstrate that clients will live in a facility for some period of time, the facility will be considered a "dwelling" under the Act. It makes no difference that health services are provided in addition to housing or that treatment staff reside in the same building. Nor does it matter that individuals will eventually leave the facility to live elsewhere. The key is whether the facility is or is intended to be a place of residence for individuals with disabilities.

Some examples of facilities that have been considered dwellings under the FHAA are:

- Oxford Houses which provide housing for an indefinite period of time to groups of four or more unrelated individuals recovering from alcohol or drug problems.¹⁰⁸
- a half-way house for recovering alcohol and drug dependent individuals in which treatment program staff reside with program participants, who pay for food, clothing, shelter and supervision.¹⁰⁹
- a nursing home for elderly individuals with severe mental or physical disabilities.¹¹⁰
- a hospice for persons with late stage AIDS.¹¹¹

¹⁰⁸ Oxford House, Inc. v. Town of Babylon, No. CV 91-3591, 1993 WL 127711 (E.D.N.Y. Apr. 20, 1993); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D.N.J. 1991); United States v. Borough of Audubon, N.L., 797 F. Supp. 353 (D.N.J. 1991).

¹⁰⁹ Elliot v. City of Athens, Ga., 960 F.2d 975 (11th Cir.), cert. denied, 113 S. Ct. 376 (1992).

¹¹⁰ United States v. Commonwealth of Puerto Rico, 764 F. Supp. 220 (D. Puerto Rico 1991).

¹¹¹ Baxter v. City of Belleville, Ill., 720 F. Supp. 720 (S.D. Ill. 1989).

It seems clear from the above examples that residential alcohol and drug treatment programs, halfway houses, and transitional housing and group homes for individuals in recovery would be able to challenge adverse siting decisions under the FHAA because housing is being denied to their program participants. Participants in these programs live in a facility for more than a brief period of time and, while they live there, they intend to return to the facility each time they leave.¹¹² Thus, the only treatment programs and individuals recovering from alcohol or drug problems who could not use the FHAA to challenge an adverse siting decision are those that provide out-patient services or seek such services.

2. Rehabilitation Act

Unlike the FHAA, the Rehabilitation Act does not define which persons have standing under Section 504 to sue to enforce the rights of individuals with disabilities. Therefore, an individual or program must satisfy the following three-part standing test to establish the right to challenge an adverse siting decision. The individual must show that:

(1) he or she has suffered an injury that is concrete and particularized, and actual or imminent;

(2) the injury is traceable to the challenged action; and

¹¹² While there is no case law, treatment programs that provide short-term residential services, i.e. 28 day programs, may have a more difficult time proving that they are a "dwelling," because the program's participants would reside at the program for only a brief period of time. Therefore, some might claim that a program participant is more of a transient who does not view his or her room as a residence to return to. To counter such a claim, a short-term residential program would argue that no particular length of stay is required to qualify a place as one's "residence." In addition, while residing at the program, patients consider it a residence where they eat, conduct activities and sleep.

(3) it is likely that the injury will be redressed by a favorable decision.¹¹³

This standard was applied in Sullivan v. City of Pittsburgh¹¹⁴ where recovering alcoholics sued to prevent the closing of several treatment facilities that were not in compliance with the city's zoning ordinances and to require the release of federal funds needed to renovate the facilities. The Court concluded that the plaintiffs had standing to sue under Section 504 because they had alleged a specific harm to themselves in that they would not be able to receive treatment if the facilities were closed and they would benefit from the court's intervention.¹¹⁵

In the context of siting programs, it is clear that individuals with alcohol or drug problems who seek to enter a treatment program, a half-way house or some other treatment facility would have standing to challenge a zoning decision that prevents the establishment of such a program. These individuals would suffer an actual injury by not being able to obtain treatment services from which they are intended to benefit. The injury would be traceable to the adverse siting decision, and a decision overturning the zoning decision would remedy the injury by permitting the establishment of the treatment program.

In addition, entities other than individuals with disabilities — treatment programs or entities that seek to provide treatment services — can sue under Section

¹¹³ Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

¹¹⁴ 811 F.2d 171 (3rd Cir.), cert. denied, 484 U.S. 849 (1987).

¹¹⁵ Id. at 175-76.

504, as long as they satisfy the above criteria. Courts have ruled that organizations of or for handicapped persons have standing to sue.¹¹⁶

For example, an organization that was established for the benefit of hearing-impaired individuals had standing to sue the jury commissioner for failing to provide interpreters to deaf individuals selected for jury duty when the organization paid for interpreters and was not reimbursed by the jury commission.¹¹⁷ Similarly, four organizations whose purpose included the improvement of the quality of life for disabled individuals had standing to sue forty-one federal agencies and the postal service for failing to promulgate regulations implementing changes in the Rehabilitation Act.¹¹⁸

A treatment program that seeks to establish a new facility but is prevented from doing so by an adverse zoning decision, should be able to show that it has a real stake in overturning that decision. The following cases provide examples:

¹¹⁶ Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1115 (9th Cir. 1987).

¹¹⁷ Id.

¹¹⁸ Williams v. United States, 704 F.2d 1162, 1163 (9th Cir. 1983).

Case 1

The Situation

An out-patient methadone maintenance program has purchased a building in which it will establish a methadone treatment facility, but has been denied the necessary occupancy permit by the zoning commission. The program has invested substantial funds in purchasing the building and in applying for the occupancy permit, which will be lost if zoning approval is not granted.

Who Can Sue

The out-patient program would have standing because it will lose substantial funds as a result of the adverse zoning decision, unless the decision is reversed. It is important to note that out-patient programs will be able to sue under the Rehabilitation Act (and the ADA) whereas they could not do so under the FHAA, as long as they satisfy the above criteria.

Case 2

The Situation

A treatment program is interested in renting six apartments in a federally subsidized housing complex that will be used as transitional housing for recovering individuals who have completed the first phase of a residential program. When the management company learned that the prospective tenants would be recovering individuals, it refused to rent the units and returned the treatment program's security deposit. The treatment program has invested funds to locate the apartments and will have to invest additional funds to find other suitable apartments. In addition, because the program cannot transfer the clients who are ready to move into transitional housing, it is unable to serve clients who are waiting to enroll in its residential program.

Who Can Sue

The program and its intended participants can sue, even though its security deposit was returned. The program will lose the funds required to locate the apartments and will have to invest additional funds to locate other apartments if the decision is not reversed. In addition, the program will suffer harm in not being able to provide services to new clients until recovering clients move into the transitional facilities.¹¹⁹

¹¹⁹ Harm can be economic or otherwise. Data Processing Serv. v. Camp, 397 U.S. 150, 152 (1970).

3. Americans With Disabilities Act

Title II of the ADA, like the Rehabilitation Act, does not define who may sue, but the same standing criteria that are used to determine who may sue under the Rehabilitation Act also apply under the ADA.¹²⁰ Thus, individuals with alcohol and drug problems and the entities that seek to establish treatment services for them can challenge an adverse siting decision under the ADA. Individuals would have to prove that they are "an individual with a disability," as defined by the Act, who has been subject to discrimination on the basis of disability. A program would have to prove that they have been (1) harmed (unable to provide treatment services or suffered from a loss of funds) (2) by a public entity's decision (the adverse zoning decision) and (3) the harm would be remedied by a favorable court decision.

Moreover, the Title II regulations provide explicit grounds on which a treatment program can sue if it has been denied the opportunity to site a program because alcohol and drug dependent individuals will use the facility. As noted above, a public entity is prohibited from discriminating on the basis of an individual or entity's known association with an individual with a disability.¹²¹ This provision creates the same scope of protection as that under the FHAA whereby residential treatment programs can sue if they have faced discrimination because individuals with drug and alcohol problems will reside in the housing being sought. It also fills a gap

¹²⁰ Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

¹²¹ See discussion supra at p. 50.

left open under the FHAA by giving out-patient programs the same broad right to challenge discriminatory siting practices as residential programs.

E. Proving Discrimination

1. Fair Housing Amendments Act

A violation of the FHAA's general prohibition against housing discrimination may be proven in four ways. First, a zoning ordinance may illegally single out a group of disabled people for discriminatory treatment — e.g., by imposing requirements only on individuals with histories of drug abuse or individuals — and thus be **facially invalid**. A plaintiff who claims that an ordinance is facially invalid would be required to demonstrate that the ordinance discriminates against the disabled by its words and is not specifically tailored to carry out legitimate governmental interest.

Second, the plaintiff may demonstrate that the defendants acted with a "discriminatory intent" when making a decision related to siting. This requires the treatment program or other aggrieved person to prove that one factor motivating an adverse siting decision was the fact that the program's residents are, or would be, alcohol or drug dependent individuals. The program need not prove that this was the sole factor underlying the decision, just one factor. Moreover, the program need not prove that the official action was motivated by a malicious or evil intent to harm individuals with alcohol and drug problems. It is sufficient to prove that the decision-makers improperly considered the resident's disability when making their decision,

whether it was for benign or paternalistic or malicious reasons. This type of a discrimination claim is called a **disparate treatment** case.

Third, another way of proving a violation is to demonstrate that the decision or practice, while seemingly neutral on its face, has a "discriminatory effect" on individuals with alcohol and drug alcohol problems. In other words, the practice has a greater adverse impact on individuals with disabilities than on others. This type of a discrimination claim is a **disparate impact** case.¹²²

Fourth, as noted above, the failure to make reasonable accommodations in housing policies and practices that are necessary to enable individuals with disabilities to enjoy the housing of their choice constitutes discrimination. In many cases, the reasonable accommodation requirement goes hand-in-hand and is considered in conjunction with a disparate impact claim, because it requires neutral rules to be modified if their application results in discrimination. Thus, if a zoning practice or procedure has a discriminatory effect on a disabled individual and that effect can be cured by modifying the practice, the modification must be made.

While the reasonable accommodation requirement will be discussed below in conjunction with the disparate impact cases, it is important to remember that the reasonable accommodation requirement is a separate and distinct ground for proving discrimination. Therefore, the failure to make a reasonable accommodation is grounds for finding discrimination even if there is no discriminatory intent or effect.

¹²² Stewart B. McKinney Found. v. Town Plan & Zoning Comm'n., 790 F. Supp. at 1210-11.

For example, in United States v. Village of Marshall¹²³ a federal Court found that the Village's refusal to grant an exception to a group home spacing requirement in order to permit a group home for mentally ill individuals to be sited within 2,500 feet of another group home constituted a failure to make a reasonable accommodation and was found to be discriminatory under the FHAA. The Court based its decision exclusively on the reasonable accommodation provision even though the plaintiff also claimed that the Village intentionally discriminated against individuals with mental illness by bowing to community pressure to exclude the group house.

While programs often will be able to prove discrimination under more than one of the above theories, proof of any one is sufficient to win the case. The following discussion provides examples of cases in which discrimination was successfully proven.

a. Facially Invalid Zoning Ordinances

Some communities, when faced with the prospect of opening their neighborhoods to individuals with disabilities, will enact and implement ordinances that explicitly limit the right to site housing or care facilities for such individuals. For example, a dispersion ordinance may prohibit group care facilities from being located within 2500 feet of one another, or a concentration requirement may restrict the number of care facilities per square mile. An ordinance that uses a discriminatory classification, such as disability, is unlawful in most situations, regardless of whether the underlying motives for the decision were benign or malicious.

¹²³ 787 F. Supp. 872 (W.D. Wis. 1991).

The case of Horizon House v. Township of Upper Southampton¹²⁴ provides an example of how zoning ordinances may be facially discriminatory against individuals with disabilities, and thus violate the FHAA. In Horizon House, a non-profit corporation leased two houses within 800 feet of each other in a single family residential area to provide housing to individuals with mental retardation. Professional staff were available 24 hours a day to assist residents. At the time the corporation sought to use the houses as group homes, the township had no spacing requirement or other restrictions on housing for people with disabilities. When the community learned that mentally retarded people were to live in the houses, neighborhood residents voiced opposition and submitted a petition to township officials to stop the Horizon House clients from moving into the homes.

When residents moved into the first house, the township officials enacted an ordinance governing group homes for disabled persons, entitled Family Care Home for Disabled Persons, which prohibited such facilities from being spaced within 3,000 feet of one another. The ordinance defined family care homes in a way to encompass the Horizon Houses, i.e., facilities that provided residential services to persons who as a result of age, physical disabilities, developmental disabilities or mental retardation are unable to live without permanent care or supervision by trained professionals.

The township directed Horizon House to comply with the ordinance by getting a use permit, but when that proved fruitless, suggested that it apply for a

¹²⁴ 804 F. Supp. 683 (E.D.Pa. 1992), aff'd, 995 F.2d 217 (3rd Cir. 1993).

variance. After a long and costly process, the variance was denied because the houses were not spaced 3000 feet from one another.

The township revised its spacing ordinance three times over four years, changing the spacing restriction from 3000 feet to 2500 feet to 1000 feet. The ordinance was also amended over time to appear facially neutral with regard to disability. For example, the second revision eliminated all references to specific disabilities under the definition of "family care home," but retained the basic definition that the facilities covered under the ordinance were those that provided permanent care or professional supervision.

Horizon House sued the township seeking to enjoin it from enforcing the space limitation. The court found that the spacing ordinance violated the FHAA because it created an explicit classification based on disability with no rational basis or legitimate government interest. The court noted that the ordinance clearly refers to people with disabilities, even though the explicit reference to disabilities was removed in the final version, because it covers only those facilities that provide permanent care or professional supervision. According to the court, the ordinance discriminated against the disabled because it restricted their housing choices based on their disability and capped the number of people who could live in the township based on their disability.

The court also ruled that the township had not demonstrated a legitimate reason for imposing the space limitation. While the township claimed that the ordinance was intended to prevent clustering of the disabled and was, therefore,

benign, the court found that the opposition to clustering was based largely on community fears of disabled individuals living in their neighborhoods. The court also found that integration of the disabled throughout the community was not an adequate justification if it were achieved through an inflexible distance requirement which essentially placed a cap or quota on the number of disabled individuals who could live in the township.¹²⁵

Similarly, licensing requirements that impose unique procedural requirements on establishing housing for disabled individuals may violate the FHAA. For example, in Potomac Group Home Corp. v. Montgomery County, Md.,¹²⁶ County licensing regulations required providers of group homes for disabled individuals to notify neighbors and civic organizations of the type of disabilities of the individuals who intended to live in the group home and to invite comments and on-going input about the compatibility of the home with the neighborhood. This requirement was imposed only on group homes for disabled individuals. The Potomac Group Home Corporation complied with this requirement when seeking licensure for four group homes, and received uniformly negative reactions from the community, which stigmatized the residents.

Although the group homes were eventually licensed, Potomac challenged the County's neighborhood notification requirement and several other licensing requirements as violative of the FHAA. The Court found that the notification

¹²⁵ Id. at 693-95.

¹²⁶ 823 F. Supp. 1285 (D. Md. 1993).

requirement was facially invalid because it applied only to disabled individuals and was not supported by a legitimate governmental interest. The Court interpreted the County's rationale for the notification requirement — that it would facilitate integration of group homes into the neighborhood — as further evidence of the County's effort to treat disabled individuals differently than those without disabilities. Rather than promote integration, the Court found that the notification requirement galvanized opposition.¹²⁷

Finally, health and safety codes which frequently impose more stringent fire and safety requirements on facilities for individuals with disabilities and, thereby make siting prohibitively expensive, may also violate the FHAA as being facially invalid. For example, in Marbrunak, Inc. v. City of Stow, Ohio,¹²⁸ a corporation of parents of mentally retarded individuals sought to establish a family consortium home for four mentally retarded women in a single family residence. The parents were informed that they had to comply with an ordinance that required extensive safety protections for family homes housing people with developmental disabilities. The safety requirements included installation of a whole house sprinkler system with alarms, fire retardant walls and floor coverings, lighted exit signs above all doorways, push bars on all doors, fire extinguishers and smoke alarms. With the exception of the smoke alarms, the safety requirements were not imposed on single family dwellings that were

¹²⁷ Id. at 1296-97.

¹²⁸ 974 F.2d 43 (6th Cir. 1992).

not occupied by developmentally disabled individuals. The parents sued the city to enjoin enforcement of the safety restrictions under the FHAA.

The court concluded that the safety ordinance violated the FHAA on its face and was not tailored to the specific needs of the particular individuals. According to the court, the FHAA did not prohibit the imposition of different standards on individuals with disabilities so long as the special protections are warranted by the unique and specific needs and abilities of the particular disabled individuals.

The city's ordinance violated this standard, according to the court, because it did not individualize its requirements to the particular type of disability; i.e., the safety requirements that would be needed for an individual with hearing impairments or those needed for an individual with sight impairments or mobility impairments. Instead the ordinance required compliance with all safety features that would be necessary to protect persons disabled by virtually all physical or mental impairments. The court concluded that the cost of complying with the needless safety requirements amounted to an onerous burden that had the effect of limiting the ability of individuals with disabilities to live in the residences of their choice, in violation of the FHAA.¹²⁹

b. Disparate Treatment (Discriminatory Intent)

Discriminatory intent may be established through direct or circumstantial evidence that the adverse housing decision was motivated in part by the alcohol or drug problems of program residents. In some cases, it will be clear from the events

¹²⁹ Id. at 47-48.

surrounding a decision and statements made by the decision-makers that the residents' disability was a motivating factor.

In other cases, the decision-makers will not reveal their true reasons. But intent can still be established by applying a five-prong test developed by the courts to evaluate the circumstantial evidence. The factors to be examined include: (1) the discriminatory impact of the decision; (2) the historical background of the decision; (3) the sequence of events leading up to the decision; (4) departures from normal procedural sequences; and (5) departures from normal substantive criteria.¹³⁰ While evidence need not be developed on all these factors, taken together they help flesh out the true intent.

A case involving opposition to the siting of an Oxford House provides a good example of how discriminatory intent can be proved. In United States v. Borough of Audubon,¹³¹ an Oxford House was established in a residential neighborhood. As soon as recovering alcoholics and addicts moved in, neighbors began to file complaints about loud music, uncut grass, and their concern that the residence was being used as a alcohol and drug rehabilitation center. The neighbors' complaints were mostly that the residents were recovering alcoholics and drug addicts who supposedly would bring drugs in and ruin the neighborhood. While initially some neighbors were friendly to the residents, when they learned through a newspaper article that the residents were in recovery they immediately changed their attitude and either ignored or glared at

¹³⁰ Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).

¹³¹ 797 F. Supp. 353 (D.N.J. 1991).

them. Several women moved out of the Oxford House because they could not tolerate the open hostility. Town officials investigated the complaints and told the Oxford House residents that they were in violation of town ordinances. They also told the owners of the property that they had to vacate the house or apply for a variance to use it as a boarding house.

When the owners did neither, city officials began to issue weekly citations alleging violations of ordinances regarding noise, parking, occupancy permits and zoning. Records from several official town meetings revealed that city officials had brought in all branches of the city government to deal with the problem and had decided to zealously enforce the law in order to get rid of the Oxford House residents.

Suit was filed by the United States Government claiming a violation of the FHAA. The Court found that the city had acted with discriminatory intent. It concluded that the zealous enforcement deviated from all previous zoning matters insofar as no citations had been issued for the same violations in any other situation for over four years.

Moreover, according to the court, the city's decision to make the Oxford House matter a priority of the entire city government could not be explained simply by the fact that the residents were too noisy, violated parking rules or did not constitute a "single family." Finally, the court pointed to statements by city officials which revealed their view that the town of Audubon should not have to provide housing to recovering individuals. All these facts led the court to conclude that the

city sought to exclude the Oxford House residents because of their status as recovering alcoholics and drug users, in violation of the FHAA.¹³²

The Audubon case and numerous other cases illustrate all too clearly that community opposition plays a major role in whether a treatment program will be sited. In many situations, city officials who oppose the establishment of housing for the disabled state that they are simply carrying out the will of their constituents rather than intentionally excluding disabled individuals. For example, the city officials in Audubon argued that their actions were merely a response to community sentiment.

This rationale, however, does not immunize local officials from responsibility under the FHAA. Many courts have ruled that discriminatory intent may be established if city officials are responding to community opposition that is itself motivated by animus against a protected disabled group. As one court noted:

a decisionmaker has a duty not to allow illegal prejudices of the majority to influence the decisionmaking process. A ... discriminatory act would be no less illegal simply because it enjoys broad political support.... [I]f an official act is performed simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decisionmaker personally has no strong views on the matter.¹³³

¹³² Id. at 360-61.

¹³³ Association of Relatives and Friends of AIDS Patients v. Regulations & Permits Admin., 740 F. Supp. 95, 104 (D. Puerto Rico 1990).

Thus, in Audubon, the court noted that because city officials were responding to and, in some cases, agreeing with community opposition which was clearly discriminatory, their own actions violated the FHAA.¹³⁴

c. Disparate Impact (Discriminatory Effect)¹³⁵

In many cases, a locality will require treatment programs or individuals with alcohol and drug problems to comply with ordinances that are facially neutral — insofar as they apply to all individuals, not just those with disabilities — but have the result that individuals with disabilities will be adversely affected and not be able to enjoy the housing of their choice.

¹³⁴ Audubon, 797 F. Supp. at 361. See also Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, N.Y., 808 F. Supp. 120, 134 (N.D.N.Y. 1992) (city's passage of a new ordinance requiring boarding houses to obtain a special use permit and its refusal to issue a permit to plaintiff for the establishment of an adult care facility for persons with AIDS (PWAs) violated the FHAA. The court ruled that the city's actions were improperly motivated by the public bias against PWAs and persons recovering from drug or alcohol problems. The community had expressed fears about the transmission of AIDS and drugs in the neighborhood and some residents had expressed both moral opposition to PWAs and their belief that, because individuals brought the disease on themselves, there was no obligation to treat them compassionately); Association of Relatives and Friends of AIDS Patients, 740 F. Supp. at 104 (city's refusal to grant special use permit to plaintiffs to open an AIDS hospice in an area zoned for agriculture was based on discriminatory intent because the city permitted the illegal prejudices of the community to influence its decision making process. The community opposed the siting because of fears that mosquitoes might transmit HIV to the community; the undesirability of having former drug users and homosexuals living in the neighborhood; the risk of transmitting AIDS-related diseases; the risk that the hospice would lower property values and pose a danger to students at a nearby school).

¹³⁵ At the time this manual was written, the Banking and Financial Services Committee of the House of Representatives was debating the Regulatory Burden Relief Act (H.R.1362), which included a provision that would eliminate the "disparate impact" standard in the Fair Housing Act. The revised provision would require evidence that statistical evidence of a pattern or practice of discrimination would not be sufficient to prove discrimination unless there was additional evidence that (1) the pattern or practice actually discriminated against an individual or group on a prohibited basis and (2) the person engaged in the conduct with the purpose or intent to discriminate.

The bill did not amend or eliminate the "effects" test in either the ADA or the Rehabilitation Act, and it is impossible to predict whether the bill will actually become law.

To prove that such neutral practices constitute discrimination, a program or disabled people must prove that the siting decision or action has a greater adverse impact on them than on others. If this is established, the locality is required to demonstrate some legitimate, nondiscriminatory reason for their action and that no less discriminatory alternatives were available or that a reasonable accommodation could not be made.

Some courts also will evaluate two other factors when balancing a city's justification against the discriminatory effect. First, the court will examine whether there is any evidence of discriminatory intent. Second, some courts will be concerned whether the program is seeking, on the one hand, to enjoin the imposition of requirements that will create barriers to providing housing or, on the other hand, to compel the city itself to provide housing.¹³⁶ Courts are much more amenable to removing barriers that will enable people to access housing than requiring a city to provide the housing.

Several cases provide examples of successful disparate impact claims.

In Oxford House, Inc. v. Township of Cherry Hill,¹³⁷ Oxford House, Inc. entered into a lease with a property management company for a single family house in a single family residential zone that it intended to use as a group home. As a condition of renting a single family home, the management company was required to

¹³⁶ Stewart B. McKinney Found. v. Town Plan and Zoning Comm'n., 790 F. Supp. at 1219-21.

¹³⁷ 799 F. Supp. 450 (D.N.J. 1992).

obtain a certificate of occupancy (C.O.), which is issued when a property complies with the township's zoning ordinance and property maintenance code.

The township denied the application for a C.O. on the ground that the Oxford House did not satisfy the township's definition of a "single family" in its zoning ordinance. Under that ordinance, the township placed more stringent requirements on groups of unrelated individuals who lived together than on groups related by blood or marriage. Unrelated groups were presumed not to constitute a "single family" and had to prove that they met an undefined standard of "permanency and stability." Groups related by blood or marriage were presumed to be a "single family" and not required to prove "permanency and stability."

When the C.O. was denied, the management company tried to sever its relationship with Oxford House. However, Oxford House sought and obtained a temporary restraining order prohibiting the township from interfering with its occupancy. Residents moved into the house shortly thereafter and sought a preliminary injunction to further enjoin interference.

The Court granted the preliminary injunction concluding that the plaintiffs likely would prove discrimination under the FHAA. According to the Court, the township's interpretation of the definition of "family" had a discriminatory effect on plaintiffs and the township failed to reasonably accommodate plaintiffs by not waiving the single family requirement. The Court reasoned that the township placed more stringent requirements on groups of unrelated individuals who wished to live together in rental property. This had a disparate impact on individuals with alcohol and drug

problems because they are more likely to need group living arrangements in which unrelated individuals live together in residential neighborhoods for mutual support through the recovery process.

Balancing this discriminatory effect against the township's interest, the Court found that the township did not have a legitimate reason for denying the C.O. While the township claimed that the group did not meet the standard of "permanency and stability," the Court concluded that the township had not applied that standard but instead denied the C.O. simply on the basis of the group's status of being unrelated.

The Court also concluded that the township did not meet its burden of proving that no less restrictive alternative was available or that no reasonable accommodation could be made. According to the Court, waiving the single family requirement would neither impose any administrative or financial burdens on the township nor fundamentally alter the nature of the neighborhood. Because the neighborhood already had apartment buildings, duplexes and offices, a group residence would enhance the residential character, not detract from it. In addition, throughout the time that the residents had been living in the house, there had been no complaints from neighbors about any adverse effect on the surrounding neighborhood.¹³⁸ Therefore, waiving the requirement was a reasonable accommodation.

¹³⁸ *Id.* at 461-63. See also *Oxford House, Inc. v. Town of Babylon*, 1993 WL 127711 (E.D.N.Y.) (town illegally discriminated when it tried to evict residents of Oxford House because they did not meet the definition of "family" in town's zoning code and failed to accommodate plaintiffs by modifying the definition of "family" to permit the Oxford House residents to live in a single family residential zone).

Another example of "disparate impact" is the case of Stewart B. McKinney v. Town Plan & Zoning Commission.¹³⁹ The plaintiff had purchased a two-family house in a residential zone that it intended to rent to HIV-infected individuals who were homeless. When the community learned that individuals with HIV disease were to live in the house, many opposed the siting of the group home and mounted a massive campaign to stop it. The community's opposition focused on the fear of AIDS, and some people made derogatory and discriminatory remarks about the residents, calling them "druggies" and "whores."

When plaintiff informed zoning officials about the intended use of the residence, it was told that the use was permitted subject to its securing a special exception. According to the zoning commission the facility was considered either a charitable institution or a chronic and convalescent nursing home and, thus, needed a special exception to operate in a residential zone. The commission reached this conclusion even though plaintiff did not intend to provide any health or medical services to the residents. To obtain a special exception, plaintiff would be required to submit a site and architectural plan, reports from the town fire marshall and director of health, a certificate of necessity from the state health department and other information required by the town. In addition, a public hearing was required and an opportunity for appeal was provided if the exception was granted.

¹³⁹ 790 F. Supp. 1197 (D. Conn. 1992).

In a further departure from normal zoning procedures, the zoning commission required plaintiff to complete a long questionnaire about the intended use of the property and the residents, some of which was not relevant to zoning matters. In addition, a town official responded to community opposition by recommending an alternative location closer to health care facilities. However, community opposition to the alternative site forced the town to back away from the proposal. When the plaintiff failed in numerous efforts to dissuade the zoning commission from requiring a special exception to operate the house, the plaintiff sued under the FHAA to preliminarily enjoin the town from imposing the requirement.

The Court granted the preliminary injunction, finding that the plaintiff would likely win the case. In so doing the Court analyzed whether the town had acted with discriminatory intent, whether its actions had a discriminatory effect and whether the town had failed to provide a reasonable accommodation.

The Court concluded that the town's imposition of the special exception requirement had a discriminatory effect on HIV-infected persons because it holds such individuals up to public scrutiny in a manner that is not required of groups of unrelated, non-HIV infected individuals planning to live together. In addition, the process could be burdensome and, based on the level of public opposition, quite controversial and unpleasant. Moreover, the Court found that the requirement had a further discriminatory effect by perpetuating the segregation of disabled individuals in housing in the town.

Balancing the discriminatory effect against the interest of the town, the Court found that the town's purported interest in ensuring that charitable institutions or chronic and convalescent care homes comply with the zoning ordinances was not legitimate. According to the Court, the town could not reasonably have believed that the residence was going to be used for those purposes and, thus, never should have imposed the requirement. Moreover, the Court found that the town could have used less discriminatory alternatives if it sought to ensure compliance with the zoning code or to gather information relevant to zoning concerns. The town's traditional police powers could ensure that health and safety codes were followed and that the welfare of the tenants and neighbors was protected.

The Court also found that two other factors weighed in favor of the plaintiff. First, there was evidence of discriminatory intent insofar as town officials departed from the normal zoning procedure by requiring completion of the questionnaire, departed from substantive criteria by characterizing the residence as a chronic or convalescent care facility and bowed to community opposition which was based in part on discriminatory attitudes. Second, the plaintiff was not seeking to compel the town to provide housing, but simply not to interfere with its efforts to provide it. Taken together, all factors led the Court to conclude that the town's action had a disparate impact on individuals with HIV disease.¹⁴⁰

¹⁴⁰ Id. at 1219-21.

Finally, zoning ordinances that limit the number of unrelated individuals who can reside in a single-family dwelling or constitute a "family" for purposes of zoning are often struck down as having a discriminatory effect.

For example, in Parish of Jefferson v. Allied Health Care¹⁴¹ an ordinance limited the number of individuals who could reside in a single family dwelling to four people. A group that provided housing to mentally retarded individuals sought to convert a house that had been a duplex (each unit which was capable of housing four people) to a single family dwelling for six tenants. The parish refused to grant an occupancy permit because the group exceeded four and refused to grant a variance to permit six occupants. The Court ruled that the occupancy limitation had a discriminatory effect because it limited the ability of mentally retarded individuals to reside where they wanted. Moreover, according to the Court, permitting six residents to reside in the dwelling was a reasonable accommodation because there was no evidence that it would burden the community's resources.¹⁴²

The above cases provide the legal theory upon which programs can challenge the requirement to obtain variances and comply with other facially neutral rules that impose a greater burden on individuals with alcohol and drug problems than other non-disabled groups.

¹⁴¹ 1992 U.S. Dist LEXIS 9124 (E.D. La. June 10, 1992).

¹⁴² Id.

d. Siting Restrictions Upheld

It is important to note that, while courts have routinely struck down zoning requirements and required modification of rules as reasonable accommodations, not all courts have protected the rights of disabled individuals. Some courts have not been sympathetic to discrimination claims and others have emphasized the interest of the locality to enforce its zoning laws.

For example, the case of Familystyle of St. Paul v. City of St. Paul¹⁴³ departs from those that reject spacing limitations that have the effect of limiting the ability of disabled individuals to live in the houses of their choice. In Familystyle, the Court rejected a challenge to a city zoning ordinance that required community residential facilities for mentally ill and mentally retarded individuals to be located at least a quarter of a mile from one another. The Court ruled that the dispersal requirement was a valid way to met the State's goal of deinstitutionalizing persons with mental disabilities and providing residential services in mainstream communities rather than segregating them.¹⁴⁴ In this particular case, the court probably upheld the spacing limitation because the housing provider, Familystyle, had created a "ghetto" of mentally ill individuals and had failed to carry out a commitment to disperse its facilities.

It is clear that courts will reach different conclusions about whether particular zoning restrictions are discriminatory under the FHAA. Much will depend on the

¹⁴³ 923 F.2d 91 (8th Cir. 1991).

¹⁴⁴ Id.

particular facts of the case and the ability of the parties to (1) develop evidence to prove discriminatory intent or effect and (2) demonstrate that modifications in policies will not dramatically affect the city's zoning plan or burden resources.

2. Rehabilitation Act and the Americans With Disabilities Act

The standards for proving discrimination under Section 504 of the Rehabilitation Act and Title II of the ADA are essentially the same since the language of the anti-discrimination provision in Title II, Section 12132, was modeled directly after Section 504. The primary distinction between the language in the two statutes is that Section 504 prohibits discrimination that is based "solely" on the individual's disability, whereas Title II prohibits discrimination against a disabled individual "by reason of such disability."¹⁴⁵

Some would argue that this difference in the statutory language affects the way discrimination is proved. Others might argue that under the Rehabilitation Act one must show that an individual's disability was the exclusive reason for an adverse action — not just **one** reason as under the ADA and the above FHAA cases.

However, the regulations that implement Section 504 in many federal agencies actually use the language that was adopted in the ADA and not the Rehabilitation

¹⁴⁵ The ADA's legislative history indicates that Congress intended to exclude the term "solely on the basis" because a literal reliance on the phrase could lead to absurd results. As the legislative history points out, an employer could reject an applicant on the grounds that he has a disability and is black. If a court required proof that the handicap was the sole reason for the rejection, the individual would be subject to discrimination that could not be remedied under Section 504. To avoid this result under the ADA, the legislative history indicates that Congress modeled the Title II language after that in the federal regulations that implement Section 504, which does not contain the "solely on the basis of" phrase. H. Rpt. 101-485, Part II, at 85-86 (1988), U.S.C.C.A.N. 303, 368.

Act's statutory language.¹⁴⁶ In addition, Section 504 cases have recognized that while several reasons may be put forth for excluding a disabled person from an activity, the key is whether disability was considered improperly in making a decision.¹⁴⁷ In many cases, the non-disability related reasons for a decision are, in fact, linked to the disability and, therefore, cannot be extricated from it or are just pretexts for a decision and not supported by the facts of the case.

It is clear that under Title II of the ADA, proof of discrimination rests on whether an individual's disability was improperly considered in the decisionmaking process. The existence of non-disability related factors in the adverse decision does not immunize it from attack.¹⁴⁸ Since it is likely that most programs will choose to sue under the ADA rather than the Rehabilitation Act (because the ADA covers more state and local entities and does not impose a federal financial assistance requirement), the following discussion outlines the proof for discrimination using the

¹⁴⁶ For example, the Section 504 coordination regulations, which were issued to coordinate the implementation of Section 504 across federal agencies, excludes all reference to discrimination "solely on the basis of handicap" in their general prohibition against discrimination. They provide:

No qualified handicapped person, shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

28 C.F.R. §41.51(a).

¹⁴⁷ For example, in Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981), an individual with multiple sclerosis claimed that he was rejected from a residency program on the basis of his disability. While the members of the committee that rejected the plaintiff identified a number of reasons for their decision, the court found that most reasons centered primarily on the disability itself.

¹⁴⁸ H. Rpt. 101-485, Part II, at 86 (1990), U.S.C.C.A.N. 303, 368.

ADA standard: i.e. that disability discrimination is one, but not necessarily the sole, reason for an adverse decision.

Under the ADA, programs that are challenging an adverse siting decision will most likely claim that they are being denied equal services or the benefits of the locality's zoning authority because of their relationship with individuals who have alcohol and drug problems. To prove this claim, a program will have the burden of showing that (1) individuals with alcohol and drug problems are disabled individuals and are protected by the ADA; (2) they are qualified to benefit from the zoning authority — obtain a variance, special use permit, building permit — either with or without a reasonable accommodation; (3) that the program has been denied the zoning service because of the disability of the individuals who will eventually use the facility; and (4) a state or local entity has made an adverse zoning decision.

While no siting cases were decided under the ADA at the time this manual was prepared, the evidence and analysis required to prove the second and third points are the same as that outlined under the FHAA cases.¹⁴⁹ The key is to show that city officials refused to permit the siting of a program or erected barriers because the persons who will use the facility have alcohol or drug problems. This requires an examination of the statements and actions by zoning officials, their acquiescence to community opposition that is grounded in discrimination and the reasons provided for making a siting decision. To the extent that officials imposed special requirements on

¹⁴⁹ See analysis of the evidence of discriminatory actions in Sullivan v. City of Pittsburgh, 811 F. 2d at 182-83, which was decided under section 504. As noted above, the ADA standards are intended to be consistent with those under the Rehabilitation Act.

the program or departed from normal zoning procedures, these facts will support a finding that disability was improperly considered. Similarly, the determination of whether an accommodation to the zoning practices and policies is reasonable will follow the same analysis as that under the FHAA.

To avoid liability, the locality would have to establish either that its decisions were not based on an improper consideration of disability or that an accommodation would fundamentally alter the nature of the community's character or impose an undue financial and administrative burden on the locality's services.

F. Enforcement Procedures

1. Fair Housing Act

The Fair Housing Act establishes a comprehensive enforcement procedure that includes an administrative complaint procedure¹⁵⁰ within the Department of Housing and Urban Development (HUD) and a court enforcement procedure.¹⁵¹ In addition, the Attorney General is authorized to file cases when she determines that a pattern or practice of discrimination exists or that the denial of equal housing in a particular case raises an issue of general public importance.¹⁵²

¹⁵⁰ 42 U.S.C. §§ 3610-3612.

¹⁵¹ 42 U.S.C. § 3613.

¹⁵² 42 U.S.C. § 3614.

Entities challenging housing discrimination can choose to file a complaint in either the administrative agency¹⁵³ or in federal or state court, and are not required to exhaust administrative remedies before filing a court action. This means that an individual may file a civil action in court without first having to file an administrative complaint. The only exception to this is if an administrative hearing has already begun, the complainant may not file a civil action.¹⁵⁴

The FHAA establishes strict time frames for filing administrative and court actions and for HUD to process administrative complaints. A complainant has one year after a discriminatory practice has occurred or terminated to file a complaint with HUD¹⁵⁵ and two years to file an action in court.¹⁵⁶ If a complaint is filed with HUD, the agency is required to complete its investigation within a brief time period — 100 days — or notify the parties as to why it cannot do so.¹⁵⁷ HUD has the authority to subpoena witnesses and gather extensive information to determine whether a violation has occurred. Throughout the investigation, HUD is required to engage the parties in conciliation to try to resolve the matter. In addition, if at any time during

¹⁵³ Before filing a complaint with HUD, the entity should check with its local Human Rights Commission or HUD to determine whether a State or local agency has responsibility for investigating housing discrimination complaints. Under the FHAA, HUD is required to refer housing discrimination complaints to state or local agencies that the Department has certified as being "substantially equivalent" in terms of their procedures for resolving complaints and law. Approximately 30 states have been certified as being substantially equivalent. HUD will not act on any complaint that is filed from one of these states until the state agency has acted.

¹⁵⁴ 42 U.S.C. § 3613(B)(2) and (3).

¹⁵⁵ 42 U.S.C. § 3610(a)

¹⁵⁶ 42 U.S.C. § 3613(a).

¹⁵⁷ 42 U.S.C. § 3610(B)(iv).

the investigation HUD determines that prompt judicial action is necessary to enforce the law, the agency can authorize the Attorney General to file suit to obtain a temporary restraining order or other preliminary relief.¹⁵⁸

Upon completion of the investigation, the agency is required to either file a charge of discrimination or dismiss the complaint. If HUD files a charge of discrimination, the complainant can choose to have the matter resolved by an administrative law judge or to have the Attorney General file an action in federal court on his or her behalf.¹⁵⁹

One significant exception to this rule relates to challenges to zoning ordinances. Under the FHAA, HUD is required to refer any complaint that involves a challenge to the legality of a State or local zoning or land use ordinance to the Attorney General for further action, rather than file a charge.¹⁶⁰ Thus, all zoning challenges will be resolved ultimately through a court procedure initiated by either the complainant or the Attorney General, provided the parties have not reached a settlement.

Under the FHAA, an administrative action must be commenced within 120 days of the issuance of a charge, unless it is impracticable, and the administrative law judge is required to issue a decision within 60 days after the end of the hearing.¹⁶¹ If a

¹⁵⁸ 42 U.S.C. § 3610.

¹⁵⁹ 42 U.S.C. § 3612(a) and (o).

¹⁶⁰ 42 U.S.C. § 3610(g)(2)(C).

¹⁶¹ 42 U.S.C. § 3612(g).

charge is resolved through the courts, the Attorney General is required to file an action within 18 months of the occurrence or termination of the discriminatory housing action.¹⁶² The decision by the administrative law judge and the federal court judge may be appealed to the federal Court of Appeals.

2. Rehabilitation Act and the ADA

The enforcement provisions for alleged violations of Section 504 and Title II are virtually identical.¹⁶³ Individuals complaining of discrimination may file a civil action in a state or federal court or an administrative complaint with the federal agency designated to resolve such complaints. Complaints filed under Section 504 of the Rehabilitation Act are resolved by the federal agency that provides the federal funding to the entity that is being sued. Complaints filed under the ADA are resolved by the federal agency that has authority over the governmental function at issue in the case. The regulations that implement the ADA identify the various functions that each federal agency has responsibility for and vests responsibility for any undesignated function with the Department of Justice.¹⁶⁴ Responsibility for complaints alleging discriminatory zoning decisions rests with the Department of Justice.¹⁶⁵

¹⁶² 42 U.S.C. § 3614(b).

¹⁶³ The ADA provides that the enforcement procedures for Title II are the same as those provided under the Rehabilitation Act. 42 U.S.C. § 12133.

¹⁶⁴ 28 C.F.R. § 35.190.

¹⁶⁵ Zoning matters are not assigned to any agency, and, thus, by default would be referred to the

An administrative complaint must be filed within 180 days of the date of the allegedly discriminatory action. For alleged violations of Title II, the agency is required to investigate the complaint, attempt informal resolution and, if resolution is not achieved, issue a letter of findings. The letter of findings includes a determination of whether a violation has occurred and a description of the remedy for any violation. If a violation is found, the agency is required to initiate negotiations to secure voluntary compliance. If the public entity does not agree to comply, the agency is required to refer the matter to the Attorney General with a recommendation for appropriate action.¹⁶⁶

A private civil action may be filed at any time within the applicable statute of limitations.¹⁶⁷ As with the FHAA, the complainant need not exhaust administrative remedies, even if an administrative action has been initiated. In addition, a civil action may be brought regardless of whether the designated federal agency finds a violation.¹⁶⁸

Department of Justice. 28 C.F.R. § 35.190(b)(6).

¹⁶⁶ 28 C.F.R. §§ 35.170, 35.172, 35.173 and 35.174.

¹⁶⁷ 28 C.F.R. § 35.172(b).

¹⁶⁸ Id.

G. Remedies

1. Fair Housing Amendments Act

The FHAA establishes three different sets of relief depending upon whether the complaint is resolved through the administrative process, a private civil action or through an action filed by the Attorney General. Taken as a whole, the penalties for violations of the FHAA are more severe than those permitted under the Rehabilitation Act or the ADA.

For actions resolved through the administrative process, the administrative law judge (ALJ) may award actual damages suffered by the aggrieved person and injunctive and other equitable relief. In addition, the ALJ may assess a civil penalty to vindicate the public interest. The penalty cannot exceed \$10,000 for the first discriminatory action, \$25,000 if one previous discriminatory action was found within the previous 5-year period, and \$50,000 if two or more discriminatory actions were found within the previous 7-year period.¹⁶⁹

For actions resolved through private court actions, the court may award the plaintiff actual and punitive damages and equitable relief, such as a temporary and permanent injunction, temporary restraining order, or other order, including an order enjoining the defendant from engaging in the discriminatory practice or ordering affirmative action as appropriate.¹⁷⁰

¹⁶⁹ 42 U.S.C. § 3612(g)(3).

¹⁷⁰ 42 U.S.C. § 3613(c).

For actions resolved in a court action initiated by the Attorney General, the court may award (1) preventive relief, including a temporary or permanent injunction, restraining order or other order necessary to assure full enjoyment of the rights granted under the Act, (2) monetary damages to persons aggrieved, and (3) to vindicate the public interest, a civil penalty not exceeding \$50,000 for a first violation and \$100,000 for any subsequent violation.¹⁷¹

In addition, regardless of the resolution process, the FHAA authorizes the award of attorney fees and costs to the prevailing party.¹⁷² This provision is essential to enable private parties to initiate and finance legal challenges.

Cases brought under the FHAA provide examples of the various forms of relief.

- In United States v. City of Taylor,¹⁷³ The Court (1) ordered the city to provide a reasonable accommodation to the operators of an adult foster care home by amending its zoning ordinance to permit up to twelve elderly disabled persons to live in a neighborhood zoned for single-family residences; (2) assessed a civil penalty of \$20,000 on the city; and (3) awarded the home's operators actual damages of \$284,000, which represent lost revenue for the period in which they could not operate the home with twelve residents.¹⁷⁴

- In United States v. Borough of Audubon,¹⁷⁵ the Court enjoined Audubon from interfering with the operation of an Oxford House or any other group living arrangements for disabled individuals and assessed a civil penalty of \$10,000. The Court refused to impose an

¹⁷¹ 42 U.S.C. § 3614(d).

¹⁷² 42 U.S.C. §§ 3612(p), 3613(c)(2), and 3614(d)(2).

¹⁷³ 872 F. Supp. 423 (E.D. Mich. 1995).

¹⁷⁴ Id. at 443-445.

¹⁷⁵ 797 F. Supp. 353 (D.N.J. 1991).

affirmative requirement on Audubon that it report all proposed changes in zoning laws to the United States before implementation.¹⁷⁶

- In Support Ministries v. Village of Waterford,¹⁷⁷ the Court (1) permanently enjoined Waterford from interfering with plaintiff's use of a dwelling as a residence for persons with AIDS and directed Waterford to issue a certificate of occupancy and to expeditiously process building permit applications; (2) awarded actual damages for mortgage interest costs; and (3) awarded the amount of attorney fees and costs incurred for the zoning process.¹⁷⁸

- In United States v. Scott,¹⁷⁹ the court (1) permanently enjoined defendant homeowners from taking any actions to interfere with the sale of a private home to an organization that sought to establish a group home for developmentally disabled individuals or the operation of the group home; (2) awarded the individuals who tried to sell their home actual damages of \$3332.08 and compensatory damages of \$2,000 for emotional distress; and (3) awarded punitive damages of \$2,000 to the sellers because defendants had demonstrated reckless indifference to their rights and those of disabled individuals.¹⁸⁰

¹⁷⁶ Id. at 362-63.

¹⁷⁷ 808 F. Supp. 120 (N.D.N.Y. 1992).

¹⁷⁸ Id. at 139-40.

¹⁷⁹ 809 F. Supp. 1404 (D. Kan. 1992).

¹⁸⁰ Id. at 1406-08.

2. Rehabilitation Act and the Americans With Disabilities Act

The remedies under the Rehabilitation Act and the ADA are virtually identical and are the same as the remedies provided in other civil rights statutes that prohibit discrimination by federally assisted entities.¹⁸¹ In general, monetary damages to compensate aggrieved individuals and entities and equitable relief in the form of temporary and permanent injunctions and temporary restraining orders may be awarded. In addition, in any court or administrative proceeding, the prevailing party may be awarded attorney fees, including litigation expenses and costs.¹⁸² Under the Rehabilitation Act, federal funds can also be cut.¹⁸³

The case of Sullivan v. City of Pittsburgh¹⁸⁴ provides an example of relief that is available under the Rehabilitation Act and the ADA. In Sullivan, the court granted the residents of the treatment program preliminary injunctive relief which required the city to (1) grant the treatment program conditional use permits for all facilities, building permits needed to bring the facilities into compliance with city safety codes, and occupancy permits and (2) release CDBG funds for necessary repairs and renovations.¹⁸⁵

¹⁸¹ 29 U.S.C. § 794a.

¹⁸² 29 U.S.C. § 794a and 28 C.F.R. § 35.175.

¹⁸³ 29 U.S.C. § 794a.

¹⁸⁴ 811 F.2d 171 (3rd Cir. 1987).

¹⁸⁵ 29 U.S.C. § 794a and 28 C.F.R. § 35.175.

II. Equal Protection Claims Under the United States Constitution

The Equal Protection Clause of the 14th Amendment of the United States Constitution also provides protection against discriminatory siting practices.¹⁸⁶ While few programs will need to use this vehicle for suits because of the FHAA and ADA's expansive protections, it is useful to understand the basic legal arguments involved in proving a violation of equal protection.

The Equal Protection Clause prohibits states and localities from denying any person the equal protection of the laws. It requires state and local officials to treat individuals who are similarly situated the same. When laws classify individuals into different groups and distinguish between groups, an equal protection violation may exist.

Under constitutional case law, three different standards have been established for evaluating whether statutes or official actions violate the equal protection clause. First, as a general rule, legislation is presumed to be valid and will be sustained if the classification between groups under the statute is rationally related to a legitimate state interest. When social or economic legislation, such as regulations or licensure of health providers or zoning ordinances, is challenged, the Equal Protection Clause gives states wide latitude to structure their programs and, therefore, does not interfere frequently by striking down statutes as unconstitutional. A stricter standard is applied

¹⁸⁶ Although the discussion focuses on the United States Constitution, cases may be brought under the parallel equal protection clause of the various state constitutions. Some states have interpreted their state constitutional provisions to provide greater protection than the federal constitution and, therefore, should be considered as grounds for suit.

for cases alleging gender discrimination, and an even tougher standard — called "strict scrutiny" — is used when a statute classifies by race, national origin or alienage.

In City of Cleburne v. Cleburne Living Center,¹⁸⁷ a case that challenged a zoning ordinance that required group homes for mentally retarded and mentally ill individuals and alcoholics and drug addicts to obtain a special use permit, the Supreme Court held that statutes and official actions that distinguish between individuals with and without disabilities should be reviewed like other legislation that affects social and economic matters. The Court said that such statutes need only be rationally related to a legitimate governmental purpose to satisfy equal protection guarantees. Thus, only arbitrary and irrational distinctions violate the law.¹⁸⁸

While this lowest level of scrutiny usually means that the statute will be upheld as valid, the Court in Cleburne found that the zoning ordinance as applied to individuals with mental retardation,¹⁸⁹ in fact, violated equal protection.¹⁹⁰ According to the Court, there was no indication that siting a group home for the mentally retarded in an area, in which hospitals, boarding houses, apartment buildings and many other dwellings were permitted without obtaining a special use permit, would

¹⁸⁷ 473 U.S. 442 (1985).

¹⁸⁸ Id. at 446-47.

¹⁸⁹ While the zoning ordinance also restricted the siting of group homes for individuals with drug and alcohol problems, the case did not challenge the ordinance as applied to such individuals. Therefore, technically, the Court's decision did not affect the rights of individuals with drug and alcohol problems.

¹⁹⁰ Several justices who wrote opinions in the case, noted that the Court was really applying a higher standard of scrutiny than the rational basis test without admitting it. They noted that under the standard rational basis test, the statute would have been upheld.

pose any special threat to the city's legitimate interests. The Court determined that the city's purported interest in responding to the negative attitudes and fears of neighbors who did not want to live close to a home for mentally retarded individuals was not a legitimate reason for treating a group home differently from other facilities.

In addition, the city's health and safety considerations about the home being located on a flood plain or having too many residents were not rational when only applied to a group home for the mentally retarded. According to the Court, these same concerns should apply to all other facilities in the particular area, but no other facility was required to obtain a special use permit. The Court concluded that the special use permit requirement was based on an irrational prejudice against mentally retarded individuals.¹⁹¹

The Court's analysis of the special use permit requirement in Cleburne is very similar to that under the Fair Housing Amendments Act.¹⁹² A court probably would have gone even further under the FHAA to invalidate the special use requirement entirely because it discriminated against disabled individuals on its face and did not serve a legitimate purpose. This overlap in analysis and results only reinforces the basic rule that courts will rarely use an equal protection claim to invalidate a discriminatory siting decision when a statutory claim, such as the FHAA or ADA, can be used instead.

¹⁹¹ Id. at 447-50.

¹⁹² Cleburne was decided before the FHAA was enacted.

III. Administrative Procedures and State Court Actions

Adverse siting decisions may also be challenged through local administrative proceedings and state court actions. If zoning officials have erred in applying a local zoning ordinance or state law, these forums are usually used, although alleged constitutional violations or state disability law violations also may be challenged in a state court procedure. For example, if the zoning board has applied a set of health and safety standards to a treatment program, even though an ordinance exempts that type of treatment program from those standards, the program could challenge the erroneous decision through an administrative hearing and, if necessary, a state court action. Or if local zoning officials have misconstrued the intended use of a group recovery home and impose requirements that apply to treatment programs providing some therapeutic services but not to group homes, the erroneous application of the zoning law could be challenged. In both cases, the programs would seek to overturn the decision because it violated the land use regulations. This approach may be a quick way to resolve certain disputes that led to denial of siting.

The procedures for initiating such actions vary on a state-by-state basis. While it is difficult to provide anything more than general guidance on state court zoning actions, it is useful to understand a few standard principles that will help your program decide whether to use this avenue to challenge an adverse zoning decision.¹⁹³

¹⁹³ The following discussion relies on information provided in Peter Salsich, Jr., Land Use Regulation (1991).

A. Administrative Procedure for Challenging an Adverse Decision

The procedure for reviewing an adverse zoning decision is generally divided into two parts: administrative review and judicial review. Usually, a claimant must go through the administrative review process — that is, exhaust administrative remedies — and have a final decision before initiating an action in state court. This practice stands in contrast to actions brought under the anti-discrimination statutes, which do not require that administrative review procedures be used before an action is filed in federal court.

The administrative body that reviews zoning decisions has authority to correct errors that local officials have made in implementing land use regulations. The body conducts a hearing, gathers evidence and then renders a decision that either affirms, reverses or modifies the zoning agency's decision. The administrative body cannot amend a provision of a zoning ordinance and, thus, has no authority similar to that given courts under the FHAA, Rehabilitation Act and the ADA to waive or modify zoning requirements to accommodate the needs of individuals with disabilities. The administrative body is, however, authorized to grant a variance or special permit if one is requested as part of the appeal.

B. Judicial Procedures to Review an Administrative Decision

State courts have authority to review the zoning decisions of administrative bodies. Courts may gather additional evidence and must determine whether the administrative decision is supported by "substantial evidence," which means that the facts of the case adequately support the decision. In general, courts will defer to the zoning agency that made the initial decision.

Consistent with the deference afforded to the local zoning authority, state courts generally will not decide a case unless the local zoning agency's administrative procedures have been exhausted. In other words, a claimant cannot file a claim in court challenging the application of a zoning ordinance to his or her property without first trying to resolve the dispute by obtaining a variance or other use permit through the agency that enforces the zoning law. The reason for this is that courts want to resolve disputes in the quickest possible manner by local agencies that have the most expertise in a matter. The only exceptions to this rule are when (1) it would be futile to exhaust administrative remedies; (2) ordinances provide the right to bypass an agency's administrative processes; or (3) the constitutionality of a zoning ordinance or official action is challenged.

Courts may overturn the decision of the local zoning agency on several grounds. The decision may be found to (1) violate constitutional or statutory provisions; (2) go beyond the statutory authority of the zoning agency; (3) be affected

by an error of law; (4) be clearly erroneous when considering the reliable and substantial factual evidence; or (5) be arbitrary and capricious.¹⁹⁴

C. Remedies

Upon overturning a zoning agency's decision, the court may order various forms of relief. Generally, the relief is more limited than that provided under the anti-discrimination laws.

The court may invalidate the agency's decision and prohibit it from being implemented.

In some states, when a court rules that a zoning ordinance is unconstitutional, it will permit the claimant to use the land as it wishes as long as the proposed use is reasonable, and the court will enjoin the locality from interfering with that use.

In extreme cases, a court will order affirmative relief such as rezoning an area in a particular manner, ordering a permit for a particular use or modifying the locality's comprehensive plan to permit the proposed use. This relief has been ordered primarily when a court finds that a community has arbitrarily refused to comply with a constitutional or judicial mandate to accept some affordable housing within its jurisdiction.¹⁹⁵

Monetary damages are not generally available, except when a zoning decision is found to violate federal civil rights laws or in cases of flagrant misuse of

¹⁹⁴ Id. at 410.

¹⁹⁵ See United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

governmental authority.¹⁹⁶ Unlike the anti-discrimination laws, attorney fees are not available to the prevailing party in state actions.

To the extent a program is contemplating whether to use the state administrative and judicial systems to challenge an adverse siting decision, it is important to analyze decisions that have been rendered in similar cases to determine whether state courts will be sympathetic to the type of claim that will be brought. In some cases, federal courts may be more sympathetic to discrimination cases and have more experience enforcing anti-discrimination laws. Therefore, if your program can choose between filing a suit in state or federal court, a review of the case law will reveal which court system will likely render a more favorable decision.

¹⁹⁶ Id. at 411-12.

Chapter III

Applying the Legal Principles

To understand how the above laws and legal strategies operate in a real situation, consider these two hypothetical cases, one involving the siting of a halfway house and the other an outpatient methadone maintenance treatment program. The discussion that follows outlines how a legal challenge would be structured, the possible enforcement mechanisms and remedies.

Case 1

The Situation

The Fresh Start alcohol and drug treatment program operates a residential treatment program for women and their children. Women who complete the one-year rehabilitation program move into a half-way house as the second stage of their rehabilitation. The half-way houses usually provide accommodations for six women and up to ten children, who range in ages from infancy to fifteen years. At least two staff live in the house and others come in to provide continuing care services and other social services to the women and their children. Fresh Start has been operating one half-way house in the town, but needs to open a second to serve six single women, who are ready to graduate, and their nine children.

Fresh Start believes that it is important to locate its half-way houses in residential neighborhoods that are removed from neighborhoods rife with open drug

trafficking. This permits the women and children to escape the negative influences that undermine recovery and to develop healthy new relationships in the community.

Fresh Start has located a large house in a residential neighborhood that, with a few modifications, fits its needs perfectly. The house was used previously as a convalescent home for the elderly, but had been vacant for six months. The house would need to be renovated to subdivide some rooms to accommodate women with several children and to have the electrical system and plumbing updated to comply with safety codes.

The program's attorney contacted the town's zoning commission to determine the permitted uses of property in the particular zone. She was informed that single and multi-family residential uses were permitted. She then contacted the property manager and negotiated a five-year rental agreement. The program paid a large security deposit and signed contracts with building contractors, electricians and plumbers to do the renovations. The program also applied for an occupancy permit, which was required of all renters, and for building permits.

Fresh Start contacted the residents of the neighborhood and invited them to their treatment facility in an effort to introduce the half-way house program to them and to facilitate the transition for the women. Few people attended, but those who did expressed concern that a half-way house did not fit into their neighborhood. They noted that the neighborhood was a mixture of elderly people who would be disturbed by the large number of children, as well as young families whose children would be negatively influenced by the children of drug using women. They also

expressed their fears of having men come into the neighborhood to visit the women and provide drugs in exchange for sex.

Fresh Start attempted to allay their concerns by discussing the strict standards that the women have to comply with in order to reside in the half-way house and the need to have women reside in this type of a neighborhood. The program also discussed the experience of the neighborhood in which its other half-way house was located, noting that none of the stated fears had materialized.

Despite the initial opposition, Fresh Start proceeded with its plans to renovate the dwelling. As part of the process to get an occupancy permit, a building inspector visited the site. He indicated that the dwelling needed substantially more renovations than had been anticipated to comply with the building and zoning code. According to the inspector, the facility was classified as an "intermediate care facility" which required (1) additional safety features, including a sprinkler system and alarms as well as bars on all windows and (2) extra bathrooms because children would reside in the facility. These renovations were estimated to cost \$40,000, which was far beyond the program's budget.

Fresh Start's attorney met with the zoning commissioner and town attorney to discuss the classification of the program as an "intermediate care facility" and the required renovations. The attorney explained that the facility was not providing any medical services that would bring it within the classification of an "intermediate care facility" and noted that the elder-care home which had occupied the dwelling previously had not been classified as such, even though it had provided medical care

services. Moreover, Fresh Start's other half-way house was not classified as an "intermediate care facility." In addition, she noted that other single and multi-family dwellings with children did not have to install bars on their windows or provide a certain number of bathrooms according to family size. The program's attorney asked that these building requirements be waived because of the financial burden.

The zoning commissioner and town attorney refused to change the designation of the dwelling or to waive the requirements for obtaining an occupancy permit. The officials also noted that they had been receiving complaints from the neighborhood that residents did not want the facility.

When the town council learned of the dispute, it decided to hold a public hearing to gather information about the half-way house and to ascertain the community's views. The public hearing was well attended. The spokesperson for the residents of the neighborhood told the town council that the half-way house did not belong in their neighborhood and that its residents presented a threat to other children and adults. He explained that they did not want drugs brought into their neighborhood and they feared drug-related violence. He also warned Fresh Start that if residents moved into the home, neighbors would take every action to drive them out. Several other individuals expressed their personal views that mothers who use drugs should be thrown into jail to learn their lesson. Fresh Start discussed the goals and successes of its treatment program and addressed the concerns of the neighbors. The program offered to have staff and residents work with the neighborhood patrol to prevent drugs from being brought into the neighborhood. The program also

reiterated its view that it was being erroneously classified as an "intermediate care facility."

The town council and zoning commission members went into executive session following the hearing to determine what action it should take. When Fresh Start's attorney met with the zoning commission chair the next day, she was told that the Commission would like to help out, but could not do so in the face of the intense community opposition which was based on legitimate safety concerns. A sympathetic member of the zoning commission who had attended the executive session told the program's attorney that several commission members had agreed that the neighborhood should not have to open its doors to "a lot of drug using women who should be punished for having children while smoking crack."

Several months have passed since Fresh Start first rented the house. The program has been paying rent throughout this period while not being able to proceed with the renovations. In addition, the women's graduation date is upon them, and the program needs to take action in order to find a halfway house so that new clients can be enrolled in the residential program. Fresh Start has decided that it will have to take legal action to resolve the problem.

The Legal Challenge

Fresh Start has several legal options. It could file an administrative action under the state's zoning enforcement procedures to challenge the zoning board's classification of it as an "intermediate care facility" and the application of special building requirements based on the presence of children. If it prevailed on this basis it

could eliminate many of the costly renovations, obtain an occupancy permit and then move the residents in. However, it would still face the prospect of intense community opposition which would make life unbearable for the women and children and possibly jeopardize their ability to remain in the house. The administrative agency that decides the appeal would probably not be able to enjoin the community prospectively from harassing the future residents. Therefore, Fresh Start would again face the need to take additional legal action or find another dwelling for its program.

Second, it could initiate a civil action under the FHAA or the ADA. Suit could also be brought under the Rehabilitation Act to the extent the zoning commission receives any federal financial assistance. It is clear that all three anti-discrimination statutes apply because women who are recovering from alcohol and drug problems have a disability that affects the major life activity of being able to care for themselves. In addition, because of the community's reaction, the women are not able to obtain housing which also constitutes a major life activity.

Under the FHAA, the program could allege that it has been prohibited from renting the house because of its relationship with women who have a disability. It could also allege that the town has failed to make a reasonable accommodation by refusing to waive the building requirements. In addition, the prospective tenants of the halfway house could sue the town for refusing, on the basis of disability, to provide them housing of their choice.

In proving a violation, Fresh Start could prove that the town has operated with a discriminatory intent and that its classification of the program as an

"intermediate care facility" and refusal to waive the additional requirements have a discriminatory effect.

With regard to discriminatory intent, the program would point to several factors that indicate that the zoning commission's decision was based on its desire to exclude the women because they had a drug problem. First, the comments of several zoning commission members during the executive session meeting provide direct evidence of their discriminatory bias against women who use drugs. Those same discriminatory attitudes characterized the community opposition, and the zoning officials admitted that they were carrying out the will of the community. Second, the zoning commission departed from substantive criteria by classifying the half-way house as an "intermediate care facility." That classification had not been applied to Fresh Start's other half-way house and, more important, had not been applied to the elder-care facility that had previously occupied the dwelling, even though medical services were, in fact, provided. In addition, the commission imposed building requirements — bars on windows and extra bathrooms — that were not required of other dwellings in which children resided. These factors clearly suggest that the classification and the additional building requirements were a pretext for not wanting to provide housing to women with drug problems.

To prove disparate impact, Fresh Start would argue that the zoning commission's decision to impose costly renovations has a greater adverse impact on individuals with drug and alcohol problems than on others. The cost of the renovations effectively precluded the halfway house from being established. The

requirements also denied the recovering women the opportunity to reside in housing of their choice. If the zoning commission applied the same requirements to all dwellings in residential neighborhoods that Fresh Start sought to use as a halfway house, the women would be totally excluded from the town.

Moreover, the disparate impact could be remedied easily by providing a reasonable accommodation of waiving all the additional building requirements and interpreting the intended use to be a non "intermediate care facility."

To bolster its claim of disparate impact, Fresh Start would also be able to point to the evidence of discriminatory intent and the fact that it is seeking to get the town to remove barriers that prevent recovering women from getting housing rather than to compel the town to provide housing.

To counter evidence of discriminatory effect, the town would probably argue that its concern about the continued safety of the neighborhood was a legitimate, non-discriminatory reason for imposing the requirements. Fresh Start could rebut that argument in the following ways. First, there was no basis for claiming that the program would attract drug-related activities or that the children would negatively influence other neighborhood kids. The experience of Fresh Start's other half-way house would prove that claim. Second, Fresh Start had committed itself to work with the neighborhood to keep drug-related activities out. Finally, the building requirements that were imposed would have no effect on remedying the neighbors' primary safety concern — the threat of drug-related activity.

The town would also have a difficult time proving that it could not accommodate the halfway house by waiving all the additional building requirements. Because it did not impose the same safety codes on the elder-care home or on Fresh Start's other halfway house and did not require other multi-family dwellings to have bars on the windows for children, waiving these requirements would not have changed the town's zoning practices and would not alter the nature of the neighborhood.

Proving a violation of the ADA would follow along similar lines. Fresh Start would allege that the town has violated the ADA by (1) denying the program the benefits of the zoning authority by imposing burdensome building requirements because the intended residents will be recovering women; (2) refusing to make reasonable accommodations in its building requirements; and (3) using its authority to issue occupancy permits in a way that limits the ability of recovering women to reside where they want and receive the health services they need.

Having developed its legal claims, Fresh Start would likely file a civil action in federal court asking for several forms of relief. First, it would ask the court to enjoin the town from imposing the additional building requirements and classifying it as an "intermediate care facility." Second, it would ask the court to enjoin the community and individuals from the community from interfering with the residents' enjoyment of the dwelling upon moving in and taking any retaliatory actions against them. Third, Fresh Start would seek to recover the monetary damages it incurred by being forced to pay rent on the dwelling while not being able to enter it to do the necessary

renovations and any other costs incurred as a result of the town's discriminatory actions. Finally, the program would request reimbursement for the costs of litigation, including attorneys fees.

Finally, because Fresh Start needs to occupy the dwelling very soon, it might seek preliminary relief to temporarily enjoin the town from imposing the additional requirements and ordering the issuance of an occupancy permit so that it can begin to make the necessary renovations.

Case 2

The Situation

The South Side Methadone Maintenance Treatment Program is an out-patient facility that is located in the business district of a large metropolitan area and currently serves 130 clients. The State in which South Side is located has been increasing its funds for methadone treatment in order to rapidly expand services to individuals at high-risk for HIV disease. With its new funds, South Side will be able to provide services to an additional 100 people, many of whom have been on the program's waiting list. However, its current facility is crowded and cannot accommodate the new clients.

South Side would like to build a second building next to its existing facility on property it already owns so that the administrative staff can more easily supervise the services that will be provided in the second building, to keep staff in close proximity, and to have clients in one general location to facilitate group counseling sessions

which are an integral part of the program. Placing the services in one location will also help South Side monitor the activities of its clients.

It would take a year to construct a building on the property South Side owns. In order to make services available immediately, South Side has decided to buy a large mobile trailer, locate it on the vacant property and commence services within two months.

South Side's attorney contacted the city's zoning commission to determine whether a mobile treatment unit could be placed on the vacant lot. The zoning commission explained that, under the zoning ordinance, a free-standing medical facility could not be placed within 4500 feet of another facility. The only way to get around the space limitation was to obtain a variance, which could be granted only after an application was submitted and a public hearing was held.

South Side's attorney applied for a variance. As part of the application, the program described the need for the services, the benefits that would come to the city if services were expanded and its reasons for wanting to locate the trailer next to the existing facility.

A public hearing was held shortly thereafter and was attended by virtually all the business owners within a six block radius of the treatment program. Every person who spoke at the hearing opposed the request for a variance. Most expressed concern that having substantially more individuals with alcohol and drug problems enter the immediate neighborhood would increase crime, drug trafficking and loitering. Others complained that many prospective clients would have HIV disease which would

bother those who shop and work at nearby stores. They noted that these factors would have a negative effect on business, which was already lagging. Others complained that the trailer would be an eyesore and detract from the neighborhood's aesthetics. Many expressed the view that they had put up with enough drug addicts in their neighborhood and should not have to tolerate more.

South Side's Director addressed many of the concerns of the speakers. He noted that the program had been operating in the neighborhood for over ten years and had a good relationship with neighboring businesses. He explained that the program was very concerned about loitering and had instituted and would continue to enforce a strict policy to prohibit loitering. He also presented the most recent crime statistics for the area which revealed that the crime rates for the neighborhood in which South Side was located were lower than every other neighborhood in the area. The Director attributed the low crime rate, in part, to South Side's cooperation with local law enforcement and businesses to keep drug dealers out of the neighborhood.

Finally, he noted that many other businesses and health facilities have used trailers as temporary structures, just as South Side intended to do. He cited an example, in which a health clinic two blocks from South Side was using a trailer to provide medical and dental services while it built a second structure next to its original facility. The two facilities would eventually be located within the 4,500 square foot space limit and the trailer was also within the space limit.

Two weeks after the hearing, the zoning commission denied South Side's request for a variance. The Commission identified two reasons for the denial. First, it

placed a heavy emphasis on the community's sentiment, which was unanimously opposed to granting a variance. Second, it determined that granting the variance would constitute "spot zoning," which means that a zoning ordinance is unreasonably altered solely as it applies to a particular parcel of land.

Having no other property on which it could locate its new facility, South Side decided to take legal action.

The Legal Challenge

South Side has two options to challenge the city's decision. First, it could appeal the decision through the administrative appeal procedure and, second, it could bring a civil action under the ADA.

In evaluating the first option, South Side's attorney might determine that the zoning board often defers to the zoning commission's decision that a variance would result in spot zoning, and, thus, deny the appeal. He should also evaluate whether the zoning board gives fair weight to evidence of discrimination. If it does not, it would probably not be willing to override the commission's decision.

South Side's second option — a civil action under the ADA — would hold greater promise of success. The program could claim that it was denied a variance because of its association with individuals who have disabilities, drug and alcohol problems and HIV disease, and that the city failed to provide a reasonable accommodation, a variance to site the facility within the 4,500 square foot space limitation.

To prove this claim, South Side would be able to show that individuals who are waiting to receive services at the new facility are persons with current drug and alcohol problems who are protected under the ADA because they have a disability that affects a major life activity. Even though the prospective clients are currently engaged in the illegal use of drugs, they are protected under the ADA because they are seeking health services.

Second, South Side would be able to prove that the variance was denied because of the disability of such individuals. The community's opposition to the project focused exclusively on the fact that the clients were drug addicts, many of whom might have HIV disease, and that the community did not want any more addicts in its neighborhood. While the community expressed fear of increased crime rates and drug trafficking, the fears were speculative considering the evidence that crime was at a comparatively low rate in the neighborhood.

The Zoning Commission's rationale, that granting a variance would constitute spot zoning, appears to be a pretext for not wanting addicts in the neighborhood. The Commission had previously granted a variance for the health clinic several blocks away, thereby permitting other free-standing health facilities to be located within the 4,500 square foot limitation.

South Side could also prevail on its claim that the city failed to make a reasonable accommodation by not granting a variance. Permitting a second methadone program within the 4,500 square foot limitation would not constitute an undue burden on the community's plan or alter its character. The city had already

permitted other health facilities to be located in close proximity. In addition, South Side had rebutted any concern that the program would increase crime or loitering and had committed its resources to continuing those efforts.

In requesting relief, South Side would seek an order requiring the zoning commission to grant a variance. It would also request that the court award it the costs of litigation, including attorneys fees, if it prevailed. Finally, to ensure that it can begin to provide new services as soon as possible, the program could request that the court consider the matter on an expedited basis.

Chapter IV

Building the Case: To Site or Sue

Siting an alcohol or drug treatment facility does not have to lead to a legal battle. Many treatment providers have overcome the NIMBY Syndrome through outreach and educational efforts that have dispelled neighbors' misconceptions and fears about treatment and persons in recovery, leading opponents to reconsider their resistance. Other providers prefer to go about siting their facilities as quietly as possible, hoping not to stir up any attention that could lead to opposition. If opposition does arise, these providers use the threat of litigation to dissuade the community from taking any discriminatory actions. Every effort should be made to site your program without resorting to legal challenges, while keeping in mind that community and official responses to your efforts may be valuable evidence if you end up in court. This chapter discusses the non-legal strategies that have proven to be particularly effective in defusing neighborhood hostility. It also provides suggestions on steps you should take and information you should gather throughout these efforts in the event legal action is ultimately required.

I. Reaching Out to the Community

For many programs, outreach is the key to opening new facilities and avoiding prolonged and difficult disputes with neighbors. By being aware of and sensitive to community concerns, many programs are able to turn opposition into acceptance,

making the siting of the facility easier for community residents, the treatment program and ultimately the program's clients.

In order to assist programs with such outreach and educational efforts, the National Institute on Drug Abuse (NIDA) recently developed a Resource Manual entitled Overcoming Barriers to Drug Abuse Treatment.¹⁹⁷ Based on extensive research and the experiences of treatment providers, communities and single state agencies, this manual recommends that programs do their homework on the communities in which they plan to site a facility, approach those communities and their leaders openly, dispel myths about drug addicts and alcoholics in recovery, and try to help community residents understand what treatment is and the benefits it provides. The following guidelines are based on the principles outlined in the NIDA manual and suggestions from treatment providers who have waged successful community outreach and education campaigns.

A. Know the Community

Before proceeding with your plans, you should become familiar with the particular character and attitudes of the community in which you intend to site the facility. Determine who is likely to understand the need for treatment and lend support for the proposed facility. Natural allies could include teachers, the police, human service providers and charitable organizations. You should also determine

¹⁹⁷ National Institute on Drug Abuse, Overcoming Barriers to Drug Abuse Treatment (1992).

who the likely opponents are, such as real estate developers and home owner associations.

If you are planning to site your facility in a specific neighborhood due to its high incidence of drug abuse, try to assemble statistics that demonstrate the need for treatment in that area. This data may also be valuable in litigation to demonstrate that excluding your program would have a discriminatory effect on the neighborhood, or that establishing a program would contribute to the general welfare of the region.

Finally, determine who the important "formal" (mayor, councilperson, zoning board of adjustment members) and "informal" (religious and business leaders) decisionmakers are, and the factors that might influence their support. Consider the timing of your efforts; political leaders are often more sensitive to community pressure during an election year. Finally, determine whether there have been battles in the past over the siting of similar facilities. This information could be useful to prove a pattern or tendency to discriminate against persons with alcohol or drug problems. The more you know about the community before you start the siting process, the better your chances of success.

B. Cultivate Community Support

You should attempt to meet with as many community leaders as possible, even those who are not directly involved in approving the proposed facility. Program representatives should speak to block and tenant associations, business groups, and churches, as well as local government officials. Often, NIMBY opposition is triggered

by a community's belief that it has not been fully informed or consulted. By meeting with leaders throughout the community, you can ensure that all interested parties have been included.

One way to overcome community distrust is to have leaders and residents from other communities in which you provide services discuss their experiences with members of the new community. You can arrange meetings between mayors, members of community boards and police departments, or have a homeowner meet with the families who live close by the site of the proposed facility. There are two advantages to this tactic: the community is more likely to trust and identify with others in its position, and the treatment provider's ability to turn out support from other communities in which it is located represents a tremendous vote of confidence.

Another key to successful siting is to build strong relationships with the local media. NIDA has developed public service announcements that emphasize the effectiveness of treatment which community programs can provide to local television and radio stations.

An especially effective means of cultivating community support is to form an advisory board which includes community leaders. Giving community leaders a role in the planning and operation of the facility can stem fears and reassure residents that the program has proper oversight. One treatment provider in California was able to overcome local resistance by placing a leader of the community group opposing her facility on the program's board.

To the extent these efforts do not win community approval, they provide a fertile ground for gathering evidence of discriminatory intent. Documenting the comments of residents and local officials and the media's characterization of the program or its residents are critical if you have to build a legal case, and to prove that disability was considered inappropriately in a siting decision. In addition, if local officials refuse to meet with you or discuss your proposal, you can evaluate whether this behavior reveals a bias, particularly if officials routinely meet with groups that try to site other types of facilities.

C. Carefully Select a Site for the Proposed Facility

One of the most important decisions you will make is determining where to locate your facility. You must not only take into account the zoning ordinances that govern the property, which may affect the type and size of the facility that can be constructed or sited, but also additional factors which can determine the degree of community resistance that you may encounter.

For example, if you decide to build a treatment facility close to a school or in an area already saturated with similar services, you could face difficulties that could be avoided if you chose a different site that still meets your needs. You may succeed in ultimately siting your program in the original location, either through extensive negotiations or litigation, but adopting strategies to avoid such costly efforts should be emphasized.

D. Obtain Legal Advice

It is very important to obtain legal advice as early as possible when you are selecting the site for your program. An attorney should be able to identify all the zoning, health, and safety requirements that apply to your prospective facility under the zoning ordinance. He or she should also be able to determine whether any requirements are facially invalid or will have a discriminatory effect or whether a reasonable accommodation would enable you to satisfy the ordinance requirements.

An attorney can also threaten to file a lawsuit to the extent local officials are not willing to work with you to find an appropriate site, are bowing to community pressure to not site your program, or are applying the zoning ordinance erroneously. Officials often change their position when informed about legal precedents that prohibit the same decisions and actions they are considering. Sometimes, local officials need the "cover" provided by legal precedents to make the right decision.

Legal help may also be available from public or private Fair Housing enforcement groups. For example, the Department of Housing and Urban Development provides funds to approximately twenty-five Fair Housing agencies to enforce the FHAA. In addition, Protection and Advocacy agencies exist in all states and provide legal assistance on discrimination in housing to individuals with disabilities.

It is important to remember that this manual is only a guide on the legal challenges that may be available. It is necessary to have an attorney who will be able to evaluate your particular situation for possible statutory or constitutional violations.

E. Plan the Facility Carefully and Be Prepared to Make Accommodations

Many communities are concerned that proposed development projects will not "fit in." Many projects, including commercial developments, are delayed for this reason. Therefore, it is important for you to take community concerns into account and modify whatever aspects of the new facility you can to meet their concerns. Again, you might be able to successfully challenge official or community requests to modify particular features on the ground that such requirements will have a discriminatory effect or are inappropriately based on the disability of future residents. But if such challenges can be avoided without burdening your program, the requests should be accommodated.

For example, altering the size or appearance of a facility in order to make it architecturally consistent with neighboring buildings might make a community more receptive. Changing the name of the program might reduce opposition. For example, one program agreed to substitute the word "rehabilitation" for the word "alcoholism" in its name in order to win approval.

In addition, planning and zoning boards, as well as fire and health inspectors may require numerous technical modifications for a new or expanded facility. Whether such requirements are legitimate, or are used as a pretext to block the opening of the program, will depend upon each situation. However, the program is obligated to bring the facility up to the requirements of the code to the extent those requirements are warranted by the unique needs of the individuals who will be using

the facility. Again, an attorney would be useful to help evaluate which requirements are necessary versus those that could be construed as discriminatory hoop-jumping.

F. Educate the Community

Many communities have tremendous misconceptions about treatment programs and the people they serve. As noted above, a critical component of any siting effort is to dispel these myths through community education. It is important that local decision-makers and residents understand that treatment programs help communities by reducing many of the costly problems associated with active alcohol and drug abuse, and that treatment enables former users to return to productive lives.

Community board or zoning commission hearings, which are a standard element in most siting processes, present an excellent forum to speak directly to your opponents and demonstrate that your treatment program will be effective in treating alcohol and drug abuse. You should explain the goals of the program, how it works and why the disputed site has been chosen. Having an individual in recovery attend the hearing and describe how treatment has benefitted his or her life may be useful.

Many communities resist treatment programs fearing that active users and dealers will be **drawn** to the neighborhood and that crime will subsequently increase. You can address these fears in various ways. For example, you could explain to the community

- how treatment encourages abstinence and prevents the client from relapsing;

- how your program monitors client drug use through urinalysis tests and other measures;
- your rules of conduct, including how you enforce curfews and supervise individuals who are allowed to travel outside the program site.

You might also agree to participate in anti-crime activities in the neighborhood. This would demonstrate your commitment to maintaining a safe community.

Another common fear is that the presence of a treatment program in the neighborhood will cause property values to decline. One way you can address this issue is to examine property values in other neighborhoods in which treatment programs operate. The single state alcohol and drug agency may have conducted a study on the impact of alcohol and substance abuse treatment on local property values that will provide assistance.¹⁹⁸ Even if you cannot obtain such information, you can still explain that your program will provide an important service that can only improve the community.

The hearing process also serves several important purposes if litigation becomes necessary. You should, therefore, obtain a transcript or recording of the hearing proceedings.

First, you can gather statements from residents and local officials who oppose the siting, which will be useful to prove that the locality is acting with a

¹⁹⁸ The Bazelon Center for Mental Health Law (formerly the Mental Health Law Project) in Washington, D.C. has extensive information on housing discrimination, including a bibliography of social science research on the economic and environmental impact of group homes on neighboring property.

discriminatory intent to exclude persons with alcohol or drug problems. Second, you can create a record that proves that you have responded to any of the neighborhood's legitimate health and safety concerns. To the extent an adverse decision is then based on these same concerns, you can demonstrate that they are simply pretexts for an underlying discriminatory intent.

Third, you can perhaps get the local officials to identify their reasons for opposing your project and then evaluate whether or not those reasons are legitimate. Moreover, if the reasons for opposing your project change over time, you can perhaps demonstrate that these reasons are simply a pretext to obscure an underlying desire to exclude individuals with drug and alcohol problems from the community.

Finally, you can identify ways to modify the locality's practices and procedures in order to accommodate your program's needs and demonstrate why such modifications will not impose a burden on the locality or alter the nature of the neighborhood. If the locality refuses to provide an accommodation by claiming an undue burden, you will have a record to demonstrate that such an accommodation is reasonable.

G. Demonstrate a Willingness To Be Part of the Community

There are a number of tangible benefits that you can offer the community as a way of demonstrating your commitment to being a good neighbor. First of all, you can offer what you do best: providing alcohol and drug treatment. You can perhaps guarantee that local residents will have priority in receiving services. In addition, the

program counselors can go into local schools and community centers to provide prevention and outreach services for youth, or work with the police and the courts to assess persons arrested for driving while intoxicated.

You can also propose to be a resource in other ways. Staff and residents can do volunteer work at the local nursing home, clean the park, or rebuild an abandoned apartment house. Representatives of the program can get involved in civic groups. You can pledge to hire from within the community and make purchases from local merchants. Whatever you choose to do, it is important to show that you are willing to have a stake in the community.

To the extent your efforts to reach out are rejected or met with hostility, you can use these responses as further evidence of community opposition to site your program on the basis of the disability of the individuals who will eventually use the facility.

II. Initiating Legal Action

While the above recommendations have proven to be helpful to many programs, they certainly do not guarantee success. You must continually evaluate whether there is any likelihood of winning approval without initiating legal action. An attorney will help you determine when it may be necessary to discuss with local officials the legal protections that prohibit discrimination on the basis of disability and to discontinue conciliatory efforts.

If you decide to take legal action, consult an attorney to determine the best approach to take. You will need to determine:

1. what legal claims you have and the strength of your case;
2. whether you want to sue in state or federal court or file an administrative action under the federal anti-discrimination laws;
3. whether you want to ask the Attorney General to become involved in the matter so that you can benefit from the federal government's resources and expertise in developing and litigating cases.

If you have few resources to pursue litigation, you should not walk away from the problem. The federal anti-discrimination laws authorize the party that wins a suit to recover attorney's fees and the costs of litigation. You may be able to find an attorney who will take your case without a large investment of funds if the prospect of winning and recovering fees exists. You may also wish to pursue the administrative complaint procedure that exists under the anti-discrimination laws, particularly that under the FHAA, because the administrative agency will conduct the investigation and gather evidence on your behalf without cost. While the remedies may differ under an administrative complaint procedure and a civil court action, you can still accomplish your primary goal of siting your program.

Conclusion

As communities search for effective ways to deal with our Nation's alcohol and drug problems, it is often ironic that communities and local officials waste precious resources and time fighting the establishment of treatment programs. The good news is that effective models exist for winning community and official approval to site new programs and expand facilities. And when those efforts fail, strong legal protections exist to fight discrimination.

It is also important to remember, however, that once a treatment program has opened its facility, either through legal action or through a persuasive educational campaign, the battle is not over. Fences must continually be tended and repaired. Studies show that communities that opposed treatment programs generally become more accepting over time, as they see the benefits that the program brings. However, neglecting community relations, even for a short time, can open old rifts or create new ones that can make future operations or expansion difficult.