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## **Cover Page Footnote**

J.D. Pace University School of Law, 1998. Associate, Jacobowitz and Gubits, LLP. The author would like to thank Professor John R. Nolon, Director of the Pace University School of Law's Land Use Center, for his contribution to this article.

# **NIMBY'S LEGACY— A CHALLENGE TO LOCAL AUTONOMY: REGULATING THE SITING OF GROUP HOMES IN NEW YORK**

*Anna L. Georgiou\**

## **Introduction**

Zoning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings.<sup>1</sup>

In 1993, the New York State Office of Mental Health ("OMH") estimated a need for at least 20,000 new residential beds "to provide housing and support for adults with severe and persistent mental illness."<sup>2</sup> And, in 1998, according to the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD"), there were approximately 6,700 people with development disabilities whose need for residential placement had not yet been met.<sup>3</sup>

It is well established that local governments may regulate land-use within their jurisdictions.<sup>4</sup> As a result of this authority, zoning laws often reflect the traditional family values of the community being regulated. For example, local concerns such as the preservation of neighborhood character, public safety, noise reduction and the removal of nuisances have been deemed legitimate "public welfare" interests.<sup>5</sup> Nevertheless, when local governments adopt zon-

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1. See *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 305, 313 N.E.2d 756, 758 (1974).

2. See *Future Housing Needs for Adults with Disabilities Living with their Families*, A Report to the Governor and to the Legislature, NYS OMH & OMRDD 2 (Apr. 1994). According to this study, the need for 20,000 new residential beds included "4,300 beds to house current inpatients of NYS psychiatric centers as they transition to community living, 10,600 beds for persons who are mentally ill and homeless, and 5,100 beds for individuals now living in the community." *Id.*

3. See *N.Y. Cares* (last modified Aug. 19, 1998) <<http://www.omr.state.ny.us/ny-cares.htm>>.

4. See *Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir.), *cert. denied*, 117 S.Ct. 81 (1996).

5. See *Ferraioli*, 34 N.Y.2d at 305.

ing laws in order to exclude or discourage "undesirable groups or individuals" from residing in the community, the laws are susceptible to challenge on the ground that they are discriminatory.<sup>6</sup>

Group homes represent a non-traditional alternative to "single family" living.<sup>7</sup> Typically, group home residents are unrelated individuals, who, under supervision, share a single family home with a common kitchen, sanitary facilities and other common living facilities. When discussed throughout the body of this Comment, the term "group home" will encompass both licensed and unlicensed homes, as well as community residences for recovering substance abusers, the mentally and physically disabled, special needs populations such as pregnant/parenting teens, victims of domestic violence and supervised foster homes. Other non-traditional households seeking to create a more affordable housing alternative through home sharing, such as shared housing arrangements for the elderly, will also be characterized as group homes. However, institutional-like facilities such as shelters, transitional housing, single-room occupancy hotels and facilities that include more than fourteen residents will be specifically excluded.

The advent of the group home as an important congregate housing resource has taken place over the past three decades for a number of reasons. First, there has been and remains a severe shortage in affordable housing, particularly for newly employed young adults and the elderly. Second, public policy calls for the deinstitutionalization of the developmentally disabled and mentally ill. Finally, there is a growing need for congregate type living arrangements for other special needs populations.<sup>8</sup>

Part I of this article will provide the framework for local zoning authority in New York State and will also explore the methods by which municipalities regulate the siting of group homes. Part II will provide an overview of relevant New York State Constitutional provisions and statutes, as interpreted by the courts, which

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

7. See *Ferraioli*, 34 N.Y.2d at 306 ("Indeed the purpose of the group home is to be quite the contrary of an institution and to be a home like other homes.").

8. See generally TERRY RICE, *WHAT IS A FAMILY FOR ZONING PURPOSES* (1986). In August 1998 Governor George Pataki announced a five year plan to create an additional 4,900 new residential beds for the developmentally disabled to meet an increased need. See OMRDD, Governor Announces "NY Cares" to Reduce Housing Waiting List (Aug. 19, 1998) <<http://www.omr.state.ny.us/nycare.htm>>. Furthermore, the New York State Legislature has identified a growing need for alternative housing resources for the mentally ill and developmentally disabled who are currently living with their aging parents. See 1993 N.Y. Laws 230, § 1.

prevent the exclusion of group homes from communities. Part II will also discuss the preemptory effect and limitations of the Padavan Law in the siting of certain group homes. Part III will examine the impact of federal laws on the siting of group homes, particularly in the context of discrimination against the disabled. The Federal Fair Housing Act, the Rehabilitation Act and the Americans with Disabilities Act are examples of federal laws that will be analyzed. Part IV provides a summary analysis of the effect of federal and state legislation on local land-use regulation pertaining to group homes. This article concludes that despite the continuing notion of "Not In My Back Yard" [hereinafter NIMBY], group home advocates have begun to build a solid legal foundation in challenging discriminatory zoning laws and practices that result in the exclusion of group homes from communities.

### **I. A Framework to "Group Homes" and the Concept of NIMBY**

The concept of the community residence group home arose as a result of the deinstitutionalization movement in the 1970s.<sup>9</sup> Consequently, The Willowbrook Consent Decree<sup>10</sup> propagated the establishment of community residences with the intent of offering more personalized services to the mentally disabled in a non-institutional, homelike setting at a lower cost to the taxpayer than institu-

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9. During the first half of this century, due to a policy of institutionalization, New York State constructed over fifty large institutions for care and treatment of the mentally disabled. See Paul F. Starvis, *Historical Repetition and Conceptual Constancy in the Development of Mental Hygiene Law*, 34 QUALITY OF CARE (Jan./Feb. 1988) <<http://www.cqc.state.ny.us/cc34.htm>>. The policy of institutionalization became disfavored in 1972 when appalling conditions were uncovered at New York's largest institution for care of the developmentally disabled, the Willowbrook Developmental Center. The ensuing public outcry for reform and subsequent litigation against the State played a major role in disfavoring institutionalization. See Paul F. Starvis, *The Willowbrook Litigation After Fifteen Years: One Step Closer to Finality*, 30 QUALITY OF CARE (Mar./Apr. 1987) <<http://www.cqc.state.ny.us/cc30.htm>>.

10. See Paul F. Starvis, *The Willowbrook Litigation After Fifteen Years: One Step Closer to Finality*, 30 QUALITY OF CARE (Mar./Apr. 1987) <<http://www.cqc.state.ny.us/cc30.htm>> (last visited Dec. 9, 1998). In 1972, the N.Y. Civil Liberties Union and others filed a class action in U.S. Federal District Court against New York State alleging civil rights of the developmentally disabled housed at the State's Willowbrook Developmental Center had been violated. As a result, the Court granted a preliminary injunction forcing the state to immediately ameliorate conditions to at least meet the then existing federal standards for care and treatment. The Willowbrook Consent Judgment of 1975 set forth the framework for reform and in effect served as the impetus for the policy of deinstitutionalization. Furthermore, a Stipulation and Order signed in 1987 mandated that the Staten Island Developmental Center (formerly Willowbrook Developmental Center) would close by the end of 1987. See *id.*

tional care. Congregate style community-based care became a preferable alternative for many mentally disabled individuals.<sup>11</sup> As a result, New York State adopted a long-term policy favoring deinstitutionalization and the development of a network of community-based services.

The policy of deinstitutionalization was met with local opposition concerning the siting of group homes in communities.<sup>12</sup> Many communities adhered to the belief that all group homes were inherently dangerous, and if a group home was situated in a neighborhood, a decline in property value would inevitably result. This pervasive attitude is commonly known as NIMBY.

### **A. Siting Group Homes Under Municipal Regulations**

As local political pressure mounted and methods for local land-use control grew more sophisticated, local governments responded by adopting zoning laws which regulated uses within residential zoning districts. For example, these laws defined the term "family" more narrowly in order to restrict allowable uses within "single family" districts. In defining "family," communities often imposed traditional values. For instance, "single family" occupancy was restricted to related individuals. Consequently, these zoning restrictions effectively excluded group homes from these communities while the need for such homes continued to grow.

As a result of this increasing need, the New York State legislature began to pass laws that facilitated the siting and development of group homes.<sup>13</sup> The ever-increasing environment of public awareness, and the ensuing enactment and enforcement of federal and state anti-discrimination laws, provided fertile ground for challenge to restrictive zoning laws. However, these developments created a tension between the autonomy of local authorities and the new mandate to provide community-based care, making confrontations unavoidable.

### **B. Local Police Powers and the Authority to Regulate**

Under New York State law, local governments have the authority to regulate many aspects of land-use within their respective ju-

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11. See *infra* note 67 and accompanying text.

12. See D. & S. ROTHMAN, *THE WILLOWBROOK WARS* 177-82 (1984).

13. See *infra* Part II Section C and accompanying notes. The Padavan Law, discussed in the aforementioned section, is an example of a state law that facilitates the placement of group homes.

risdictions.<sup>14</sup> The New York State Constitution delegates to the State Legislature the authority to enact legislation concerned with the public health, safety, morals and general welfare of New York State citizens.<sup>15</sup> While this delegation of power includes the power to enact and interpret zoning ordinances, the State Legislature has further delegated this specific right to local governments by way of enabling legislation.<sup>16</sup> A municipality's authority to regulate the siting of group homes is derived from delegated police powers.

While it is well established that municipalities possess police powers, it is also well established that a municipality may not exceed the powers granted to it by enabling legislation. Pursuant to New York State Law, if a "municipality fails to enforce its zoning laws, or acts arbitrarily or capriciously in varying the application of the ordinance, and a person is thereby aggrieved," a decision by a municipality may be subject to appeal.<sup>17</sup> Such an appeal, commonly referred to as an "Article 78" proceeding, is, in effect, a judicial review procedure.<sup>18</sup>

There are a number of legal doctrines that may limit the authority of local governments to enact and enforce zoning ordinances and other land-use restrictions. Such doctrines include: (1) protections provided by the First Amendment; (2) protections provided by the Takings Clause of the Fifth Amendment;<sup>19</sup> (3) Fourteenth Amendment protections such as substantive due process, proce-

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14. See N.Y. GEN. CITY LAW § 20(2) (McKinney 1989); see also N.Y. TOWN LAW § 262 (McKinney 1987); N.Y. VILLAGE LAW § 7-702 (McKinney 1996). New York City has been credited with the first comprehensive zoning ordinance in the United States, adopted in 1916. See *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920).

15. See N.Y. CONST. art. 3, § 1.

16. See N.Y. MUN. HOME RULE LAW § 10 (1)(ii)(a)(11), (12) (McKinney 1996) (these provisions give municipalities the power to enact local laws for the "protection and enhancement of [their] physical and visual environment," and for "protection, order, conduct, safety, health and well-being of persons or property therein"); see also N.Y. GEN. CITY LAW § 20(2) (Consol. 1980); N.Y. TOWN LAW § 262 (McKinney 1987); N.Y. VILLAGE LAW § 7-702 (McKinney 1996).

17. See *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals*, 69 N.Y.2d 406, 412, 508 N.E.2d 130, 515 N.Y.S.2d 418 (1987).

18. See N.Y. C.P.L.R. § 7801 (McKinney 1996). The standard of review under an Article 78 proceeding is limited to whether the action was arbitrary and capricious, or an abuse of discretion. See *id.* at § 7803(3). Therefore in any Article 78 proceeding there is a strong presumption favoring the local regulatory authority. See *Human Development Services of Port Chester, Inc. v. Zoning Board of Appeals*, 67 N.Y.2d 702, 490 N.E.2d 846, 499 N.Y.S.2d 927 (1986).

19. See generally Daniel William Russo, *Protecting Property Rights With Strict Scrutiny: An Argument for the "Specifically and Uniquely Attributable" Standard*, 25 *FORDHAM URB. L.J.* 575 (1998).

dural due process, and equal protection; (4) preemption by a state statute or regulation; and (5) vesting rights limiting the enforcement of "overly burdensome regulations."<sup>20</sup>

Federal courts will also have appellate jurisdiction to review local zoning ordinances or decisions made by zoning boards, "when local decisions infringe national interests protected by statute or the constitution."<sup>21</sup> Moreover, acts of Congress may preempt state and local police powers, if the Congressional intent and purpose to preempt is clear.<sup>22</sup>

When a municipality employs its delegated powers to regulate for the benefit of public interest, however, this authority must not be exercised in an arbitrary or capricious manner. Furthermore, a "legitimate public interest" and a "reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end" must exist.<sup>23</sup>

A municipality's police powers are extensive when applied to local zoning authority. In *Village of Euclid v. Ambler Realty Co.*,<sup>24</sup> the Supreme Court held that legitimate public interests include "public health, safety, morals or general welfare."<sup>25</sup> The Court reasoned that the exercise of zoning authority to segregate uses into

20. See Land-Use Law, Supplement II, Professor John Nolon, Spring 1997.

21. See *Innovative Health Systems, Inc. v. City of White Plains*, 931 F. Supp. 222, 234 (S.D.N.Y. 1996), *aff'd*, 117 F.3d 37 (2d Cir. 1997); see also U.S. CONST. art. VI (Supremacy Clause).

22. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (providing insight into factors to be considered when evaluating whether federal preemption of local police powers is warranted). The Court stated:

[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. [Or] the object sought to be obtained by the federal law and the character of [the] obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute.

*Id.* at 230 (citations omitted); see also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").

23. See *Genesis of Mount Vernon v. Zoning Board of Appeals*, 152 Misc. 2d 997, 1000, 579 N.Y.S.2d 968, 971 (1991), *aff'd*, 179 A.D.2d 644, 579 N.Y.S.2d 890 (2d Dept. 1991), *aff'd in part*, 81 N.Y.2d 741, 609 N.E.2d 122, 593 N.Y.S.2d 769 (1992).

24. 272 U.S. 365 (1926).

25. See *Village of Euclid*, 272 U.S. at 394.



various zoning districts, namely residential, commercial or industrial, is valid.

Moreover, the segregation of the intensity of certain uses (i.e., single family zoning districts which exclude higher density uses such as multifamily housing or apartment houses) continues to be upheld as a valid use of local police powers. As a result, local zoning powers may be legitimately used to protect the character of single family neighborhoods, thereby limiting the use of homes in single family residential districts to single families. As stated by Justice Douglas in *Village of Belle Terre v. Boraas*,<sup>26</sup> "[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."<sup>27</sup>

### C. How Municipalities Regulate the Siting of Group Homes

In direct contrast to the well-established local power to zone and segregate uses, the means by which local governments implement these powers may be subject to challenge. For example, a local government might craft a zoning ordinance to include a definition of family which carefully mirrors the locality's perception of a single family use or neighborhood. Typically, such regulations have required a blood or legal familial relationship among those residing in a single family home. As such, group homes that functioned as single family homes, but included a number of unrelated individuals, would not satisfy the definition and were thus excluded from single family zones.

Local governments often regulate the siting of group homes in three ways: (1) by permitting principal uses in one or more zoning districts (this typically occurs when a group home complies with a zoning code's definition of "family"); (2) by allowing siting upon the attainment of a special permit;<sup>28</sup> or (3) in the face of a use expressly or impliedly not permitted, the municipality requires a use

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26. 416 U.S. 1 (1974).

27. *Id.* at 9.

28. See generally N.Y. VILLAGE LAW § 7-725-b, N.Y. TOWN LAW § 274-b, N.Y. GEN. CITY LAW § 27-b. A special permit use, in contrast to a variance, is a permitted use, subject to conditions stipulated in the zoning ordinance. Often times a zoning ordinance will include both specific (to a particular special use) and general (pertaining to all special uses) conditions to be complied with prior to special permit approval by the designated local government entity.

variance.<sup>29</sup> For the purposes of this analysis, the approach adopted by two Westchester County municipalities will be described and contrasted.

### 1. *Definition of Family*

The Zoning Code of the City of Mount Vernon defines family as “[o]ne (1) or more persons having a common domestic bond who live together in one (1) dwelling unit as a traditional family or its functional equivalent, headed by one (1) or more resident persons who have the authority over the care, functioning or management of their common household.”<sup>30</sup> The Zoning Code describes a “dwelling unit” as “[a] building or portion thereof providing complete housekeeping facilities for one (1) family, including independent cooking, sanitary and sleeping facilities.”<sup>31</sup> Single-family dwellings are considered to have met the principal use requirements in all residential zoning districts. Accordingly, if a group home is rendered the functional equivalent of a traditional family, it will be allowed as a principal permitted use in every residential zoning district.

In contrast, the Town of Ossining’s Zoning Code defines family as “[o]ne (1) or more persons occupying a dwelling unit as a single nonprofit housekeeping unit. More than five (5) persons, exclusive of domestic servants, not related by blood, marriage or adoption, shall not be considered to constitute a family.”<sup>32</sup> The vast majority of the Town’s zoning districts are one-family residential districts of varying density, with permitted uses restricted to “[o]ne-family detached dwellings, not to exceed one (1) dwelling on each lot.”<sup>33</sup> The Zoning Code definition of “dwelling unit” is “[a] building, or entirely self-contained portion thereof, containing complete house-

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29. The standards to be used for granting a use variance are defined in the laws of New York State. *See* N.Y. VILLAGE LAW § 7-712-b(2), N.Y. TOWN LAW § 267-b(2), N.Y. GEN. CITY LAW § 81-b(3). The following standards must be met to prove the zoning regulations have caused an “unnecessary hardship”: (1) the owner cannot realize a reasonable return; (2) the hardship is unique to the owner’s property and not applicable to a substantial portion of the zoning district; (3) granting of the variance will not alter the essential character of the neighborhood; and (4) the hardship is not self-created. The Zoning Board of Appeals must grant the minimum variance necessary.

30. CITY OF MOUNT VERNON ZONING CODE § 267-2.3 (1997). The prior code definition of family was as follows: “One (1) or more persons related by blood, marriage or legal adoption who live together in (one) dwelling unit and maintain a common household.” *See id.*

31. *See id.*

32. TOWN OF OSSINING ZONING CODE § 200-53 (1985).

33. *See id.*

keeping facilities for only one (1) family . . . .”<sup>34</sup> Therefore, a group home consisting of six unrelated individuals would effectively be excluded as a permitted use.

## 2. *Special Permit*

The City of Mount Vernon permits “domiciliary care facilities” as a special permitted use in most residential zoning districts. A “domiciliary care facility” encompasses “[a] private proprietary nursing home, convalescent home, or home for adults; a home for the aged, a group residence or other residential care facility for adults as defined in the New York Social Services Law or regulations promulgated thereunder, and any similar facilities operated under the supervision of federal departments and agencies.”<sup>35</sup> In this respect, group homes which do not meet the Zoning Code’s “traditional family standard” may be granted a special permit. However, in order to be approved by the Planning Board as a specially permitted use, general and specific conditions must first be met.<sup>36</sup>

Procedurally, an applicant for a special permit in the City of Mount Vernon must comply with the following Zoning Code requirements: (1) the applicant must submit a preliminary application to the Department of Buildings; (2) a public hearing must be held on the application within sixty-two days of the date the completed application is received; (3) the City must publish notice of the hearing in the official newspaper; and (4) the applicant must notify all property owners within two hundred fifty feet of the proposed site: (i) of the hearing, (ii) the substance of the application,

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34. *See id.*

35. *See* MOUNT VERNON ZONING CODE §§ 267-6.4, 267-6.5B.

36. *See id.* The Code’s general conditions are as follows:

(1) [t]he location and the size of the special permit use, the nature and intensity of the operations involved in or conducted in connection with it, the size of the site in relation to it and the location of the site with respect to streets giving access to it, are such that it will be in harmony with the appropriate and orderly development of the area in which it is located; (2) the location, nature and height of buildings, walls and fences and the nature and extent of existing or proposed plantings on the site are such that the special permit use will not hinder or discourage the appropriate development and use of adjacent land and buildings; (3) operations in connection with any special permit use will not be more objectionable to nearby properties by reason of noise, traffic, fumes, vibration or other such characteristics than would be the operations of permitted uses not requiring a special permit.

*Id.* The Code’s specific condition for “Domiciliary Care Facilities” includes the following prohibition: “[n]o office of a professional person shall be permitted except for the treatment of residents of the facility itself.” *See id.*

and (iii) submit an affidavit to the City attesting to the fact that such notification was made.<sup>37</sup>

### 3. Use Variance

The Town of Ossining fails to include any special permitting provision for group homes or related congregate facilities.<sup>38</sup> Accordingly, in consideration of the Town Zoning Code's narrow definition of family and lack of a special permitted use provision, a use variance would be required for the siting of a group home consisting of greater than five residents.<sup>39</sup>

## II. State Laws Impacting the Siting and Development of Group Homes

### A. The New York State Constitution

New York municipalities, as well as municipalities throughout the nation, have attempted to preserve the character of single family zoning districts by narrowly defining the allowable residential use in these districts. For example, in *City of White Plains v. Ferraioli*,<sup>40</sup> the New York Court of Appeals held that a zoning ordinance which required that a "family" consist of genetically or legally related individuals was too restrictive.<sup>41</sup> It was in this respect that the court ultimately found that the Ferraioli family, which consisted of an adult couple, their two children and ten foster children, was indeed the functional equivalent of a family.<sup>42</sup>

In *McMinn v. Town of Oyster Bay*,<sup>43</sup> the zoning ordinance being challenged restricted the definition of family to "any number of persons related by blood, marriage, or legal adoption, living and

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37. See *id.* § 267-6.3.

38. In most residential districts, the following is included as a use permitted by special permit: "[s]chools and educational institutions, philanthropic, eleemosynary or religious institutions, hospitals, nursing and rest homes or sanitarium for general medical care and treatment of the mentally ill, but excluding facilities for the permanent confinement of the mentally ill, drug addicts and chronic alcoholics." TOWN OF OSSINING ZONING CODE § 200-7(B)(2).

39. See *id.* at § 200-46. Procedurally, pursuant to the Town of Ossining Zoning Code, an applicant for a use variance is subject to notice and hearing requirements, similar to the provisions of the Mount Vernon ordinance. See *id.*

40. 34 N.Y.2d 300, 313 N.E.2d 756 (1974).

41. See *Ferraioli*, 34 N.Y.2d at 303. The White Plains zoning ordinance defined family as "one or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers or sisters of the owner or the tenant or of the owner's spouse or tenant's spouse living together as a single housekeeping unit with kitchen facilities." *Id.* at 304.

42. See *id.* at 303.

43. 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985).

cooking on the premises together as a single, non-profit house-keeping unit" or "[a]ny two (2) persons not related by blood, marriage or legal adoption, living and cooking on the premises together as a single, nonprofit housekeeping unit, both of whom are sixty-two (62) years of age or over, and residing on the premises."<sup>44</sup> Upon review, the New York Court of Appeals held that a zoning ordinance restricting the occupancy of single family homes based on biological or legal relationships had no reasonable relationship to a municipality's legitimate zoning purposes and thus violated the due process clause of the New York State Constitution.<sup>45</sup> As a result of *McMinn*, legitimate zoning ordinances that effectively limit the number of unrelated persons living together in a single family zone, but do not similarly restrict the number of related persons, are unconstitutional pursuant to the New York State Constitution.<sup>46</sup>

In recent years, the *McMinn* standard has been expanded by the Appellate Division. For example, in *Children's Village v. Holbrook*,<sup>47</sup> the Third Department held that the definition of family, as set forth in a town zoning ordinance, violated the State Due Process Clause, notwithstanding the fact that the same zoning ordinance included a provision specially permitting group homes in single family residential zoning districts.<sup>48</sup> The court noted that of particular importance was the fact that the conditions for special permits failed to distinguish between family style group homes and institutional group homes. Accordingly, the Third Department ruled that "without a constitutionally valid definition of family in the zoning ordinance, its specific regulation of group homes is also objectionable in that it may be applied to 'exclude [from the class of occupancies not requiring a special permit] households that due process requires be included.'"<sup>49</sup>

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44. See *id.* at 547-48.

45. See *id.* at 549, 552. According to the Court, "[m]anifestly, restricting occupancy of single family housing based on the biological or legal relationships between its inhabitants bears no reasonable relationship to the goals of reducing parking and traffic problems, controlling population density and preventing noise and disturbance." *Id.* at 549.

46. See *Baer v. Town of Brookhaven*, 73 N.Y.2d 942, 943, 537 N.E.2d 619 (1989).

47. 171 A.D.2d 298, 576 N.Y.S.2d 405 (3d Dept. 1991).

48. See *id.* at 407. The Town of Clarkstown's zoning ordinance defined family as "any number of individuals related by blood, marriage or adoption [or not more than five (5) individuals who are not so related], living together as a single housekeeping unit." *Id.* at 406.

49. *Id.* at 407 (citing *McMinn*, 66 N.Y.2d at 550).

In 1994, the Second Department affirmed a supreme court judgment that a zoning ordinance, which included a rebuttable presumption that four or more unrelated persons living in a single dwelling did not constitute the functional equivalent of a traditional family, was valid.<sup>50</sup> The court reasoned:

because the provisions in question place no restriction on the size of a group of people living together as the functional equivalent of a traditional family, there is a rational relationship between the end sought to be achieved . . . the preservation of the character of residential neighborhoods and the means used to achieve that end . . . the rebuttable presumption.<sup>51</sup>

Although the rebuttable presumption was in effect a variance provision, the court held that there was fair opportunity for a party to show that a proposed group home was indeed a functional equivalent to a single family home. As such, the court concluded that there was no violation of the State Constitution's Due Process Clause.<sup>52</sup>

### B. State Statutes

State statutes may preempt local zoning regulations if the state has either an implied or explicit intent to preempt, or if a local law is inconsistent with a general state law.<sup>53</sup> Section 41.34 of the Mental Hygiene Law, also known as the Padavan Law, provides that licensed community residences and family care homes for the mentally disabled are deemed a family unit for purposes of local land-use regulation.<sup>54</sup> The Padavan Law also sets forth dispersion

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50. *See* *Unification Theological Seminary v. City of Poughkeepsie*, 201 A.D.2d 484, 607 N.Y.S.2d 383 (1994).

51. *Id.* at 485. The City's zoning ordinance provided for "broad criteria" to rebut the presumption "including whether the group shares the entire house, lives and cooks together as a single housekeeping unit, shares expenses for food, rent, utilities, or other household expenses, and is permanent and stable." *Id.*

52. *See id.*

53. *See* *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S. 627 (1989); *New York State Club Ass'n, Inc. v. City of New York*, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987), *aff'd*, 487 U.S. 1 (1988).

54. The family care program consists of individuals who provide a home to mentally disabled persons in private homes. The community residence program assists the mentally disabled who can benefit from a structured program "geared toward the development or rehabilitation of skills that are necessary for successful reintegration into the community." 1985 N.Y. Laws 351, § 33.

guidelines and notification guidelines for the siting of licensed community residences.<sup>55</sup>

In addition, the New York Court of Appeals has held that the operation of an unsecured detention home, established pursuant to County Law Section 218-a, is exempt from local zoning regulation. For example, in *People v. St. Agatha Home for Children*,<sup>56</sup> the Town of Pound Ridge charged a private child-care organization with violating its zoning regulation for a single-family zoning district. The court, however, held that Westchester County was authorized and required to provide non-secure detention facilities pursuant to County Law § 218-b.<sup>57</sup> Although the county fulfilled its obligation through the vehicle of privately owned homes, the court reasoned that such an arrangement could remain valid on three distinct grounds: (1) the facility was established by request of the county; (2) the location was approved by the county; and (3) the facility was funded by the county.<sup>58</sup>

The state laws regulating residential substance abuse facilities, in contrast to the Padavan Law and County Law Section 218-a, have not been held to preempt local zoning regulation. In *Incorporated Village of Nyack v. Daytop Village, Inc.*,<sup>59</sup> the court of appeals stated that although Article 19 of the Mental Hygiene Law represented:

[A] sweeping effort to address the myriad of problems that have flowed from the scourge of substance abuse in this State . . . [n]one of this, though, leads inexorably to the conclusion that the State's commitment to fighting substance abuse preempts all local laws that may have an impact, however tangential, upon the siting of substance abuse facilities.<sup>60</sup>

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55. See *infra* Part C of this Section for a detailed discussion concerning the Padavan Law.

56. 47 N.Y.2d 46, 389 N.E.2d 1098, 416 N.Y.S.2d 577 (1979).

57. See *id.* at 49; see also N.Y. COUNTY LAW § 218-a(B) stating in relevant part:

[n]otwithstanding any other provision of law, each board of supervisors shall provide or assure the availability of conveniently accessible and adequate non-secure detention facilities, certified for the state division for youth, as resources for the family court in the county . . . to be operated in compliance with the regulations of the division for youth for the temporary care and maintenance of alleged and adjudicated juvenile delinquents and persons in need of supervision held for or at the direction of a family court.

*Id.*

58. See *St. Agatha*, 47 N.Y.2d at 49.

59. 78 N.Y.2d 500, 583 N.E.2d 928, 577 N.Y.S.2d 215 (1991).

60. *Id.* at 506.

The court expressly distinguished Article 19 from Padavan, stating that Padavan expressly withdrew the zoning authority of local governments and further found that there was no implied preemption evident from the wording of Article 19, its legislative intent or promulgated regulations. The court left open the possibility, however, that municipal zoning regulations that effectively "block[ed] the placement of substance abuse facilities within its borders" might warrant a finding of preemption.<sup>61</sup>

The courts have also been reluctant to preempt local zoning regulations pertaining to the siting of group homes for foster care. In *Group House of Port Washington, Inc. v. Board of Zoning and Appeals of Town of North Hempstead*,<sup>62</sup> for instance, the court of appeals held that a town may not use its zoning regulation's definition of family to exclude a small group home for foster care of children. The court was careful, however, to narrow its holding by stating that, "[w]e need not, and accordingly we do not reach the broader question whether the State has pre-empted this area to the extent that a municipality may not forbid the establishment of a group home authorized under State law."<sup>63</sup> Despite such reluctance, however, this area of the law will undoubtedly continue to evolve absent a clear legislative mandate.<sup>64</sup>

### C. The Padavan Law

In New York State, the Padavan Law<sup>65</sup> has preempted local zoning authority in the siting of licensed community residential facilities for the mentally disabled.<sup>66</sup> The Padavan Law provides for local input into the siting of certain licensed group homes. The un-

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61. *See id.* at 508.

62. 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978).

63. *Id.* at 271; *see also* N.Y. SOC. SERV. LAW § 374-c (McKinney 1997). This provision of the Social Services law empowers authorized agencies to operate group homes for children in compliance with departmental regulations. Section 374-c (2)(a) sets forth a local notification procedure as follows: "If an authorized agency plans to establish one or more group homes within a municipality, it shall notify the chief executive officer of the municipality in writing of its intentions and include in such notice a description of the nature, size and the community support requirements of this program." *Id.*

64. *See* *People v. Town of Clarkstown*, 160 A.D.2d 17, 559 N.Y.S.2d 736 (2d Dept. 1990) (holding that provisions of a town zoning ordinance regulating family day-care homes were preempted by N.Y. Social Services Law §§ 390, 410-d).

65. *See* N.Y. MENTAL HYG. LAW § 41.34 (McKinney 1996).

66. *See generally* N.Y. MENTAL HYG. LAW § 41.34 (McKinney 1996); *see also* N.Y. MENTAL HYG. LAW § 41.34(f) ("A community residence established pursuant to this section and family care homes shall be deemed a family unit for the purposes of local laws and ordinances.").



derlying purpose of the law is to promote and encourage the placement of mentally disabled individuals in community settings in order to provide the "least restrictive environment that is consistent with [the needs of such individuals]." <sup>67</sup> The statute includes a community notice requirement, in which the project sponsor formally identifies the proposed site, the type of community residence and the anticipated number of residents, and notifies the chief executive officer of the municipality of this information. <sup>68</sup> The municipality, in turn, has a forty day response period to analyze the proposal and to approve the site, suggest one or more suitable sites, or reject the siting of a facility within the municipality because of an over-concentration of such facilities. <sup>69</sup>

It should be noted that the Padavan Law and its mandated approval process applies only to community residences licensed by the New York State Office of Mental Health or the Office of Mental Retardation and Developmental Disabilities, with a proposed occupancy of four to fourteen residents. <sup>70</sup> Therefore, an unlicensed facility could not avail itself of Padavan's siting and dispersion guidelines. <sup>71</sup>

The essential element of Padavan is mandated, but flexible, dispersion guidelines. <sup>72</sup> After receiving notice, a municipality may approve the recommended site, suggest alternative sites or object to the establishment of a facility because of over-concentration. If a municipality claims saturation or over-concentration, the critical

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67. See 1978 N.Y. Laws 468.

It is the intention of this legislation to meet the needs of the mentally disabled in New York State by providing, whenever possible, that such persons remain in normal community settings . . . . It is further intended that communication and cooperation between the various state agencies, local agencies, and local communities be fostered by this legislation, and that this will be best achieved by establishment of clearly defined procedures for the selection of locations for community residences, to best protect the interests of the mentally disabled and ensure acceptance of community residences by local communities.

*Id.*

68. See N.Y. MENTAL HYG. LAW § 41.34(c)(1) (McKinney 1996).

69. See *id.*

70. See N.Y. MENTAL HYG. LAW § 41.34(a)(1) (This provision includes the definition for "community residential facility for the disabled.").

71. See *Jennings v. New York State Office of Mental Health*, 90 N.Y.2d 227, 243, 682 N.E.2d 953, 960, 600 N.Y.S.2d 352, 359 (1997) (Judge Smith stated that unlicensed facilities are not relevant to Padavan's over-concentration analysis and "[s]uch a sweeping position is not the one adopted by the Legislature and the Commissioner's conclusions in this regard are rational.").

72. The Padavan Law has been upheld by the State Court of Appeals. See *Jennings*, 90 N.Y.2d at 227.

concern becomes whether the nature and character of the area in which the facility is to be based would be substantially altered as a result of establishment of the facility. Over-concentration is determined by identifying the number of similar facilities (e.g., licensed community residences, residential care facilities and facilities providing residential services to former in-patients) located in the area of the proposed siting or located within the municipality.<sup>73</sup> These dispersion guidelines are absolute and must be applied to alternative sites recommended by a municipality prior to approval by either the Commissioner of Mental Health or by the Commissioner of Mental Retardation and Developmental Disabilities.<sup>74</sup>

Padavan's dispersion guidelines have paved the way for an efficient and effective siting process. In fact, the law has been so successful that no municipality has ever prevailed on a challenge of a proposed siting based on over-concentration, despite the fact that municipalities have raised concerns that proposed sitings would impact the character of a neighborhood.<sup>75</sup> Such concerns, including safety and traffic, have been found to be without effect unless there

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73. See N.Y. SOC. SERV. LAW § 463-a (McKinney 1997) (The Department of Social Services is responsible for providing to the governor on an annual basis "a registry of all community residences presently operating in [the] state including the types of services provided, the number of persons served, the number of persons authorized to reside therein, the licensing authority by which it is governed and the municipality in which it is located.").

74. See N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney 1997). The New York Mental Hygiene Law sets forth the procedures for reviewing facility siting by the sponsoring state agency. See *id.* If the municipality and the sponsoring agency cannot reach agreement as to the siting of a facility, "either the sponsoring agency or the municipality may request an immediate hearing before the commissioner [of the sponsoring agency] to resolve the issue." *Id.* The Commissioner or a designated hearing officer must conduct a hearing within fifteen days of a request. See *id.*

In reviewing any such objections, the need for such facilities in the municipality shall be considered as shall the existing concentration of such facilities and other similar facilities licensed by other state agencies in the municipality or in the area in proximity to the site selected and any other facilities in the municipality or in the area in proximity to the site selected providing residential services to a significant number of persons who have formerly received in-patient mental health services in facilities of the office of mental health or the office of mental retardation and developmental disabilities. The commissioner shall sustain the objection if he determines that the nature and character of the area in which the facility is to be based would be substantially altered as a result of establishment of the facility. The commissioner shall make a determination within thirty days of the hearing.

*Id.*

75. See Kevin J. Zanner, *Dispersion Requirements for the Siting of Group Homes: Reconciling New York's Padavan Law with the Fair Housing Amendments Act of 1988*, 44 BUFF. L. REV. 249, 258 (1996).

is an over-concentration of similar facilities and the nature and character of a neighborhood will be substantially altered.<sup>76</sup>

In *Jennings v. New York State Office of Mental Health*,<sup>77</sup> the court of appeals dismissed an Article 78 petition and interpreted the facility siting criteria of the Padavan law.<sup>78</sup> A community residence, to be licensed by the New York State Office of Mental Health, was proposed to be sited in an Albany neighborhood.<sup>79</sup> Applying a hybrid, arbitrary and capricious standard of review, Judge Smith stated, "while over-concentration is certainly relevant, whether the nature and character of an area will be substantially altered by the establishment of the proposed facility is the dispositive inquiry."<sup>80</sup> The court cited support in the fact that the neighborhood boundaries were defined by the City's own witnesses and "there [was] no indication that the larger area . . . would be any more saturated than the smaller neighborhood."<sup>81</sup> Moreover, the court affirmed both the hearing officer's and Commissioner's conclusion that testimony concerning a decrease in property values was an irrelevant inquiry.<sup>82</sup>

The Padavan Law's purpose is to facilitate the establishment of community residences and to place the disabled into the "life of the

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76. See *Town of Mount Pleasant v. New York Office of Mental Health*, 200 A.D.2d 576, 606 N.Y.S.2d 296 (1994) (noting that the evidence offered by the municipality, in showing that the character of an area would be substantially altered, must be clear and of a convincing nature).

77. 220 A.D.2d 148, 644 N.Y.S.2d 844 (1996), *rev'd*, 90 N.Y.2d 227 (1997).

78. See *id.* at 151-52, 644 N.Y.S.2d at 846-47 (1996), *rev'd*, 90 N.Y.2d 227 (1997). The Court of Appeals rejected the Appellate Division's determination that the presence of residential facilities in an area adjacent to the neighborhood as defined was relevant. See *id.* In its analysis the Appellate Division interpreted this provision of Padavan and stated, "[i]n this unique situation where there is a high concentration of similar facilities that impact upon the subject area, we find that the Commissioner's delineation of the neighborhood boundaries to exclude a number of other residential facilities in close proximity to the site in question was arbitrary and capricious . . . ." *Id.* at 150, 644 N.Y.S.2d at 846.

79. See *id.* The Mayor of Albany objected to the site, and requested a hearing without suggesting an alternative site for the facility. At the hearing, the State Office of Mental Health provided evidence that there was a significant need for more residential non-institutional programs in Albany County. The City's witnesses argued that: (1) there was an over-concentration of special needs housing (unlicensed and licensed) in the Albany neighborhood; (2) property values had been adversely impacted by these existing facilities; and (3) when conducting an over-concentration analysis, facilities located in the area adjacent to the neighborhood should be included. See *id.* at 150.

80. See *Jennings*, 90 N.Y.2d at 240-41 (footnote omitted).

81. *Id.* at 242.

82. See *id.* at 237.

community.”<sup>83</sup> However, in consideration of recent federal court decisions, including the Sixth Circuit’s recent holding in *Larkin v. State of Michigan Department of Social Services*,<sup>84</sup> Padavan may be subject to challenge as discriminatory pursuant to the Fair Housing Act Amendments [hereinafter FHAA]. Unlike Padavan, the Michigan Adult Foster Care Licensing Statute, challenged in *Larkin*, included a mandatory notice requirement to all residences located within 1,500 feet of the proposed facility, and prohibited licensing if the proposed facility was located within 1,500 feet of a similar institution.<sup>85</sup> However, similar to Padavan, the purpose and intent of the Michigan statute and the dispersion requirement was to “integrate[ ] the disabled into the community” and “serve[ ] the goal of deinstitutionalization by preventing a cluster of [Adult Foster Care] facilities from recreating an institutional environment in the community.”<sup>86</sup> In holding that the statute was preempted by the FHAA, the Court stated “statutes that single out for regulation group homes for the handicapped are facially discriminatory” and that a “benign motive does not prevent the statute from being discriminatory on its face.”<sup>87</sup>

Padavan’s inherent flexibility is clearly distinguishable from the Michigan statute’s application of rigid dispersion and spacing guidelines. Moreover, the recent court of appeals holding in *Jennings* confirmed that over-concentration is not dispositive, but merely a factor to consider when evaluating the impact of licensed

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83. See *id.* at 241 (quoting Governor’s Approval Memorandum, 1978 N.Y. Laws 1821).

84. 89 F.3d 285 (6th Cir. 1996).

85. The Michigan Adult Foster Care, Licensing Act (M.C.L.) Section 400.716(3) (1997) required the state licensing agency to comply with M.C.L. §§ 125.216(a), 125.286(a) and 125.583(b) (1997), which required it to give notice to the municipality within which a proposed facility was to be located. The municipality then was required to give notice to all property owners of residences located within a 1,500 radius of the proposed facility. See M.C.L. §§ 125.216(a), 125.286(a) and 125.583(b) (1997). According to the statute, “[a] state licensing agency shall not license a proposed residential facility if another licensed residential facility exists within the 1,500-foot radius of the proposed location, unless permitted by local zoning ordinances or if the issuance of the license would substantially contribute to an excessive concentration of state licensed residential facilities within the city or village.” M.C.L. § 125.583(b)(4) (1997).

86. See *Larkin*, 89 F.3d at 290 n.37.

87. See *id.* According to the Court a facially discriminatory statute will survive challenge pursuant to the FHAA only if the statute’s provisions are “‘warranted by the unique and specific needs and abilities of those handicapped persons’ to whom the regulations apply.” *Id.* The court held that both the Michigan statute’s 1,500 foot dispersion requirement and the notice requirement were preempted by the FHAA. See *id.*

community residences on a particular neighborhood. Although the issue has not yet been addressed by state or federal courts, and irrespective of the Sixth Circuit's holding in *Larkin*, Padavan would likely survive a challenge under the FHAA.<sup>88</sup>

### III. The Federal Fair Housing Act and Amendments

#### A. Legislative History

In 1968, Congress enacted the Fair Housing Act in order to prohibit housing discrimination on the basis of color, race, religion, national origin, and gender. The FHAA extended protections to the handicapped.<sup>89</sup> It was the intent of Congress to protect against housing discrimination by expanding its reach to discriminatory practices of state and local governments.<sup>90</sup> A House of Representatives Report defined the intent of the FHAA as follows:

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 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 people with disabilities.<sup>91</sup>

#### B. Proving a Prima Facie Case and Discrimination

According to Section 3604 of the FHAA, it is unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable, or deny, a dwelling to any buyer or renter because of a handicap . . . ."<sup>92</sup> This provision would extend to a current or potential resi-

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88. See *infra* text accompanying notes 163-165.

89. See 42 U.S.C. § 3602(h). According to the FHAA, handicap includes: "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) a record of having such impairment; or (3) being regarded as having such an impairment." Current illegal use of drugs or substance abuse is excluded from the definition of handicap. The protections of the FHAA also extend to groups that provide housing for the handicapped. See 42 U.S.C. § 3602(b).

90. See 42 U.S.C. § 3615; see also H.R. REP. NO. 711 (1988) ("Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.").

91. See H.R. REP. NO. 711 (1988).

92. See 42 U.S.C. § 3604(f)(1).

dent of a group home and to "any person associated with that buyer or renter."<sup>93</sup>

There are three different methods of proving discrimination under the FHAA: (1) discriminatory intent or discriminatory treatment; (2) discriminatory effect; and (3) reasonable accommodation. To prove intentional discrimination, plaintiffs must show that "discriminatory purpose was a motivating factor" in the decision making process.<sup>94</sup>

The Second Circuit has adopted two tests to determine the presence of discrimination under the Fair Housing Act.<sup>95</sup> First, pursuant to the "disparate impact" test, mere "discriminatory effect" may present adequate proof of discrimination.<sup>96</sup> Second, under the discriminatory treatment test, a plaintiff "need only show that the

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93. See 42 U.S.C. § 3604(f)(1); see also *infra* text accompanying notes 124-29 for a discussion of Article III standing requirements.

94. See *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270 (1977). The Sixth Circuit has adopted a rigid standard for proof of intentional discrimination under the FHAA. See *Smith & Lee Associates v. City of Taylor*, 102 F.3d 781 (6th Cir. 1996). The owner of an adult foster care home for the elderly handicapped brought a claim against a Michigan municipality under the FHAA. The plaintiff alleged intentional discrimination and a failure to make reasonable accommodation to permit the operation of a twelve person home in a single family residential district. See *id.* at 786. In modifying the holding of the District Court, the Sixth Circuit held that there was insufficient proof of discriminatory animus by the City in its refusal to rezone the foster care home because: (1) the City's zoning ordinance that restricted occupancy of unrelated individuals in single family zones was adopted prior to the plaintiff's application; (2) the City's treatment of "home businesses" as an accessory use was not relevant; and (3) statements of City officials expressing concerns regarding property values and safety did not necessarily provide proof of discriminatory purpose. See *id.* at 792-94. However, the court held there was sufficient proof that the City of Taylor had not made a reasonable accommodation in violation of the FHAA. See *id.* at 795-96; see also *Ass'n for Advancement v. City of Elizabeth*, 876 F. Supp. 614 (1994) (holding that a city ordinance automatically denying a conditional use permit for higher occupancy community residences for the developmentally disabled, unless special siting and other conditions were met to protect the community from a "risk of harm," was facially discriminatory and violated the FHAA).

95. See *Stewart B. McKinney Found. Inc. v. Town Planning and Zoning Commission*, 790 F. Supp. 1197, 1217 (D. Conn. 1992). "The Second Circuit has stated a disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group, whereas a disparate [differential] treatment analysis involves differential treatment of similarly situated persons or groups." *Id.*

96. See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1989); see also *Stewart B. McKinney*, 790 F. Supp. at 1211.

Although we agree that a showing of discriminatory intent is not required under section 3604 (a) [Fair Housing Act], we refuse to conclude that every action which produces discriminatory effects is illegal. Such a per se rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases. Rather, the courts must use their discretion in

plaintiff's disability was a "motivating factor" in the defendant's decision.<sup>97</sup> Accordingly, to prove discrimination under the FHAA, because discriminatory practices are often invidious and hidden, specific intent to discriminate does not have to be proven by the plaintiff.

A third test to establish proof of discrimination against the handicapped is nonetheless expressly designated as a method of proof in the FHAA and has been adopted by other circuits; however, the test is rarely employed by the Second Circuit.<sup>98</sup> Pursuant to the Federal rights established under the FHAA, the test requires local governments to "make reasonable accommodation in rules, policies, practices or services, when accommodations may be necessary to afford such [handicapped] person equal opportunity to use and enjoy a dwelling."<sup>99</sup> The analysis as to whether an accommodation is required is a determination based upon the facts.<sup>100</sup>

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deciding whether, given the particular circumstances of each case, relief should be granted under the statute.

*Stewart B. McKinney*, 790 F. Supp. at 1217. The plaintiff has the burden of establishing a prima facie case under disparate impact analysis. See *Huntington Branch, NAACP*, 844 F.2d at 933. The burden then shifts to the defendant to prove a legitimate government interest in the regulation. See *id.* "In the end, the court must balance the plaintiff's showing of discriminatory impact against the defendant's justifications for its conduct." *Oxford House v. Town of Babylon*, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993).

97. See *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977). This Court of Appeals case on remand from the Supreme Court, delineated four factors to determine discriminatory impact under the FHA: (1) the strength of the discriminatory effect, (2) evidence of discriminatory intent, (3) the defendant's interests in the action, and (4) the nature of relief the plaintiff seeks. See *id.* at 1240. A differential treatment analysis includes inquiry into the following: "(1) discriminatory impact; (2) the historical background of a decision; (3) the sequence of events leading up to the challenged decision; (4) departures from normal procedural sequences; and (5) departures from normal substantive criteria." *Stewart B. McKinney*, 790 F. Supp. at 1211.

98. See *Smith & Lee Assoc.*, 102 F.3d at 793-96; see also *Stewart B. McKinney*, 790 F. Supp. at 1222 (acknowledging that reasonable accommodation could provide the basis for a separate claim of discrimination under the FHAA).

99. See 42 U.S.C. § 3604(f)(3)(B).

100. See *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 945 (9th Cir. 1996) (discussing *City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802 (9th Cir. 1994)). See also *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995); *Smith & Lee Assoc.*, 102 F.3d at 794-95. The court defined the key elements of 42 U.S.C. § 3604(f)(3)(B) as follows: (1) "equal opportunity" as used in the FHAA "is concerned with achieving equal results, not just formal equality;" (2) "necessary" means "plaintiffs must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice;" and (3) the term "reasonable" was intended by Congress to share the definition pursuant to Section 504 of the Rehabilitation Act and as interpreted in *Southeastern Community College v. Davis* to require an accommodation unless "it requires 'a fundamental alteration in

Courts have been careful to limit the application of the FHAA to give a protected class equal access to housing, but not preferred access.<sup>101</sup> Courts also have required reasonable accommodation by local governments in zoning matters, pursuant to the FHAA.<sup>102</sup> In *Oxford House-C v. City of St. Louis*,<sup>103</sup> the Eighth Circuit held that zoning restrictions were not exempt from the FHAA. The Court limited the application of the Fair Housing Act exemption provision, Section 3607 (b)(1), consonant with the Supreme Court's *City of Edmonds*<sup>104</sup> decision.<sup>105</sup> Therefore, the FHAA required "the City to make reasonable accommodation in its generally applicable zoning ordinances when necessary to give a handicapped person equal opportunity to use and enjoy a dwelling."<sup>106</sup>

In *Pulcinella v. Ridley*,<sup>107</sup> the district court noted "substantial case law that holds or opines that local zoning laws and municipal zoning decisions must make 'reasonable accommodation' for hand-

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the nature of a program' or imposes 'undue financial and administrative burdens.'" Ultimately the local burden imposed by the accommodation must be balanced against the needs of the handicapped class. See *Smith & Lee Assoc.*, 102 F.3d at 794-95.

101. See *Brandt v. Village of Chebanse, Illinois*, 82 F.3d 172, 175 (7th Cir. 1996). The *Brandt* court stated: "it is unlikely that the Fair Housing Act was designed to abolish single-family zoning for all developers who comply with the requirement that first-floor apartments be accessible to handicapped tenants." *Id.* at 175; see also *Turning Point*, 74 F.3d at 945.

102. See *Turning Point*, 74 F.3d at 944; *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 45 (6th Cir. 1992); *Horizon House Developmental Serv. Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 699 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993). But see *Pulcinella v. Ridley Township*, 822 F. Supp. 204, 209 (E.D. Pa. 1993).

103. 77 F.3d 249 (8th Cir. 1996).

104. *City of Edmonds v. Oxford House, Inc. et al.*, 514 U.S. 725 (1995) (holding that zoning provisions governing area zoned for single-family dwelling units, which defined family as persons related by genetics, adoption, marriage or group of five or fewer unrelated persons, described who could compose a family unit, not the maximum number of occupants that the dwelling unit could house, and thus, did not fall within the FHA's absolute exemption for total occupancy limits). See *id.*

105. See *Oxford House-C*, 77 F.3d at 251. ("The Supreme Court recently held § 3607(b)(1) only exempts total occupancy limits intended to prevent overcrowding in living quarters, not ordinances like the City's that are designed to promote the family character of a neighborhood") (citing *City of Edmonds*, 514 U.S. at 728; see also 42 U.S.C. § 3603(b), 3.2(b), 3604(f)(9) (1994) (The FHAA's other exemptions pertain to: (1) the sale or rental of single family homes, if an owner owns no more than three such homes; and (2) units in dwellings containing four or less individual families where the owner resides in one of the units). In addition, the Act does not require housing be made available to an individual posing a direct health or safety threat to others, or "whose tenancy would result in substantial physical damage to the property of others." See 42 U.S.C. § 3604(f)(9) (1994).

106. See *Oxford House-C*, 77 F.3d at 251 (quoting 42 U.S.C. § 3604(f)(1) (1994)).

107. 822 F. Supp. 204 (E.D. Pa. 1993).



icapped persons.”<sup>108</sup> The court distinguished between “local zoning ordinances that placed special requirements upon zoning permits obtained by handicapped”<sup>109</sup> and “zoning decisions and practices,”<sup>110</sup> recognizing only the former as subject to the FHAA.

However, this narrow interpretation of the statute has not been widely accepted and appears inconsistent with Congressional intent. Congress clearly intended that the FHAA be applied to prohibit zoning practices that have a discriminatory effect.<sup>111</sup> Therefore, in this instance, Congress has concluded beyond inference that the expansive language of the FHAA is inclusive of local governmental functions such as zoning.

### C. Remedies under the FHAA

The FHAA provides for two mechanisms of enforcement. A civil action may be brought by an aggrieved party<sup>112</sup> within two years after the alleged discrimination, and an administrative remedy is available through the Department of Housing and Urban Development with further enforcement by the U.S. Attorney General.<sup>113</sup>

## IV. The Americans with Disabilities Act

### A. Legislative History

The Americans With Disabilities Act [hereinafter ADA] was enacted in 1990 to help counter the historic discrimination experienced by the disabled.<sup>114</sup> There were a number of prior laws which helped to provide its foundational basis, including the

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108. *Id.* at 216.

109. *Id.* at 215.

110. *Id.*

111. See 134 CONG. REC. S122449 (daily ed. Sept. 7, 1988) (statement of Sen. Kennedy); 134 CONG. REC. H6491 (daily ed. Aug. 8, 1988) (statement of Rep. Edwards).

112. See 42 U.S.C. § 3602. Pursuant to the statute, an aggrieved person is (1) any person who claims to have been injured by a discriminatory housing practice; or (2) any person who believes such person will be injured by a discriminatory housing practice about to occur. See *id.*

113. See 42 U.S.C. §§ 3610-14. If a state or local land-use law is being challenged, the matter is referred to the Attorney General who may file an action in Federal Court for mandamus and invalidation of the law, damages, court and attorney's fees, and a civil penalty. An action involving challenge of a local land-use law must be filed in Federal Court within eighteen months of the alleged discrimination. See 42 U.S.C. § 3610(g)(2)(c).

114. See 42 U.S.C. § 12101(a)(2) (1996) (stating, “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive problem”).

FHAA and the Rehabilitation Act of 1973.<sup>115</sup> These enactments prohibited discrimination against the disabled under specific circumstances and conditions, however none offered a comprehensive approach to countering discrimination against the disabled.

The major purpose of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals."<sup>116</sup> It was also the intent of Congress to enact a bill with broad coverage, so that persons with physical and mental disabilities, as well as persons with health related disabilities, would be protected from discrimination.<sup>117</sup> The ADA formally recognized that the basis of discrimination experienced by the disabled was politically and socially based, noting that such discrimination could be more debilitating than the actual mental or physical handicap itself.

Title II of the ADA follows the framework of the House of Representatives' original bill and amendments, by setting specific standards for public entities in two subtitles, one which applies to general prohibitions against discrimination known as Subtitle A', and the other public transportation known as Subtitle B'.<sup>118</sup>

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115. See 29 U.S.C. § 794 (1996). "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." *Id.* Title II of the ADA significantly expanded rights under the Rehabilitation Act of 1973, as amended, to include services, programs and activities of local governments without regard to Federal assistance. 42 U.S.C. § 12132.

116. See 134 CONG. REC. S5106, S5114 (1988) (statement of Senator Harkin). Senator Harkin, Chairman of the Senate Subcommittee on the Handicapped described additional purposes of the Act as follows:

[T]o provide a prohibition of discrimination against persons with disabilities parallel in scope of coverage with that afforded to persons on the basis of race, sex, national origin, and religion . . . to provide clear, strong, consistent, enforceable standard addressing discrimination against persons with disabilities . . . [and] to invoke the sweep of congressional authority, including our power to enforce the 14th [a]mendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

*Id.*

117. See 134 CONG. REC. S5106, S5115 (1988) (statement of Senator Kennedy). The Senator described the broad coverage of the bill as follows:

It is based on the recognition by Congress and the courts that people have many kinds of disabilities, from traditionally recognized conditions such as blindness, cerebral palsy, and mental retardation to medical conditions such as heart disease and diabetes. They are vulnerable to discrimination, and they deserve protection. These protections are the basic civil rights of disabled citizens, and they ought to be enforced.

*Id.*

118. See H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. § 19 (1990).

One of the purposes of the ADA was to address the segregation of the disabled, resulting from discriminatory practices. California Congressman Ronald Dellums stated:

The history of different, separate, and unequal treatment of persons with disabilities, especially those with severe disabilities, could not be clearer. That history is in fact a stark reminder of the prejudice and misunderstanding that has characterized the treatment of minority citizens. This disparate treatment establishes an abundant factual predicate for the relief granted . . . . The [ADA] is a plenary civil rights statute designed to halt all practices that segregate persons with disabilities and those which treat them inferior or differently. By enacting the ADA, we are making a conscious decision to reverse a sad legacy of segregation and degradation.<sup>119</sup>

Title II, Subtitle A, was restructured during the evolution of the ADA in Congress. In its final form, the Subtitle was described as setting "forth the general anti-discrimination provision and other relevant provisions for all public entities, which includes State and local government, agencies and departments of a State . . . ." <sup>120</sup> Thus, according to the congressional findings for the Act, "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services . . . ." <sup>121</sup>

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Title II of the legislation has two purposes. The first purpose is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance. Currently, section 504 prohibits discrimination only by recipients of Federal financial assistance.

The second purpose is to clarify the requirements of section 504 for public transportation entities that receive Federal aid, and to extend coverage to all public entities that provide public transportation, whether or not such entities receive Federal aid.

S. REP. NO. 116, 101st Cong., 1st Sess. § 44 (1989).

119. 136 CONG. REC. H2599-01, H2639 (1990).

120. *Id.*

121. 42 U.S.C. § 12101(a)(3) (1996).

## B. Proving Discrimination Pursuant to Title II

Title II of the ADA prohibits discrimination against the disabled by public entities.<sup>122</sup> A public entity is defined in the statute, in part, as "any state or local government" or instrumentality thereof.<sup>123</sup> As such, this broad definition would seemingly apply to virtually any instrumentality of a local, state or federal entity.

Generally, to bring a claim under Title II of the Act: (1) a plaintiff must be a qualified individual with a disability; (2) the individual must have been discriminated against by the public entity, or excluded from participation in or denied the services, programs or activities of a public entity specifically because of the disability; and (3) the entity providing the activity, service, or program must be a public entity.<sup>124</sup>

In order to have standing to bring a claim under the ADA, a plaintiff must satisfy both the constitutional<sup>125</sup> and prudential<sup>126</sup> limitations imposed by Article III. These Article III requirements are satisfied if the plaintiff can allege: "(1) an 'injury in fact' (2) fairly traceable to the defendant's conduct [and] (3) that a favorable federal court decision likely would redress or remedy."<sup>127</sup> Additionally, to fully address standing requirements, prudential limitations apply.<sup>128</sup> Courts have interpreted the ADA regulations to grant a right of action to persons or entities who themselves are

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122. See 42 U.S.C. § 12132 (1996) ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such a disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). *Id.*

123. 42 U.S.C. § 12131(1) (1996) (In addition to "any local or state government," a public entity is "any department, agency, special purpose district or other instrumentality of a State or States or local government.").

124. See 42 U.S.C. § 12132 (1996); see also *Tyler v. City of Manhattan*, 857 F. Supp. 800, 817 (D. Kan. 1994). But see *Cox v. Township of Upper St. Clair*, No. Civ. A. 93-1443, 1994 WL 902369 at \*3 (W.D. Pa. 1994) (holding that the ADA prohibits discrimination by public entities limited only to their services, programs, and activities).

125. See U.S. CONST. art. III, § 2, cl. 1.

126. See *Oak Ridge Care Center, Inc. v. Racine County*, 896 F. Supp. 867, 871 (E.D. Wis. 1995).

127. *Id.*

128. See *id.* The court states: "Prudential limitations include the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the 'zone of interests' protected by the law invoked." *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984) (discussing the standing doctrine in the context of school desegregation)).

not disabled, but have been "discriminated against because of their known association with disabled people."<sup>129</sup>

Plaintiffs do not have to prove discriminatory intent under Title II and some courts have held that proof of discriminatory effect is sufficient.<sup>130</sup> For instance, in *Crowder v. Kitagawa*,<sup>131</sup> the Ninth Circuit held that the discrimination prohibited by Title II includes the "exclusion from benefits of public services, as well as discrimination by a public entity."<sup>132</sup> The court based its conclusion on statutory construction and the legislative findings of the ADA.<sup>133</sup>

The *Crowder* court held that a state's mandatory quarantine requirement for animals, including guide dogs, discriminated against visually impaired individuals by denying them "meaningful access" to state services.<sup>134</sup> Although the quarantine was defined as a public health measure and not a service, program, or activity, the complaint alleged discrimination by a public entity. As such, the elements of the ADA were met.<sup>135</sup> The court also analogized the Supreme Court's past interpretation of discriminatory standards under the Rehabilitation Act, which included "thoughtlessness, indifference or benign neglect," as well as intentional discrimination, to the ADA.<sup>136</sup>

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129. See *id.* at 872 (discussing *Tugg v. Towey*, 864 F. Supp. 1201, 1208 (S.D. Fla. 1994)); see also 28 C.F.R. § 35.130(g) (1996) ("A public entity shall not exclude or otherwise deny equal services, programs or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.").

130. See *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1995) (reversing the district court's summary judgment upholding a 120-day quarantine on importation of animals to Hawaii because it unreasonably affected unusually impaired persons); see also 42 U.S.C. § 12101 (a)(5) (1996) (describing various forms of intentional and non-intentional discrimination experienced by the disabled).

131. See *Crowder*, 81 F.3d at 1480 (reversing a district court's summary judgment).

132. See *id.* at 1483 (interpreting 42 U.S.C. § 12132).

133. See *id.*; see also 42 U.S.C. § 12101(a)(5). "It is thus clear that Congress intended the ADA to cover at least some so-called disparate impact cases of discrimination, for the barriers to full participation . . . are almost all facially neutral but may work to effectuate discrimination against disabled persons." *Crowder*, 81 F.3d at 1483.

134. See *Crowder*, 81 F.3d at 1482.

135. See *id.* at 1483; see also 42 U.S.C. § 12132 (1996).

136. See *Crowder*, 81 F.3d at 1484; see also *Alexander v. Choate*, 469 U.S. 287 (1985). The Supreme Court held that a pure discriminatory effect test for discrimination under the Rehabilitation Act would be overburdensome for the courts. Thus, as a practical matter, proof of discrimination would include the denial of "meaningful access" to services. See *id.*; see also *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995) ("The Legislative History of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA.").

The Third Circuit has since expanded this "meaningful access" test to include "unnecessary segregation of individuals with disabilities" as a factor for consideration.<sup>137</sup> In *Helen L. v. DiDario*, for example, the Third Circuit held that the rights of the disabled plaintiff, under the ADA, were violated when the State of Pennsylvania required that she receive care in a nursing facility, instead of her own home.<sup>138</sup> The plaintiff qualified for a home attendant care program, but for reasons of administrative efficiency, the State rejected a home placement.<sup>139</sup> The court decided that "[t]he ADA is intended to insure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them."<sup>140</sup>

According to Section 35.130(b)(7) of the Title II regulations, promulgated by the Department of Justice, "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." Therefore, like the FHAA, a failure by a municipality to provide a reasonable accommodation or modification may be evidence of discrimination under Title II of the ADA.

### **C. *Innovative Health Systems v. City of White Plains*— Expanding the Reach of the ADA**

The Second Circuit, in *Innovative Health Systems v. City of White Plains*,<sup>141</sup> has expanded the reach of the Americans with Disabilities Act by applying the statute to local zoning decisions.<sup>142</sup> Plaintiff, Innovative Health Systems, Inc. ("IHS"), operated treatment programs for alcoholics and substance abusers in the City of White Plains. In January 1994, IHS leased the first floor of an apartment building, located in downtown White Plains, in order to move its treatment program to a more convenient and larger site.<sup>143</sup> As IHS needed to renovate the leased space, it required a building permit,

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137. See *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995).

138. See *id.* at 335-39.

139. See *id.* at 337-39.

140. See *id.* at 335 (footnote omitted).

141. 931 F. Supp. 222 (S.D.N.Y. 1996), *aff'd*, 117 F.3d 37 (2d Cir. 1997).

142. See *id.*

143. See *id.* at 229. The program's initial location, inconvenient to the City's downtown, was not easily accessible to clients, especially those relying on public transportation and needing child care. See *id.*

and since part of the building's first floor had been used as a store (change of use), approval from the City's Planning Board was required.<sup>144</sup> The Commissioner of Building referred the matter to the City's Planning Board and included an opinion that an alcohol and drug treatment program was a permitted use in a mixed-use district. Because of considerable community opposition<sup>145</sup> and resulting delays in the approval process, IHS withdrew its application.<sup>146</sup>

IHS then applied for a building permit to renovate a section of the leased premises that had been previously used as office space, so that Planning Board approval would not be required. Again, the Commissioner of Building deemed IHS' use to be an "office" use and therefore "a permitted use," and the City's Corporation Counsel concurred.<sup>147</sup> However, community opposition was mounting, and the determination of the Commissioner of Buildings was appealed to the Zoning Board of Appeals. The Zoning Board voted four-to-one to reverse the prior determinations of the Commissioner of Building that IHS' use would be a permitted use under the City's zoning code.<sup>148</sup>

In a Memorandum and Order authorizing a preliminary injunction against the City, District Court Judge Parker held: (1) that the ADA applies in the zoning context because zoning is an activity of a public entity under Title II; (2) if the City received federal financial aid, the plaintiffs could also sustain a claim against one of the City's instrumentalities for discrimination under the Rehabilitation Act; (3) the plaintiffs had standing to sue; and (4) that the plaintiffs met the test for a preliminary injunction by showing that there was a substantial likelihood of success on the merits because there was strong indication that the City and its instrumentalities allowed illegal prejudices against a qualified disabled class to influence their decision not to issue the building permit.<sup>149</sup> The Court agreed to

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144. *See id.*

145. Community opposition included (1) members of the subject building's cooperative association, (2) owners of local businesses and a nearby mall, and (3) members of the community generally. Community concerns included: (1) the "condition and appearance" of IHS' client base, (2) depressed market values of property, and (3) the treatment program should be considered a "clinic," instead of an office use. *See Innovative Health Sys.*, 117 F.3d at 41.

146. *See Innovative Health Sys.*, 931 F. Supp. at 229.

147. *See id.* at 229-30.

148. *See id.* at 230.

149. *See id.* at 244. The defendant, the City of White Plains, moved to dismiss on the following points: (1) the City's zoning ordinance was not within the scope of the ADA; (2) the Plaintiffs did not have standing to sue under the ADA; and (3) that

provide the relief sought by the plaintiffs which included a preliminary injunction against the City of White Plains, ordering it to refrain from withholding the building permit for the out-patient treatment program.<sup>150</sup>

The district court held that the plaintiff would likely succeed on the merits because of sufficient evidence of discriminatory motivation by the City.<sup>151</sup> The City's Zoning Board made its decision not to issue the building permit and effectively reversed the prior opinion of the Commissioner of Building, after a series of well attended public hearings. Contrary to the opinion of the Commissioner of Building and the City's Corporation Counsel, the Zoning Board independently interpreted the proposed use by IHS as a clinic or "hospital or sanatoria" use, an impermissible use in the City's high density BR-4 zoning district.<sup>152</sup> In addition, the City permitted office use by several psychiatrists and social workers (offering comparable out-patient services to IHS) within the same zoning district. In light of the foregoing, the district court concluded that "the evidence supports plaintiffs' claim that defendants bowed to political pressure exerted by certain members of the community" and that the defendants were motivated by this pressure in their decision making.<sup>153</sup>

In affirming the district court's order, the Second Circuit held that Title II of the ADA and the Rehabilitation Act "clearly encompass zoning decisions by the City because making such decisions is a normal function of a government entity."<sup>154</sup> Consonant with the district court's approach, the Second Circuit reiterated that the statutory language of Title II clearly encompasses "all discrimination by a public entity, regardless of the context," and that the legislative history and applicable Department of Justice regulations provide ample support to this approach.<sup>155</sup>

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"federal statutes do not accord preferential treatment to persons with disabilities." *See id.*

150. *See id.* at 231.

151. *See id.* at 244.

152. *See id.* at 230.

153. *See id.* at 243.

154. *See Innovative Health Sys.*, 117 F.3d at 44. Although not specifically addressed by the Court, the implication is that Title II's provisions will also apply to the Planning Boards, Boards of Architectural Review and other local agencies involved in zoning matters and land-use decision making.

155. *See id.* at 45. Therefore, according to the Second Circuit, the protections of the ADA, Title II extend to discrimination against the qualified disabled in local land-use decision-making. *See id.* at 45-46.



### D. Remedies under Title II of the ADA

Administrative and judicial remedies are available to qualified disabled individuals who believe they have been discriminated against by a public entity.<sup>156</sup> A complaint may be filed within 180 days of the alleged discrimination, "with any agency that provides funding to the public entity . . . or with the Department of Justice for referral."<sup>157</sup> The Department of Justice also has included in its regulations the use of "alternate means of dispute resolution, including settlement, negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration."<sup>158</sup> In such situations, attorneys' fees may be awarded to the prevailing party in any action or administrative proceeding.<sup>159</sup>

Furthermore, the ADA also provides a private right of action.<sup>160</sup> A civil action may be brought by the Attorney General or any aggrieved person.<sup>161</sup> In addition to injunctive relief, the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*<sup>162</sup> may signify the availability of compensatory and punitive damages as a remedy under Title II of the ADA.

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156. See 42 U.S.C. § 12133 (1994). The remedies under Title II include, all "remedies, procedures, and rights set forth in section 794a of Title 29 [the Rehabilitation Act of 1973, as amended]." *Id.*

157. See 28 C.F.R. § 35.170(a)-(c) (1998).

158. *Id.* § 35.176

159. See *id.* § 35.175

160. See *Cousins v. U.S. Dep't of Transp.*, 857 F.2d 37, 46, *aff'd en banc*, 880 F.2d 603 (1st Cir. 1988) (holding that in addition to administrative remedies, there is a right to private action under the Rehabilitation Act). Pursuant to the ADA enforcement provisions, "the remedies, procedures, and rights" under the Rehabilitation Act are applicable to the ADA. 42 U.S.C. § 12133 (1994).

161. See 42 U.S.C. § 2000-e-5(f) (1994). The remedies and procedures under the Civil Rights Act apply; see 42 U.S.C. § 12133 (1996) ("The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title."). According to 29 U.S.C. § 794a, "the remedies, procedures and rights" available under the Civil Rights Act of 1964 are available to aggrieved persons. 29 U.S.C. § 794a (1996).

162. 503 U.S. 60 (1992). In *Franklin*, the Supreme Court held "that Congress did not intend to limit the remedies available in a suit brought under Title IX" because there was a common law presumption that remedies at law and in equity would be available to enforce rights under federal law, and that in the 1986 Rehabilitation Act Amendments (which amended Title IX) Congress extended such traditionally established remedies to be used in suits against any state, public, or private entity. See *id.* at 72.

## V. Effective Local Regulation of the Siting of Group Homes

Although a fairly complex statutory scheme has evolved, in large part due to liberal interpretation of provisions of the FHAA and ADA by the courts, significant local discretion in the siting of group homes still exists. Zoning legislation must be adopted and local authority should be exercised to effectively regulate the siting of group homes within this complex scheme.

### A. Local Law and Regulation/Disability-based Classifications

#### 1. Dispersion Guidelines

Mandatory dispersion guidelines and rigid spacing requirements for group homes for the disabled will likely violate the FHAA as facially discriminatory.<sup>163</sup> New York State's Padavan Law would likely survive a challenge under the FHAA because of its inherent flexibility, and lack of rigid spacing requirements.<sup>164</sup>

Considering the State legislation in this area, any local law that attempted to regulate the placement of licensed group homes for the mentally disabled would be preempted by the Padavan Law. Furthermore, a local law attempting to place spacing requirements on the placement of other group homes, would likely be subject to challenge under the State's Equal Protection Clause and Due Process Clause.<sup>165</sup>

### B. Local Law and Regulation/Facially Neutral Standards

#### 1. Definition of Family

To meet the *McMinn* standard and avoid violating the New York State Due Process Clause, a municipal ordinance cannot differentiate between related and unrelated individuals when defining "family" or other occupancy restrictions for single family zoning districts. The City of Mount Vernon's "functional equivalency" standard would likely meet the *McMinn* test. However, the Town

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163. See *Horizon House Developmental Serv. Inc. v. Township of Upper South Hampton*, 804 F. Supp. 683, 693 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993).

164. See Kevin J. Zanner, *Dispersion Requirements for the Siting of Group Homes: Reconciling New York's Padavan Law with the Fair Housing Amendments Act of 1988*, 44 BUFF. L. REV. 249, 278-81 (1996).

165. For example, singling out a group home for teenaged mothers or a foster care home for the elderly for special regulation would have to serve a legitimate government purpose and the spacing requirement would have to be rationally related to the government purpose to be served. It is unlikely such a regulation would survive rational basis analysis. See generally *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985).

of Ossining's standard clearly violates *McMinn*. By limiting the number of unrelated persons, the Ossining Zoning Code is both under-inclusive and over-inclusive.<sup>166</sup> Furthermore, the Ossining Zoning Code may be subject to challenge under the FHAA.<sup>167</sup>

According to the Second Department, a zoning ordinance that includes in its definition of family, a rebuttable presumption that four or more unrelated persons living in a single dwelling does not constitute the functional equivalent of a traditional family will not violate the New York State Due Process Clause.<sup>168</sup> As such, if a local regulation provides a fair opportunity for a party to show that a proposed group home is the functional equivalent of a single family home, such a provision may survive challenge pursuant to the State Constitution's Due Process Clause. If the presumption is ultimately applied to deny approval, however, the municipal decision making process may be subject to challenge as discriminatory under the FHAA and ADA.

## 2. *Special Permit*

A special permit process for group homes will likely survive challenge under federal and state laws if the provision does not single out the handicapped as a class, and if the municipal ordinance includes a definition of family that meets the *McMinn* standard. According to the Third Department in *Children's Village v. Holbrook*,<sup>169</sup> a special permit provision for group homes is insufficient if the definition of family in a municipal zoning ordinance was facially invalid due to the State Due Process Clause. Therefore, a municipal ordinance would still be flawed if the definition of family does not meet the *McMinn* standard. Because the City of Mount Vernon's definition of family meets the *McMinn* standard, its special permitting requirements would likely survive challenge pursuant to the Third Department's standard.

Special permitting provisions will likely survive challenge under the FHAA if they are narrowly tailored and are not applied exclusively to group homes for the handicapped. However, certain special permit procedures and conditions nevertheless may be

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166. According to the Ossining zoning ordinance twenty persons related by blood, marriage or adoption could reside in a single family home, while six persons functioning as a family but not so related would be excluded. See *supra* note 32 and accompanying text.

167. See *infra* Part III. and accompanying notes.

168. See *supra* notes 50-52 and accompanying text.

169. See *supra* notes 44-49 and accompanying text.

susceptible to FHAA challenge.<sup>170</sup> For instance, the notice and public hearing procedures which are usually included in the special permit approval process may be subject to challenge under the FHAA.<sup>171</sup> The imposition of special permit conditions concerning the operations for group homes for the handicapped also may violate the FHAA.<sup>172</sup> Moreover, zoning conditions that apply to the actual operation of a group home, or place similar restrictions on group home residents, may exceed delegated local authority to regulate land-use in New York State.<sup>173</sup>

### C. Application of Local Land-Use Regulation

In order for a regulation to be challenged as discriminatory, there must be a protected class. Group home residents from classes protected under the ADA and FHAA, collectively the handicapped or disabled, have greater leverage to challenge certain regulations. Group home residents other than the handicapped, who are not a protected class under these statutes, may challenge the local laws and regulations under New York State's Equal Protection and Due Process Clauses. Furthermore, the procedures used to implement and enforce local land-use regulations may be subject to judicial review pursuant to Article 78 of the New York State CPLR.

#### 1. *Intentional Discrimination*

A municipality that has intentionally discriminated against a protected class in the application of its land-use laws may be subject to

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170. See *Ass'n for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 621 (D.N.J. 1994) (holding that rigid conditional use permit conditions for community residences for the developmentally disabled were facially discriminatory and violated the FHAA when these mandatory conditions were not related to the city's objective to protect the community from a risk of harm).

171. See *Potomac Group Home Corp. v. Montgomery County, Md.*, 823 F. Supp. 1285, 1296 (D. Md. 1993) (holding that a public notice and hearing requirement routinely waived for group homes for the elderly, but strictly applied to group homes for people with disabilities, was discriminatory under the FHAA). The Court also stated there was no legitimate justification for the public hearing process. See *id.*

172. See *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1496 (10th Cir. 1995) (questioning a special permit condition which required that a group home for the mentally handicapped be: (1) supervised on a twenty-four hour basis; and (2) mandated that a community advisory council be established to address the concerns of the community).

173. See generally *Dexter v. Town Board of the Town of Gates*, 36 N.Y.2d 102, 105, 365 N.Y.S.2d 506, 508, 324 N.E.2d 870, 871 (1975) (declaring the "fundamental rule that zoning deals basically with land-use and not with the person who owns or occupies it").

suit under the FHAA and ADA, as well as the equal protection and due process clauses. The plaintiff must prove the municipality was influenced by animus toward the handicapped or other protected class, or that discriminatory purpose was a motivating factor in the decision making process. It is often difficult to identify the presence of a discriminatory motive in the municipal decision-making process. If a local government offers a non-discriminatory basis for the application or interpretation of its zoning laws, these local decisions will likely survive challenge.

A zoning board's record of proceeding should delineate a non-discriminatory factual basis for its decision.<sup>174</sup> Notably, the basis for the decision must not be the disability of the applicant. A decision made when strong discriminatory opposition by the community is present, may become tainted with discriminatory intent, because the decision maker may be influenced. However, a reasonable and consistent interpretation of a zoning ordinance will not be considered proof of discriminatory intent.<sup>175</sup> Accordingly, there must be justification for a municipal board's interpretation of the applicable laws and regulations.

In *Innovative Health Systems*, the Second Circuit concluded that the zoning board's decision making was suspect because it rejected the interpretation of its zoning ordinance by its own experts, the Building Commissioner and Corporation Counsel, without providing any basis for the rejection. Furthermore, a possible double standard arose in light of the fact that other uses, similar to the proposed use, already existed as conforming within the same zoning district. As such, the Second Circuit concluded that when intentional discrimination is alleged, in addition to reviewing a government entity's decision making proceedings, courts may also closely scrutinize interpretation and consistent application of local laws and regulations by a local government entity to uncover possible discriminatory taint.

## 2. *Disparate Impact*

According to the *Arlington Heights* test,<sup>176</sup> a violation of the FHAA can be proven if there is a discriminatory effect. In addition, a violation of the ADA may occur if there is a denial of mean-

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174. According to the Second Circuit legitimate safety concerns may be considered but not "perceived harm from . . . stereotypes and generalized fears." *Innovative Health Sys.*, 117 F.3d at 49.

175. See *Smith & Lee Assoc.*, 102 F.3d at 792.

176. See *supra* notes 95-101 and accompanying text.

ingful access to a government service, program, or activity. Once a plaintiff has made a prima facie case pursuant to the *Arlington Heights* factors, a municipality must justify its actions. The municipality must have a legitimate bona fide interest and must have no alternative which would allow the municipal interest to be served with less discriminatory impact.<sup>177</sup>

### 3. Reasonable Accommodation

The ADA and FHAA require municipalities to make reasonable accommodations for the handicapped. In the context of local land-use decision making, if an accommodation is reasonable, a municipality must not deny a handicapped individual an equal opportunity to enjoy the housing of their choice.<sup>178</sup> For example, consonant with the factors identified in *Smith and Lee Associates*, if a municipality denies a special permit for a group home for handicapped residents, to survive a FHAA challenge based on an alleged failure to make a reasonable accommodation, a municipality likely would have to show: (1) the group home would not be a reasonable accommodation because it would impose an undue financial or administrative burden on the municipality or require fundamental program changes; (2) the group home is not necessary because it will in no way enhance the residents' quality of life; or (3) that the handicapped are not being entirely excluded from residential neighborhoods, and are not given less of an opportunity to live in certain neighborhoods than those without handicap. The municipal burden imposed by the accommodation would then be balanced against the benefit that the accommodation would provide to the handicapped group home resident.<sup>179</sup> It is important to note that the reasonable accommodation standard under the FHAA has not been successful in challenging municipal land-use regulations and requirements on their face, such as special permit conditions for group homes.<sup>180</sup>

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177. See Karen A. Aviles, *Federal Fair Housing Act*, 7 Rocky Mountain Land-Use Institute, at 8-9 (1996).

178. See *supra* notes 98-111 and accompanying text.

179. See *supra* note 100 and accompanying text.

180. For a detailed analysis of the FHAA's reasonable accommodation standard in the context of group homes for recovering substance abusers, see Laurie C. Malkin, *Troubles at the Doorstep: The Fair Housing Amendments Act of 1988 and Group Homes for Recovering Substance Abusers*, 144 UNIV. OF PA. L. REV. 757, 805-22 (1995); see also *United States v. Village of Palatine*, 37 F.3d 1230 (7th Cir. 1994) (holding that the plaintiffs, handicapped group home residents, could only bring a claim under the FHAA after applying for a special permit in conformance with the Village zoning ordinance procedures).

### Conclusion

Although NIMBY continues to flourish in New York, albeit somewhat obscured, group home advocates have begun to amass a significant legal basis to challenge discriminatory zoning laws, and the exercise of authority that results in exclusion of group homes from communities. Under the laws of New York State, local governments cannot prohibit the placement of group homes that operate as the functional equivalent to a family, in single family neighborhoods. Furthermore, the state has also preempted local regulation concerning the placement of certain licensed group homes. The FHAA and ADA further limit the ability of local governments to regulate the placement and operation of group homes, and protect the rights of group home residents (those qualifying as handicapped, disabled, or otherwise protected under the FHAA and ADA).

Although the ultimate reach of recent federal enactments is unclear, the vast protections against discrimination offered by these statutes continue to be expansively defined by the courts. In consideration of *Innovative Health Systems* and the federal cases that have already expanded the reach of the FHAA, local autonomy in this area of land-use regulation will be closely scrutinized and subject to challenge under a more complex and ever evolving remedial scheme. In the interim, the unmet need for group homes for the mentally disabled and other special needs populations, balanced against traditional local regulatory interests, will continue to plague both legislators and the judicial system.

Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good. What that regulation shall be every generation must work out for itself.<sup>181</sup>

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181. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS-THE STORRS LECTURES DELIVERED AT YALE UNIVERSITY* 87 (1921).

